

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
(Civil Jurisdiction)

2001/HK/463

BETWEEN:

MARTIN SAMPA AND OTHERS	-	PLAINTIFFS
AND		
ZCCM INVESTMENT HOLDINGS PLC	-	1 ST DEFENDANT
KAULANDA NYIRENDA AND OTHERS	-	2 ND DEFENDANT

Before the Honourable Mr. Justice I.C.T. Chali in Open Court on 7th day of November, 2011

For the Plaintiffs: Mr. D. Mazumba – Messrs Douglas and Partners

For the Defendants: Mr. P. Chamutangi – Messrs Peter Chamutangi and Company

J U D G M E N T

Cases referred to:

1. *Zambia Consolidated Copper Mines Limited v. Richard Kangwa and Others* (2000) Z.R. 109
2. *Elizabeth K. Mulenga v. Fredrick Solomon Mwelwa Appeal No. 57/2008*
3. *Beatrice Muimui v. Sylvia Chunda SCJ No. 50/2000*
4. *ZCCM and OK Simwinga v. Dr. Francis Khama Appeal No. 71 of 2001*

The Plaintiffs took out a writ of summons accompanied by a Statement of Claim and were seeking the following reliefs:

1. A declaration that the offers of sale of houses made by the 1st Defendant to the other Defendants who were not sitting tenants were wrong and therefore null and void;
2. An order for the cancellation of the said offers;
3. A further declaration that the Plaintiffs, as sitting tenants, are entitled to purchase the houses they occupy; and

4. An order compelling the 1st Defendant to offer the houses the Plaintiffs occupy for sale to the Plaintiffs.

It is common cause that in 1997 the Government of the Republic of Zambia introduced a policy of home empowerment in which, inter alia, parastatal companies were directed to sell its housing stock to employees who were occupying their houses at the time. The Zambia Consolidated Copper Mines Limited (ZCCM), the fore-runner to the 1st Defendant in this case, was one such parastatal whose employees were to benefit from the said scheme. The term used in this respect for such employees was “**sitting tenants,**” that is to say, employees in occupation and residence.

This policy has been interpreted in various court decisions, including that of the Supreme Court in the case of **Zambia Consolidated Copper Mines Limited v. Richard Kangwa and Others (2000) Z.R. 109**, to include not only the direct employees of the concerned parastatal, but also employees of the direct subsidiaries of such parastatal “**in occupation and residence**”. This appears to have been premised on the Supreme Court having taken “**judicial notice of the fact that sales of houses to “sitting tenants” across the country in local authority and public institution houses was the brainchild and decision of the government which ultimately also owns the (parastatal) as the majority shareholder**”. It was the Supreme Court’s view “**that the state wishes to sell parastatal houses to “sitting tenants”, including employees of subsidiary companies who are and have been in actual occupation of the houses**”. (Pages 110 and 111 of the Report).

In my view, the question to be resolved as to whether the Plaintiffs were entitled to purchase the houses revolves around whether they were employees of ZCCM or its subsidiary.

In their Statement of Claim, the plaintiffs claimed to have been employee’s of ZCCM subsidiaries. The Defendants took issue with the Plaintiffs on that claim in their defence.

The evidence of the 1st Plaintiff MARTIN SAMPA (PW1) was that he was employed in December, 1974 by the then ROAN COPPER MINES LIMITED (RCM) which, as history has it, was later merged with NCHANGA CONSOLIDATED COPPER MINES LIMITED (NCCM) to form ZCCM in 1980. Upon the 1st Plaintiffs return from studies in 1991 he was sent to work for MULUNGUSHI INVESTMENTS LIMITED which had NCHANGA FARMS as one of its operating units. He was posted to Luanshya Farm and was living at Number 6A Lantana Avenue Luanshya which belonged to ZCCM. He said he was at first Farm Manager and later General Manager of Luanshya Farm which he said was owned 100% by ZCCM.

Equally, the evidence of JAMES MWEWA CHIYABWE (PW2) was that he was employed in 1988 by ZCCM and assigned to its subsidiary MULUNGUSHI INVESTMENTS LIMITED where he started working at Luanshya Farm belonging to NCHANGA FARMS. At the time the sale of ZCCM houses began in July, 1997 he was living at 19 Lantana Avenue Luanshya, which house also belonged to ZCCM.

