

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



2014/HP/1449

**B E T W E E N :**

GEOFFREY CHIPOLYONGA

**PLAINTIFF**

**AND**

WISTED KAMANGA

**1<sup>st</sup> DEFENDANT**

CHARLES MKANDAWIRE

**2<sup>nd</sup> DEFENDANT**

CLEMENT MUJANE

**3<sup>rd</sup> DEFENDANT**

MOSES SIMBEYE

**4<sup>th</sup> DEFENDANT**

PETER PWELE

**5<sup>th</sup> DEFENDANT**

OLEN SINKALA

**6<sup>th</sup> DEFENDANT**

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on 12<sup>th</sup> day of April, 2017**

*For the Plaintiff : Mr. T.K. Ndhlovu, Batoka Chambers*

*For the Defendant : No Appearance*

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**J U D G M E N T**

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**Case Authorities Referred To:**

1. *Wilson Masauso Zulu v Avondale Housing Project Limited* (1982) Z.R 172
2. *Khalid Mohammed v The Attorney General* (1982) Z.R 66

**Legislation Referred To:**

1. *Lands and Deeds Registry Act, Chapter 185*
2. *High Court, Chapter 27*

The Plaintiff issued Writ of Summons seeking the following reliefs:

- i. *A declaration that he is the rightful owner of Subdivision No. 605 of Lot No. 1052/M Kafue.*
- ii. *General and special damages for trespass to property being Subdivision No. 605 of Lot No. 1052/M Kafue,*
- iii. *Damages amounting to K51,564.00 in respect of Lot property damaged by the Defendants.*
- iv. *An injunction restraining the Defendants from threatening to evict the Plaintiff and to trespass by way of cultivating on the said Subdivision No. 605 of Lot No. 1052/M Kafue.*
- v. *Vacant possession of Subdivision No. 605 of Lot No. 1052/M Kafue*
- vi. *Interest*
- vii. *Costs*
- viii. *Any other relief the Court may deem fit to award*

The statement of claim discloses that the Plaintiff applied for land from the Commissioner of Lands and by a letter dated 5<sup>th</sup> September, 1997, he was allocated Subdivision No. 605 of Lot No. 1052/M. In 2008, he was issued with a certificate of title No. 7669. The Plaintiff started developing his property and in August, 2012, he deployed a tractor on his land to prepare for 2012/2013 farming season.

The Statement of Claim further discloses that on 14<sup>th</sup> October, 2012, the Defendants and other people led by Mr. Wisted Kamanga trespassed on the Plaintiff's land and ordered him to stop cultivating it. On 28<sup>th</sup> November, 2012, the Defendants once again invaded the Plaintiff's property and warned him that they would demolish his structures. In the process, they manhandled and assaulted the Plaintiff's wife and children. A report was lodged with Kafue Police Station.

The Plaintiff states that the Defendants carried out their third invasion on his land on 18<sup>th</sup> December, 2012, at around 19:00 hours and held the Plaintiff and his wife hostage in their car while they went on to destroy the Plaintiff's property. On 20<sup>th</sup> December, 2012, the Defendants once again invaded the Plaintiff's land damaging a tractor and other farm implements including the worker's house and the poultry house which had 36 turkeys.

The Defendants settled a Defence where they admitted that they were residents of Soloboni Compound in Kafue. The Defendants averred that the Plaintiff's claims on his acquisition of



Subdivision No. 605 of Lot No. 1052/M Kafue and his farming activities were *res acta inter alios* and could not make any statement in admission or traverse. The Defendants denied that they ever attacked the Plaintiff, his wife and children as they were remanded in Police custody at his instance and at the time his property was damaged.

The matter came up for trial on 9<sup>th</sup> March, 2017. A notice of hearing was duly served on the Defendants' Advocates on 30<sup>th</sup> September, 2016. An Affidavit of Service was filed into Court on 20<sup>th</sup> October, 2016. There was proof that the Defendants' Advocates received the Notice of Hearing because they attended Court on 29<sup>th</sup> September, 2016 when the date of hearing was set.

In a twist of events, the Defendants' Advocates filed a Notice of Withdrawal as Advocates on 10<sup>th</sup> March, 2017 a day after the scheduled trial. I was fully convinced that the Defendants were aware of the trial and I proceeded under Order XXXV Rule 3 of the High Court Rules.

At trial, the Plaintiff, **Geoffrey Chipolyonga** testified as **PW1**. His testimony was that he had a certificate of title for Subdivision 605 of Lot No. 1052/M in Kafue District. Ever since he obtained title, he experienced a lot of interference from the Defendants and as a result, failed to properly develop his property.

PW1 testified that on 14<sup>th</sup> October, 2012, the Defendants went to his farm and ordered his caretakers to stop cultivating the land. In addition, the Defendants issued death threats to the caretakers and insisted that they owned the property. He told the Court that he knew the Defendants well and that they resided in Soloboni Compound. PW1 testified that at the time of the Defendants' invasion, he had guinea fowls, chickens, ducks, a tractor and other farming implements. He had built a caretaker's house, a poultry house and a kitchen on the farm.

PW1 further testified that after receiving the threats from the Defendants, he sought assistance from the area Councillor who failed to resolve the matter. He also testified that he sought redress from the Kafue Subordinate Court but was directed to the High Court.

