

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**
(Commercial Jurisdiction)

REGISTERED No. 916/34/194/5-21
PROVINCIAL CERTIFICATE NO. 83-40
2020/HPC/0776

BETWEEN:

EVA CHIBONI



PLAINTIFF

AND

NEW FUTURE FINANCE COMPANY LTD

DEFENDANT

BEFORE: HON. MR JUSTICE E.L. MUSONA.

For the Plaintiff:

Mr. B. Phiri and Mr. J. Tembo both of Messrs Linus E. Eyaa and Partners

For the Defendant:

Mr. M. Bah and Mr. L. Kasali both of Messrs Nkulukusa and Co.

JUDGMENT

Date: 28th June, 2021

Cases referred to:

- 1. Jonathan Van Blerk v Attorney General and 5 others
SCZ/08/02/2020**
- 2. HIM Casualty and General Insurance Ltd v Chase
Manhattan Bank, 2003, 2 Lloyds Report**
- 3. Kalusha Bwalya v Chadore Properties and another Appeal
No. 222/2013**
- 4. Gillian Mutinta Kasempa v New Future Finance Company
Ltd and 2 others, 2020/HPC/0125**
- 5. Eric Masowe Nchunba Nhandu and New Future Finance
Company Ltd, 2020/HPC/0265**

This action was commenced on 30th September, 2020 by writ of summons and an accompanying statement of claim.

The Plaintiff's claim is for the following reliefs;

- (i) An order that the Contract of Sale between the Plaintiff and the Defendant dated 12th May, 2020 is illegal and cannot be enforceable in the circumstances against the Plaintiff as it is null and void.
- (ii) An order that what existed between the Plaintiff and the Defendant from the outset is a loan agreement
- (iii) An Order for re-opening of the transaction and that the Plaintiff pays the Defendant the loaned amount plus interest chargeable in accordance with the Money Lenders Act.
- (iv) An Order that the interest chargeable on the loaned amount by the Defendant is excessive, unconscionable and as such illegal.
- (v) An Order of Interim Injunction restraining the Defendant by itself, servants and or agents or otherwise whosoever from changing or undertaking to process change of ownership to whosoever in respect to property known as F/916/34/A4,

Lusaka South and further restraining the Commissioner of Lands from issuing any title to whosoever with respect to property known as F/916/34/A4, Lusaka South until the determination of this matter or further order of the Court.

- (vi) An Order for Costs
- (vii) Any relief that the Court will consider just

The Defendants filed a defence and a counter claim. The counter claim by the Defendant is couched in the following terms;

- (i) A declaration that the sale of subdivision A4 of Subdivision 34 of Farm No. 916, Lusaka South has been completed, is valid, and cannot be cancelled by virtue of the purchase price in the sum of \$20,000.00 having been paid in full and received by the Plaintiff.
- (ii) Vacant possession of the said property known as subdivision A4 of Subdivision 34 of Farm No. 916, Lusaka South that the Plaintiff contracted to sell to the Defendant;
- (iii) An order for costs;
- (iv) Such further and other relief the court will consider just.

The Plaintiff gave evidence and called one (1) other witness. I shall, therefore, refer to them as PW1 and PW2 respectively.

PW1 was F/Eva Chiboni who is the Plaintiff.

According to the witness statement for PW1, she stated that she was in need of money, and, consequently she went to the Defendant who was a well known money lending institution.

She talked to a Mr. John Zulu who is a Defendants' loan adviser that she wanted a loan of K250,000. The said Mr. John Zulu informed PW1 that the loans were usually payable within a period of four (4) months with interest. He further advised that PW1 would only be availed K216,000 payable in 4 months by monthly instalments.

The Plaintiff was further told that the requirement was to avail the Defendant with an unencumbered property as surety. The Plaintiff availed property No. F/916/34/A4, Lusaka and Mr. Joey Yang who was the Defendants Manager inspected it in the company of Mr. John Zulu who was the Defendant's loans adviser. Mr. John Zulu availed the Plaintiff some documents to sign. The Plaintiff was also given a contract of sale and a deed of assignment to sign. The Plaintiff was

told by Mr. Joey Yang that since the Plaintiff had signed the loan agreement wherein PW1 was going to receive the sum of K216,000 and pay back K351 000 after 4 months, the Contract of Sale and deed of assignment were in essence of no consequence.

According to the evidence of PW1, she informed the Defendant that she could not read or understand the contents of the documents but Mr. Joey Yang told PW1 that the Contract of Sale and the deed of assignment were a mere formality.

