

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

2016/HP/1093

BETWEEN:

CECILIA CHILANGA

PLAINTIFF

AND

SIDA LWEENDO

1ST DEFENDANT

AMIS MWANDEZI

2ND DEFENDANT



Before the Hon. Mrs. Justice M.M. Bah- Matandala,

On the 4th day of April, 2024.

For the Plaintiff:

*Mr. M. Tatila-Mulumbwa --Messrs. Legal Aid Counsel
Legal Aid Board*

For the 1st Defendants:

In Person

For the 2nd Defendant:

No Appearance

JUDGMENT

LIST OF LEGISLATION REFERRED TO:

1. *The Lands and Deeds Registry Act Chapter 189 of the Laws of Zambia*
2. *Section 33 of the Lands and Deeds Registry Act Chapter 189 of the Laws of Zambia*
3. *Section 34 (1) (c) of the Lands and Deed Registry Act*

CASE LAW:

1. *Colgate Palmolive (Z) Inc v Abel Shemu Chika and 110 Others Appeal No. 181 of 2005*
2. *Printing and Numerical Registering Company v Sampson (1875) CA 19 EQ 462*
3. *Kalusha Bwalya v Chadore Properties and Another SCZ No. 20 of 201*

WORKS REFERRED TO:

1. *Chitty on Contracts General principles, Vol.1, 20th edition.*

1.0 INTRODUCTION

1.1 By an Amended Writ of Summons dated 14th February 2022, the Plaintiff claimed against the Defendants the following:

- i) An Order that the 1st Defendant pays the Plaintiff a sum of K800, 000.00 being the value of the house which has been foreclosed;*
- ii) An Order that the 2nd Defendant surrenders back the house being Plot No. 24414 Libala South in Lusaka after recovering his debt back from 2016 to date;*
- iii) Costs of and incidental to these proceedings;*
- iv) Interests on all amounts found due to the Plaintiff;*
- v) Any other relief as the court may deem fit*

2.0 STATEMENT OF CLAIM

2.1 In the accompanying Statement of Claim, it was averred that in June 2014, the Plaintiff met the 1st Defendant who

is also her brother in law. The Plaintiff indicated that she wanted to borrow some money for her children's school fees. The 1st Defendant then informed her that he could connect her to AWESCO Cooperative where he was a member. The said Cooperative said to be providing lending services to people who could provide collateral for the loans. The Plaintiff agreed to go to the Cooperative to borrow the money which wanted.

2.2 It was further averred that the 1st Defendant then introduced the Plaintiff to a Mr. Stan Sichita the CEO of AWESCO Cooperative. The 1st Defendant instructed the Plaintiff to arrange and secure a certificate of title for her house being Plot No. 24414 in Libala South of Lusaka as collateral.

2.3 Consequently, Mr. Stan Sichita went to inspect the Plaintiff's house which he then qualified as collateral. She said that she was later called by the 1st Defendant that the money was ready and the 1st Defendant led her to meet the 2nd Defendant. The Plaintiff stated that to her surprise the 2nd Defendant produced K100, 000.00.

- 2.4 The Plaintiff then informed the 1st Defendant that she only needed K10,000.00 but the 1st Defendant gave her K20,000.00 instead and indicated to her that K80,000.00 will be paid back to AWESCO Cooperative.
- 2.5 She further averred that she signed the documents without reading the content and was informed by the 1st Defendant that copies of the documents are never given to the borrower in such a transaction.
- 2.6 Further she averred that later the 1st Defendant failed to settle the debt of K80,000.00 and consequently the Plaintiff's house was foreclosed.

3.0 AMENDED DEFENCE

- 3.1 In the 1st Defendant's Amended Defence, the 1st Defendant denied having given anyone the Plaintiff's certificate of title. It was averred that the Plaintiff was the one who had approached the 1st Defendant seeking a loan from the Cooperative Society, to which the 1st Defendant is affiliated to, but that the Cooperative didn't have money at the time.