It was PW1's testimony that in the evening of 18<sup>th</sup> December, 2012, whilst on his farm the Defendants emerged and issued strong threats to his family. According to PW1, the Defendants went on to burn the poultry house whilst stealing his chickens, blankets and mattresses. They also damaged the tractor and held PW1 and his wife hostage in his car.

PW1 testified that police officers went to his family's rescue after an hour, and when they saw the magnitude of destruction, they advised him and his family to vacate the farm for their own safety. According to PW1, they left the farm and spent a night in Kafue Estates. PW1 testified that he returned to the farm the next morning to assess the damage. He found that the farm had been badly vandalized. As he was making arrangements to collect the remnants of his possessions, the Defendants returned to completely damage the property.

PW1 prayed to the Court to restrain the Defendants from threatening, trespassing, cultivating and interfering with the enjoyment of his property. He also prayed to the Court to restrain



the Defendants from cultivating his land and their plans to subdivide it into smaller plots for themselves.

**Gary Chipolyonga** testified as **PW2**. His evidence was that in June, 2012, his father PW1 asked him to settle at his farm in Kafue as a caretaker. He kept ducks, chickens, guinea fowls, turkeys, a tractor and some farming implements on the farm. PW2 stayed on the farm for some time without any incidence. He later asked his friend Humphrey Mwamba to join him.

It was PW2's evidence that in early October, 2012, he begun to prepare the land for the farming season, when Clement Mujane, entered the farm. He cut a Mukuyu tree without his permission and a few moments later Wisted Kamanga appeared. According to PW2, he informed PW1 of the intrusion and he advised them to report the matter to the neighbourhood police.

PW2 testified that in the second week of October, 2012, the Defendants returned with others to the farm. They told PW2, his friend and the other caretaker to vacate the property or face the consequences. In November, 2012, PW2 testified that the

Defendants returned in a hostile manner and beat them up. PW2 stated that in December, 2012, the Defendants and their friends went to the farm in the evening and attacked them.

According to PW2, he ran for his life and from a distance could hear bangs and saw a big flame on the farm. When the Defendants went away, he returned to the farm only to find that they had destroyed the poultry house, the kitchen and stolen all the poultry. PW2 repeated PW1's evidence on how they sought refuge at Kafue Estates and the events of the following morning.

**Humphrey Mwamba** testified as **PW3**. His evidence was that he was taken to PW1's property by his friend PW2 as a caretaker. He found two other people staying there in addition to PW1. He repeated PW1 and PW2's evidence on the farm assets. It was his evidence that in October, 2012, while preparing the land for farming season, some people entered the farm to cut trees and grass. As caretakers, he and PW2 tried to stop the invaders as their instructions were not to allow trespassers. According to PW3, the trespassers, amongst them the Defendants, warned them to stop their work or they would be killed.



PW3's evidence was no different from PW2 on the November and December, 2012 farm invasion by the Defendants. He also repeated PW1's evidence on the involvement of the police and how they spent a night in Kafue Estates.

Learned Counsel for the Plaintiff filed written submissions for which I am indebted. I will not produce his submissions suffice to state that I will refer to them in the judgment.

I have seriously considered the evidence adduced and the written submissions of Learned Counsel. In my considered view, the main issue that falls for determination is whether the Plaintiff as registered owner of Subdivision No. 605 of Lot No. 1052/M Kafue is the rightful owner of the farm and therefore entitled to quiet possession.

There is no dispute that the Plaintiff was issued with certificate of title No. 76692 dated 27<sup>th</sup> June, 2008. In that certificate of title, he acquired a 99 years lease. Sometime in 2012, the Plaintiff moved on to his property and begun to develop it.

It is trite law that he who alleges must prove. In the case of **Wilson Masauso Zulu v Avondale Housing Project**<sup>1</sup>, it was stated that where a Plaintiff makes any allegation, it is generally for him to prove those allegations. That a Plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent's case.

Further in **Khalid Mohamed v The Attorney General**<sup>2</sup>, it was held that a Plaintiff must prove his case and if he fails to do so, the mere failure of the opponent's defence does not entitle him to judgment. It follows that for the Plaintiff to succeed in the present case, it would not be enough to say that the Defendants have completely failed to provide a defence or to call witnesses, but that the evidence adduced established the case in his favour.

As rightfully contended by Learned Counsel, it is settled law that a certificate of title is conclusive evidence of ownership of land, as provided in section 33 of the Lands and Deeds Act. In fact, where a person holds a certificate of title, there can be no claim for adverse possession according to section 35 of the Lands and Deeds Registry Act.

There has been no evidence adduced challenging the Plaintiff's certificate of title and as such, I have no hesitation in declaring that the Plaintiff is the rightful owner of Subdivision No. 605 of Lot No. 1052/M Kafue. The Defendants having interfered with the Plaintiff's possession and who having not shown any claim of right are illegally on the Plaintiff's property.

From the evidence adduced, I am satisfied that the Defendants caused extensive damage to the Plaintiff's property. They stole livestock, some farm implements, burnt the poultry house and kitchen. The Defendants threatened the lives of the Plaintiff, his caretakers and other family members. This allegation was not challenged by the Defendants.

It is my considered view that the Plaintiff has proved his claim for general and special damages for harassment and trespass to his property. I award him these damages to be assessed by the Learned Deputy Registrar. On the other hand, I find that the claim for damages for K51,564.00 was not proved, it is therefore unsuccessful.



I award the Plaintiff interest and costs to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 12<sup>th</sup> day of April, 2017

  
M. Mapani-Kawimbe  
**HIGH COURT JUDGE**