PW1 admitted in her evidence having been paid by the Defendant K166 000 in cash and a further K50,000 by bank transfer into her bank account which added to K216,000 the loan amount.

PW1 was not given any copy of the documents which she signed.

PW2 was F/Eglah Tembo. Her evidence was largely a repeatation of the evidence for PW1. By her witness statement, the evidence for PW2 was that sometime in May, 2020, PW1 who is her mother went to the Defendant to apply for a loan. PW2 needed a loan of K250,000 but was only given K216,000 to be repaid in monthly instalments over a period of four (4) months.

PW1 and PW2 were told by Mr. John Zulu who was the Defendant's loan advisor that the Defendant needed surety in the form of certificate of title. PW1 was assured by the said Mr. John Zulu that the certificate of title was to be held by the Defendant only as security, so, PW1 availed her certificate of title for property No. F/916/34/A4, Lusaka to the Defendant. PW1 was given a number of documents to sign but when she indicated that she could neither read nor comprehend the documents Mr. Joey Yang who was the Defendants Manager told PW1 that all the documents related to the loan agreement. PW1 was given the loan agreement to sign and she did so. PW2 read through that loan agreement. PW2 also read the Contract of Sale and discovered that in the Contract of Sale one of the terms therein was that PW1 was selling the house to the Defendant at USD20,000. But when confronted by PW2 Mr. John Zulu who was the Defendants loan advisor responded that the clause showing the sale of the house was a mere formality.

After PW1 had signed the documents given to her by the Defendants, the Defendant gave PW1 K166,000 in cash and the other K50,000

was paid to her by bank transfer into the bank account for PW1. This totaled K216,000, the loan amount.

The Defendant called only one witness. I shall refer to this witness as DW.

DW was M/Feng Sheng Hu who is the Defendant's Deputy General Manager.

By the witness statement, the evidence for DW was that the Defendant is a private company registered in accordance with the provisions of **Act No. 10 of 2017** and is involved in the business of buying and selling property and is also a registered money lender in accordance with the provisions of the **Money Lenders Act, Cap 398 of the Laws of Zambia.**

DW averred that the Plaintiff initially approached the Defendant with the intention of obtaining a loan, but the Plaintiff's security was insufficient and so, the Defendant offered to buy the property and gave the Plaintiff an option to buy back the property within a limited amount of time. The parties reduced their intention into writing and entered into a Contract of Sale and the Plaintiff executed an

assignment in favour of the Defendant. The Plaintiff received the full purchase price of USD20,000 and acknowledged its receipt.

Having reviewed the evidence for both parties, I must now consider the claims.

- (i) **An order that the Contract of Sale between the Plaintiff and the Defendant dated 12th May, 2020, is illegal and cannot be enforceable in the circumstances against the Plaintiff as it is null and void**

The grounds upon which the Plaintiff perceives that contract to be illegal are as follows;

- i. That the Plaintiff approached the Defendant with the sole purpose of obtaining a loan.
- ii. The Defendant paid the Plaintiff ZMW 166 000 in cash and ZMW 50, 000 was deposited into the Plaintiff's bank account by the Defendant. This added to ZMW 216,000= which is the amount the Plaintiff acknowledges to have received from the Defendant. The cash deposit is reflected

on the bank statement on page 20 in the Plaintiff's bundle of documents.

- iii. The Plaintiff has vehemently denied being paid in USD on 19th May, 2020
- iv. The Defendant made the Plaintiff to sign purporting to have received USD17,500 in cash and that the other USD 2 500 was deposited into the Plaintiff's Zanaco account No. 93400067755994 held at Cairo road branch in Lusaka. This added up to USD20,000 which the Defendant have argued that was the purchase price for the Plaintiff's property. The Zanaco bank statement on account No. 93400067755994 for the period 1st March, 2020 to 1st June, 2020 does not suggest that any such money equivalent to USD 2 500 was ever deposited into that account. There is no bank statement showing that such money was deposited in favour of the Plaintiff as claimed by the Defendant on page 12 of the Plaintiff's bundle of documents. This shows that the Plaintiff was made to

acknowledge receipt of the payment of USD 17,000 and a deposit of USD 2 500 which she never received.

- v. Page 13 of the Plaintiffs bundle of documents is a power of Attorney where in it is shown that the Plaintiff gave authority that the Defendant should sell the property on 11th day of September, 2020. That power of Attorney is not dated. I note that the Contract of Sale purportedly between the Plaintiff and the Defendant was signed on 12th May, 2020. There is a deed of assignment but is not dated.

