

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

2018/CRMP/0033

BETWEEN :

MORRIS CHITEMA

PLAINTIFF

AND

MELVIN MUTOYA

DEFENDANT

JUDGMENT

CASES REFERRED TO:

- Chibwe v. Chibwe (2001) ZR 1
- Khalid Mohamad V Attorney General (1982) ZR 46
- Clementina Banda Emmanuel Njanje v Boniface Mudimba (2010/HP/A39).



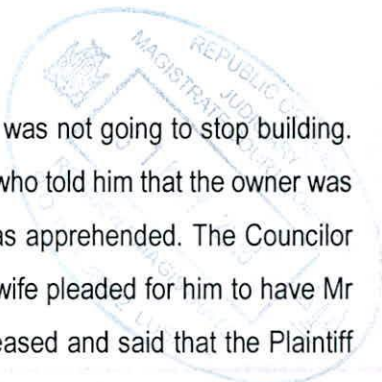
The plaintiff issued out of this court a Writ of Summons claiming the following against the Defendant:

1. Demolition of the structure constructed on the window level foundation at part of property sub AA-division Plot No. F1609 Foxdale, Lusaka
2. The defendant, his servants or agents or whosoever be restrained from dealing with the property known as F/609 AA 1, Foxdale, Lusaka
3. Damages and costs
4. Further or other relief the court may deem fit
5. Costs of the application

I warn myself from the outset that, in Civil matters, the burden of proof is on the Plaintiff and the standard of proof is on the balance of probabilities and he who asserts must prove his claim. In Khalid Mohamad V Attorney General (1982) ZR 46 Ngulube DCJ as he was then stated:

"An unqualified position that the plaintiff should succeed automatically whenever a defence has failed is unacceptable, a plaintiff must proof his case, if he fails to do so, the mere failure of the opponents defence does not entitle him to judgment".

The Plaintiff **MORRIS CHITEMA** (PW1) averred that he bought the piece of land in question from a Mr chewe on 25th June 2013 who was his neighbour in kaunda square at K5, 000.00. The said land is situate in Chamba valley and at the time, it was bare. He hired someone after two weeks to dig the foundation and he was given a plan by ministry of Lands. In December 2013, there was a meeting at Lusaka City council and Mr Chewe invited him to attend. The meeting legalised the land and he had the minutes thereof. He engaged bricklayers after buying material and they started building on 15th January 2015. He was on site for three weeks and went back to Mbala on 21st January 2016. In July 2017, he received a call from his brother to the effect that he had seen someone sinking a borehole and building on the property. His brother sent him the defendant's number as the person who was building and when he called the Defendant telling him that he was sinking a borehole on his property, the defendant told him that he bought the plot from Felix Chewe. He told the Defendant that it was his plot and the defendant told him that they needed to talk. The defendant called him after 10 minutes and told him that he had found Mr Chewe. The defendant gave him the phone and he spoke to Mr Chewe. He could not get a satisfactory reply. He called the defendant and told him to stop building.



The defendant in reply told him that he had already bought material and he was not going to stop building. He flew to Lusaka within two hours and found two people at the plot working who told him that the owner was the defendant. He reported the matter to Ngombe Police and Mr Chewe was apprehended. The Councilor Mr Sylvester Mulenga called the defendant. The councilor and Mr Chewe's wife pleaded for him to have Mr Chewe released so that the matter could be sorted out. Mr Chewe was released and said that the Plaintiff was the owner of the plot. That he also stated that he sold it to the Defendant because he was under pressure. Mr Chewe told him to have him released so that he could refund the defendant or find him another plot. He went back to mbala in September and in December, he heard that the defendant had started construction works again. He called the Defendant who told him that he had already spent on the plot and Mr chewe who was supposed to refund him had died. His wife confirmed that Mr Chewe had died. He took the matter in a Christian way and told the defendant that he would sale the plot so that City council would do a bill of quantity so that he refunds the defendant what he spent on the plot. He instructed his wife to advertise the house for sale and put his phone number. He told the defendant who told him that he was not interested in selling and that it was his plot. His wife was in Lusaka for 10 days and she told him that the defendant was not cooperating. He came to Lusaka and called the defendant so that they could settle the matter amicably. The defendant reported him to Central Police that he was victimizing him at his plot. He had no option but to come to court so that the defendant could remove all the debris he had put on his plot.

When cross examined, he stated that the defendant found a six roomed structure almost at window level on the plot and the defendant started building on top. He had witnesses to that effect and those who were there when Mr chewe said that the plot was his.

PW2 was **STEVEN LUNGU** a Bricklayer who stated that in 2015, he was engaged by the Plaintiff to build a house for him on his plot in Chamba Valley. He went there with his friends. They dug the foundation and did the footing. The day following, they built a box and raised the corners.

In cross examination, he stated that they started building in December 2015 and they built the foundation plus two coats and raised the corners.

