

**IN THE SUBORDINATE COURT OF THE FIRST CLASS
FOR THE LUSAKA DISTRICT HOLDEN AT LUSAKA
BEFORE MRS J.S CHIYAYIKA**
(Civil Jurisdiction)

IN THE MATTER BETWEEN:

ANDREW NOEL PHIRI

- PLAINTIFF

AND

SIBESO MUBIANA

- 1ST DEFENDANT

PRUDENCE MOOKA

- 2ND DEFENDANT



JUDGMENT

REFERENCE

STATUTES

1. Circular No. 1 of 1985
2. The Subordinate Court Act, Chapter 28 of the Laws of Zambia.

BOOKS

1. W.V.H. Rogers, Winfield & Jolowicz on Tort, 2002, 16th ed.

CASE LAW

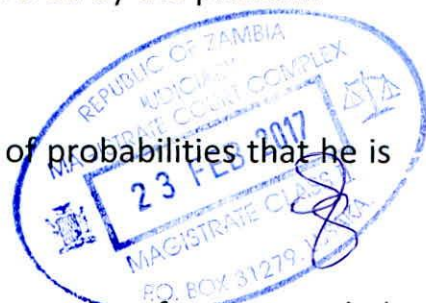
1. Justine Chileshe v Lusaka City Council (2007) SC 256
2. Khalid Mohammed v The Attorney General (1982) ZR 49



The plaintiff commenced his action by way of writ of summons seeking the following relief:

1. Damages for infringement to own property.
2. Damages for trespass and unlawful entry of the plot.
3. Damages for the inconvenience and trauma suffered by the plaintiff.
4. Any other relief the court may deem fit.

The plaintiff bears the burden to prove on a balance of probabilities that he is entitled to the claim.



The 1st defendant did not appear before court. The court therefore proceeded with the matter upon proof of service and on the basis of Order 31 r 14 of the Subordinate Court Rules.

I will now consider the evidence in this case. The plaintiff testified and called 4 witnesses. **PW1** was **Andrew Phiri**. He bought a plot from PW2 in 2011. The plot is 1070, Obama in Chelstone. In 2015, he was informed by PW4 that the defendant claimed that he was encroaching on her land. He produced the contract of sale marked AP1 as part of his evidence.

When cross examined by the defendant, he stated that he did not tell her that the plot in question has no documents from Ministry of Lands.

PW2 was **Raymond Phiri**. He is the one that sold the plot to the plaintiff. The plot is 1070, Obama area. This was in 2011. He bought the plot from Obama Housing project which was a scheme under the MMD cadres in 2009. He put up a box on the material plot.

When cross examined by the defendant, he stated that he just dug a foundation and not a slab.

PW3 was **Bernard Lupangala**. He was with the plaintiff when he purchased the plot.

He was not cross examined.

PW4 was **Prisicilla Mulenga**. Her house is next to the plaintiff's plot. She was allowed to cultivate on the material plot by the plaintiff 3 years ago. After 3 years, a certain man claimed ownership of the same and that he wanted to sell it. Later she saw the same man and the plaintiff. The 2 exchanged money. The defendant went to her but she explained that she knew the owner of the plot. The defendant asked why she did not inform her earlier.

When cross examined by the defendant, she stated that she did not tell her that she did not know the owner. It was true that she told her that she was still new at the plots.

PW5 was **William Phiri**. He witnessed the transaction between the plaintiff and PW2. PW2 was given the plot by the cadres.

The defendant testified and called two witnesses. **DW1** was **Prudence Mooka**. She bought the plot in question after seeing an advertisement in the newspaper. She bought it from Mr. Sibeso Mubiana who showed her documents from Ministry of Lands. She was later informed that there was another man on the plot. Two weeks after, she received a call from the plaintiff informing her that he was the owner of the plot. She produced a letter of sale, an offer letter and ground rent receipt marked PM1, PM2 and PM3 respectively.

When cross examined by the plaintiff, she stated that she could not speak on behalf of the 1st defendant.

