

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

2020/HPC/0125

BETWEEN:

GILLIAN KASEMPA MUTINTA

PLAINTIFF

AND

NEW FUTURE FINANCIAL COMPANY LTD

1ST DEFENDANT

ZHONG CHENG ZAMBIA MINING AND
BUILDING MATERIALS ^{COMPANY} COMAPY LTD

2ND DEFENDANT

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

For the Plaintiff:

Mr. C. Ng'andu with Mr. I. Tindi both of Messrs Japhet
Zulu Advocates

For both Defendants:

Mr. L. Mwanabo with Mr. G. Hakainsi with of Messrs L.
M. Chambers

JUDGMENT

Date: 20th May, 2021

Cases referred to:

1. ***Chuba v The People (1977) ZR 272***
2. ***Sithole v State Lotteries Board (1975) ZR 106***

Legislation referred to:

1. ***S. 15 of Money Lenders Act Chapter 398 of the Laws of Zambia***
2. ***S.33 and S.34 of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia***

This matter was commenced by writ of summons with an accompanying statement of claim on 25th February 2020.

The Plaintiff's claim is for the following reliefs;

- i) An order of declaration that the purported registered assignment of Stand No. 462 Chilanga from the Plaintiff to the 2nd Defendant dated 4th July 2019 was fraudulent and therefore null and void;
- ii) An order of declaration that the Plaintiff is still the rightful proprietor of Stand No. 462, Chilanga and as such the Certificate of Title relating to the said stand should be altered back to her names accordingly;
- iii) An order of declaration that the transaction of 12th July 2017 between the Plaintiff and the 1st Defendant, to advance to the Plaintiff an amount of K300,000.00 was for all intents and purposes a mortgage and not a sale;
- iv) An order of declaration that the charge by the 1st Defendant of interest at 47% for a period of six months is unlawful and void ab initio for being excessive and unconscionable;
- v) An order of declaration that the amount payable by the Plaintiff to the 1st Defendant, shall be K300,000.00 plus

such interest as a money lender is permitted to charge by law;

Alternatively, to the reliefs in (iii), (iv) and (v) above, the Plaintiff seeks:

- vi) Damages for breach of the alleged contract of sale relating to Stand No. 462, Chilanga between the Plaintiff and the 1st Defendant dated 12th July 2017 for non-payment of the alleged full purchase price and fraudulent change of ownership;
- vii) Rescission of the contract referred to in (vi) above;
- viii) Costs.

The Plaintiff called four (4) witnesses. I shall refer to these witnesses as PW1, PW2, PW3 and PW4 respectively. All the Plaintiff's witnesses filed witness statements and relied on those witness statements at trial.

PW1 was F/Gillian Mubanga Mutinta Kasempa who relied on her witness statement which was filed on 2nd October, 2020.

The witness statement by PW1 was that she was a widow to her late husband Joseph Mubanga who was a registered proprietor of property number Chila/462 which he held on a state lease for a period of 99 years from 1st January, 2000 on certificate number 174416. After the death of her husband and owing to the financial

challenges which PW1 was going through, she approached the 1st Defendant Company for a loan which was in the business of giving loans. What PW1 wanted was a loan of K300,000= but after calculating interest payable and other charges for the amount needed PW1 was advised that she would repay approximately total of K600,000. PW1 was also informed that the loan was collateral based. That meant that PW1 needed to pledge a property with value above the loan amount together with interest payable in order to qualify for the loan.

PW1 presented the certificate of title number 174416 which was still in the name of her late husband.

A Mr. Moffat Mwanambulo who was an employee of the 1st Defendant was assigned to assist PW1 with the process of changing title. Mr. Moffat Mwanambulo obtained various documents from PW1 and sometimes required PW1 to sign certain documents whose nature PW1 has now alleged that she did not understand but which she admits being told that they were necessary to complete the process of changing title from her late husband's name to the name of PW1.

While the process of changing title was underway, a Chinese National who PW1 came to know as Linda from the 1st Defendant and her colleague went to the property in issue for purposes of verifying whether or not it was worthy the value of the loan PW1

had applied for. After that, it was confirmed that the property was worthy the value stated in the valuation report which PW1 had presented to the 1st Defendant and was, therefore, sufficient security for the loan. When title for the property in issue was issued in the name of PW1, PW1 collected her certificate of title number CT 34028 for property number Chila/462.

