

**IN THE HIGH COURT FOR ZAMBIA  
AT THE KITWE DISTRICT REGISTRY  
(CIVIL JURISDICTION)**

**2010/HK/274**

**BETWEEN:**

**BESSIE CHISENGA PHIRI** (*Suing as an* **PLAINTIFF**

*Administratrix of the estate of the late  
Peter Chisanga*)

**AND**

**SHARON ZIMBA CHISENGA** **1<sup>ST</sup> DEFENDANT**

**JOHN MUSHINGE** **2<sup>ND</sup> DEFENDANT**

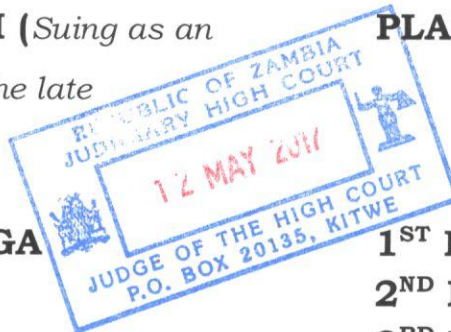
**ANDREW TEMBO** **3<sup>RD</sup> DEFENDANT**

**Before the Honourable Mr. Justice I. Kamwendo in Open  
Court on the 12<sup>th</sup> of May, 2017.**

**For the Plaintiff; Mrs. Bupe, National Legal Aid Clinic for  
Women**

**For the 1<sup>st</sup> and 2<sup>nd</sup> Defendants; No appearance**

**For the 3<sup>rd</sup> Defendant, Mrs. Mbaluku, Mmes. L.K. Mbaluku &  
Company**



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**JUDGMENT**

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Cases referred to:

1. Mohammed v Attorney General [1982] ZR 49
2. Mwenya and Another v Kapinga [1998] ZR 17
3. Hunt v Luck [1902] 1 Ch D.428
4. Mbewe and Another v Mwanza [2012] 2 ZR 87

Legislation referred to:

1. Section 9 Intestate Succession Act, Chapter 59 of the Laws of Zambia
2. Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia
3. Statutory (Housing Improvement Areas) Act, Chapter 194 of the Laws of Zambia

By Writ of summons dated 21<sup>st</sup> January, 2010, the Plaintiff claims for:

- (i) Declaration that house No. 2296 New Ndeke, Kitwe is for the children of the late Peter Chisenga
- (ii) An order to nullify the sale of house No. 2296 New Ndeke, Kitwe to the 3<sup>rd</sup> Defendant by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants
- (iii) Damages for wrongful interference with House No. 2296 New Ndeke, Kitwe against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
- (iv) An order of possession by the Plaintiff of house No. 2296 New Ndeke, Kitwe
- (v) Any other relief that the court shall deem fit.
- (vi) Interest
- (vii) Costs

In the Statement of Claim, the Plaintiff averred that her late son Peter Chisanga was the purported owner of house No. 2296, New Ndeke which he occupied from the year 1978. She further averred that the *first* and *second* Defendants sold the house to the *third* Defendant without her consent as the mother to the deceased. She averred that the Plaintiff had put the house on rent for the benefit of all the beneficiaries but the *first* and *second* Defendants sold, the house and shared the money without the other beneficiaries. She further averred that she came to know the *first* Defendant when she was summoned to court before the house was sold and as a result of the *first* Defendant's actions the Plaintiff had suffered physical and emotional harassment to the extent of moving from office to another in search of relief. Hence her claims.

The Defendants filed a defence in which it was said that, the *third* Defendant was an innocent purchaser of value without any

notice of defect in the transaction and that, the *first* Defendant had the letters of administration of the estate of her late father Peter Chisenga and sold it as an administratrix of the estate of her late father, and thus convinced the *third* Defendant, that she had authority to sell the house. The *second* Defendant just witnessed the transaction and that the *first* Defendant was a daughter to the estate of the late Peter Chisenga and hence a beneficiary whereas the Plaintiff was not. They further averred that, the Plaintiff was not even looking after many of the children left by Peter Chisanga but were being looked after by the *first* Defendant. The Plaintiff filed a reply in which she said that the *first* Defendant went to the grandmother where the children were being kept and used them so that she sells the house and that the family was not aware of the *first* Defendant as a daughter.