- 3.2 Consequently, it was averred that the 1st Defendant introduced the Plaintiff to a money lender who advanced the Plaintiff with an amount of K100, 000.00.
- 3.3 It has been stated that the 1st Defendant was not privy to the foreclosure proceedings.
- 3.4 In the 2nd Defendant's Amended Defence, the 2nd Defendant denied the assertion by the Plaintiff that he was a money lender. He averred that he was an innocent purchaser of Plot No. 24414 Libala South, Lusaka.
- 3.5 It was further averred that the 2nd Defendant had no knowledge of any money lending/borrowing arrangements between the Plaintiff and any other party.
- 3.6 He further averred that he took possession of the property in question after the Plaintiff signed a contract of sale with him in his capacity as the 2nd Defendant. He stated that the sale was freely and voluntarily done wherein the Plaintiff then received the full purchase price for the same property.
- 3.7 He further averred that Plot No. 24414 Libala South, Lusaka has since been sold, transferred and conveyed to

the proper legal ownership of another innocent third party and the property is no longer in the possession, control and ownership of the 2nd Defendant.

4.0 REPLY

4.1 In reply, the Plaintiff joined hands with the 1st Defendant's defence in so far as the same consisted of admissions and denials.

5.1 HEARING

5.1 At the hearing of the matter, PW1 was Cecilia Chilanga the Plaintiff herein. She testified that sometime in June 2014 she was looking for money to pay school fees for her children when she met the 1st Defendant who is her brother in law.

5.2 The 1st Defendant following her intimation to the 1st Defendant proceeded to organise for her to be given money from the Cooperative whose Chairperson was the 1st Defendant's friend. She further testified that at the time of getting the aforesaid money from the Chairperson, she was given K100.000.00 instead of K10, 000.00 which she had requested for.

- 5.3 The Plaintiff stated that she was then told by the 1st Defendant that the balance would be used by the Cooperative and it is the Cooperative which will pay back to the lender the sum of K80,000.00.
- 5.4 The Plaintiff stated that she remembered signing on one of the documents given to her and the rest of the documents were not explained to her. Consequently, the Plaintiff denied having sold the house in issue to the 2nd Defendant at a consideration of K150, 000.00; and that she never saw any document which indicated the sale of the same property. It was her further testimony that she was given K20, 000.00 out of the K100, 000.00 by the 1st Defendant in the whole scheme of the transaction going on.
- 5.5 The Plaintiff stated that she was later called by the lender informing her that she had defaulted on the loan. Therefrom, the Plaintiff contacted the 1st Defendant and asked him to accompany her to see the 2nd Defendant over the subject issue of the money they had borrowed. The 1st Defendant then referred her to his lawyers whom she later met and was assured that the amount involved for the loan

was so little and that they would sort it out. Thereafter, the lawyer placed a caveat on the property; but after sometime she was informed that her tenants were evicted and the house was sold.

5.6 Under cross examination, she acknowledged that she only got an amount of K20, 000.00 while the 1st Defendant got K80.000.00. With reference to page (1) one of the of Plaintiff's bundle of documents, the Plaintiff said that she signed a document whose content she didn't know but later came to know the said document as a Contract of Sale.

5.7 In further cross examination, she said that she only needed K10, 000 as the loan money but instead it was K100,000.00 wherein she was told to get only what she needed from that money. Thereafter the 1st Defendant informed her that the balance of the loan would be given to the Cooperative and the said Cooperative was to pay it back to the lender.

5.8 The Plaintiff said that the fact that she was present when the 1st Defendant got the money, that fact is her evidence

confirming that the 1st Defendant actually got the money.
She also confirmed that the 2nd Defendant gave the K100,000.00 to the 1st Defendant who then gave K20,000.00 out of it to the Plaintiff.

5.9 The Plaintiff confirmed that the Contract document in issue was signed by himself and the 1st Defendant wherein Mr. Enock Lusambo signed as witnesses for the Plaintiff and for the 2nd Defendant respectively. There was no reexamination for this witness.

5.10 DW1 was Sida Lweendo, the 1st Defendant herein testified that sometime in 2014 the Plaintiff approached her for help to acquire a loan because he was a member of AWESCO Cooperative which gave out loans.

5.11 It was his testimony that at that time, the Cooperative did not have money and so he introduced the Plaintiff to someone who loaned out money. After she was done with the transaction, the 1st Defendant was called to sign as a witness.

5.12 He confirmed that the documents he signed were prepared by the 2nd Defendant and that he never got any money

from that transaction and that he did not promise the Plaintiff anything.

5.13 Under cross examination of DW1, the witness confirmed that when he met the Plaintiff she told him that she wanted to borrow money. He said that the Plaintiff didn't tell him that she was selling a house.

