

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

2016/HP/1703



B E T W E E N :

PATRICK MANSON MULWANDA

PLAINTIFF

AND

AUTRY MUUNGA
PAUL SWANA
SYDNEY MUMBI
OTIS MUDIYO

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT**

**Before Honorable Mrs. Justice M. Mapani-Kawimbe on the 11th day of
October, 2018.**

For the Plaintiff : *Mr. N. K. R Sambo, Messrs Sambo Kayukwa
& Company*
For the 1st Defendant : *In Person*
For the 2nd Defendant : *In Person*
For the 3rd Defendant : *In Person*
For the 4th Defendant : *In Person*

J U D G M E N T

Cases To be Referred To:

- 1. Nora Mwaanga Kayoba and Valizani Banda v Eunice Kumwenda Ngulube and Andrew Ngulube (2003) ZR 132*
- 2. Raphael Ackim Namung'andu v Lusaka City Council (1978) Z.R 368*

Legislation Referred To:

- 1. Statute of Frauds Act, 1677*

Other Works Referred To:

1. *Halsbury's Laws of England, 4th Edition, Volume (1) (2), Butterworths, London 1990*

The Plaintiff is the head lessor of subdivision No. 96/D/1/A of farm no. 687, Makeni, Lusaka. In 2013, he subdivided some of his property and sold some of his plots. The others were sold on his behalf by the 4th Defendant who was his agent. In particular, the 4th Defendant sold plots to the 1st, 2nd and 3rd Defendants, which the Plaintiff alleged was done without his authority, while the Defendants contended that they lawfully acquired their plots. In this respect, this suit raises a question on the agent/principal relationship and the extent to which an agent can bind a principal in the disposition of land.

By a Writ and Statement of Claim filed into Court on 13th December, 2016, the Plaintiff **Patrick Manson Mulwanda** seeks the following orders against the Defendants:

- i. *An Order that he recovers possession of Plot Nos. 687/A/1/D/96/1/J, 687/A/1/D/96/1/S and 687/A/1/D/96/1/T, Lusaka from the 1st, 2nd and 3rd*

- Defendants, which they bought from the 4th Defendant and occupied without his licence or consent.*
- ii. In the alternative, an order that the 1st, 2nd and 3rd Defendants pay the Plaintiff for their parcels of land at the current market value; and*
 - iii. Costs of and incidental to this action.*

The Plaintiff pleaded that sometime in January, 2016, the 1st, 2nd and 3rd Defendants, unlawfully occupied his property, Plot Nos. 687/A/1/D/96/1/J, 687/A/1/D/96/1/S and 687/A/1/D/96/1/T in Makeni Lusaka. They purported to have bought the plots from the 4th Defendant who he never donated a power of attorney. After he discovered their undesired presence, the Plaintiff told the Defendants to vacate his property but they ignored him. On 23rd May, 2016, his Advocates, Messrs Sambo Kayukwa and Company, acting on his instructions wrote the Defendants notices to vacate and which, they were given an option of buying the plots at K150,000.

On 7th June, 2016, the Defendants through their Advocates, Messrs Hobday Kabwe & Company responded that they would pay for their plots at lower price, but the Plaintiff rejected the offer. The Plaintiff averred that he never had any dealings with the 1st, 2nd and

3rd Defendants and they illegally occupied his property without offer letters or other legal documents.

The suit was defended by a defence and counterclaim filed into Court on 7th March, 2017. The Defendants denied the Plaintiff's claims and contended that they lawfully bought their parcels of land from the 4th Defendant. They also paid the full purchase price and the Plaintiff was aware of their presence from 2013. By January, 2016, the 1st and 2nd Defendants built their houses to habitable levels and were living in them, while the 3rd Defendant's house had reached roof level. The Defendants averred that the Plaintiff only accused them of illegal occupation after he differed with the 4th Defendant. As such, the Plaintiff was not entitled to evict them from their property and they counterclaimed the following orders:

- i. *Specific performance to complete the subdivision of plots nos. 687/A/1/D/96/1/J, 687/A/1/D/96/1/S and 687/A/1/D/96/1/T for the 1st, 2nd and 3rd Defendants respectively.*
- ii. *Loss of ownership of land by not acquiring title.*
- iii. *Specific performance of the agreements initiated by the 4th Defendant on behalf of the Plaintiff. Alternatively, a refund of the full value of their investments to be assessed.*

Once pleadings closed, I proceeded to hold trial on 29th March and 13th June 2018. The Plaintiff (**PW1**) testified that he is the head lessor of subdivision 96/D/1/A, farm no. 687, Makeni, Lusaka and produced his title deed at pages 1 to 7 of his Bundle of Documents. He continued to say that sometime in 2013, he subdivided part of his property into forty plots after he was given planning permission by the Lusaka City Council. Consequently, in 2014, he secured survey diagrams and was permitted to sell his land.

PW1 engaged Mr. Mudiyo, the 4th Defendant (**DW4**) as his agent and authorized him to sell some parcels of land, while he sold others to clients who were introduced to him by his caretaker, Mr. Mulikita. PW1 agreed to give DW4 subdivision 'U' as remuneration for the agency work. In 2015, PW1 was surprised to find Mr. Paul Swana, the 2nd Defendant (**DW2**) on subdivision S. He had built a house without his authority and he told DW2 to pay for his plot but he failed to do so. On a subsequent occasion, PW1 discovered that Mr. Muunga the 1st Defendant (**DW1**) built a house without his knowledge on subdivision J. He made another discovery in 2016,

when he noticed a building on subdivision J, which had been occupied by Mr. Mumbi the 3rd Defendant (**DW3**). PW1 did not know these persons and instructed his Advocates to deal with them. His Advocates consequently served the Defendants with notices to vacate and were given an option of paying for the plots at market value. Through their Advocates, Messrs Hobday Kabwe and Company, the Defendants promised to pay for their plots in June, 2016 but failed to do so.

It was PW1's evidence that he kept a record of payments for all the land he sold and never signed any documents of sale with the Defendants. He prayed to Court to evict the 1st, 2nd and 3rd Defendants from his property and for mesne profits for the period they were in occupation. In the alternative, he prayed to Court to order the Defendants to pay for the plots at the current market value. He further prayed to Court to order the 4th Defendant to pay back K194,000, which was outstanding from the sales he made.

In **cross-examination by the 1st Defendant**, PW1 responded that DW4 acted as his agent for some of the plots, while he sold

others. He kept a record of payments for all plots that were sold and the clients he transacted with. PW1 denied that he ever discussed the 1st, 2nd and 3rd Defendants plots with DW4 and contended that they were squatters. PW1 averred that a purchaser of land is required to conduct due diligence at the Ministry of Lands before buying land. In this case, the Defendants who did not conduct due diligence were to blame for their own predicament. PW1 testified that he was not aware that DW1 paid DW4 money for the plot. He also denied that he had differences with DW4 and reminded DW1 that he had uttered a false contract of sale in Court.

In **cross-examination by 2nd Defendant**, PW1 testified that DW4 received money by cheque or cash for the plots. He either deposited it into PW1's Standard Chartered Bank account or gave him cash. In 2015, PW1 told DW2 through his caretaker to stop building on his property.

In **cross-examination by the 3rd Defendant**, PW1 responded that he kept all the documents of sale of his property. The transaction between DW3 and DW4 did not bind him because it

was illegal. Only those who transacted with him had obtained title deeds. DW4 never told him that subdivision T, S and J had been occupied by the Defendants.

In **cross-examination by the 4th Defendant**, PW1 replied that they first met in 2013 after he subdivided his land and engaged him as his agent. DW4 sold some plots on his behalf and the money was deposited into PW1's bank account or given to him in cash. PW1 testified that he executed contracts of sale with the clients who bought land through DW4. He denied that he gave DW4 a contract of sale to show prospective buyers and that DW4 forged his signature on the contract. PW1 maintained that DW4 owed him K194,000 and that to pay off the debt, DW4 proposed to give him land in Itezhitezhi, which he declined. His Advocates told the Defendants that the value of their plots was K150,000. He could not recall the number of plots he sold through Mr. Mulikita.