PW3 was **AMBRY SAKALA** a bricklayer who recounted that in December 2015, Steven Lungu told him that his cousin wanted them to build a foundation for a six roomed house for him. They went to Chamba valley

and they found a dug foundation. They did the footing as instructed by the plaintiff and he told them that he needed to protect his plot as he was staying far. They built a box and 2 coats in all the corners.

In cross examination, he stated that they started building in December 2015. They built the whole box and 2 courses after the foundation. The evidence he had to show that they built was the foundation which he could go and show the court.

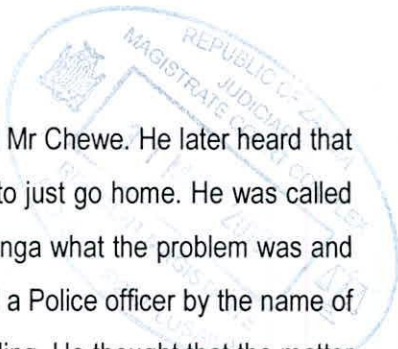
PW4 was **NTASUWILA SINKALA** a Bricklayer who recounted that PW2 told his brother that there was a building contract in Chamba Valley. The day following, he got them and they went to Chamba Valley where they found a dug foundation. They cleared the foundation and poured footing. They went back the day following, built a box and raised the 4 corners by 2 courses.

When cross examined, he stated that they started building in December 2015 and they built up to 2 courses in the corners. They left a slab inside but they did not demarcate the rooms. He knew the box they built and evidence thereof was to show him.

This marked the close of the Plaintiff's Case.

The Defendant gave evidence on his own behalf and called 2 witnesses.

The Defendant **MARVIN MUTOYA** (DW1) disputed having found a foundation on the said property and stated that he is the one who started building. He recounted that in July 2017, he went to Lusaka City Council looking for Land where he met a Mr Kabonso who gave him another person to take him to the plot. There were 2 plots in the same line and one had stones. The person he went with did not know the actual plot so he called Mr Chewe and Mulenga who showed him the plot and explained that it was community land. He saw a Police officer who had a plot in the area and when he inquired from him, he told him that the plots were genuine. He asked him to be his witness and he agreed. He asked for the Price and Mr Chewe told him that it was K65, 000.00. He found a foundation dug and he asked them if they could be any person to give him trouble. He paid K47, 000.00 to Mr Mulenga and Mr Chewe was the witness. They signed a Letter of sale (DD1). On 4th July 2017, they buried the foundation they found there and dug another one. They built up to roof level. He engaged some people to roof and they told him that someone people had come saying that they were building on their property. He called Mr Mulenga and texted him the number for the person who was roofing. When



they finished roofing, he heard that the person had come again so he called Mr Chewe. He later heard that Mr Chewe had been apprehended. He asked Mr Mulenga and he told him to just go home. He was called and he went to the Police where he found the Councilor. He asked Mr Mulenga what the problem was and he told him to wait for 3 days. In September 2017, he went to the Police and a Police officer by the name of Chilufya told him in the presence of PW1 and the councilor to continue building. He thought that the matter had ended. In November 2017, Mr Chewe died and in 2018, Pw1 started calling him that he would have him arrested as he was working at the court. Pw1 advertised the house for sale. He went to Ngombe Police post and proceeded to the plot with 2 Officers. He called PW1 asking him how they could meet. He asked him to come to the Police and he was quite. He also stated that the person who sold him the plot was alive and willing to come to court.

When cross examined, he stated that he bought the plot on 19th July 2017 and he knew the people who sold him the plot. When he bought the plot at K47,000.00, there was no structure. He would have loved to see that the people who signed as witnesses on their letters of sale were the same.

DW2 was **DAVIES KAOMA** who stated that he had been to the plots in Chamba valley and he knew that the person who built the house is DW1. He did know PW1 and he only saw him in court.

When cross examined, he stated that he did not know the person who sold PW1 the plot at K5,000.00 on 25th June 2015. The signature on MC1 was not his and he was saying that Dw1 built the house from the ground. He was not the one who came with Mr Chewe to congratulate him in January 2016. He never got any money from PW1.

DW3 was **LEVY LUNGU** who testified that the owner of the plot was the late Mr Chewe who told him that he had sold the plot to DW1 who he introduced him to. DW1 was the one who started building the house.

When cross examined, he stated that it was in 2013 to 2014 when Mr Chewe introduced him to DW1 as the person who bought the plot. He was witnessing for the period 2013 to 2014 and not 2017 as stated by DW1. He was not aware that the same people signed both letters of sale. What he saw on both letters of sale were the names Felix Chewe and not Davies kaoma.

This marked the close of the defendant's case.

In the interest of justice and seeing that the Councilor was mentioned in this, I summoned him as a Civic leader to come and state what he knows in this matter.