When PW1 was availed the agreement to sign and which, of course she signed, she noticed a different figure reflected on the agreement. When she inquired from the 1st Defendant, PW1 was told that the principal amount, interest, security deposit and other service charges reflected on the documents as one figure. PW1 received K100,000 cash from the 1st Defendant and a further K200,000 was paid by bank transfer confirming a total of K300,000 the loan amount.

PW1 denied signing a contract of sale but admitted signing a loan agreement.

PW1 was supposed to repay the loan in 6 months, when the loan fell due for repaying PW1 was unable to pay back. Accordingly, she decided to sell the disputed property in order to pay off the loan. So, PW1 asked for an extension of time within which PW1 could pay back the loan. PW1 noticed that her prospective buyers were losing interest in the house. This aroused some suspicion in the mind of PW1. PW1, then, proceeded to the Ministry of Lands to check on the

status of this disputed house. That inspection revealed that a new certificate of title number CT 59 8411 for property number Chila/462 was issued to the 2nd Defendant.

PW2 was M/Nsama Oliver a detective Police Officer in the Zambia Police and a handwriting expert.

PW2, by his witness statement told this court that he knew about this matter when a copy of a deed of assignment bearing the disputed signature with random specimen signature samples of Gillian Mutinta Kasempa were submitted to his office for examination. The said Gillian Mutinta Kasempa is PW1 in this case. The examination results are on page 87 and 88 of the Plaintiff's bundle of documents. The results show that there were strong dissimilarities between the signature on the deed of assignment in question with the provided random specimen signature samples of Gillian Mutinta Kasempa.

PW3 was M/Derrick Mundia. The evidence for PW3 was that he introduced PW1 to the 1st Defendant through a Mr. Banda who PW3 knew as a Credit Officer of the 1st Defendant.

When PW1 who was accompanied by PW3 met Mr. Banda at the offices for the 1st Defendant, PW1 expressed interest in acquiring a loan facility from the 1st Defendant. The said Mr. Banda explained to PW1 issues to do with interest expected to be paid and the modalities on how the money obtained would be paid back. He also

explained that property needed to be pledged for such loans and the value expected of such property.

PW4 was F/Elimeth Kasempa. The evidence for PW4 was that she accompanied PW1 to the office of the 1st Defendant for the purpose of obtaining a loan from the 1st Defendant. PW1 is the Plaintiff in this case. The 1st Defendant gave PW1 K100,000= as part payment for her loan and the 1st Defendant promised to deposit the rest of the money into her bank account.

Conversely, the 1st Defendant called one witness. I shall refer to this witness only as Defence witness (DW).

DW was M/Feng Sheng Hu who is Director and Deputy Manager for the 1st Defendant Company.

The evidence for DW was that on 12th July 2017, the 1st Defendant executed a contract of sale with the Plaintiff for the sale of house No. 462 Chilanga. That on 13th July 2017 the 1st Defendant paid the Plaintiff USD 67,800.

DW stated in his evidence that the Plaintiff (PW1) had an option of buying back the property from the 1st Defendant if PW1 paid back the money advanced to her by 11th January, 2018 failure to which the ownership of the property would be changed to the 2nd Defendant.

On 11th January, 2018, the Plaintiff failed to buy back the property and since the Plaintiff had already obtained state consent to assign, the 1st Defendant proceeded to draw a deed of assignment which was signed by the Plaintiff (PW1) and changed the ownership of the property to the 2nd Defendant. The Defendants have disputed the Plaintiff's claims and have argued that there was a sale between the Plaintiff and the Defendants.

The Defendants have put up a counter claim in their defence.

The following is the counter claim by the Defendants;

1. An order granting possession to the Defendants and directing the Plaintiff to vacate Stand No. 462, Chilanga.
2. Payment of Mesne profits or capital occupation fee from the date of lapse of the buyback periods being 11th January, 2018 of not than 1700 USD per month until the date of vacation of the properties.
3. Damages for inconvenience.
4. Alternatively, an order directing the Plaintiff to pay back US\$67,800.00 together with monetary loss 42500 USD, including but not limited to interest and profits and Mesne profits or capital occupation fees as stated above whose total

as at 10th March, 2020 is 1110300 USD and the Plaintiff should bear all the costs for registering the properties back into her names.

5. Interest on any amounts found due

6. Costs against the Plaintiff

7. Any other relief the court may deem fit.

I have considered and analyzed the evidence by the parties. I shall now consider the claims seriatim.

Claim i: An order of declaration that the purported registered assignment of Stand Number 462 Chilanga from the Plaintiff to the 2nd Defendant dated 4th July, 2019 was fraudulent and, therefore, null and void.

