

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

2020/HP/0313

BETWEEN:

DAVISON CHONDE MVULA



PLAINTIFF

AND

KAY KAMATUWA CHIRWA

*(sued in his capacity as Administrator of the
estate of the late Emmanuel Chirwa)*

DEFENDANT

Before the Hon. Mrs. Justice M.M. Bah- Matandala,

On this 10th day of August, 2023.

For the Plaintiff:

*Mrs. M. K. Mulubwa Legal Aid Counsel Messrs. Legal
Aid Board*

For the Defendant:

Ms. A. Muyumbana Messrs. E.M.K & Associates

J U D G M E N T

LEGISLATION & OTHER REFERENCES:

- 1. The Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia*
- 2. Intestate Succession Act Cap ...of the laws of Zambia.*
- 3. Learned Authors of Halsbury's Laws of England, 4th edition, at paragraph 962,
under heading, the Nature of Conditions Precedent.*

CASE LAW

- 1. Josiah Tembo, Henry Jawa vs Peter Mukuka Chiambala 2005/HP/0208*
- 2. Fabiano Humane V.D.P Chinkuli 1971/HP/407*

3. *Raphael Ackim Namung'andu vs Lusaka City Council [1978] ZR 358*
4. *Ndongo vs Moses Mulyango, Roostica Banda SCZ Appeal No. 598/2013*
5. *A.M. G Global Trust Limited vs The Administrator General and Caldoms Properties Limited Appeal No. 25 of 2020*
6. *Lonrho Cotton Zambia Limited vs Mukuba Textiled Limited vs Mukuba Textiles Limited [2002] Z.R. 43*
7. *University of Essex v Djemal (1980) 1 W, R. 1301 (1980) ALL E.R. 742. CA*

1.0 INTRODUCTION

1.1 By a Writ of Summons dated 18th March, 2020 the Plaintiff claimed against the Defendant the following:

- 1) *A Declaration that the Plaintiff is the legal and bonafide owner of farm D24 subdivision E, Kauzu area, Chipata.*
- 2) *An Order that the Plaintiff be granted vacant possession of farm D24 subdivision E, Kauzu Area, Chipata.*
- 3) *An injunction restraining the Defendant either by himself, his agents, servants or whosoever from carrying out any construction works, or whatsoever developments, interfering, occupying, remaining in*

possession and trespassing upon the said farm D24 subdivision E, Kauzu Area, Chipata.

4) Damages for inconvenience.

5) Costs of and incidental to the proceedings

6) Any other relief the Court may deem fit.

1.2 The parties by a consent order dated 7th April, 2022 agreed and adjudged as follows;

1. That PW2's application for misjoinder in these proceedings herein be resolved excuria,

2. The Plaintiff does not oppose the application by the PW2 to be removed from the proceedings,

3. That the 2nd Defendant by this Order be removed from the proceedings herein, and

4. That the Defendant in the alternative be called upon as witness of the Plaintiff in these proceedings.

1.3 The 2nd Defendant was thereafter removed and made a witness for the Plaintiff.

2.0 THE PLAINTIFF'S CASE

- 2.1 This matter was commenced by a Writ of summons dated 18th March, 2020 which was accompanied by a Statement of Claim of even dates wherein it was averred by the Plaintiff that he was at the material time a farmer and purchaser of farm D24 subdivision E, Kauzu area in Chipata District of the Eastern Province in the Republic of Zambia. The said property formed part of the estate of Emmanuel Chirwa the deceased.
- 2.2 The Defendant is the son and administrator of the estate of the late Emmanuel Chirwa who died on the 9th May, 1997 (hereinafter called the deceased)
- 2.3 It has been averred that the Defendant agreed to subdivide farm D24 wherein on the 19th September, 2007, PW2 executed an agreement in which he sold a portion of the land to Dean Mitchell at the purchase price of ZMW 48,000.00 (rebased) of which he paid half, being ZMW 24,000.00 (rebased). The balance of ZMW24,000.00 (rebased) would be paid once the farm was subdivided.