While the Contract of Sale and the deed of assignment show that the parties were the Plaintiff and the Defendant, it has not been explained why there is a power of Attorney by the Plaintiff authorizing the sale of the property by the Defendant at a later date, infact, much later after the purported sale by Plaintiff to the Defendant.

There is also a consent judgment. This consent judgment is not dated, it has no cause number, it has no court seal and is not signed by a Judge. The consent judgment purports to show that

the Defendant is the legal purchaser of the disputed property. It purports to show that the Defendant is the Plaintiff. I have seen no case where the Defendant is the Plaintiff in the matter of this property. What I discern is that the Defendant authored this consent judgment and made the Plaintiff to sign it anticipating a dispute that the Defendants would bring a matter to court as Plaintiffs but which they never did.

From the foregoing, what I garner is that the Defendants who were aided by counsel from different law firms including L M Chambers who drew the contract of sale, and the deed of assignment and Nkulukusa and Co. who drew that consent judgment took advantage of the Plaintiff who was not represented and begun to ride on her ignorance in a scheme which was properly designed to get the Plaintiff's property.

I find that the conduct of the Defendant was fraudulent.

I have looked at the case of ***Jonathan Van Blerk v Attorney General*** (1), and Am well guided. In that case the Supreme Court stated that;

“....we are clear in our mind that fraud is a deceptive act done intentionally by one party in order to influence or induce another party to believe or accept the existence of a certain state of affairs when the actual state of affairs is otherwise. A misrepresentation on the other hand is a representation of a misstatement innocently or negligently which wrongly persuades another party to accept the existence of give affairs. Both involve untruthfulness”

Also, in the case of ***HIM Casualty and General Insurance Ltd v Chase Manhattan Bank*** (2) it was held that;

“Once fraud is proved, it vitiates judgments, contracts and all transactions whatsoever....”

On the above basis, I find that the Contract of Sale between the Plaintiff and the Defendant dated 12th May, 2020, is illegal and do hereby declare it null and void ab initio.

(ii) **An order that what existed between the Plaintiff and the Defendant from the outset is a loan agreement**

I have already held that the contract of sale between the Plaintiff and the Defendant dated 12th May, 2020, is null and void. I have given reasons.

From the available evidence, it is clear that the intention of the Plaintiff was to obtain a loan from the Defendant. She provided her property as collateral. This intention is evidenced by clause 6 of the Contract of Sale which has a buy back clause exercisable within 4 months. It is very incongruous and inconceivable that a person would sale his/her property to another yet with an intention to buy it back within a period as short as 4 months. The argument by the Plaintiff that the money was a loan repayable within 4 months is more probable.

Clause 6 of the Contract of Sale also shows that the Defendant who was the purported purchaser was not to change title within 4 months after the purchase. Paragraph 7 of the Contract of Sale shows that the Plaintiff who was the purported vendor was

to buy back the property within 4 months but before 11th September, 2020.

The receipt on page 12 of the Plaintiff's bundle of documents also shows that the Plaintiff who then was the purported vendor had the option to buy back the property.

In the Contract of Sale the parties did not have any Attorney. The purported contract of sale was fully executed by the parties themselves. I have, therefore, seen no purpose for the power of Attorney exhibited on page 13 of the Plaintiff's bundle of documents. Since, the Defendant was purportedly the purchaser of the property I have seen no basis upon which the Plaintiff who was purportedly the vendor would grant power of Attorney to the Defendant to sell who under that purported Contract of Sale was the purchaser.

Then there was a consent judgment. I have already discussed the validity, legality and ramification of that consent judgment. Suffice to state that I have seen no basis for the consent judgment affecting the sale of this property because there is no

evidence that when this consent was drawn there was any litigation in court.

I say so because that consent judgment has no cause number and is not indorsed by a Judge.

Nkulukusa and Co. which is the law firm which drew this consent judgment perhaps knew the purpose this purported consent judgment was designed to serve. I have seen no purpose other than deception.

From the above, what I discern is that the intention of the parties was that the money was a loan. The property was collateral. The Contract of Sale, deed of assignment and several other documents which the Defendants made the Plaintiff to sign were all meant to facilitate change of title from the Plaintiff to the Defendant in the event that the Plaintiff defaulted on her loan repayment.

