

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 216/2015

HOLDEN AT KABWE

(Civil Jurisdiction)

BETWEEN:

GERSHOM CHILOMBO (2001/HN/404)

APPELLANT

AND

JULIUS MASUMBA

RESPONDENT

AND

ZCCM INVESTMENT HOLDINGS PLC (2004/HK/116) PLAINTIFF

AND

JULIUS MASUMBA

1ST DEFENDANT

AND

GERSHOM CHILOMBO

2ND DEFENDANT

Coram: Wood, Kabuka and Mutuna JJS.

On 7th August, 2018 and 12th October, 2018.

For the Appellant:

*Mr. Michael Masengu –Messrs Michael
Masengu & Company*

For the 1st and 2nd Respondents:

No Appearance

JUDGMENT

Wood, JS, delivered the judgment of the Court.

When we heard this appeal we dismissed it and indicated to the parties that we would give our reasons later. We now do so.

This is an appeal against a decision of the High Court allowing the appellant's claim for a declaration that he is a tenant in common in Farm No. 937 and Lot No. 249/M Mufulira with 55% shareholding following his purchase of the same from members of a Management Buyout Team (MBO team) which was a party to the sale of property by Zambia Investment Holdings Plc (ZCCM - IH). The High Court also granted the appellant a declaration that the respondent renders an account of all the assets that were the subject of sale between ZCCM and the MBO team and subsequently between ZCCM and the appellant and the respondent. The appeal is further against a claim for damages for loss of business which was dismissed and in the alternative, a refund of the money paid to ZCCM - IH as the balance of the purchase price of the property.

Two causes were consolidated in this appeal namely 2001/HN/404 and 2004/HK/116. The first cause relates to a claim by the appellant against the respondent for a declaration that he is a tenant in common in Farm 937 and Lot No. 249/M Mufulira with 55% shareholding; a declaration for an account and damages for loss of business or in the alternative a refund of money paid to ZCCM-IH as the balance of the purchase price of the property.

The second cause was a claim by ZCCM-IH against the appellant and respondent for payment of the balance of K74,250,780.00 in respect of the property referred to in the first cause or in the alternative, the interest of the second respondent in the property reverts to ZCCM-IH. In addition to that, the proceeds of the sale of farming equipment and vehicles should be given to ZCCM –IH.

It is necessary to give a brief background leading to this appeal. During the era of privatization, the respondent and twelve other employees of Zambia Consolidated Copper Mines Limited (ZCCM) were part of a Management Buyout Team which was offered Farm 937 and Lot No. 249/M Mufulira commonly known as Mufulira farms by ZCCM. The farms were owned by Mulungushi Investments Limited, a subsidiary of ZCCM. The consideration was K190,000,000.00 (K190,000.00). The agreement for the purchase of the property was concluded on or about 8th August, 1996. It was expressly agreed between ZCCM and the Management Buyout Team that the respondent would purchase 45% of the shares in the property while 55% of the shares would be held by the other twelve employees. It was a further express term of the agreement that the

purchase price for the property would be liquidated in three installments of K5,000.00 upon exchange of contracts, K33,000.00 at the end of the year in 1996 and further that the balance of the purchase price would be liquidated in four equal installments of K38,000.00 each at the end of each of the subsequent years until the whole purchase price stood liquidated on or before the end of the year 2000. The respondent accepted the offer on 22nd April, 1996 on his own behalf as well as for and on behalf of the other members of the Management Buyout Team and the property was handed over by ZCCM to the respondent and the other twelve employees. On 26th February, 1998, the appellant together with two others incorporated a company called Mufulira Farms Limited with a total issued share capital of 500,000 with the respondent holding 350,000. On 27th April, 2001, the other twelve employees sold their combined stake of 55% shares in the property to the appellant. The respondent denied this in his defence and stated that he purchased the 55% shares in the property from the Management Buyout Team.

The judge in her judgment found that the appellant had bought out the 55% interest of the twelve employees in the property and as such was the new owner of the 55% interest in the property.