- 2.4 Consequently, the Defendant proceeded to apply at Chipata Municipal Council for the subdivision of Farm No. D24, Chipata to enable 16 beneficiaries, including Dean Mitchell, to obtain independent title deeds for the portions of the land they had bought.
- 2.5 The aforesaid application was approved through the Plans, Works and Development Committee Meeting. This was followed by another approval by the Ordinary Council Meeting. The Chipata Municipal Council notified the Defendant that the application was approved and the Council also informed the Ministry of Lands that the application to subdivide Farm D24 was approved and further recommended for subdivision E of Farm D24 to be approved. Further the recommendation for the subdividing and renumbering of the farm followed.
- 2.6 On 31st December, 2012 the Defendant executed an application for Consent to Assign for farm No. D/24/E to Dean Mitchell. This was followed by the Chipata Municipal Council writing to Dean Mitchell informing him that his

application to formalize subdivision E of farm D24 was approved.

2.7 The Plaintiff further claimed that Dean Mitchell on 4th May, 2013 paid the last installment of the purchase price for farm D24 subdivision E.

2.8 On 6th July, 2015 the said Dean Mitchell died wherein Graham Mitchell, his father took over the administration of his estate and further appointed Enrico Carretta as a representative of the family in Chipata since Dean Mitchell was originally from United Kingdom where his family lived.

2.9 Dean Mitchell's family agreed that his properties in Zambia be given out to his colleagues on condition that they offset the debts he had left. Consequently, the Plaintiff was offered farm No. D/24/E and he expressed interest in the property.

2.10 The condition given was for the Plaintiff to pay ZMW7,000.00 balance on the purchase price and ground rates for the same property amounting to ZMW600.00. Both amounts were paid to the PW2 on 31st March, 2016.

2.11 Further, on 13th May 2016 Graham Mitchell proceeded to give consent to transfer farm No. D/24/E to the Plaintiff and he

proceeded to take possession of the farm where he carried out farming activities in peace.

2.12 The Plaintiff avers that some time in July, 2016 the Defendant alleged that the Plaintiff had no authority to be on the land despite the Plaintiff's explanation of how he took possession of the land and the Defendant went ahead to sale a portion of land in issue to a Mrs. Jere.

2.13 On 30th December, 2019, the Defendant threatened to demolish the Plaintiff's property which threats caused the Plaintiff's family to report the matter to Chipata Central Police where they were advised to institute a civil action against Defendant.

2.14 The Plaintiff tried on numerous occasions to engage with the Defendant to resolve this matter amicably but all efforts have proved futile.

2.15 The Plaintiff claimed that he has been cultivating on the said land since 2016 producing for sell crops. The Plaintiff alleges that he had also planned to produce soya beans during the 2019 to 2020 farming season expecting a profit of ZMW56,000.00 and was planning to clear more land to

increase the acreage for growing crops but was not able to do so due to the Defendant's actions and as a consequence he has lost business to earn profits.

2.16 Therefore, by reason of the matters aforesaid the Plaintiff has suffered loss, farming time, mental stress, humiliation, damages and inconvenience.

3.0 DEFENCE

3.1 In Defence, the Defendant filed a memorandum of appearance and defence dated 23rd April, 2020. The Defendant denied the assertion that Plaintiff is a purchaser of farm D24 subdivision E, of Kauzu area in Chipata District. Instead the Defendant avers that the Plaintiff is an illegal occupier or squatter who should vacate the farm.

3.2 The Defendant admits that he is the son and administrator of the deceased. He denies the allegation that the Defendant appointed the PW2 as the vendor for Farm D24 subdivision E.

3.3 The Defendants admits having applied for the property in issue to be subdivided. And that he had applied at the

Chipata Municipal Council for the subdivisions which included the property for Dean Mitchell.

3.4 The Defendant avers that Dean Mitchell now deceased was offered to purchase subdivision E of farm D24 which measured 48 acres at ZMW1,000,000.00 (unrebased) per acre. The said purchaser paid a deposit of K28,000,000.00(unrebased) leaving a balance of ZMW20,000,000.00 (unrebased) which was to be paid on completion. The Defendant avers that Dean Mitchell still owes a sum of ZMW20,000.00 (rebased) balance of the purchase price.

3.5 The Defendant denies being violent towards the Plaintiff and states that he had only advised the Plaintiff to voluntarily vacate the said subdivision E of farm D24 Chipata since the legally recognized purchaser was Dean Mitchell and not the Plaintiff with whom the Defendant has no contractual relations. Therefore, the Plaintiff is not entitled to the reliefs sought or at all.