5.14 In further cross examination, he said that it was the secretary at the Cooperative where he works who introduced the 2nd Defendant to the Plaintiff.

5.15 He said that he did not know the Plaintiff's educational background and that he did not explain to the Plaintiff what the documents she signed were about before signing them. Further, he stated that as far as he was concerned the Plaintiff was signing a contract of sale. He confirmed that he went to sign a sale of property agreement.

5.16 In further cross examination he acknowledged that the 2nd Defendant was not a member of the Cooperative and that he was not the one who introduced the 2nd Defendant as money lender to the Plaintiff.

5.17 In reexamination he said that the Plaintiff told her to sign the contract of sale and thereafter she had signed it.

5.18 DW2 was Amisi Mwandezi the 2nd Defendant herein who testified that sometime in 2014 he used to deal in building and property business. And as regards the matter before the Court; he was informed by his agent namely Enock Lusambo that there was a property for sale in Libala Chalala area in Lusaka.

5.19 He arranged to meet the vendor at Central Park and after meeting the vendor they discussed the details of the transaction. It was his further testimony that his agent and the vendor went to view the property and brought him a good report; after which he also made a follow up to view the property and he was satisfied with it.

5.20 He then asked the vendor to avail the certificate of title, National Registration Card and they conducted due diligence test.

5.21 Later the lawyers prepared the documents and he called the vendor. And therefrom they met at central park. At that meeting, DW2 was with Enock Lusambo while the Plaintiff

was with the 1st Defendant and the documents were then signed by both parties in his presence.

5.22 He further testified that after signing, he prepared the payment voucher and they went to Standard Chartered Bank North-end Branch where he withdrew the money and paid the Plaintiff in cash.

5.23 The Plaintiff counted the money with her witness and acknowledged receipt. He said that at that time the property was occupied and there was a verbal agreement for the tenants to vacate but that at the time he requested for vacant possession the Plaintiff brought up a story that the 1st Defendant had borrowed the money.

5.24 He narrated that by all means to have vacant possession failed hence he had to sought from the Court for a writ of possession, which was granted. Later the 2nd Defendant the asked the Plaintiff and the tenants were to vacate within a month of which they did.

5.25 Under cross examination, he confirmed that he did not know the person who introduced him to the Plaintiff and he had not heard of the person called Stan Sichita. He said

that the Plaintiff agreed that they would use one lawyer in the transaction; who was Mr. H.H Ndhlovu.

5.26 It was his further testimony that despite the 1st Defendant, denying having gone to the bank in his testimony; he was there. He confirmed that there was no assignment and or application for Property Transfer Tax in the bundle of documents.

5.27 He said that he had not known the Plaintiff before the transaction and only came to know her through Enock Lusambo.

5.28 There were no submissions from both parties.

6.0 CONSIDERATION ANALYSIS.

6.1 The facts of this matter are heavily disputed. The only common cause is that property being Plot No. 24414 Libala South Lusambo was possessed by the 2nd Defendant from the Plaintiff.

6.2 The Plaintiff alleges that she was introduced to a Mr. Stan Sichita by the 1st Defendant as the CEO of the Cooperative where the 1st Defendant was a member, with a view of borrowing money. This fact was denied by the 1st Defendant whose version of the story was that the Plaintiff went to the Cooperative where

he was member. Further that it was at the said Cooperative where she was informed that they had no money to lend to the her. Henceforth, the secretary of the Cooperative introduced the Plaintiff to a third party who was the 2nd Defendant.

6.3 Further that 2nd Defendant went into an agreement with the Plaintiff to borrow money and the 1st Defendant only signed as a witness. However, what is evident from the record is that the contract of sale was between the Plaintiff and the 2nd Defendant.

6.4 The 1st Defendant also disputes the assertion by the Plaintiff that the money was given to him by the 2nd Defendant for onward transmission to the Plaintiff at Standard Chartered Bank in Northmead Lusaka. Although the 1st Defendant has disputed this fact, the 2nd Defendant testified that he gave the money to the Plaintiff and it was counted by the Plaintiff and the 1st Defendant. It was also said that the 1st Defendant witnessed the signing in the presence of the 2nd Defendant.