In **re-examination**, PW1 testified that DW4 never mentioned DW1, DW2 and DW3 to him and he never issued them receipts to

prove their purchases. PW1 terminated the agency agreement with DW4 before he sold off all his land.

The Defendants gave evidence in their own right. The first was **Autry Mukookola Muunga** who testified as **DW1**. He stated that in early 2013, DW4 invited him to view plots that were on sale in Makeni, Lusaka. He obliged and after viewing the plot with his wife, he bought one for K20,000 instead of K21,000. He paid DW4 K5,000 on 12th August, 2013 and later made a payment of K15,000. DW4 did not give him a receipt but produced a contract of sale, which they signed.

In December, 2013, DW1 delivered building materials to his plot, that is, 1500 blocks, 20 tonnes building sand, quarry dust, cement and tools which he stored at PW1's caretaker's house. He would collect them whenever he wanted to use them. On 11th January, 2014, he sunk a borehole and erected a tank stand and on that date, he met PW1 for the first time after DW4 introduced them. According to DW1, PW1 asked him to flush his borehole and he did so at his personal expense. Occasionally, PW1 and DW4 inspected

the houses on the estate and PW1 never told him that he had illegally constructed his house. He was surprised to receive the notice to vacate and Court summons because PW1 was aware of his presence.

In **cross-examination by Counsel for the Plaintiff**, DW1 responded that he bought his plot through DW4 and signed the contract of sale with him. He did not conduct due diligence before the purchase and never responded to the notice to vacate. He did not have a title deed because DW4 told him that it was still being processed. DW1 denied that his plot had a value at K50,000.

In **re-examination**, DW1 stated that in 2013 he paid DW4, K20,000 for his plot. He never offered to pay the Plaintiff K50,000 for his plot and the offer came from his former Advocates who acted without his instructions.

The second Defendant, **Paul Swana** testified as **DW2**. His evidence was that in 2013, he was invited to view plots that DW4 was selling in Makeni, Lusaka. After negotiations, he purchased

his plot from DW4 at K17,000 and paid DW4 in full. He was not given a title deed because DW4 told him that it was still being processed. However, he authorised to build a house and inspected the construction work from time to time. In August, 2015, PW1 told DW2 through his caretaker to pay him K32,000 for the plot. He disputed the figure and in June, 2016, he received a notice to vacate from PW1's Advocates.

In **cross-examination by Counsel for the Plaintiff**, DW2 replied that he never dealt with PW1 when he bought the plot. He signed the contract of sale with DW4 and saw PW1 for the first time in Court.

The witness was not **re-examined**.

The third Defendant, **Sydney Mumbi Lusengo** testified as **DW3**. His evidence was that he bought his plot from DW4 in 2013. On 22nd July, 2013, he paid him K10,000, and later K5,000, K3,000 and K2,000 on diverse dates. Altogether he paid K20,000 and moved building materials to the plot, which he kept with PW1's

caretaker. It was DW3's evidence that PW1 often visited his property and his caretaker introduced them. By 2016, he had built his house to roof level and surprisingly received a notice to vacate or to pay PW1 K50,000 for the plot. He reported the matter to DW4 who promised to settle it.

In **cross-examination by Counsel for the Plaintiff**, DW3 replied that he received the notice to vacate in 2016 and did not respond to it. DW4 engaged Messrs Hobday Kabwe & Company as their lawyers and they proposed to pay PW1 K50,000 for his plot without his consent.

The witness was not **re-examined**.

The fourth Defendant, **Otis Chimwengele Mudiyo (DW4)** testified that he met PW1 sometime in 2011 after some MMD cadres attempted to invade his farm. PW1 asked him to assist him in subdividing his property. In April 2013, PW1 told DW4 that draft subdivisions had been prepared and submitted to the Lusaka City Council for approval. PW1 consulted DW4 on the prices for the

his deceased's father's land in Muzoka and asked PW1 for a loan. PW1 lent him the money, which was realised from DW2's plot sale and on the understanding that he would return it. PW1 also told him that his commission would be paid out of DW2's payment.