At the trial, the Plaintiff testified that she took out the action because the *first* Defendant sold the house which she personally bought. She told the court that, in 1998 the owner of the house was Wallace Chitobolo who died in 1996, Peter Chisanga remained in the house. She was approached by Peter Chisanga who wanted money from her to buy the house. The grandchildren told her that she should buy the house as it would belong to all of them. She gave Peter K650. The house was going at K640. When he bought the house the receipts were issued in his name. This was in 1998. Later Peter went back and asked for K400 to clear the arrears so that title could be issued. She refused to give him the money.

In 2005, when she went to the council, she was shown the receipts which were in Peter's name. They advised her to place a caveat on the property so that she could pursue the matter further because if she did not do so the house would be sold. The issue of title stalled because Peter fell ill. He died on 6<sup>th</sup> July 2006. The *first* Defendant who was claiming to be Peter's daughter did not attend the funeral. She did not know this child. When she went to the council to pursue the matter she was advised that she should first be appointed as administratrix. Her order of appointment was at page 7 of the Plaintiff's Supplementary Bundle of Documents. After the order of appointment of the 1<sup>st</sup> Defendant, the council stopped processing the papers. The council told her that Sharon took the order of appointment, and advised that that she had been removed as administratrix. She further told the court, that on 22<sup>nd</sup> February, 2010, Sharon sold the house to Mr. Tembo, the *third* Defendant. Her grievance was that the house belonged to her since she is the one who produced the money, and wanted the court to give her back the house.

In cross-examination, she said that the *first* Defendant claimed to be the daughter to Mr. Peter Chisanga and she could be her grandchild. She told the court that in the year 2010, the 1<sup>st</sup> Defendant was not staying in the house. She said that according to the documents at page 3 of the third Defendant's Bundle of Documents, the house was sold for K60,000. Her order of appointment was at page 7 of the Plaintiff's Supplementary Bundle of Documents, and the date of the order was 8<sup>th</sup> August, 2006. She was referred to page of the Plaintiff's Supplementary of

Documents and said that she was never given this document, and that she was never told how to distribute the estate. According to paragraph 2 of the documents, the house was to be for the children of the owner of the house. Even if this was her document, she was never given this document. She further told the court, the document at page 9 of her Supplementary Bundle of Documents was an application by Peter Chisanga for letter of offer for plot number 2296, Ndeke.

At page 3 of the same bundle was the letter of offer which she received after Peter Chisanga died. It was her evidence that the offer letter in July, 2005 and that Peter Chisanga died in July, 2006. She further told the court that when she went to the council, she discovered that, they were attempts to remove the caveat and that the council even failed to produce the letter she wrote to remove the caveat. When she was referred to the document at page 1 of the her Supplementary Bundle of Documents she told the court, that, that was the caveat and did not know if it was filed but she took it to the council. The receipt at page 3 of the 3rd Defendant's Supplementary Bundle of Documents referred to an earlier caveat. She told the court, that she was not aware that an order of appointment which she got in 2006 was only valid for one year. The document at page 2 of her supplementary Bundle of documents was her earlier caveat which was processed stamped by the council. The last sentence stated that legal owner of the house was the deceased. She authored the document, but did not agree that Peter Chisanga was the legal owner of the house. Regarding the document at page 1 of the supplementary bundle of Documents,

she told the court, that, she would not know if the council put a stamp on it, because it's her copy. She agreed that there was a caveat, but denied that, it was removed. As regards the document at page 2 of the *third* Defendant's Bundle of Documents, the administratrix was Sharon Zimba Chisanga, the *first* Defendant.

PW2, was Thomas Musonda, a grandson to the Plaintiff. He testified that house No. 2296/Ndeke, Kitwe used to be occupied by his two uncles, Wallace Chitobolo who was the owner of the house and Peter Chisanga. After Wallace died, Peter remained staying in the house. When the council was about to start selling its houses, since Peter was not working he approached the Plaintiff for money so that he would purchase the house. The house was going for K640. His grandmother gave the Plaintiff K650 to go and buy the house so that it can be a family house. The house was supposed to be in the grandmother's name. They were surprised how the *first* Defendant sold the house. He told the court, Sharon was a step daughter to Peter. The Plaintiff told him that Sharon was Peter Chisanga's daughter from a women in Luanshya. She never attended Peter Chisanga funeral. He was told that Sharon was appointed administratrix in Lusaka. They did not know that Sharon was being appointed an administratrix of the estate of the late Peter Chisanga. The Plaintiff was appointed as administratrix in June, 2006. He stayed with Peter Chisanga for 2 years with this aunt and her 3 children Musonda Chisanga, Mushili Chisanga and a young child whose name he had forgotten. When Wallace Chitobolo died Peter pressed for change for ownership into his name.