6.5 It is therefore my considered view that the 1st Defendant was around when the money was being disbursed.

6.6 The other assertion by the Plaintiff is that the whole transaction was being arranged for her by the 1st Defendant and that there

- were a lot of documents which were arranged in the transaction and 1st Defendant told her that they don't give documents to clients. The Plaintiff also alleged that she was only a grade seven school drop-out who only knew how to write her name but didn't know how to read.
- 6.7 According to the Plaintiff she only came to know the content of what she signed was a contract of sale later and not at the time of signing. She reiterated that there was no sale of property but an agreement for borrowing money.
- 6.8 On the other hand, the 1st Defendant denied having gotten involved in the transaction for lending out money save only to sign as a witness for the Plaintiff.
- 6.9 The questions for my determination are whether there was a sale or money lending contract between the Plaintiff and the 2nd Defendant; and whether the Plaintiff was entitled to the surrender of Plot No. 24414 Libala South Lusaka to the 2^{ad} Defendant.
- 6.10 I have looked at the purported contract of sale between the Plaintiff and the 2nd Defendant exhibited herein, and in terms

of the applicable law, it is governed by the general principles of contract law.

6.11 Reference is being made to the authors of **Chitty on Contracts General principles, Vol.1, 20th edition** where the author had this to say on the contractual principles:

“the cardinal presumption is that the parties have intended what they in fact said, so that their words must be construed as they stand. That is to say, the meaning of the document or part of it is to be sought in the document itself: one must consider the meaning of the words used, not what one may guess to be the intention of the parties.”

6.12 As can be seen from the authority cited above, the meaning of a contractual agreement, where there is a written document, must be sought from the document itself.

6.13 *In casu* the document signed by both parties herein is the contract of sale, which is purporting that the Plaintiff sold her property to the 2nd Defendant.

6.14 Furthermore, the case of **Colgate Palmolive (Z) Inc v Abel Shemu Chika and 110 Others Appeal No. 181 of 2005¹**

where the Supreme Court adopted a passage from ***Printing and Numerical Registering Company v Sampson (1875) CA 19 EQ 462***² which brings in the condition that there is need for contracts to be entered in 'freely and voluntarily entered into' for it to be to be construed as the intention of the parties.

6.15 In the above case, the Court held that:

"If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracts and that contracts when entered into freely and voluntarily, shall be sacred and shall be enforced by the Courts of justice..."

6.16 This brings me to the question whether the purported sale herein was entered into freely and voluntarily. I have examined the contract of sale exhibited herein and observed that, while it purports to have been a sale agreement and signed by the Plaintiff, there are inconsistencies between the evidence of the 1st Defendant and the 2nd Defendant as to how this transaction was done.

6.17 The 1st Defendant wants this Court to believe that he did not know the 2nd Defendant and that all he did was to sign as a witness. He further denied having been present when the money was disbursed, while the evidence is clear that the Plaintiff is his sister in law and that this whole transaction was arranged by the 1st Defendant as shown in the testimony by the Plaintiff.

6.18 It is not in dispute that 1st Defendant was the first person who was contacted by the Plaintiff in pursuit of the loan in question. I find it therefore that it is too odd to believe that the 1st Defendant had nothing to do with the conclusion of the transaction between the two parties when there is also a record that he was the one who was given the title deed by the Plaintiff to give to the 2nd Defendant.

6.19 The 1st Defendant also acknowledged in cross examination that the document signed as the contract of sale was not a contract but collateral for the loan given to the Plaintiff, while the 2nd Defendant vehemently denied anything to do with money lending.

- 6.20 Furthermore, the 2nd Defendant claims that the money was
•
• disbursed in the presence of the 1st Defendant although the 1st Defendant denied the assertion.

6.21 A further analysis on how the sale was concluded, reveals that no assignment or proof of property transfer tax was exhibited before this court. One would also wonder how vacant possession being an important term of the contract, especially where property is sold while in occupation of tenants, would be made verbally as claimed by the 2nd Defendant.

6.22 The above analysis brings me to an inescapable conclusion that there was no genuine contract of sale between the parties herein. It is my considered view that the contract was one, for borrowing money and the Defendants herein were well aware of the transaction.

6.23 Having concluded that the contract was for money lending, the next question is, which law is applicable? In the case *in casu* there is no evidence to confirm that the 2nd Defendant holds a Money Lenders Certificate; therefore, the Money Lenders Act does not apply herein as none of the parties have demonstrated that it applied.

