

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

2014/HP/1955

**BETWEEN:**

**KABWE GRACE TUMEO**

**AND**

**J.C. MULUNGA & COMPANY (sued as a law firm) DEFENDANT**

**BEFORE THE HONOURABLE MRS. JUSTICE M. C. KOMBE**

*For the Plaintiff:*

*Mr. J. Chabalabala - Messrs John  
Chabalabala Legal Practitioners*

*For the Defendant:*

*No Appearance*

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**J U D G M E N T**

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**Cases referred to:**

1. Patrick Dickson Ngulube v. Rabson Malipenga (SCZ Judgment No. 3/2015).
2. J.Z. Car Hire Limited v. Malvin Chola and another (2002) Z.R. 112.

**Work referred to:**

1. Bryan A. Garner, The Black's Law Dictionary, Ninth (9<sup>th</sup>) Edition, 2009.
2. Anthony M. Dugdale and Michael A. Jones (Eds), Clerk and Lindsell on Torts 19th Edition, (London, Sweet and Maxwell, 2006).



**PLAINTIFF**

On 9<sup>th</sup> December, 2014, the Plaintiff herein, **KABWE GRACE TUMEO** commenced this action by way of writ of summons seeking the following reliefs:

- a) *The return of the sum of K16, 050.00 the Defendant received from the Plaintiff on un-executed conveyance and legal fees.*
- b) *Payment of the sum due between the 2010 Property Transfer Tax Rate and the current Rate.*
- c) *An order that the Defendant surrenders the Original Certificate of Title relating to Stand No 10284 Lusaka and other supporting documents to the Plaintiff.*
- d) *Damages for breach of the Defendant's duty to execute the Plaintiff's lawful instructions.*
- e) *Damages for breach of the Defendant's duty to act with reasonable care and skill.*
- f) *Interest on any amount found to be due from the Defendant to the Plaintiff.*
- g) *Costs.*

In the statement of claim that accompanied the writ of summons, the Plaintiff averred that the Defendant law firm represented both the vendor and purchaser in the contract of sale between Peggy Chanda Kapinda and the Plaintiff relating to Stand No.10284 Lusaka.

By the said contract of sale dated 7<sup>th</sup> September, 2010, the Plaintiff purchased Stand No.10284 Lusaka at the price of K345,000,000.00, now K345,000.00 and the Defendant by Receipt No.099 acknowledged receipt from the Plaintiff of the sum of K16,050,000.00 now K16,050.00, legal fees, property transfer tax and registration fee.

She further averred that between 2011 and 2013 the Plaintiff made several verbal reminders to the Defendant to carry out its duty to convey the said property into the Plaintiff's name but to no avail.

By a letter dated 9<sup>th</sup> July, 2014, the Plaintiff terminated the services of the Defendant and appointed Messrs Douglas & Partners in its stead who wrote to the Defendant requesting for a refund to the Plaintiff of the K16, 050.00 but it was ignored. The Plaintiff's advocates Messrs Douglas and Partners attempted on several occasions to hold meetings with the Defendant but to no avail.

The Plaintiff averred that by reason of the aforesaid, the Defendant was in breach of its duty to execute the Plaintiff's lawful instructions with reasonable care and skill and the Plaintiff had suffered and was likely to suffer more loss and damage.

The Defendant filed a Defence on 7<sup>th</sup> January, 2015 in which it was averred that it communicated with the Plaintiff to the effect that some documents inclusive of the Plaintiff's title deeds got misplaced at the time the Defendant was relocating; that the said documents had since been found, and the conveyance of the said property was in course.

In her reply, filed on 18<sup>th</sup> March, 2015, the Plaintiff averred that the Defendant had no instructions from the Plaintiff to handle conveyancing relating to Stand No.10284, Lusaka.

When this matter came up for trial, there was no appearance for the Defendant even though the record indicated that service of the Notice of hearing had been effected. I was therefore satisfied that the Defendant's absence was deliberate and I proceeded to hear the Plaintiff's case.

The Plaintiff **GRACE KABWE TUMELO BWANALI**, aged forty eight (48) years old of Plot No. 288A SDB14 Makeni testified as **PW1**. She told the Court that J.C Mulunga acted as her advocate at the time of purchase of property Stand No.10284 Lusaka in September, 2010. She stated that she paid K345, 000.00 (rebased) as purchase price for the property and K16, 050. 00 (rebased) as registration fees, legal fees and property transfer tax as per signed contract of sale. She identified the contract of sale which was at page 1 of the Plaintiff's bundle of documents.

She further stated that after the contract was signed and the amounts were fully paid, she followed up with the advocate verbally on the progress. That in 2014, she wrote a letter to them, requesting that they complete the transfer of the title and reminded them of the numerous conversations they had to complete their side of the bargain but to no avail.