There is also evidence from both PW1 and PW2 that in early 1996, during the privatization process of some parastatal companies, the two together with other workers at Luanshya Farm submitted a bid to ZCCM for the purchase of the said farm initially on a rental basis but subsequently on an outright purchase basis. The purchase was to be on a Management Buy Out (MBO) basis. By letter dated 9th April, 1996 from ZCCM's Company Secretary the Plaintiffs were informed that their bid had been successful. In April/May, 1996 PW1 signed the acceptance of the formal offer of sale of Luanshya Farm on behalf of the MBO Team.

The letters of offer and acceptance appear at pages 12/13 (17th April, 1996) and 15/16 (15th May, 1996) of the First Defendant's Bundle of Documents. At about the same time or very shortly thereafter the Plaintiff's started making payments towards the agreed purchase price of K120,000,000=00 for the farm.

The other developments are also worth noting.

Firstly, on 6th September, 1996 the Plaintiff's registered a company by the name of KAFUBU SMALL HOLDERS DEVELOPMENT COMPANY LIMITED. This company was said by PW1 to have been formed for the purpose of running the farm the Plaintiffs had bought, namely, Luanshya Farm. This fact was communicated to ZCCM by letter dated 29th January, 1997 authored by PW1 as General Manager of the company. That letter read in part **“.....Nchanga Farms – Luanshya is now formally registered under the name KAFUBU SMALL HOLDERS DEVELOPMENT COMPANY LIMITED.”**

Related to the incorporation of **KAFUBU SMALL HOLDERS DEVELOPMENT COMPANY LIMITED**, on 29th January, 1997, PW1 as General Manager of that Company wrote to MULUNGUSHI INVESTMENTS LIMITED (**under Liquidation**) in part:

“Please be informed that, after consultations with the Company Secretary – ZCCM, it was agreed that under the terms of the sale of the farm to us all liabilities incurred by the Farm before 8th August, 1996 through Nchanga Farms/Mulungushi Investments are not our responsibility. Similarly we have also foregone all amounts owed to the farm from ZCCM Luanshya Division which were subsequently credited to your account through accounts payable.”

The other development PW2 alluded to particularly was that the Plaintiff's used to receive their salaries from MULUNGUSHI INVESTMENTS up to the time of its liquidation in 1996. Thereafter they started being paid by the farm.

The 1st Defendant in its Defence stated, inter alia:

“1. The 1st Defendant denies the allegation contained in paragraph 1 of the Statement of Claim and it will testify that the Plaintiffs were not in 1977 employees of any of its subsidiaries.”

The 1st Defendant's position was that the Plaintiffs were not entitled to the reliefs they sought.

The other Defendants in their joint Defence and Counter Claim also denied that the Plaintiff's were employees of the 1st Defendant or its subsidiaries when the sale of the 1st Defendants houses commenced.

It is trite that the sale of ZCCM houses started in July, 1997. As shown in the evidence I have reviewed, by then MULUNGUSHI INVESTMENTS, the original employer of the Plaintiffs had been liquidated.

From 1996 at the very latest, when MULUNGUSHI INVESTMENTS was liquidated, there was no longer any link by way of employment between the Plaintiffs and ZCCM. Further, on 6th September, 1996, the Plaintiffs had incorporated a new company, KAFUBU SMALL HOLDERS DEVELOPMENT COMPANY LIMITED, in which PW1 was General Manager and PW2 Operations Manager. That company was the one paying the salaries of the Plaintiffs from 1996. In fact, according to PW1, it was the new Company which paid some of the redundancy pay to some former employees of MULUNGUSHI INVESTMENTS. The new company was not by any stretch of imagination a subsidiary of ZCCM. In fact by the very letters of 29th January, 1997 to ZCCM and Mulungushi Investments which I have referred to, PW1 was confirming that Luanshya Farm (**now KAFUBU SMALL HOLDERS DEVELOPMENT COMPANY LIMITED**) should be divorced from Mulungushi Investments.