In January 2015, PW1 called DW4 to his office to reconcile the record of land sales and payments. He also told DW4 to halt future sales until they finished the reconciliation. However, on 4th November, 2015, PW1 handed him a note showing the balance that he owed over the plots and demanded payment by 31st January, 2016. DW4 told PW1 that they had agreed on a commission of 10% but he insisted on 5%. DW4 felt aggrieved by PW1's decision because he did a lot of work for him in that he deposited money from the sales, supervised the construction of standard buildings, organized people to work on the sewer and water reticulation system. DW4 also pushed for the removal of the KV ZESCO line, which had cut across five of PW1's plots at his own cost and risk. DW4 went on to testify that he paid PW1 his money on 31st March, 2016 through a deposit of K6,000. He however, owed PW1 money from Mr. Reagan Mwange's plot sale. He denied that he owed PW1

K194,000 but between K50,000 and K60,000. He averred that PW1 overpriced his plots because they were way below the value of K150,000. DW4 tried to settle the matter amicably with PW1 but he declined.

In **cross-examination by Counsel for the Plaintiff**, DW4 replied that the money from DW2 was part of his commission. PW1 lent him money, which he was supposed to return. The Defendants agreed to buy the plots from PW1 on the amounts they indicated. PW1 appointed him as his agent in 2013. He signed the contracts of sale with the people he sold land to because PW1 had authorized him. He also testified that PW1 met DW1 and DW2 on his property.

In **re-examination**, DW4 testified that he had a good relationship with PW1 before their disagreement. He did not pay PW1 all his money and desired to settle the matter out of Court.

At the close of trial, the parties undertook to file written submissions. However, only the 1st and 4th Defendants filed written submissions on 25th July, 2018. Their submissions exposed what

they perceived to have been the evidence received by the Court and I found them unhelpful. Thus, I shall not refer to them in the judgment.

I have considered the pleadings and evidence adduced. It is not in dispute that the Plaintiff is the head lessor of subdivision No. 96/D/1/A OF Farm No 687, Makeni Lusaka. In 2013 he subdivided his property and engaged the 4th Defendant as his agent. The 4th Defendant sold of some parcels of land, while the Plaintiff sold others. The Plaintiff recorded the transactions of sales and executed contracts of sale with the persons who bought land from him except for the 1st, 2nd and 3rd Defendants plots, which were signed by the 4th Defendant.

The Plaintiff alleged that the 1st, 2nd and 3rd Defendants adversely occupied Plot Nos. 687/A/I/D/96/1/J, 687/A/I/D/96/I/S and 687/A/I/D/96/I/T, in collusion with the 4th Defendant. On the other hand, the Defendants contended that the 4th Defendant who was the Plaintiff's agent had authority to sell

plots in the area because he had just subdivided his own. According to DW4, PW1 did not have all the necessary documents and he authorized DW4 to use his contract of sale when negotiating with prospective buyers.

PW1 and DW4 agreed that DW4 would be paid an agency fee in the form of a plot and 10% commission from all the sales. Consequently, DW4 advertised the plots in the Daily Mail and erected a billboard near the property site. There was favourable response and people bought plots. Some people paid PW1 directly while others went through him. Whenever he received money, he would deposit it into PW1's Standard Chartered Bank Account or give him in cash.

DW4 testified that he sold his brothers in law, DW1 and DW2 plots together with DW3. From time to time, he and PW1 inspected the property to check on the building standards. In addition, he arranged for an engineer from Lusaka Water and Sewerage Company to prepare a sewer plan at his own cost. It was DW4's evidence that while he was assisting PW1, he began to subdivide

them land. Flowing from the above, the issues that distill themselves for determination by this Court are as follows:

- (i) *Whether there existed an agency relationship between the Plaintiff and the 4th Defendant which bound him to the sale of the suit property?*
 - (ii) *Whether the Defendants are entitled to an order of specific performance of the agreements initiated by the 4th Defendant on behalf of the Plaintiff?*
 - (iii) *What orders are due?*
- (i) ***Whether there existed an agency relationship between the Plaintiff and the 4th Defendant which bound him to the sale of the suit property?***

The Plaintiff testified that he engaged the 4th Defendant as his agent after he subdivided his land. However, as regards the suit property, he did not donate the 4th Defendant authority. The 4th Defendant argued that the Plaintiff was his principal and had authority to sell the 1st, 2nd and 3rd Defendants parcels of land. It was also contended that the acts of the 4th Defendant bound the Plaintiff his principal.