The judge also found that the appellant had become a shareholder of Mufulira Farms Limited. As such, he was entitled to the benefits of ownership of the farm as a tenant in common with 55% shareholding having purchased the same from members of the MBO Team which was party to the sale of the property by ZCCM. The judge then dealt with the issue of the assets. She found that the assets belonged to the company which has a separate legal existence although it is owned by shareholders. She accordingly granted a declaration that the respondent renders an account within thirty days of the judgment. She however declined to grant the claim for damages for loss of business as it had not been proved. She also declined to grant the alternative relief of a refund to the appellant as the appellant had paid and was a 55% shareholder.

The appellant was dissatisfied with the judgment of the High Court and has now filed seven grounds of appeal which can be summarized as follows:

- (1) *The trial court erred in law in compelling the respondent to buy out the appellants shares or refund him K96,000,000.00 (K96,000.00);*
- (2) *The true value of the shares was not K96,000.00 because a valuation that was carried out showed 55% was K126,500.00.*

- (3) *The respondent did not account for the assets of the farm within thirty days of the judgment as ordered by the court.*
- (4) *This ground is a repetition of the first ground.*
- (5) *The court below erred when it refused to award damages for lost profits.*
- (6) *The money that was paid to the minor shareholders was not taken into consideration by the judge.*
- (7) *The pleading in the alternative for a refund of money was incorrect because the balance was K74,250.78 and that the appellant's 55% shares should be restored to him.*


We have carefully considered the record of appeal and in particular, the memorandum of appeal. We note from the record of appeal that the appellant was successful in the court below because he was confirmed as a 55% shareholder in the property and was granted an order to account against the respondent. The appellant was not given the alternative remedy of a refund for the simple reason that he could not be a shareholder and at the same time be paid back the money he had used to buy the 55% shares. The claim for loss of business was equally dismissed for good reason since no evidence was led to show the special damages which the appellant claimed he had suffered. The appellant cannot now be heard to argue that he was claiming general damages for being prevented from entering the property as he is bound by his pleadings which specifically mention loss of business.

The appellant cannot also at this stage claim that that his pleadings were incorrect. He should have taken steps to examine his pleadings prior to the application for amendment of his statement of claim and made the necessary amendments. He is therefore bound by his own pleadings. We therefore do not think that anything would be gained from a detailed analysis of the evidence or the judgment which was to a large extent in favour of the appellant. During the hearing of the appeal, the effect of the *per incuriam* comments made by the judge in relation to the possible sale of the appellant's shares to the respondent was clarified. We must state again that the comments made by the judge in her concluding paragraph subject of ground one of the appeal, were *per incuriam* and should not be understood to mean that the appellant was being ordered to sell his shares to the respondent. Shares are personal property and can only be sold when certain conditions are met. For the avoidance of doubt the appellant is entitled to a 55% shareholding.

What really seems to be the problem with the appellant is his inability to reap the fruits of his judgment. We say so, because even the routine order made to account which was not obeyed by the respondent does not appear to have been followed up by the

appellant upon default, but has instead been made a ground of appeal. There are various methods of how to enforce this judgment in the High Court but it is not within our province to proffer advice to the appellant on how to enforce it.

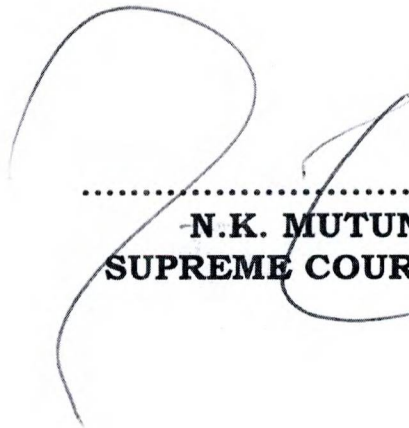
From what we said above it is quite clear that this appeal should be dismissed for having no merit. Costs to the respondent to be agreed or taxed in default of agreement.



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A.M WOOD
SUPREME COURT JUDGE



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J.K. KABUKA
SUPREME COURT JUDGE



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N.K. MUTUNA
SUPREME COURT JUDGE