SYLVESTER MULENGA MUMPUKU the Councilor for Munali ward 33 testified that last year on a date he could not recall, PW1's mother in law came to his office and complained that someone had sold PW1's plot to someone unknown to her. He inquired about PW1 and she told him that he was working out of town. After a few days, he received a call from Pw1 complaining on the same and confirmed that he was the owner. After a few days, he learnt from PW1's mother in law that the plot was sold by Mr Chewe to DW1 and he was the same person who sold to PW1. He was approached by someone who told him that he had been sent by Mr Chewe and he had been arrested over the same issue. He went to the Police after a day where the CIO explained to him that it was a matter between PW1 and DW1 over the sale of a plot. A meeting was convened and in attendance were DW1, PW1, Pw1's wife, Mr Chewe, Mr chewe's wife, PW1's mother in law, Mr Mulenga, the CIO and another person that DW1 came with whose name he could not recall. The purpose of the meeting was to bring Mr Chewe and PW1 so that they could know the truth. It was established in the meeting that Mr chewe sold PW1's plot to DW1 and the agreement was for Mr chewe to find PW1 an alternative plot and compensate him. The condition was that PW1 should be agreeable and because he was busy, he left the CIO to handle the matter who is better placed to know what transpired thereafter.

When cross examined by PW1, he stated that Mr chewe pointed at PW1 as the owner of the plot. He did not know if they did agree that Mr chewe finds him an alternative plot. DW2 was present in the meeting.

When cross examined by DW1, he stated that Mr Chewe stated at the Police that the plot was for PW1. He left the meeting on the preliminary agreement of Mr Chewe finding PW1 an alternative plot.

In reexamination, he stated that he was not privy to the final agreement as he left the meeting before it ended.

This is the evidence I heard in total and having considered it, I find that :

1. PW1 bought the said plot in 2015 and DW1 bought the same plot in 2017.
2. Both parties dealt with Mr Chewe over the said plot
3. DW1 has built on the property up to roofing

4. Mr Chewe was apprehended after selling the plot to DW1 which he had sold to PW1 initially.
5. None of the parties has legal title to the said plot
6. A meeting was convened where both parties were in attendance and the plot was discussed.

What ought to be established in this matter is who is entitled to own the property in dispute?

I am required to administer law and equity concurrently. In this particular case, the resolution of the dispute at hand, largely imports principles of equity.

In this matter, it is clear and not in dispute that PW1 bought the said plot from Mr Chewe in 2015 and DW1 in 2017 as it is also exhibited by the letters of sale. When Mr Chewe sold the plot to PW1 in 2015, the property in the plot passed to PW1. In 2017 when Mr Chewe and Mulenga obtained money from DW1 on the same plot, the plot was not theirs but PW1's. It is clear that the dual pretended that they had a plot to sale when in fact not. It is also the evidence of PW1 and the ward councilor that at the meeting Mr Chewe stated that PW1 was the owner of the plot and DW1 is fully aware. Though PW1 does not have legal title to the said plot, he is the equitable owner.

In the case of Clementina Banda Emmanuel Njanje v Boniface Mudimba it was held inter alia that:

1. **At law and in equity, the basic rule is that estates and interests primarily rank in the order in which they are created.**
2. **In equity, the result is expressed more directly in the maxim: "qui prior est tempore potior est jure." That is, "he who is earlier in time is stronger in the law".**
3. **Where there are two competing equitable interests, the general rule of equity is that the person whose equity attached to the property first will be entitled to priority over the other.**
4. **Where equities are equal, and neither claimant has the legal estate, the first in time prevails.**
5. **Prior equitable interest in law can only be defeated by a bona fide purchaser for value without notice.**
6. **The following requirements need to be fulfilled when relying on the doctrine of bona fide purchaser for value without notice; a purchaser must: act in good faith; be a person who acquires an interest in property by grant rather than operation of law; must have given value for the property; must generally have obtained the legal interest in the property; and must have had no notice of the equitable interest at the time he gave his consideration for the conveyance.**

With the guidance by the above authority, interests in the said land have to rank in the order in which they were created and according to the evidence, PW1's interest was created first and since PW1's equity attached to the plot first, he is entitled to priority over DW1. For the fact that PW1 is earlier in time, he is stronger in law and for the fact that DW1 is not a bona fide purchaser for value without notice, I have no difficulties in finding that PW1 is the one entitled to own the property in question. It therefore follows that PW1's claim for demolition of structure constructed on his structure on the said plot succeeds.

The plaintiff also claims damages but it is not clear as to what damages he is claiming and he has not led evidence of any injury suffered that would entitle him to damages.

In the case of **Chibwe v. Chibwe (2001) ZR 1**, it was held inter alia that:

"It is a cardinal principle supported by a plethora of authorities that court's conclusions must be based on facts stated on record."

Having not led evidence on the claim for damages, I will not delve into the claim.

For the avoidance of doubt, I order that the structure built by the defendant on the said property be demolished.

I order costs in favour of the Plaintiff to be taxed in default of agreement.

IRA 30 days and in case of appeal, I order Security for costs in the sum of K1,000.00

Delivered in Open court this day of 2018

IRA 30 days

.....
SYLVIA MUMYINYA OKOH (MRS)
RESIDENT MAGISTRATE