The Learned Authors of **Halsbury's Laws of England**, 4th Edition, Volume 1(2) Butterworths London 1990 at page 4 paragraph 1 state that:

“The relationship of agency arises whenever one person called “the agent” has authority to act on behalf of another called “the principal” and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent. If an agreement in substance contemplates the alleged agent acting on his own behalf and not on behalf of a principal, then, although he may be described in the agreement as an agent, the relationship of agency will not have arisen.”

Flowing from the above, a relationship of agency exists between an agent and a principal. An agent is only authorized to act on behalf of his/her principal. Where an agent acts on his/her own accord, such actions do not bind a principal, because he can only act where power has been expressly granted to him/her by a principal or in situations ordinarily incidental to the exercise of the express authority.

The Learned Authors of **Halsbury's Laws of England** further state at page 19 Paragraph 21 that:

“ Where the authority of the agent is required to be conferred by a deed, or where in any other circumstances it is desired formally to appoint an agent to act for the principal in a transaction or a series

of transactions or to manage the affairs of the principal generally, the necessary authority is conferred by an instrument known as a power of attorney.....”

It follows that there are certain instances which require an agent to possess a power of attorney in order to legitimize his/her actions. An agent cannot act in the pretended exercise of authority that he does not have and where he does so, a third party cannot hold a principal liable.

Section 4 of the Statute of Frauds 1677 provides that:

“No action shall be brought upon any contract for the sale or other disposition of land or an interest in land, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person there unto by him lawfully authorized.”

According to that provision, a contract for sale of land or other disposition of land or any interest must be witnessed by some memorandum or note to evidence the transaction. Where there is no evidence in existence, an action in land cannot be enforced.

At page 19 paragraph 20, the Learned Authors of **Halsbury’s Laws of England 4th Edition** state that:

“...Where the agency is given power to execute a deed, that power must in itself be contained in a deed. Certain acts are required, either by statute or common law, to be by deed, the chief of which include (1) conveyances, including mortgage, charges, vesting declarations, vesting instruments of land or any interest in land,.....(3) instruments effecting certain dispositions of registered land.....The necessity for appointment by deed of an agent for the purpose of executing an instrument as a deed does not however, exist where the execution of the instrument is in the presence of the principal, when at his request, someone signs on his behalf and in his name....”

This means that only an agent who has been donated authority through a power of attorney can act on behalf of a principal in the disposition of land. In addition, the power of attorney must be registered with the Lands and Deeds Registry.

Turning to the evidence on record, the 1st, 2nd and 3rd Defendants all testified that they transacted with the 4th Defendant who they believed was acting on behalf of the Plaintiff. They also contended that he had authority to bind the Plaintiff. They, however did not conduct due diligence before they bought land from the 4th Defendant at the Ministry of Lands. The 1st and 2nd Defendants also believed that the Plaintiff acquiesced their stay because they met him on the property. The Plaintiff challenged the Defendants' evidence and averred that they had illegally occupied his property.

Accordingly, I find that there was no agency relationship created between the Plaintiff and the 4th Defendant over the suit property because the Plaintiff did not donate the 4th Defendant a power of attorney. For a valid agency to have been created, the 4th Defendant should have shown proof of appointment but failed to do so. I further find that the 1st, 2nd and 3rd Defendants did not conduct due diligence when they purportedly bought their parcels of land from the 4th Defendant as required by law. If they had done so, they would have discovered that the Plaintiff never donated a power of attorney to the 4th Defendant over the suit property and could not transact in it.