She identified in Court the said letter which was at page 7 of the Plaintiff's bundle of documents.

It was her testimony that she further sent another letter in which she told them that since they had not acted on her earlier letter, she was transferring her case to the newly appointed advocates. A copy of the said letter was at page 6 of the Plaintiff's bundle of documents.

After that, her appointed advocates took up the matter and wrote to Messrs J.C Mulunga. In the engagements that followed they filed a statement of claim and that is when the Defendant requested that the caveat placed on the property be lifted so that they are given enough time to complete the transfer of the title. She added that this had not yielded any results to date.

She told the Court that she sought the reliefs as pleaded in the statement of claim.

After her testimony, the matter was adjourned on several occasions for cross-examination. However, the Defendants did not show any commitment towards defending this matter as the Court kept on adjourning to give the Defendant an opportunity to cross-examine the witness but to no avail.

The Plaintiff closed her case and the matter was adjourned for judgment.

I have considered the pleadings filed by both parties and evidence adduced by the Plaintiff in this matter.

The Plaintiff herein claims that she is entitled to the reliefs as outlined on page 2 of this judgment. I should state from the outset that although the Defendant did not attend court, the burden of proof in a civil matter rests upon the Plaintiff to prove her claims on a balance of probabilities.

From the pleadings and evidence adduced, the following facts are not in dispute:

- (i) That the Plaintiff engaged the Defendant's services in the purchase of Stand NO. 10284, Lusaka.
- (ii) That the Defendant acted for both the vendor and purchaser.
- (iii) The Defendant was paid K16, 050,000 for legal fees, property transfer tax and registration fee in the said transaction.

- (iv) The Defendant received the sum of K16, 050 .00 as shown by the receipt dated 7<sup>th</sup> September, 2010 in the Plaintiff's bundle of documents.

What I have to determine however is whether the Plaintiff is entitled to the reliefs sought which include return of K16,050.00 received from the Plaintiff on unexecuted conveyance and legal fees, damages for breach of Defendant's duty to execute the Plaintiff's lawful instructions and damages for breach of the Defendant's duty to act with reasonable care and skill.

As I have mentioned, it is not in dispute that the Plaintiff engaged the Defendant's services (a law firm) in the purchase of Stand No. 10284, Lusaka. Therefore, the relationship that existed between them was that of solicitor and client. This contractual relationship gave rise obligations to be fulfilled by the parties concerned. According to the learned authors of Clerk and Lindsell on Tort at paragraph 10-101, it was stated that a solicitor who is paid by his client owes concurrent duties in contract and tort.

The same authors further stated that:



**“When a solicitor is engaged for reward, there is no doubt as to the existence of a contractual duty to exercise skill and care on behalf of his client.”**

Similarly, there is a tortious duty of care owed to the client to exercise reasonable care and skill. The authors further state that the client owes the client specific duties to advise concerning the transaction in respect of which he is instructed, duty to explain documents, duty to keep client informed and to take care in carrying out instructions.

The standard of care is what is reasonable in the particular circumstances and varies on the facts of each case. If there is a breach, the solicitor will be liable in negligence and the onus is on the claimant to prove negligence.

As I have mentioned, the solicitor owes concurrent duties in contract and tort. Now in relation to the reliefs sought by the Plaintiff does the duty arise in tort for negligence?

I have carefully read the Plaintiff's pleading, it seems to me perfectly plain that the Plaintiff has not pleaded negligence. It is trite that in an action for negligence, it should be specifically pleaded and the

particulars outlined. See Order 18/12/29 of the Rules of the Supreme Court 1999 Edition. Furthermore, the claimant must establish that he has suffered loss. Although the Plaintiff in her statement of claim averred that she suffered loss as a result of the Defendant's breach, she did not adduce any evidence to establish the loss suffered.

For the foregoing reasons, I will not consider the Defendant's duty to the Plaintiff in the field of tort as the Plaintiff has not pleaded negligence.

Having said that, I will consider whether the Plaintiff is entitled to the reliefs sought based on the contractual relationship between the Plaintiff and the Defendant.

As I have mentioned, there was a contractual relationship between the Plaintiff and Defendant and because of that relationship, the Defendant owed the Plaintiff a duty to conduct the case of conveyancing properly on behalf of the Plaintiff with reasonable care and skill.

The Plaintiff contends that she paid the Defendant conveyance and legal fees. However, despite several reminders from the Plaintiff, the Defendant failed to perform its part of the contractual obligations without any lawful excuse. That because of this, she terminated the services and engaged the services of Messrs Douglas and Partners.

I have noted that the Defendant in its Defence averred that it had misplaced documents and title deeds relating to the Plaintiff's stand and that was why it had not carried out the client's instructions.