In cross-examination, he confirmed that Peter Chisanga was the legal owner of the house and that the Plaintiff was appointed administratrix in 2006. He did not know that at that time the house was being sold the Plaintiff's administratorship had expired. When he was referred to page 2 of the *third* Defendant's Supplementary Bundle of Documents, it showed that Sharon was appointed as administratrix of the estate of Peter Chisanga and was aware that once one is appointed as administratrix, they had the authority to deal with the property of the estate of the deceased. He also said that at the time of the sale of council houses, Peter Chisanga was the sitting tenant. Further he told the court, that the Plaintiff confirmed to him that Sharon was the daughter to Peter Chisanga. After Peter got the money from the Plaintiff, he did not know if he gave it back of her.

In re-examination, he told the court that Peter Chisanga was not the owner of the house, and that she knew Sharon after the Plaintiff explained to her.

That marked the close of the case for the Plaintiff.

The *third* Defendant testified that, after getting his retirement benefits he purchased a house from Sharon Zimba Chisanga, the *first* Defendant. This was after he was shown the documents at pages 1,2,4, and 6 of the Defendant's Supplementary Bundle of Documents. He was also shown the probate which showed that, she was the executrix of the estate of the late Peter Chisanga. Thereafter he proceeded to pay K60,000 for the purchase of the house and a contract of sale was prepared as

shown on pages 3, and 4 of the *third* Defendant's Bundle of Documents. The last paragraph of the contract provided that, the purchaser would become the legal owner effective 22<sup>nd</sup> February, 2010. Mr. Mushinge was present. Thereafter he took occupancy of the house. Later he was called at the Police Victim Support Unit. At the time, he was buying the house, there was no caveat.

In cross-examination, the witness was referred to pages 1 and 2 of the *third* Defendant's Supplementary Bundle of Documents, and told the court that the offer letter indicated that it was collected by Bessie Chibuye. He never inquired who Bessie was because he already seen that Sharon Chisanga was the executrix of the house of the late Peter Chisanga. He told the court, that when he went to the council, he verified that, the late Peter Chisanga was the owner of the house. He also noticed the removal of the caveat at page 3 of the his Supplementary Bundle of Documents was the caveat placed by the Plaintiff. It was dated 6<sup>th</sup> October, 2009. The document at page 3 of his Supplementary Bundle of Documents was a removal of the caveat. It was dated 22<sup>nd</sup> August, 2005 or 2006. It was a Kitwe City Council document. It was for the removal of an earlier document and he did not see the caveat which was placed in 2009. At the time when he was buying the house, he told the court that Sharon was staying there. Sharon was staying in the house, but did not know if she was staying alone. When he went to the police station, he went with the probate. He also had the purchase letter which he showed at the police. He first met Mr. Mushinge, when he was giving Sharon the money for the house. At the council, he never physically checked the file.



In re-examination, he told the court that removal of the caveat meant that, there must have been an earlier caveat put on the house, and now that the house caveat had been removed it could be sold by the administratrix. He also said that the caveat on page 1 of the Plaintiff's Supplementary Bundle of Documents had no council stamp. That marked the close of the case for the Defendant.

That marked the close of the case for the 3<sup>rd</sup> Defendant.

The facts in this matter are common cause. They are that the house in issue used to be occupied by Wallace Chitobolo and Peter Chisanga. When Wallace Chitobolo died, Peter Chisanga took over occupation of the house after the death of Wallace Chitobolo, who was the registered owner of the house. The Plaintiff was appointed as administratrix to the estate of the late Peter Chisanga on 8<sup>th</sup> August, 2006 by the Buchi Local Court as shown at page 7 of the Plaintiff's Supplementary Bundle of documents. The *first* Defendant Sharon Chisanga was appointed as administratrix of the estate of the late Peter Chisanga on 17<sup>th</sup> April, 2009. Sharon Chisanga the daughter to the late Peter Chisanga sold the house to the *third* Defendant Mr. Andrew Tembo.

