

**IN THE SUBORDINATE COURT OF THE FIRST CLASS  
HOLDEN AT LUSAKA FOR THE LUSAKA DISTRICT  
(Civil Jurisdiction)**

**IN THE MATTER BETWEEN:**

**MARVIS CHAILE** **PLAINTIFF**  
(SUING AS ADMINISTRATOR OF THE ESTATE OF <sup>LATE</sup> AGUSTINE MUMBA)

**AND**

**MULENGA BWALYA**  
**PRUDENCE NAYAME**

**1<sup>ST</sup> DEFENDANT**

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



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**JUDGMENT**

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**REFERENCE**

**STATUTES**

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

**CASE LAW**

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

The plaintiff commenced this action by way of writ of summons seeking the following reliefs:

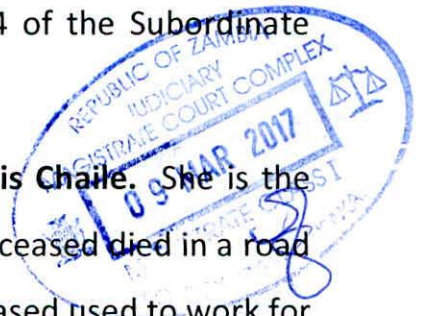
1. Reversal of sale of property Number A33/35, Garden House, Lusaka.
2. Damages for deprivation of the rightful beneficiaries of the proceeds derived from the sale of the said house.
3. Costs.
4. Any relief the court may deem fit.

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

The 2<sup>nd</sup> defendant did not appear before court. The court proceeded with the matter upon proof of substituted service and Order 31 r 4 of the Subordinate Court Rules.

The plaintiff testified and called 1 witness. **PW1** was **Marvis Chaile**. She is the administrator to her late nephew Augustine Mumba. The deceased died in a road traffic accident in South Africa in September 2012. The deceased used to work for Celtic. The deceased acquired house is A 33/35, Garden House, Lusaka although at the time of acquisition, it was not numbered. During the funeral, the 2<sup>nd</sup> defendant introduced herself as the widow to the deceased. The 2<sup>nd</sup> defendant claimed to be pregnant for the deceased. However, after a month, it was proved that she was not the widow.

As a family, they decided to renovate the material house. It was at this time that the 1<sup>st</sup> defendant phoned her that he wanted to buy the house from the 2<sup>nd</sup> defendant. She advised him not to do so because the house was not for the 2<sup>nd</sup> defendant. The defendant informed her that he had paid something to her but she advised him to get the money he had paid her. She later sent her niece to



check on the said house but reported back that the 1<sup>st</sup> defendant had occupied the house. She tried to rehearse with him to move out but he became arrogant. She decided to sue because the beneficiaries of the house are not getting anything. She produced the ownership form marked MC 1 and the letter of administration marked MC2.

When cross examined by the 1<sup>st</sup> defendant, she stated that it was true that his response was that he could not his refund from the 2<sup>nd</sup> defendant because she was an imposter. They did not conclude that he adds up for the house because it is expensive. The 2<sup>nd</sup> defendant sold him the house at K25,000.00 and he paid her K10,000.00. It was true that she increased the amount to K50,000.00 and told him to add some money but he refused. The house was not at roof level as it had been roofed but was vandalized and the roof removed.

The defendant testified and called 1 witness. **DW1** was **Bwalya Mulenga**. The 1<sup>st</sup> defendant informed him she was selling a house in Garden House. He went to view it. The door and window frames were removed. They met the next day. She was in company of her sister and the brother while he was with Justine Lesa and Nicholas Mulenga. The 2<sup>nd</sup> defendant informed him that her husband had died in a road accident in 2012. She was selling the house because she had no money for her 2 children. When he asked for his relatives, she indicated that the deceased was a foreigner and had no relatives in Zambia. She sold the house at K25,000.00 through the document marked MB2. He paid her K15,000.00. He was taken to an office where ownership of the house was changed from the deceased to his names through the document marked MB1. He developed the same house and moved in. After 8 months, some people from Kabwe claimed the





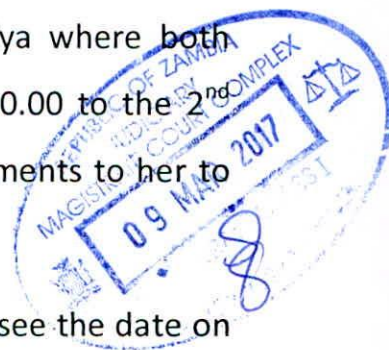
house to be theirs. He was told to vacate from the said house. He tried to resolve it with the plaintiff but all failed.