The 1st, 2nd and 3rd Defendants' letters, all of 7th June, 2016, in response to the Plaintiff's Advocates notices to vacate dated 23rd May, 2016, confirmed that they only transacted with the 4th Defendant and had no dealings with the Plaintiff. Thus, the Plaintiff was not bound by the actions of the 4th Defendant, who had no authority to act on his behalf. In the case of **Nora Mwaanga Kayoba and Valizani Banda v Eunice Kumwenda Ngulube and Andrew Ngulube**¹, the Supreme Court held that purchasers of real

properties must be more vigilant in making enquiries to establish whether or not the property in question has encumbrances. In this case, the 1st, 2nd and 3rd Defendants adopted an indifferent attitude and did not make any enquiries. They only have themselves to blame for their undesirable predicament.

Having established that there was no agency relationship created between the Plaintiff and the 4th Defendant, I have no hesitation in further finding that the 4th Defendant's actions did not bind the Plaintiff. I am fortified by the Learned Authors of **Halsbury's Laws of England, 4th Edition**, where they state at page 107, paragraph 153 that:

"Where an agent is entrusted with any money, goods or other property belonging to his principal, as a general rule, no disposition of such property made by the agent without the authority of the principal is binding upon the principal and notwithstanding any disposition, the principal is entitled to follow the property into the hands of third persons and recover it or its value...."

In other words, an agent who does not have authority cannot bind a principal. A principal can recover his property from the hands of third persons. In this case, I hold that the Plaintiff is entitled to recover his property from the 1st, 2nd and 3rd Defendants.

(ii) Whether the Defendants are entitled to an order of specific performance of the agreements initiated by the 4th Defendant on behalf of the Plaintiff?

In their counterclaim, the Defendants sought an order of specific performance. It is trite that specific performance cannot lie where there is no contractual relationship between parties. Thus, I find no merit in this claim.

(iii) What orders are due?

The Plaintiff sought an order of possession or in the alternative payment for his plots from the 1st, 2nd and 3rd Defendants at market value. In my considered view, only one order is available to the Plaintiff and it is one for possession of his property from the 1st, 2nd and 3rd Defendants are squatting on his property. I therefore, hold that the Plaintiff should recover his property from the 1st, 2nd and 3rd Defendants.

In the case of **Raphael Ackim Namung'andu v Lusaka City Council**², Hon. Matthew Ngulube, then High Court Commissioner, *inter alia* held that:

“(i) Squatters build on 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 much regrettable are not recoverable in a Court of law.”

Accordingly, squatters can be ejected from property by the owner of land. When they are evicted from land they have no right to compensation whatever may be said of their losses.

Although not pleaded, the Plaintiff in his evidence introduced a claim for K194,000 as money owed to him by the 4th Defendant. The claim was not challenged by the 4th Defendant and it was admitted into evidence. In fact, the 4th Defendant testified that he owed the Plaintiff between K50,000 – K60,000. From the above, I find that the 4th Defendant owes the Plaintiff money, however, what is disputed is the quantum. Thus, I shall refer this claim to the Deputy Registrar for assessment. The Plaintiff further introduced a claim for mesne profits, which he did not elaborate nor tender evidence to support it. I therefore, find no merit in this claim.

In quite similar fashion, the 4th Defendant introduced a claim of 10% commission, which was not initially pleaded but not

disputed by the Plaintiff. However, he did not present any evidence to prove his claim other than stating that he was entitled to a 10% commission. Thus, I find no merit in the claim.

For the avoidance of doubt, I grant the Plaintiff an order of possession of plot Nos. 687/A/I/D/96/1/J, 687/A/I/D/96/1/S and 687/A/I/D/96/1/T. He is at liberty to evict the 1st, 2nd and 3rd Defendants forthwith and without further recourse to Court. The alternative order sought by the Plaintiff arises from an out of Court arrangement with the Defendants and this Court has no jurisdiction to entertain it.

Costs are awarded to the Plaintiff to be taxed in default of agreement.

Dated this 11th day of October, 2018.


M. Mapani-Kawimbe
HIGH COURT JUDGE