The issues for determination are as follows:

1. *Whether or not the Plaintiff has a valid claim in the house as she seeks an order for possession of the said house.*
2. *Whether or not the 3<sup>rd</sup> Defendant was a bona fide purchaser for value.*

It is trite law that in civil matters the Plaintiff must prove his claim the standard on balance of probabilities. In the case of Mohammed v Attorney General<sup>1</sup>, it was held *inter alia* as follows:

*“ A Plaintiff cannot automatically succeed wherever a defence has failed; he must prove his case.”*

From the evidence before me, Peter Chisanga was the registered owner of the house. The documents prove this. The letter at page 1 of the Plaintiff's Bundle of Documents, and 25<sup>th</sup> August, 1998. Further, the Plaintiff herself wrote a letter to the Director of Housing from the Kitwe City Council, in which she and that, the legal owner of the house was the deceased, (Peter Chisanga) offer dated 12<sup>th</sup> July, 2005 at page of Plaintiff's Supplementary Bundle of Documents. He died intestate and left his house. The Intestate Succession applies in the circumstances. The Intestate Succession Act provides in Section 9 as follows;

*1) Notwithstanding Section 5, where the estate included a house the surviving spouse or children or both, shall be entitled to that house.....*

The Act does not provide for Aunts to inherit of the house. The house devolved to the children and they could do whatever they wished with it. I find therefore that, the Plaintiff had no interest in the said house was not the owner of the house.

This second issue I will have to deal with is whether or not the 3<sup>rd</sup> Defendant was a bonafide purchaser for value. Before considering this issue, I wish to refer to the “caveat” at page 1 of the Plaintiff's Supplementary Bundle of Documents. I have observed that, it is issued pursuant to Sections 76 of 79 of the Lands and Deeds

Registry Act Chapter 185 of the Laws of Zambia. This is erroneous.

As the property which is the subject of these proceedings is in Ndeke Township, Kitwe, it falls within the ambit of the Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of Zambia. Section 26 of the said Act, empowers any person claiming to be or to be beneficially interested in any land to lodge a caveat with the Registrar. Section 27(2) provides as follows:

*“Every caveat shall be entered on the register as well as of the date and time of its receipt by the registrar*

Section 29, provides for the effect of caveat against dealings on the piece of land on which a caveat has been placed. Clearly despite the said document confirming to the rules and format prescribed in the regulations, it shows that, it was not registered at the Council Registry. They were clearly, 2 caveats, the one which was removed on 22<sup>nd</sup> August, 2008 as shown in the exhibit page 12 of the Plaintiff’s Supplementary Bundle of Documents and the one which was never registered as shown at page 1 of the Plaintiff’s Supplementary Bundle of Documents dated 19<sup>th</sup> May, 2014.

In the case of Mwenya and another v Kapinga<sup>2</sup>, reference was made to the case of Hunt v Luck<sup>3</sup>, where it was held as follows:

*“In that case that the occupation of land by a tenant affects a purchaser of land with constructive notice of all that tenant’s rights including an agreement for sale to him by the vendor.”*

*“It means that if a purchaser has notice that the vendor is not in possession of the property he must make inquiries of the person in possession - and find out from him what his rights are and, if he does not choose to do that then whatever he acquires as a purchaser will be subject to the title or right of the tenant in possession.”*

Further in the case of Mbewe and Another v Mwanza<sup>4</sup> it was held *inter alia*, that:

1. *The constituent elements of the doctrine of bona fide purchaser of a legal estate for value without notice are as follows: The first 10 requirement is that a purchaser needs to satisfy or prove that he acted in good faith; any sharp or unconscionable conduct may forfeit the privilege of a purchaser in the eyes of equity in accordance with the general principles.*
2. *Second, purchasers are required to inquire about equitable interests with no less diligence than about legal interests, which they ignore only at their own peril.*

The 3<sup>rd</sup> Defendant testified that, he went to the house where the 1<sup>st</sup> Defendant was staying. He was also shown the probate at page 2, of 3<sup>rd</sup> Defendant's Supplementary Bundle of Documents and at the found that, there was no caveat. He said that, he inquired about the house, he found no occupant besides the 1<sup>st</sup> Defendant. The issue of the Plaintiff having received the offer letter did not grant her any interest in the house or show that, she was the owner of the house. This was not a notice that the 1<sup>st</sup> Defendant was not in occupation of the house.

I therefore, find that the *third* Defendant was the bonafide purchaser for the value of house No. 2296, Ndeke.

For the avoidance of doubt, my orders are that the Plaintiff has no claim whatsoever in the said house and that the 3<sup>rd</sup> Defendant was the bonafide purchaser of the said house.

The Plaintiff's action is accordingly dismissed with no order as to costs.

Dated at Kitwe this 12<sup>th</sup> day of May, 2017.

*I. Kamwendo*

**I. Kamwendo**

**JUDGE**

