

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

2017/HP/2001



BETWEEN:

DENNIS CHOLA
(Suing as Attorney for Saul Radunski)

PLAINTIFF

AND

NANCY MUSESA

DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 17th DAY OF JULY,
2018**

For the Plaintiff : Ms T. Sakala, Fraser Associates

For the Defendant : No appearance

J U D G M E N T

CASES REFERRED TO:

- 1. Wesley Mulungushi V Catherine Bwale Mizi Chomba 2004 ZR 96**
- 2. Anti Corruption Commission V Barnett Development Corporation Limited
2008 VOL 1 ZR 69**

OTHER WORKS REFERRED TO:

- 1. The Statute of Frauds 1677**

The Plaintiff commenced this action on 16th November, 2017 by way of Originating Summons, and in a ruling dated 20th February, 2018, I directed that the matter be deemed to have been commenced by writ of summons and granted leave to the Plaintiff to file a writ if summons to

include any appropriate relief, as the affidavit in support of the Originating Summons disclosed that the Defendant had obtained planning permission for the Plaintiff's land that she was occupying.

The Plaintiff on 21st May, 2018 filed a bundle of documents. According to the affidavit in support of the Originating Summons, the Applicant holds a power of attorney on behalf of Saul Radunski, the legal owner of Farm No 1068, Livingstone, as evidenced by the power of attorney exhibited as 'DC1' and the certificate of title exhibited as 'DC1A'. The affidavit further states that the owner of the property Saul Radunski subdivided the property into at least forty (40) residential plots of diverse dimensions with the intention of selling them, as shown on the sketch map exhibited as 'DC2' to the affidavit.

It is also deposed in the affidavit that the sale of the plots is being handled by the Applicant and Abel May Bakery Limited, an agent appointed by Saul Radunski, and the said sale was advertised to members of the public. That the Respondent approached the Applicant with a proposal to purchase four of the residential plots, and she picked the ones marked B1 to B4 on the sketch map.

The Applicant further deposes that he informed the Respondent that Saul Radunski would determine the price of the properties, and he would thereafter communicate the same to her. However, the Respondent deposited K18, 000.00 into Saul Radunski's bank account, purporting the same to be a deposit towards the purchase price of the properties, and she dubiously proceeded to obtain a copy of the certificate of title relating to the said land, and obtained building permission from the Livingstone City Council, and commenced construction.

The Applicant also deposes that he then informed the Respondent that each property was being sold at K240, 000.00, and advised her to desist from constructing on the properties until a contract of sale was signed between the parties. However, the Respondent has refused and or neglected to pay the purchase price in full, and has continued developing the properties as shown on exhibit 'DC3'. That the applicant's occupation of the property is illegal, and she is therefore a squatter.

The Defendant did not file anything in response to the process.

When the matter came up for trial on 29th May, 2018 the Plaintiff testified as the only witness for his case, while the Defendant did not appear. In his testimony, the Plaintiff testified that the Defendant went to their offices in Kabulonga with a client, Abel May Baker with a view to purchase land. He stated that the Plaintiff had explained that Saul Radunski who was selling the land had to approve the purchase price. The Plaintiff identified the document at pages 1-4 of the Plaintiff's bundle of documents as the certificate of title for the property that Saul Radunski owns.

Further in his evidence, the Plaintiff testified that the Defendant told him that she would get back to him and she left, and the next thing they saw was that the Defendant had deposited money in the amount of K18, 000.00, for the purchase of the plot in their account, whose number the Defendant obtained from the client. He went to testify that they tried to contact the Defendant to no avail, and she did not respond to the e-mails that they wrote to her. Then after two months the Plaintiff was informed that the Defendant had started building on the four plots. The pictures at pages 6 to 8 of the Plaintiff's bundle of documents reflected the said developments.

The Plaintiff also testified that they contacted the Defendant's brother who had also deposited money in the account without the purchase price being agreed, and he opted to be refunded the money. The Plaintiff asked the court to order that he is entitled to possession of the plots.

In the submissions filed, the Plaintiff submitted that for the Defendant to claim the plots in contention, she needed to demonstrate that she had entered into a valid contract with the Plaintiff for the purchase of the said plots. Reliance was placed on the case of **WESLEY MULUNGUSHI V CATHERINE BWALE MIZI CHOMBA 2004 ZR 96** where it was held that;

“Where real property is the subject of sale, there is need for the sale to be evidenced by a contract of sale.