I note that as was expounded in the case of ***Kalusha Bwaly v Chadore Properties and another*** (3) extrinsic evidence cannot

be allowed in a written contract. The court should uphold the parties intentions which are expressed in a written contract. However, where there is evidence that a party was tricked into signing a contract or indeed any document which did not represent the intention of the parties the contents of the contract or indeed any document should not be upheld by a court because they represent treachery.

I have also taken cognizance of the case of **Gillian Kasempa Mutinta v New Future Finance Company Ltd and 2 others** (4) **and Eric Masowe Nchumba Nhandu and New Future Finance Company Ltd** (5). Both these cases were before me and in both cases the Defendant in casu was also the Defendant in those both cases. In those two cases there was a modus operandi by the Defendant similar to this case wherein the Defendant tricked the clients (Plaintiffs) into signing a Contract of Sale as a condition for lending them money and when the clients failed to pay they were told that there was no loan but a sale. In all cases, the clients had signed loan agreements but were not given copies thereof.

In the circumstances, I declare that what existed between the Plaintiff and the Defendant was a loan agreement.

(iii) An order for reopening of the transaction and that the Plaintiff pays the Defendant the loaned amount plus interest chargeable in accordance with the Money Lenders Act

I have already ruled that what existed between the Plaintiff and the Defendant was a loan agreement.

I accordingly, order that the Plaintiff pays to the Defendant the loaned amount of ZMW 216,000 plus minimum chargeable interest under the Money Lenders Act. The interest shall run from the date when the ZMW 216,000 was received by the Plaintiff to 20th September when the writ of summons was filed into court. In default of agreement the same shall be assessed by the Registrar. I order that same be paid within 90 days from this the 28th June, 2021 or if the matter goes for assessment within 90 days from the date the Plaintiff shall receive notice of the assessed sum.

- (iv) **An order that the interest chargeable on the loaned amount by the Defendant is excessive, unconscionable and as such illegal.**

I have already ruled that the Plaintiff shall pay the loaned amount of ZMW 216,000 plus the minimum chargeable interest under the Money Lenders Act. This claim, therefore, has already been overtaken.

- (v) **An order for interim injunction restraining the Defendant by itself, servants and/or agents or otherwise whosoever from changing or undertaking to process change of ownership to whosoever in respect to property known as F/916/34/A4, Lusaka South and further restraining the Commissioner of Lands from issuing any title to whosoever with respect to the property known as F/916/34/A4, Lusaka South, until the determination of this matter or further order of the court**

It is clear that this was an interim order pending determination of this matter. Now that this matter has been determined the

status of the parties regarding the ownership of this property known as F/916/34/A4 Lusaka South, is clear. What is clear arising from this judgment is that the property belongs to the Plaintiff, and if ownership had changed into the name of any other, same shall revert to the Plaintiff. The Plaintiff owes the Defendant ZMW 216 000 with interest. I have already ruled on interest.

(vi) An order for costs

I award costs of this action in favour of the Plaintiff to be taxed in default of agreement. The costs are payable forthwith.

I now turn to the Defendant's counter claim.

The following is the Defendant's counter claim;

- i. A declaration that the sale of subdivision A4 of subdivision 34 of Farm No. 916, Lusaka South has been completed, is valid, and cannot be cancelled by virtue of the purchase price in the sum of USD 20,000.00 having been paid in full and received by the Plaintiff.**

I have already ruled that there was no sale. What existed between the Plaintiff and the Defendant was not a sale but a loan agreement. The Plaintiff did not receive from the Defendant purchase price in the purported sum of USD 20,000, what the Plaintiff received from the Defendant was a loan amount in the sum of ZMW 216, 000=. This counter claim, therefore, fails.

ii. Vacant possession of the said property known as subdivision A4 of subdivision 34 of farm number 96, Lusaka South that the Plaintiff contracted to sell to the Defendant

I have already ruled that the Plaintiff did not contract with the Defendant for the sale of the property. What existed was a loan. I have already made a ruling regarding that loan. I have, therefore, seen no reasonable basis for this claim for vacant possession. This claim fails.

iii. An order for costs

I have seen no basis for awarding costs in favour of the Defendant. This claim, therefore, fails.

The Defendant has lost all counter claims.

Leave to appeal is granted.

In view of the phobia for covid 19 and its attendant health guidelines, this judgment shall not be read to the parties. I order that the parties shall proceed to uplift.

DATED THIS THE 28TH DAY OF JUNE, 2021.



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**HON. MR JUSTICE E.L. MUSONA
HIGH COURT JUDGE**