

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

2020/HP/0045



BETWEEN
MOUDY MWANSA

PLAINTIFF

AND

GODFREY HACHIKATA

DEFENDANT

Before the Honourable Lady Justice C. Lombe Phiri in Chambers

For the Plaintiff: H. M. Munsange - Messrs. H. M. Munsange and Co.

For the Defendant: N/A

JUDGMENT

CASES REFERRED TO:

1. Khalid Mohamed v The Attorney General (1982) Z.R 49
2. Holmes Limited v Buildwell Construction Company Limited (1973) Z.R. 97
3. Printing and Numerical Registering Company v Simpson [1875] L.R. 19 E.Q. 62
4. Colgate Palmolive (Z) Inc. v and Chuka and Others Appeal No. 185 of 2005 (unreported)
5. Nora Mwaanga Kayoba and Alizani Banda v Eunice Kumwenda Ngulube and Andrew Ngulube (2003) Z.R 132
6. Raphael Ackim Namung'andu v Lusaka City Council [1978] ZR 358

7. **Fabiano Humane v D.P. Chinkuli [1971/ HP/ 407 Unreported**

LEGISLATION REFERRED TO:

1. **Lands and Deeds Registry Act Cap.185 of the Laws of Zambia**

OTHER MATERIALS REFERRED TO:

1. **Bryan A Garner “Black's Law Dictionary” 8th Edition 1999**

1. INTRODUCTION

1.1 This is a matter where the Plaintiff took out a writ of summons and statement of claim seeking the following reliefs –

- A declaratory order that the Plaintiff has an interest in and is the legal owner and therefore entitled to possession as beneficial owner of the land and premises in extent 387 square meters known as Plot No. A.139 Olympic Youth Development Centre Land situate in Lusaka in the Lusaka Province of the Republic of Zambia*
- Damages for trespass*
- An Injunction restraining the defendant whether by himself his agents or servants or otherwise howsoever from entering the said piece of land the subject of these proceedings or in any way interfering with the Plaintiff's quiet enjoyment or possession thereof until final determination of the matter herein*
- Any other relief deemed appropriate and just by the Court*
- Costs*

- 1.2** In the Plaintiff's statement of claim dated 13th January 2020, it was averred that by written contract dated 28th October 2016, the Sports Development Trust T/A Olympic Youth Development Centre (hereinafter referred to as OYDC) agreed to sell to the Plaintiff all that piece of land in extent 387 square meters known as Plot No. A139 situate in the Lusaka Province of the Republic of Zambia at K20,638.71.
- 1.3** It was averred that the Plaintiff paid in full K20,638.71 to OYDC, and the process of obtaining title from the Ministry of Lands was still in process. It was stated that despite the contract of sale, the Defendant had been claiming an interest in the said land, which the Plaintiff had since developed.
- 1.4** It was further averred that the vendor OYDC had been beset with challenges arising from the likes of the Defendant and politicians in relation to parcels of land legally sold in the area thereby seeking the Ministry of Lands intervention but to no avail.
- 1.5** It was also averred that the Defendant had since erected a small structure on the said land wherein he had settled one of his agents or servants without any proof by way of documentation of his claim to the land. It was stated that on 30th October 2018, the Defendant threatened to demolish the Plaintiff's structure and that as a result of the Defendant's conduct, the Plaintiff has been deprived use and quiet enjoyment of the property.

1.6 No Defence was filed by the Defendant despite only entering an appearance.

2. TRIAL

2.1 At the trial of the matter, the Defendant did not appear. Pursuant to Order 35 Rule 3 of the High Court Rules, having been satisfied that proper service of the Notice of Hearing of the trial date was served on the Defendant, trial proceeded.

2.2 The Plaintiff was the sole witness in his cause (**PW1**). He who testified that on 28th October 2016, he purchased land from OYDC at the price of K20,680.00, and was given a contract of sale and receipts of payments made relating to Plot Number A.139.

2.3 **PW1** testified that the Defendant encroached on the land and built a house at the corner, while another individual was occupying the said house as a caretaker. **PW1** told the Court that he reported the circumstances to OYDC, who informed him that they would help locate the Defendant, who was traced but was evasive.

2.4 **PW1** testified that he sought the Court's assistance, as he purchased the land and had in his possession the contract of sale and receipts of payment. **PW1** stated that he would be relying on the documents filed in the Plaintiff's Bundle of Documents

3. SUBMISSIONS

3.1 At the close of the trial, the Plaintiff opted to not file submissions.

4. LAW

4.1 In the case of Khalid Mohamed v The Attorney General⁽¹⁾, the Supreme Court held that:

“a Plaintiff must prove his case and if he fails to do so the mere failure of the opponent’s defence does not entitle him to judgment.”

4.2 It, therefore, follows that for the Plaintiff to succeed, it would not be enough to say that the Defendant had completely failed to provide a defence but that the evidence establishes the issues raised to the required standard of proof, that is on a preponderance of probabilities.

4.3 In the case of Holmes Limited v Buildwell Construction Company Limited⁽²⁾ it was stated that:

“Where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally admissible to add to, vary, subtract from or contradict the terms of the written contract.”

4.4 Further, in the case of Printing and Numerical Registering Company v Simpson⁽³⁾, quoted at page 8 in the case of Colgate Palmolive (Z) Inc. v and Chuka and Others⁽⁴⁾ it was also stated as follows:

“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 in contracting and that their

contract, when entered into freely and voluntarily, shall be enforced by Courts of justice.”