When cross examined by the plaintiff, he denied having told her that she got her phone number from the 2<sup>nd</sup> defendant. He never told her that she had the documents for the house. He never told her that 2<sup>nd</sup> defendant was not the owner of the house. It is not him that called her before he shifted into the house that he had bought a house. It is true that he used to communicate with the 2<sup>nd</sup> defendant but not now.

**DW2 was Mirriam Chisala.** She is not a witness as she only helped the 1<sup>st</sup> defendant to acquire the said plot from the 2<sup>nd</sup> defendant. They viewed the house together. It was at window level. They went to Chibolya where both parties signed some documents. The 1<sup>st</sup> defendant paid K15,000.00 to the 2<sup>nd</sup> defendant. After some time, the 1<sup>st</sup> defendant took some documents to her to sign as witness.

When cross examined by the plaintiff, she stated that she did not see the date on the documents. She was just taken to Chibolya. She did not know that the 2<sup>nd</sup> defendant was still married to Mr Mwanakasale.

I have taken into consideration the evidence at hand. The following facts are not in dispute. The plaintiff is the administrator of the estate of the late Augustine Mumba who died in 2012. The 2<sup>nd</sup> defendant was an imposter who posed as a widow to the deceased. The deceased's estate comprised of the house in question. It is situated in Garden House. The house in question was sold by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant did get in touch with the



plaintiff regarding the sale of the same house. The defendant was told to vacate the house but did not do so.

I have taken into consideration that from the documents before me, the plot where the house in question was built was issued neither issued by the council or the Ministry of Lands. I must state that the acquisition of land by the deceased 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. This is because the area is now known as Garden House compound although there is no evidence before me to show that the area has been legalised as a settlement. I have also taken into consideration application of equity in Section 15 of the Subordinate Court Act which provides that:

*"In every civil cause or matter which shall come in a Subordinate Court, law and equity shall be administered concurrently; and a Subordinate Court, in the exercise of the jurisdiction vested in this Act, shall have power to grant, and shall grant either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, as any of the parties thereto may appear to be entitled to. In every legal or equitable claim*





*or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and, in all matters in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail”.*

The issues to be determined are as follows:

1. Who is the owner of the house in question?
2. Whether the 1<sup>st</sup> defendant had authority to sell the material property.
3. Whether the plaintiff is entitled to damages.

The evidence of the plaintiff reveals that the house belongs to the deceased. This evidence was supported by the defendant who stated that ownership of the said house was changed from that of the deceased to himself. I am therefore satisfied on a balance of probabilities that the said house belongs to the deceased.

The bone of contention is whether the 2<sup>nd</sup> defendant had authority to sell the material house. The evidence of the plaintiff reveals that the 2<sup>nd</sup> defendant was an imposter who posed to be the widow of the deceased. The plaintiff thus bears the burden to prove on a balance of probabilities that the sale is null and void. 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”.*

The plaintiff stated that at the time the 2<sup>nd</sup> defendant sold the material house, the 1<sup>st</sup> defendant called her on phone and informed her he was buying a house from the 2<sup>nd</sup> defendant. He advised him not to do so because the house did not belong to her. She also advised him to get back the deposit he had paid. The plaintiff did

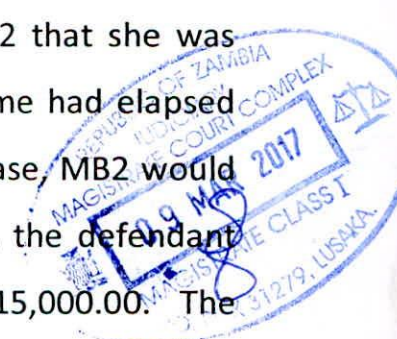


not dispute this evidence but instead suggested to the plaintiff whether he did not tell her that he could not get back his money.