DW2 was **Josephine Mooka**. She was in the company of the defendant when she saw the advertisement, viewed the plot and during the transactions. The 1st defendant had an offer letter that was confirmed to be genuine at Ministry of Lands. A lady at the next plot informed them that the plot belonged to someone else. They tried to call the 1st defendant but only his agent came. Another care taker informed them that he had been there for 3 years but did not see the owner.

She was not cross examined.

DW3 was **Evaristo Mooka**. He gave similar evidence to PW2

He was not cross examined

I have carefully considered the evidence in this case. The following facts have been proved without any dispute. The plot is situated in Obama, Chelstone. At the time that the defendant bought the plot, she was informed by PW4 that the land belonged to someone else. The defendant later received a call from the plaintiff who claimed that the plot was his.

Having stated the facts, the critical questions I must determine are who the rightful owner of the plot in question is and whether the plaintiff is entitled to damages.

1. Ownership of the Property

The evidence of PW2 reveals that he acquired the material plot through the cadres that allocated him the plot in question. I must state that the acquisition of land by the previous owner was irregular. Circular No. 1 of 1985 vests the power to allocate land in the Ministry of Lands and the Local authority which derives its delegated powers from the same circular as agents of the Ministry

of Lands. The case of Justin Chileshe v Lusaka City Council (2007) SC 256 is illustrative on this point. It was held that *"an applicant for land has in terms of circular No. 1 of 1985, an option either to apply directly to the commissioner of Lands, or to apply through the local authority which has been delegated powers to receive applications from the members of the public."*

The law is thus clear that the cadres have no authority to allocate land pursuant to Circular No. 1 of 1985. I therefore find that the mode of acquiring land was irregular. Although this is the position of the law, there is need to find out who actually owns the material plot because the area is now known as Obama compound although there is no evidence before me to show that the area has been legalised as a settlement.

The unchallenged evidence of the plaintiff which is supported by PW3, PW5 and the document AP 1 reveals that the material plot was sold to the plaintiff. The defendant does not dispute that this plot was sold to the plaintiff in 2011. However, the defendant claims ownership of the plot on the basis that she bought the said plot in December 2015 from the 1st defendant having seen the advertisement in the newspaper.

The evidence of PW4 reveals the plaintiff is the owner of the plot. She claims that she told the defendant about this at the time after she had paid the 1st defendant the money. This evidence is supported by the defence who stated that they were told that there was already an owner of the material plot. I have taken into consideration the documents produced by the defendant. A close analysis of the letter of sale indicates the sale of plot F/32A/E/2/1875. The receipt for payment of ground rate reveals that the said plot is a residential plot under the High cost. However, the offer letter reveals that the said plot is a farm in Chongwe and not the plot in question which is situated in

Chelstone. I therefore find that the property sold to the defendant is not the one in issue.

I am satisfied that the plaintiff has proved his case on a balance of probabilities to the satisfaction of the court. I therefore enter judgment in favour of the plaintiff as the rightful owner of the property in question.

2. Damages for Trespass to land and the inconvenience caused.

Having found that the property belongs to the plaintiff, the next question I must consider is whether the defendant trespassed on the same property. The law as I understand it is that a person in adverse possession can sue for trespass any person other than the lawful owner or a person acting on behalf of or under the instructions from the lawful owner. The term 'trespass' is defined by Rodgers in his book Winfield & Jolowicz on Tort at P 47 as *"unjustifiable interference with the possession of land"*.

The plaintiff has laid no evidence regarding how the defendant trespassed on the said land. This also applies to the issue of the inconvenience caused. As the plaintiff, he bears the burden to prove on a balance of probabilities that he is entitled to the claim. In the case of Khalid Mohammed v The Attorney General, it was stated that:

"A plaintiff must prove his case and if he fails to do so the mere failure of the opponents does not entitle him to judgment".

I am not satisfied that the plaintiff has proved his claim on trespass and inconvenience caused to him on a balance of probabilities to the satisfaction of the court. I therefore dismiss the claim for damages for trespass and inconvenience caused.

For the avoidance of doubt I order as follows:

1. The material plot belongs to the plaintiff.
2. The claim for damages and inconvenience caused fails.
3. Each party to bear its own costs.

DELIVERED IN OPEN COURT THIS DAY OF FEBRUARY 2017.

J.S. CHIYAYIKA
MAGISTRATE CLASS I