- 4.5 It is apt to note that legal ownership of land is evidenced by the production of a certificate of title to a property. In this respect, **Section 33 of the Lands and Deeds Registry Act** states inter alia as follows:

“A certificate of title shall be conclusive as from the date of its issue and after the issue thereof, notwithstanding the existence in any other person of any estate or interest....” 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 on interest as may be shown by such certificate of title....”

- 4.6 A bonafide purchaser as defined in **Black's Law Dictionary** ⁽¹⁾ at page 1355 is as follows:

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or iniquities against the Seller's Title; one who has in good faith paid valuable consideration for property without notice of prior claims.”

- 4.7 Further **Black's Law Dictionary** ⁽¹⁾ defines a squatter at page 1439 states as follows:

“as a person who settles on property without any legal claim or title.”

4.8 Whilst it is commonly accepted that the sale of land in Zambia is usually governed by the Law Association of Zambia General Conditions of Sale, one must ensure compliance with other laws.

4.9 In the case of Nora Mwaanga Kayoba and Alizani Banda v Eunice Kumwenda Ngulube and Andrew Ngulube ⁽⁵⁾, the Supreme Court articulately stated that:

“in purchasing of real properties, parties are expected to approach such transactions with much more serious inquiries to establish whether or not the property in question has no encumbrances. Buying real property is not as casual as buying household goods or other personal property.”

4.10 In the case of Raphael Ackim Namung’andu v Lusaka City Council ⁽⁶⁾, Commissioner Mathew Ngulube, (as he then was) stated, regarding the status of squatters in Law that:

“Squatters build at their own risk and if the owners of the land withdraw their permission or licence or if they decide to demolish a structure built in the absence of any permission or other lawful relationship, the Squatters’ losses though very regrettable are not recoverable in a court of Law.”

4.11 Further, in Fabiano Humane v D.P. Chinkuli ⁽⁷⁾ where both the Plaintiff and the Defendant were squatters, it was elucidated that a squatter is a person in mere adverse possession and that the

position in law was that his want of title disentitled them to any remedy in a Court of law.

5. ANALYSIS

5.1 This is an action that has not been challenged by the Defendant, who failed to file any defence into court or appear at any hearing despite being served with the process. The genesis of the matter lies in the purchase of land from the Olympic Youth Development Center. The Plaintiff has adduced the contract of sale and the receipts in relation to the transaction. I therefore find it as a fact that the Plaintiff did indeed purchase the parcel of land in question. It is also a fact that has been shown before the Court that the Plaintiff was in the active process of acquiring a Certificate of Title relating to the said land. This is evidenced by the payment of the land rates and also the correspondence to the lawyers representing the Olympic Youth Development Center. I therefore find that as a fact as well. It has been pleaded that the Plaintiff has developed the property, although there is no evidence to that effect. It is therefore a fact in this matter that while there exists a valid contract of sale of the property, at the time this action was taken out, the Plaintiff did not have any certificate of title relating to the land.

5.2 The Plaintiff's grievance in this matter against the Defendant is that the Defendant has trespassed on the Plaintiff's land. As a result the Plaintiff seeks a declaration not only that he has an interest in the land but also that he is the legal owner of the land and is therefore entitled to possession of the land as beneficial

owner of 387 square meters of Plot No. A. 139 Olympic Youth Development Centre in Lusaka.

5.3 It is clearly not in dispute that the Plaintiff has an interest in the land in dispute as is evidenced by the contract of sale. What needs to be determined is whether the interest he so possesses by being a bonafide purchaser entitles him to a declaration that he is the legal owner of the land in question. The Lands and Deeds Registry Act in Section 33 clearly states that a certificate of title provides conclusive proof as to ownership of property. In this case there is no such proof of title. The facts revealed before the Court show that the Plaintiff came into possession of the land illegally as shown in Paragraph 5 of the Contract of Sale exhibited. Further, the Contract also stipulates that the Vendor would facilitate the replanning and normalization of the property with relevant authorities upon full payment from the purchaser. It is clear from the foregoing that inspite of the manner that the Plaintiff came into possession of the land, it was the inention of the Vendor to pass on title upon full and final settlement of the amount. The receipts and correspondence exhibited in the Bundle of Documents shows that this condition was met. The prayer of the Plaintiff is therefore consonant with the intention of the parties which this Court has no difficulty giving effect. In that regard it is forthwith declared that the Plaintiff is the legal owner of the land in question and is entitled to possession of it as beneficial owner.

5.4 With regards to damages for trespass it is common parlance that in order for damages to be awarded the claimant must not only show that they are entitled to the relief sought but also it must be shown what injury or damage was occasioned as a consequence of the alleged trespass. It has been properly established that the Plaintiff is the legal owner of the property in question however, there is no evidence to show that the defendant's trespass directly caused harm or damage to the plaintiff or their property. This being the case the claim for damages for trespass fails and is dismissed.

6. CONCLUSION

- 6.1 In view of the foregoing findings and declarations, the Plaintiff succeeds on the claims that have been made before the Court on account of the declarations that he had an interest in the land and that he is the beneficial and legal owner of the property subject of the proceedings. With regard the claim for damages for trespass fails.
- 6.2 Costs are ordered for the Plaintiff, to be taxed in default of agreement.
- 6.3 Leave to appeal is granted.

Dated at Lusaka this^{25th}.....day of^{April}..... 2024.



**C. LOMBE PHIRI
JUDGE**