4.0 HEARING

- 4.1 At the trial hearing of the matter, PW1 was **Davison Chonde Mvula** the Plaintiff herein who gave sworn evidence. He testified that in 2010 he joined an association known as Hotels and Catering Association of Zambia Eastern Region wherein Dean Mitchell was also a member.
- 4.2 He stated that in the year 2013 Dean Mitchell and the Plaintiff were members of the Committee of the aforesaid Association. And in the same year he was murdered in the month of July, 2015 and as members of the association they were informed by Enrico Carretta. He was the link between them and the Parents to Dean Mitchell. The parents were in England and had travelled to Zambia for the funeral.
- 4.3 Later on, the Plaintiff testified that about October of the same year Dean Mitchell's parents travelled to Zambia for the memorial and disposing off the property of Dean Mitchell.
- 4.4 The Plaintiff testified that some time later, during one of the interactions with Enrico Carretta as the representative of the estate of the Deceased, he offered the Plaintiff, Dean Mitchell's

farm on condition that the he pays off the balance of the purchase price.

4.5 The Plaintiff was informed that Patrick Teleka Chirwa was the person who dealt with Dean Mitchell. The Plaintiff testified that Enrico Carretta showed him the statement of the debt and after which he was taken to see Patrick Teleka Chirwa.

4.6 The Plaintiff informed the Court that he was informed by Patrick Teleka Chirwa that Dean Mitchell was the owner of the land in issue and he had paid the purchase price in full before his demise. He also said that the only pending payments related to a balance on the purchase price and for ground rates. The money for both was given to Patrick Teleka Chirwa in the presence of Penius Banda as a witness. The payment was signed for and the document was taken to Enrico Carretta who released the file containing documents for the farm. After that payment the Plaintiff was shown the farm.

4.7 The Plaintiff indicated that one of the documents was a Contract of Sale, an affidavit, payments, council minutes for subcommittee planning unit, council minutes for the main committee council minutes, recommendation for subdivision,

consent to assignee, minutes from works and supply for a survey and a statement of debt or credit. Also, there were documents for formalization of subdivision which should have come after consent of assignee.

- 4.8 In the month of May 2016 consent was given by the father to Dean Mitchell, Graham Mitchell to transfer to the Plaintiff and thereafter the Plaintiff took possession of the Farm.
- 4.9 In the month of July, 2016, the Plaintiff informed the Court that he received a call from the Defendant who asked him if he was Mr. Mvula and if he had moved to Dean Mitchell's farm? The response was in the affirmative. The Defendant then informed him that he was on the farm illegally.
- 4.10 In the year 2019 the Defendant went to the farm and requested to see the Plaintiff. The Plaintiff sent his son Makandwa Mvula to meet him. The meeting resulted in the Defendant insisting that the Plaintiff should move out of the farm and also threatened the family for being illegally on the farm. The threats were reported to the Police. The Police advised that the matter be taken to court

4.11 According to the Plaintiff the documents he was given were showing that in the year 2007 an agreement was entered between Dean Mitchell and Patrick K. Chirwa who is PW2.

4.12 The Plaintiff now claims for a declaration that the farm belongs to him. And that the Court should consider his suffering and the harassment he has experienced. He claims loss of business since he was under threat from the Defendant and also the Plaintiff further claims that he has incurred expenses due to his movements from Chipata to Lusaka for Court proceedings, and that at the time of the trial it was his 8th trip.

Cross Examination

4.13 In cross examination the Plaintiff stated that he was not a party to the contract of sale agreement relating to the property in issue but he knew the parties had agreed on ZMW48,000,000.00 unrebased as the purchase price. The Plaintiff confirmed that he paid ZMK7,600.00 to purchase the property from the estate of Dean Mitchell.

4.14 The Plaintiff indicated that he had not conducted a search at the Ministry of Lands before he bought the property. The Plaintiff testified that property in issue was and is in the name

of the late Emmanuel Chirwa the father to the Defendant. And that he was not aware that it was in the name of the Defendant.

4.15 He informed the Court that Graham Mitchell, the father to Dean Mitchell had no certificate of title to transfer it to him since title had not yet passed to Dean Mitchell.

Re-Examination

4.16 In Re- examination, PW1 said that the property in issue is farm No. D24 subdivision E and also that there was nothing unsettling to purchase the property at ZMK7,600.00 for the reason that the Dean Mitchell's father had allowed the same property to be given to any friend of Dean on condition that he that he pays the debt pending on the said property.

4.17 PW2 was **Patrick Teleka Chirwa** who informed the Court that between 2018 – 2010 he had been given an assignment by the family to sale part of farm D24 in Chipata. Thereafter, customers started to show interest and whenever a purchaser paid for the property the money was shared among the family members. By the year 2010 they family had sold about 14 subdivisions of the farm in issue.

