

IN THE SUBORDINATE COURT OF THE CASE No. 2016/CRMP/82
FIRST CLASS FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BEFORE HON. BRIAN. M. SIMACHELA

BETWEEN

STELLA NAKAONGA

PLAINTIFF

AND

MBUYA LUCY

DEFENDANT

For The Plaintiff : In person

For The Defendant : In person

JUDGMENT

This is a civil matter having commenced by way of Originating Notice of Motion. The plaintiff, Stella Nakaonga claims the following reliefs against the defendant Mbuya Lucy:

- i. Vacant possession of stands number 41 and 42 Kamwala market;
- ii. Any other reliefs the court may deem fit;

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- iii. Legal costs arising from and incidental to these proceedings.

This being a civil matter, the parties are required to prove their respective claims on a balance of probabilities. The plaintiff called two witness while the defendant called two as well.

The defendant denied having rented the two tables from the Plaintiff but averred that she bought them out rightly.

I will now review the evidence on record.

PW1 Stella Nakaonga, testified 2011 the defendant started renting her two tables after the one who was renting them decided to go somewhere. She stated that the defendant paid her K1200.00 as first instalment and another payment of K3600.00 for two years. She informed the court that the defendant proposed to buy the tables but she refused as the tables were being used as collateral to obtain loans from FINCA. She further stated that the rental agreement was put in writing by her daughter, but since 2013 the defendant has not paid anything that amounts owing stands at K7600.00. The plaintiff stated that when she started asking for her rentals, the Defendant refused to pay her, saying that she had bought the tables. It was at that time when she decided to report the matter at the Police but she was advised to come to the courts.

In cross-examination, the plaintiff told the court that she wanted to pay back the money to the Defendant because she was refusing to pay rentals. She stated that the

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Defendant paid rentals up to 2013, and started refusing to pay. She stated that the Defendant told her that she would sign the papers later on.

PW2, Nobert Ngandu, is an Uncle to the Plaintiff stated that on the 6th March 2012, he visited his niece "PW1" at kamwala market. While there, he found the Defendant negotiating for something he did not know, but after wards his niece told him that the Defendant wanted to be using her tables. He stated that he saw the daughter for the Plaintiff and the son for the Defendant signing an agreement and after that the Defendant asked for the papers so that she could go and make copies.

In cross-examination, PW1 he stated that it was not his interest to ask whether or not the two had sold each other the said tables, and there was no dispute.

PW3 Charles Mwale a cashier at Kamwala market who brought the register for the market, stated that he was transferred to that market in January 2017 and the name that appear in the register regarding the two tables was for the Defendant.

There was no cross examination.

DW1, Atupakise Kenane (alias Mbuya Lucy), a businesswoman stated that in 2012, she purchased three tables from the Plaintiff. The first table she paid K2,800.00 and for the two she paid K6,300.00 and she called witnesses from the market. She testified that last in 2016, the Plaintiff took back the money to her for the tables but



she refused to get because she had kept it since 2012. She further stated that the Plaintiff left a K5000.00 and left. It was at that time when she called the witnesses and they went to the office Bob where the Plaintiff went to collect her money and promised to take the matter somewhere.

In Cross-examination, she stated that she bought the three (3) tables from the Plaintiff, one was at \$300 US Dollars, and the two at K6, 300.00. She testified that the tables were not registered at the civic centre because they are small in sizes.

In Re-examination, PW1 stated that she wanted to give back the K5000.00 the Defendant because she was difficult to give her back the tables.

DW2, Moses Tembo a trader at kamwala testified that on the 17th August 2015, he witness a transaction for the sale of two tables between the Plaintiff and Defendant. He stated that the two tables were being sold at K2, 800.00 and K3, 500.00 respectively, and both parties asked him to prepare the letters of sale "ID1" and "ID2". He stated that the Plaintiff had no witness but the Defendant came with her grandson, and everything went well until last 2016, when the plaintiff informed him that she had taken back K5000.00 to the Defendant. He testified that 15 minutes after the Plaintiff had gone, the Defendant called him and they went to the office of Bob where she had taken the money. After two days she informed him that the Plaintiff had gone to collect the money from Bob, and some few days later the Defendant was sued. He tendered "ID1" and

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"ID2" respectively and they were produced as "ML1" and "ML2" respectively.

In Cross-examination, he stated that he witnessed the sale agreement between the two parties and he was a witness of fact who was under oath and henceforth, he could not lie.

DW3 Godfrey Siwale, the grandson to the Defendant stated that in 2012 the Plaintiff approached his grandmother that she was selling her tables. His grandmother got interested and she sent him to call a witness. He stated his grandmother paid the Plaintiff K6300.00 and the Plaintiff asked the Defendant if the tables could be used in 2013.

In cross-examination, he stated that he was there during the sale agreement and both parties did not go to the council as per requirement.

In Re-examination, he testified that the Plaintiff said she got a loan from FINCA that's why the parties could not go to the council or market master.

FACT FINDING

After a careful consideration of the evidence above, my conclusion is that:

It is not in dispute that the money amounting to K2, 800.00 and K6, 300.00 respectively was paid by the

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Defendant. It is not in dispute that the Plaintiff got the money from the Defendant.

The questions that I asked myself was? Were the two tables rented out or sold by the Plaintiff to the Defendant? Why did the Plaintiff ask the Defendant to start using the tables in 2013 when the transaction was done in August 2012? Is it true that the Plaintiff got a loan from FINCA and she pledged her tables as collateral and that's the reason why they did not register the transaction with the council?

The fact that the Plaintiff took back the K5000.00 to the Defendant confirms to me that there is a very high probability that the transaction that occurred between the parties was a sale agreement. I failed to understand why a person could take back the money that was paid for rentals after three (3) years. If the money was paid for the two (2) year period, why did the Plaintiff decide to take it back after three and half years? The plaintiff failed to bring her daughter to testify even after she mentioned that it was her who wrote a rent agreement and witnessed.

The plaintiff sought to show that she did not sell her two tables by producing a genuine tenancy agreement and witnesses (**This is guided by the maxim of equity which states that" he who comes to equity must come with clean hands"**). However, she failed to produce evidence. She was given an opportunity to call the witness who prepared the document to authenticate her signature and Handwriting but she did not do so. Therefore, the provisions of **section 15 of subordinate court Act Cap 28 is hereby**

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applied and the rules of equity shall prevail over that of common law.

I have given serious consideration to this evidence. It is vital in claims of this nature that the plaintiff adduces Documentary and authenticated evidence to substantiate his/her claim. It is not enough for the plaintiff to simply say my two tables were not sold without proof of Documentary and Authenticated evidence. Documentary and Authenticated evidence is what supports her claim of tenancy agreement for the tables to enable the court to make a reasoned decision on whether or not the tables were sold or rented out. I conclude that the Plaintiff sold the two tables to the Defendant and used the money to liquidate her loan at FINCA, and later on attempted to take back the money to the Defendant after raising it three years later.

In order for me to determine this matter, I have to warn myself on a balance of probability and taking into account the evidence adduced, I hereby quash the Plaintiff's claims and award the two tables to the Defendant forthwith. Both parties shall bear their own costs for this suit.

**DELIVERED IN CHAMBERS ON THIS 7TH DAY JULY
2017.**

Stella Nakaonga





HON.MR. BRIAN. M. SIMACHELA

MAGISTRATE CLASS III