For a note or memorandum to satisfy section 4 of the Statute of Frauds 1677, the agreement itself need not be in writing. A note or memorandum of it is sufficient, provided that it contains all the material terms of the contract, such as names, or adequate identification of the subject matter and the nature of the consideration”.

That in this case, there is no evidence on record to show that the parties agreed on the purchase price of the plots, and therefore there was no contract of sale. It was also submitted that the Defendant did not respond to the Plaintiff's communication and neither did she appear in court, which was evidence that she does not have a valid claim against the Plaintiff. Further in the submissions, the Plaintiff argued that Saul Radunski is the holder of a valid certificate of title for Farm 1068, Livingstone, and the Defendant had not challenged this.

Therefore, the certificate of title was conclusive ownership of the whole property which encompassed the subdivisions made therefrom, until title

was transferred to the other parties. Reliance was placed on the case of **ANTI CORRUPTION COMMISSION V BARNETT DEVELOPMENT CORPORATION LIMITED 2008 VOL 1 ZR 69** which held that;

“Under section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership of land by a holder of a certificate of title”.

It was the Plaintiff's submission that the Defendant was not given licence or authority to be on the properties Plots B1 to B4, and prayed that he be granted possession of the said properties.

I have considered the evidence. It is not in dispute that Saul Radunski is the legal owner of Farm No 1068, Livingstone, and that he had subdivided the said property into a number plots that he offered for sale to members of the public. It is also not in dispute that the Defendant approached the Plaintiff who was authorised by Saul Radunski to sell the properties, with a view to buy four of the plots. It is a matter of common cause that the Defendant deposited K18, 000.00 into the Plaintiff's account as purchase price for the four plots. The question is whether the Defendant is entitled to possession of the said plots?

The Plaintiff in this matter testified that he is the Attorney for Saul Radunski, the legal owner of the property known as Farm No 1068, Livingstone, which he has subdivided into residential plots and has been selling. The evidence of the Plaintiff was that the Defendant upon enquiry was told that the owner of the Plots Saul Radunski would communicate the price of the plots, and before this was done, the Defendant deposited K18, 000.00 into the Plaintiff's account, and she could thereafter not be reached to agree on the purchase price of the plots. The Plaintiff's evidence was also that when the Defendant was informed that the plots

were being sold at K240, 000.00 per property, she continued to occupy the property and develop it.

The Defendant did not respond to the process and has therefore not advanced any defence in this matter. The certificate of title at pages 1-4 of the Plaintiff's bundle of documents shows that the property Farm No 1068 is indeed owned by Saul Radunski. At page 5 of the same bundles is a sketch plan showing the subdivisions that have been made to the property. As rightly submitted by the Plaintiff, under Section 33 of the Lands and Deeds Registry Act, a certificate of title is conclusive evidence of ownership, as was held in the case of **ANTI CORRUPTION COMMISSION V BARNETT DEVELOPMENT CORPORATION LIMITED 2008 VOL 1 ZR 69**.

It was further held in that case that "**However, under section 34 of the same Act, a certificate of title can be challenged and cancelled for fraud or reasons for impropriety in its acquisition**". In this case the Defendant did not make any allegations challenging the certificate of title issued to Saul Radunski, and therefore did not dispute that he owns the property. The Plaintiff further alleged that he did not enter into any contract of sale with the Defendant for the sale of Plots B1 to B4 of Farm No 1068, Livingstone, and this assertion was also not disputed in any way. Section 4 of the Statute Frauds 1677, provides that transactions for the sale of land must be evidenced in writing, and this position was reiterated in the case of **WESLEY MULUNGUSHI V CATHERINE BWALE MIZI CHOMBA 2004 ZR 96**.

There being evidence in writing on record to show that the Plaintiff and the Defendant entered into an agreement for the sale of the four plots to the Defendant, it cannot be said that the Plaintiff entered into a valid

contract of sale of the plots with the Defendant. This is despite the evidence on record that the Defendant deposited K18, 000.00 into the Plaintiff's account, as there is nothing to show that an agreement was reached between the parties that was intended to bind them. That being the position, the Defendant had no authority to be in possession of the Plots B1 to B4, and the Plaintiff has proved his case on a balance of probabilities. I accordingly grant the Plaintiff immediate possession of the said properties. The Plaintiff is also awarded costs to be taxed in default of agreement.

DATED THE 17th DAY OF JULY, 2018

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**