4.18 PW2 testified that, what followed was that some purchasers started to ask for their title deeds to be given to them. This prompted PW2 to go at Chipata Municipal Council where he was guided that the holder of the Certificate of title should write for the approval process. The Plaintiff was detailed on the procedure that would be followed to obtain the Certificate of Title. At the point for obtaining consent to assign PW2 took the forms to the Defendant.

4.19 He stated that Dean Mitchell was one of purchasers of the property in issue and it is this same property that was passed on to the Plaintiff. When the Plaintiff informed him of what had happened between him and the Defendant when he attempted to evict him from the property in issue, he tried to reason with the Defendant but it was to no avail.

4.20 PW2 informed the Court that when he was called at the Police station he informed them that the property was bought by Dean Mitchell which was later passed on to the Plaintiff.

Cross Examination

4.21 In cross examination, he stated that he was not the owner of the property in issue and that it was registered in the name of

the Defendant. There is no document to confirm that the Defendant had authorized to sale the property. And that the document purporting to be the contract of sale in the Plaintiff's bundle of documents relating to the property in issue did not have the Defendant's signature. But on the other hand, PW2 stated that he was assigned by the family to sale the subdivisions.

Re-Examination

4.22 There was no reexamination for this witness.

4.23 PW3 was Makenge Mvula the son to the Plaintiff. His evidence was more or less the same as that of the Plaintiff save to say in re-examination that he had sold about 16 subdivisions of the land in issue. PW2 said that he was an agent for and on behalf of the family as evidenced by his signature on the said subdivisions not just for Dean Mitchell contract.

Defence

4.24 DW1 was the **Defendant** who testified that he was the owner and title holder of the Farm in issue in extent of 1200 hectares on a 100-year lease from 1975.

- 4.25 He testified that in 2007 he authorized his sister Mwenge Chirwa to sale 48 acres of land from Farm D24 which was sold to Dean Mitchell at a price of ZMK48,000,000.00 unrebased
- 4.26 It was agreed with his sister that Dean Mitchell pays ZMK28,000,000.00 unrebased leaving a balance of ZMK20,000,000.00 which was to be paid upon issuance of the title in the purchaser's name.
- 4.27 In the year 2015 the Defendant summoned Dean and signed off the consent letter which was to be submitted to the Ministry of Lands to start the process of issuing the title deeds.
- 4.28 In the year 2016 Dean Mitchell died and none of the Administrators went to the Defendant to conclude the process therefore, the process of getting the title deeds stalled. He testified also that unfortunately his sister who he had authorized to transact on his behalf died in the year 2019. And in the same year the Defendant indicated that he discovered that the Plaintiff had illegally occupied the land in issue without any consent or authorization.
- 4.29 The Defendant also testified that he discovered that his brother PW2 had connived with the Plaintiff to exchange documents and

exchange moneys without his consent. Therefore, in the year 2019 the Defendant travelled to Chipata wherein he discovered that the Plaintiff was in possession of the property in issue. Consequently, Defendant gave the Plaintiff 30 days to vacate the piece of land which was ignored. After the 30 days' notice, the Plaintiff did not vacate.

4.30 Accordingly, the Defendant sent word that the structure on the property would be demolished which was also ignored. The Defendant went ahead to demolish and as a result PW3 served the Defendant with a summons to report at the police. And in the year 2021, The Defendant was served with an interim injunction restraining him from using the land wherein he had a Certificate of Title.

4.31 The Defendant conceded that he personally signed a consent letter to the Commissioner of Lands at the Ministry of Lands to transfer to Dean Mitchell. But the Plaintiff denies giving authority to PW2 to transact with the Plaintiff, as such the receipt of the moneys was without his authority.

4.32 In responding to the actions by Graham Mitchell transferring the property in issue to the Plaintiff, he testified that Graham

Mitchell was not the owner therefore could not pass on good title.

4.33 In relation to the contract of sale, the Defendant stated that he did not sign it. The parties connived with each wherein PW2 signed the contract instead of the Defendant.

4.34 The Defendant prays that the matter be dismissed for lack of merit. He states that he is the legal owner of the land.

Cross Examination

4.35 In cross examination he informed the Court that he did not authorize the sale of the land to the Plaintiff. He stated that title deeds were obtained on the 28th November, 2016. The title is for remaining extent of farm D24 but he did not agree that the mother title had the names of his deceased father.