The evidence in this case is clear. The evidence is that the Plaintiff did not sign any deed of assignment. The Plaintiff, too, has denied ever signing a deed of assignment in respect of property number Chila/462. PW2 is a handwriting expert who was called to verify the authenticity of that signature on the deed of assignment. When PW2 examined the signature on the deed of assignment, he noticed dissimilarities. The report of PW2

who is handwriting expert is on page 87 – 88 of the Plaintiffs bundle of documents.

The relevant part of that report reads as follows;

“Strong dissimilarities between the signature on the deed of assignment dated 2019 in question with the provided random specimen signature samples of Gillian Mutinta Kasempa”

Also, the conclusion of that report reads as follows;

“The primary features observed in terms of proportion alignment, stroke connection which is consistent indicates with certainty that the signature alleged to have been signed by Gillian Mutinta Kasempa is not similar with his submitted random specimen signature samples”

Am alive to the decision in the case of Chuba v The People (1) wherein the court held that;

“The evidence of a hand writing expert is an opinion and the matter is one on which the court has to make a finding....”

I have considered the opinion of the handwriting expert. My finding will follow.

I have also looked at the case of ***Sithole v State Lotteries Board*** (2) and Am well guided. Am not required to blindly accept what the handwriting expert has said, but having looked at and examined the opinion evidence of the handwriting expert Am to make my own independent finding.

I have also looked at the evidence of the Plaintiff (PW1) denying having signed the deed of assignment and disputing the authenticity of the signature thereon.

My finding is that the assertion by the Defendants that the Plaintiff (PW1) executed/signed a deed of assignment has not been proved.

On the above basis, I find that indeed, the purported registered assignment of stand number 462 Chilanga from the Plaintiff to the 2nd Defendant was smudged with fraud.

For the above reasons, I declare the registered assignment of stand number 462, Chilanga from the Plaintiff (PW1) to the 2nd Defendant null and void.

Claim ii: An order of declaration that the Plaintiff is still the right proprietor of stand number 462, Chilanga and as

such the certificate of title relating to the said stand should be altered back to her names accordingly

Am alive to the provisions of sections 33 of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia. That section provides as follows;

“A certificate of title shall be conclusive as from the date of its issue.....”

However, under ***Section 34 of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia***, a certificate of title can be challenged and cancelled for fraud.

I have already nullified the purported registered assignment of stand number 462, Chilanga from the Plaintiff (PW1) to the 2nd Defendant. I have already given *the* reason.

Noting that the purported registered assignment of stand number 462, Chilanga from the Plaintiff (PW1) to the 2nd Defendant has been nullified, it follows that the certificate of title relating to the said stand number shall be altered back to the Plaintiff (PW1) and so, I order.

Claim iii: An order of declaration that the transaction of 12th July, 2017 between the Plaintiff and the 1st Defendant, to advance the Plaintiff an amount of K300,000 was for all intents and purposes a mortgage and not a sale.

The Plaintiff has averred that the transaction was a loan and not a sale. That she pledged her property as security because the loan was collateral based. PW1 averred that on the date of the agreement, the Plaintiff surrendered her certificate of title to the 1st Defendant and signed an agreement, but was not given a copy of the same on that particular day and as a result did not remember the nature of the said document which the parties thereto signed. When she was subsequently availed a copy the Plaintiff (PW1) learnt that the said copy was not a loan agreement but a contract of sale. According to the Plaintiff (PW1), the document which she signed and the copy which she later received from the 1st Defendant were different. The Plaintiff (PW1) has averred that the transaction was a loan and not a sale. Conversely DW averred that when the Plaintiff (PW1) got the money from the 1st Defendant it was agreed that the Plaintiff (PW1) had the option of buying back the property from the 1st Defendant if the Plaintiff (PW1) paid back the amount **advanced** to Plaintiff (PW1) by 11th January, 2018. I note

that the would used by DW is **“amount advanced.”** This resonates well with the evidence by the Plaintiff (PW1) that the money which she received from the 1st Defendant was a loan (advance) and not a sale.

In fact paragraph 3 of the witness statement of DW showeth that the money which the Plaintiff (PW1) received from the 1st Defendant was an advance to the Plaintiff (PW1). Further, that only if Plaintiff (PW1) did not pay back the money advanced by 11th January, 2018 would the ownership of the property be changed to the 2nd Defendant. This is sufficient confirmation that the transaction was a loan and the property was collateral for the loan. What I discern from this is that the intention of the parties was for all intents and purposes to treat the transaction as a loan. But when the Plaintiff (PW1) defaulted on 11th January 2018, the Defendants availed themselves property number 462, Chilanga which was pledged as collateral.