I have taken note that 1<sup>st</sup> defendant when challenged by the plaintiff disputed having called her before he shifted into the same house. I must state that the 1<sup>st</sup> defendant is not sincere because he did not rebut the plaintiff's evidence but instead suggested to the plaintiff that he could not get the money. I therefore find that the 1<sup>st</sup> defendant was warned by the plaintiff that the house in question did not belong to the 1<sup>st</sup> defendant. This explains why he did not even complete the payment and opted to put a 'nil' balance MB2. Having been warned, the 1<sup>st</sup> defendant completed the house and shifted in it at his own peril.

Another issue to take into consideration is the evidence of DW2 that she was given MB2 which is a sale agreement to sign as witness after time had elapsed when they had gone to change ownership. Surely, if this is the case, MB2 would not have had the same date as MB1. Further, in his evidence, the defendant stated that he bought the said house at K25,000.00 and paid K15,000.00. The plaintiff's evidence when challenged reveals that he told her he paid K10,000.00. I must state that if the house was sold at K25,000.00, the defendant according to exhibit MB 1 should have a balance. It is thus surprising and suspicious that such a document would have such irregularities. I therefore find MB2 to be a false document. This also applies to MB1 which according to DW2 was obtained from Chibolya and yet the property is in Garden House.

It will also be noted that at the time of sale, the 2<sup>nd</sup> defendant did not produce any documents to show that the house in question was for her late husband and was authorised to sell. This then brings us to the issue raised by the plaintiff





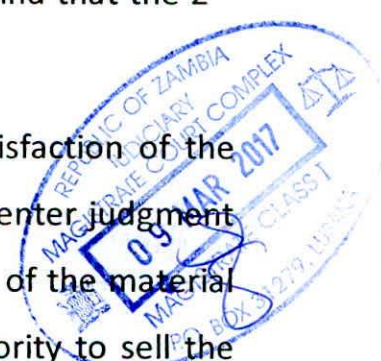
when challenging the 1<sup>st</sup> defendant that he called to ask for the documents because she was told by the 2<sup>nd</sup> defendant that she had the documents. Surely, like any reasonable person, he ought to have wondered why the documents were with the plaintiff and not the 2<sup>nd</sup> defendant and could not have committed himself to such an illegal sale.

Further, although the 1<sup>st</sup> defendant claimed that the 2<sup>nd</sup> defendant represented herself as a widow, the question to be considered is whether as a widow, she had power to sell. Certainly not because even if she claimed to be a widow, the house was not hers and would only have life interest in the property. Further, she was not the administrator of the estate of the deceased. I therefore find that the 2<sup>nd</sup> defendant had no authority to sell the house.

I am satisfied that the plaintiff has proved her claim to the satisfaction of the court that the sale between the 2 defendants is null and void. I enter judgment for the plaintiff on the first claim. I order the reversal of the sale of the material house for the following reasons: the 2<sup>nd</sup> defendant had no authority to sell the house; the 1<sup>st</sup> defendant was warned by the plaintiff to get his deposit from the plaintiff because the house belongs to the deceased. This explains why he failed to complete the transactions and therefore cannot claim to have bought the house when the house was not fully paid for; the documents MB1 and MB2 are fake documents that were obtained dubiously.

The second claim relates to damages for deprivation of the rightful beneficiaries of the proceeds from the sale of the said house. However, since the sale has been reversed, this claim is not attainable. The claim therefore fails.

For the avoidance of doubt, I order as follows:





1. The sale of property No. A33/35, Garden House by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant is reversed.
2. The defendant to vacate the said house and hand it over to the plaintiff.
3. The claim for damages for deprivation of the rightful beneficiaries of the proceeds derived from the sale of the said house is rejected.
4. Each party to bear its own costs.

Delivered in open court this

day of March 2016

J. S. CHIYAYIKA

MAGISTRATE CLASS 1