From the evidence on record, the contract of sale was executed in 2010 and the Plaintiff terminated the Defendant's services in 2014. This means that for a period of four years the Defendant failed to complete the conveyance transaction and there is no evidence to show that the Defendant communicated with the Plaintiff to inform her what had caused the delay.

I am of therefore of the view that the Defendant deliberately failed to execute the Plaintiff's instructions diligently and carry out its duties with reasonable care and skill as a period of four (4) years is a long

time not to conclude a conveyance transaction especially that there was no communication with the Plaintiff.

In this regard, I find that there was a breach of duty by the Defendant to carry out its obligations to handle the conveyance relating to stand No. 10284, Lusaka on behalf of the Plaintiff notwithstanding the fact that the Plaintiff had paid the requisite fees.

Having made the above findings, I shall now consider whether the Plaintiff is entitled to the reliefs sought in the writ of summons.

- (i) Return of the sum of K16, 050.00 received from the Plaintiff on unexecuted conveyance and legal fees.

It is not in dispute that the Plaintiff paid the sum of K16, 050.00 to the Defendant for legal fees, property transfer tax and registration fee and there is no proof that the refund was made. Having proved that there was a breach of duty by the Defendant, I find that the Plaintiff is entitled to the payment of the sum of K16, 050.00 paid to the Defendant.

- (ii) Payment of the sum due between the 2010 Property Transfer Tax Rate and the current Rate.

It has not been proved to the satisfaction of the Court that the Plaintiff is entitled to this relief as it was not shown that the rate of the property transfer tax has changed from what it was initially when the Plaintiff paid in 2010. This claim fails.

- (iii) An order that the Defendant surrenders the Original Certificate of Title relating to Stand No 10284 Lusaka and other supporting documents to the Plaintiff.

The Plaintiff in her evidence stated that after her new advocates took up the matter and wrote to the Defendant that is when the Defendant requested that the caveat place on the property be lifted so that they are given enough time to complete the transfer of the title. She added that this had not yielded any results. Therefore she wanted the original title to the property with all the related documents that were signed which would enable her get title.

The Defendant did not adduce any evidence challenging this evidence. However, it is not clear to this Court whether the

transaction for the sale was concluded with the vendor for the Certificate of Title to be surrendered to the Plaintiff. I find no basis to grant this order sought. However, if there are documents signed by the Plaintiff that the Defendant has in its possession, I order that those be surrendered to the Plaintiff.

- (iv) Damages for breach of duty in executing the lawful instructions that she gave the Defendant and damages for breach of duty to act with reasonable care and skill.

As I have mentioned, the Plaintiff has not proved loss on account that the Defendant was negligent as she did not plead negligence. That notwithstanding, I have made a finding that the Defendant breached the duty to execute the Plaintiff's instructions and act with reasonable care and skill, when there was a contractual relationship between the Plaintiff and the Defendant.

The learned authors of Clerk and Lindsell stated at page paragraph 10-131 that:

**“Whether the claimant sues in contract or tort, he must of course establish that he has suffered a loss: if**

**he cannot, he will fail in tort and only recover only nominal damages in contract.”**

Thus in the case of **Patrick Dickson Ngulube v. Rabson Malipenga**<sup>(1)</sup>, which was a case involving professional negligence, the Supreme Court found that although the Appellant had not pleaded negligence, there was some damage suffered and therefore it awarded nominal damages.

In the present case, the Plaintiff has pleaded that she suffered loss as a result of the Defendant's breach of duty. However, she did not establish to the satisfaction of this Court what loss she suffered. In the case of **JZ Car Hire Limited v. Malvin Chala and another**<sup>(2)</sup> the Supreme Court stated that it is for the party claiming any damages to prove the damage.

However, since there was a breach of duty, I am guided by what the Supreme Court stated in the case of ***Patrick Dickson Ngulube*** that there was some damage suffered even though the damage was not established. In this regard, I hold that the Plaintiff is entitled to nominal damages for the breach of duty to execute the Plaintiff's

instructions and to act with reasonable care and skill. I award the sum of K500.00.

The above sum of K500.00 and K16, 050.00 shall attract interest at the short term deposit rate from date of the writ of summons to the date of judgment and thereafter at the current bank lending rate as determined by Bank of Zambia until final payment.

In the result, I hold that the Plaintiff has proved her case on a balance of probabilities that she is entitled to the reliefs (i), (iii) (iv) and (v) as they appear on the writ of summons which are founded on the contractual relationship of lawyer and client. I accordingly grant the reliefs sought as herein indicated. Considering the circumstances of this case, I make no order as to costs.

Leave to appeal is granted.

**Delivered at Lusaka this 30<sup>th</sup> day of June, 2020.**



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**M.C. KOMBE**  
**JUDGE**