- 6.24 It is also clear that the Plaintiff was misled by the 1st Defendant,
• on the issue relating to the dealings in the subject transaction;
• that is, whether it was AWESCO or a different lender that loaned
her the money. The evidence shows that it only came to the
Plaintiff's knowledge that at the time of disbursing the money,
she was dealing with the 2nd Defendant as the lender.

6.25 In the case of ***Kalusha Bwalya v Chadore Properties and Another SCZ No. 20 of 2015***³, it was held that the Court will only refuse to enforce an agreement where there is fraud or misrepresentation. In the instant case, the Plaintiff has shown that there was misrepresentation as to the true state of affairs regarding the purported loan. Therefore, I am inclined to believe the evidence of the Plaintiff that the amount disbursed was only K100,000.00 and not K150,000.00 as purported by the documents since the Plaintiff was made to sign documents by trusting the 1st Defendant to tell her the content since she is not literate.

6.26 I have also noted that the 1st Defendant was given the Writ of Possession sometime in 2016 based on the purported contract of sale when in fact not and looking at the amount which was

- owed, ordinarily he has recovered his money since he has been
-
- in possession.

6.27 Furthermore **Section 33 of the Lands and Deeds Registry**

Act Chapter 189 of the Laws of Zambia enacts as follows:

"A certificate of title shall be conclusive as from the date of its issue and upon and after issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise which but for parts III to VII might be held to be paramount or to have priority; the Registered Proprietor of the land comprised in such certificate shall, except in case of fraud, hold the same subject only to such encumbrances, liens, estates, or interests as may be shown by such certificate of title, and any encumbrances, liens, estates, or interests created after the issue of such certificate as may be notified on the folium of the register relating to such land hut absolutely free from all other encumbrances, liens, estates, or interests whatsoever:

- a) *Except the estate or interest of a proprietor claiming the same land under a current prior certificate of title issued under the provisions of parts II to VII; and*
- b) *Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land;* c) *Expect so far as regards any portion of land that may be erroneously included in the certificate of title, evidencing the title of such registered proprietor by wrong description of parcels or of boundaries. (As amended by S.I. No. 65 of 1965.”*

We agree that under Section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by the holder of the certificate, in this case the respondent. But we also know that under the same section or Section 34, a certificate of title can be challenged and cancelled for fraud or for reasons of impropriety in its acquisition. So, the statement that a certificate of title is conclusive evidence of ownership of land is only true

when there is no challenge based on fraud. We note that in this appeal, the appellant is alleging fraud. We allow ground one.

6.28 Furthermore, **Section 34 (1) (c) of the Lands and Deed Registry Act** enacts as follows:

"No action for possession, or other action for recovery of any land shall lie or be sustained against the Registered Proprietor holding a certificate of title for the estate or interest in respect to which he is registered, except in any of the following cases, that is to say:

- d) The case of a person deprived of any land by fraud, as against the person registered as proprietor of such land through fraud or against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud."

6.29 *In casu*, the Plaintiff has demonstrated that she was the title holder of the property in question before the purported transaction took place. Having found that there was no sale

make the writ of possession ineffective; the property thus still belongs to the Plaintiff herein.

6.30 Having analysed as above, and to this extent, the Plaintiff's claim succeeds and it is further ordered as follows;

- 1. That the purported sale of Plot No. 24414 Libala South in Lusaka by the 2nd Defendant to a third party is null and void ab initio because the 1st Defendant had no title to transmit.*
- 2. Cancellation of entries No. 8 and 9 dated 21st July 2015 and titled preliminary registration in the Lands Register purportedly transferring title from the Plaintiff to the 2nd Defendant.*
- 3. The 2nd Defendant surrenders back the house being Plot No. 24414 Libala South Lusaka to the Plaintiff within 30 days.*
- 4. Costs for the Plaintiff*

6.31 The claim for the recovery of K800, 000.00 as the value of property fails as it would entail unjustly enriching the Plaintiff since the Court has already ordered that the property be surrendered back to the Plaintiff.

7.0 The Parties are informed of the right to appeal.

Dated at Lusaka, this day of 4th April, 2024.



**M.M. BAH-MATANDALA
HIGH COURT JUDGE.**