The decision of the Supreme Court in the case of **Elizabeth K. Mulenga v. Fredrick Solomon Mwelwa Appeal No. 57/2008 (unreported)** cited by Mr. Chamutangi in his submissions is quite instructive on the question before me. In that case, the Plaintiff was an employee of ZCCM with whom she had worked for over 20 years. She never occupied the house the subject of those proceedings but was offered it, the contract of sale was signed on 12th December, 1997, and she paid for it from her terminal benefits. On the other hand, the Defendant was, first, an employee of ZCCM and later an employee of MULUNGUSHI INVESTMENT LIMITED, a ZCCM subsidiary. MULUNGUSHI INVESTMENT LIMITED had a working unit called RYCUS HEAVY HAULAGE in which the Defendant was working. In 1996 MULUNGUSHI INVESTMENT LIMITED went into liquidation and the operating unit RYCUS HEAVY HAULAGE was disposed of through a Management Buy Out Team

and the Defendant went with it. At the time the Defendant was moving over with RYCUS HEAVY HAULAGE in 1996, no offer had been made to him for the house. He was, however, still occupying the house as an employee of RYCUS and in fact witnessed the tenancy agreement between the Plaintiff and RYCUS after the latter was informed that the Plaintiff was their new landlady.

The Supreme Court said the issue before the Court in that case was not who was entitled to buy the house, but whose house was it. The Court held that,

“when the Defendant was working for RYCUS HEAVY HAULAGE before the MANAGEMENT BUY OUT, the Defendant was entitled to buy the house as a sitting tenant but that right was taken away from him once RYCUS HEAVY HAULAGE went out on Management Buy Out”.

Further, in the case of **BEATRICE MUIMUI v. SYLVIA CHUNDA SCJ NO. 50/2000**, and the latter case of **ZCCM AND OK SIMWINGA v. DR. FRANCIS KHAMA APPEAL NO. 71 OF 2001**, the Supreme Court held that being a sitting tenant is not the sole criteria in purchasing a government or parastatal house.

The Plaintiffs notion appears to be that since the final Sale / Purchase Agreement of the farm was only signed between ZCCM and the MBO Team on 2nd February, 1998, that should be taken as the date of separation of the Plaintiffs' links with ZCCM.

The corollary to the said idea by the Plaintiffs is that since the “**completion date**” in that agreement meant the date of completion of payment of the purchase price and transfer of the farm, which had not occurred by July, 1997, the farm remained the property of ZCCM and hence the Plaintiffs could benefit from the sale of ZCCM houses.

Indeed, completion may not have taken place by July, 1997. However, for all practical purposes the Plaintiffs had taken over the farm and its operations under a new legal entity and employer which was not a subsidiary of ZCCM.

In the instant case, the Plaintiffs may well have been sitting tenants in the ordinary sense of landlord and tenant. However, they did not establish a legal right to purchase the houses they were occupying under the housing empowerment policy.

In the circumstances of this case, I refuse to accept that approach and it is accordingly rejected. The result is that I find no basis to make the declaration or orders the Plaintiffs seek. Their claims are dismissed as being without merit.

On the other hand I find nothing wrong in the 1st Defendant's decision to sale the affected houses to the other Defendants. The other Defendants are hereby declared to be the rightful purchasers and owners of the said houses.

I hereby order the Plaintiffs to vacate and give vacant possession of the houses in issue to the Defendants within 30 days from the date of this judgment in tenantable state.

I further award the Defendants damages against the Plaintiffs for wrongful occupation and use of those houses from the dates the Defendants purchased the houses till vacation, said damages to be assessed by the Learned Deputy Registrar. The said damages shall attract interest at average short term deposit rate from the date of the writ to the date of this judgment and thereafter at lending rate as determined by the Bank of Zambia till full payment. The Defendants shall also recover from the Plaintiffs all outstanding bills for electricity and water relating to their respective houses.

The Defendants shall have the costs of the action, said costs to be taxed in default of agreement.

Leave to appeal is hereby granted to any aggrieved party.

Delivered in Open Court at Kitwe this 7th day of November, 2011

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I.C.T. Chali
JUDGE