On the above basis, I declare that the transaction was a loan and not a sale. The Plaintiff shall therefore, repay to the 1st Defendant the loan amount within 90 days from the date hereof, in default, then, the 1st Defendant shall sell property number 462, Chilanga to recover the loan

owing and any surplus money thereof (if any) shall be given to the Plaintiff.

Claim iv: An order of declaration that the charge by the 1st Defendant of interest at 47% for a period of six (6) months is unlawful and void ab initio for being excessive and unconscionable

Am alive to the provisions of the Money Lenders Act Chapter 398 of the Laws of the Republic of Zambia.

S. 15 (1) of the Money Lenders Act Chapter 398 aforesaid provides interest at the rate not exceeding 48%. The precise terms of section 15 of the Money Lenders Act Chapter 398 of the Laws of Zambia read as follows;

- (1) Where, in any proceedings in respect of any money lent by a money-lender after the commencement of this Act or in respect of any agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act, it is found that the interest charged exceeds the rate of forty-eight centum per centum per annum, or the corresponding rate in respect of any other period, the court shall, unless the contrary is proved,

presume for the purposes of section *fourteen*, that the interest charged is excessive and that the transaction is harsh and unconscionable, but this provision shall be without prejudice to the powers of the court under that section where the court is satisfied that the interest charged, although not exceeding forty-eight per centum per annum, is excessive.

My finding is that PW1 received a total of K300,000 (Zambian currency) and the 1st Defendant required the Plaintiff to pay back a total of K600,000. What I discern from this is that the rate of interest was possibly 100%.

I order that the Plaintiff shall pay the loan at the interest of 47%. This shall accrue from the date when the loan was obtained until full payment. This is on the principle^{al} sum of K300,000= which the Plaintiff was loaned for 6 months repayment period and thereafter at short term bank deposit rate from the date when this matter was filed into court to date of judgment and thereafter at the current Bank of Zambia lending rate.

Claim v: An order of declaration that the money payable by the Plaintiff to the 1st Defendant shall be K300,000

plus such interest as a money lender is permitted to charge by law.

There is a dispute. The dispute is that the Plaintiff has insisted that she received from the 1st Defendant a cash amount of K300,000. Conversely, the Defendants have stated a different amount which is quoted in USD currency. The Plaintiff stated that of the K300,000, the 1st Defendant first paid to the Plaintiff K100,000. Then K200,000 was credited to the account of Plaintiff by direct deposit by the 1st Defendant. On the above basis, Am satisfied that what the Plaintiff got from the 1st Defendant was K300,000. It is this K300,000 which is now due from the Plaintiff to the Defendant. I have already indicated that this shall carry interest at 47% for the first 6 months which was the agreed repayment period. Thereafter, the interest shall be at the short term bank deposit rate from the date when this matter was filed into court to date of judgment and thereafter at the current Bank of Zambia lending rate.

Claim vi: In the alternative to claim (iii) (iv) and (v), the Plaintiff seeks damages for breach of the alleged contract of sale relating to stand number 462, Chilanga between the Plaintiff and the 1st Defendant dated 12th July, 2017 for nonpayment of the alleged

full purchase price and fraudulent change of ownership

This claim is in the alternative to claims (iii) (iv) and (v). I have already held in favour of the Plaintiff in respect of claims (iii), (iv) and (v). This alternative claim number (vi), therefore, falls away.

Claim vii: Rescission of the contract referred to in (vi) above.

This claim is also in the alternative to claims (iii), (iv) and (v). For the reasons which I have given earlier on claim (vi) above, this claim also falls away.

Claim viii: Costs.

It is trite that costs follow the event. It is also trite that costs are awarded in the discretion of the court.

I have seen no reason to deny the Plaintiff her costs. I accordingly, award the Plaintiff the costs of these proceedings to be taxed in default of agreement.

Now, I turn to the counter claims by the Defendants.

The Plaintiff has succeeded on all material facts. The Plaintiff's success has left this counter claim with no legs

to stand on. This counter claim, therefore, fails and falls away accordingly.

Leave to appeal is granted.

Due to the phobia for covid 19, this judgment shall not be read to the parties in open court but I order that the parties shall proceed to uplift their copies.

DATED AT LUSAKA THIS THE 20TH DAY OF MAY, 2021.

E.L. Musona

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