4.36 He admitted authorizing his sister to sale portions of the land as subdivisions although there is no documentary evidence that he had authorized the sister to do that. The agreement that was entered by the sister with Dean Mitchell was not brought before Court. The final payment was supposed to be paid by Dean Mitchell upon the title being passed on to him. Further consent to assign has not been exhibited.

4.37 The Defendant denies that he got title of the land in his capacity as the first born or as an administrator but as the first-born son. He stated that he did not authorize PW2 to sale the land on his behalf.

4.38 He admits that Dean Mitchell paid part of the purchase price but that according to him that does not warrant that him as owner of the land since title has not yet passed to him. There is no evidence to show that Dean Mitchell paid the full purchase price.

Re- Examination

4.39 He indicated that the first owner whilst the father was alive was Mr. Mcpherson and that it only changed to the Defendant's name prior to 2016 whose exact date he cannot remember.

5.0 FINAL SUBMISSIONS FOR THE PLAINTIFFS

5.1 In the final submissions for the Plaintiff, it was submitted that the Plaintiff is the rightful owner of farm D24 subdivision E, Kauzu Area Chipata, the property in issue. It has been submitted that the said property was acquired by him from Dean Mitchell after he off-set the debt owed by Dean Mitchell to

Patrick Teleka Chirwa (PW2) an amount of ZMK7,000.00 and ZMK600.00 as ground rates.

5.2 The Plaintiff submits that he paid the said debt as confirmed by PW2 who has acknowledged receipt of it. It has been stated that PW2 was acting as an agent for the Defendant.

5.3 The Plaintiff contends that he has provided evidence of the sale of the property in issue between the Dean Mitchell and PW2 which is the Agreement Form and Payment sheet in the bundles of documents. The Plaintiff further contends that he satisfied the condition given by the family of Dean Mitchell so as to get the property transferred to him by paying the outstanding debt.

5.4 In support of this contention, reference was made to the *Learned Authors of Halsbury's Laws of England, 4th edition, who stated at paragraph 962, under heading, the Nature of Conditions Precedent*, where the following was said;

"The major categories of conditional promises are (1) Conditions precedent to the formation of the contract; and (2) Conditions suspensive of performance... A condition precedent to the formation of a contract... should be distinguished from a condition precedent to

the performance of the contract. In the former case, no contract comes into existence until the contingency occurs[while] in the latter case there is a contract but the obligations of one or both of the parties are suspended. Where the liability to perform only arises on the happening of the contingency or performance of the condition, the condition is called a condition precedent.”

5.5 It was submitted therefore that the Plaintiff performed his part of the contract by offsetting the debt incurred by Dean Mitchell to PW2 amounting to ZMK7,000.00 balance on the purchase price and ZMK600.00 for ground rates. The contract is said to be valid and binding between Dean’s father and the Plaintiff. And in turn Dean’s father performed his part by giving all the documentation relating to the said piece of land to the Plaintiff as exhibited in the bundles of documents.

5.6 The Plaintiff in relation to the ownership claim by the Defendant, contends that the Defendant is an administrator of the estate of his father being Emmanuel Chirwa wherein the property in issue formed part of the estate. The Plaintiff submits

that the said property in issue was sold by PW2 to Dean Mitchell and it was done in his capacity as the chosen family representative to sale subdivision E of farm D24 for the reason that the Defendant had relocated to Lusaka. PW2 admitted that he sold the property to Dean Mitchell and the purchase price was paid in full.

5.7 Further the Plaintiff submits that title was entered for the Defendant in relation to the remaining extent of Farm D24. This is supported by the description in the Defendant's bundles of document at page 2, showing that the land was in extent of 1800.9131 hectares being the remaining extent of Farm No. D24 situate in Lusaka Province of the Republic of Zambia and described on diagram No. 636 of 1998 but on page 3 of the same bundles of documents. The document stipulates that the total Area is 1802.8702 hectares of Farm D24 situated in the Eastern Province of the Republic of Zambia. Further on page 5 of the same land shows that the said land is in extent of 188.9131 hectares and was surveyed in 2017.

5.8 The Plaintiff submits that the aforementioned analysis shows a distinct and incurable discrepancies in the Certificate of Title.

Consequently, Plaintiff submits that the title is questionable and cannot be a true title of farm D24 subdivision E, Kauzu area in Chipata. It is contended that the property which the Defendant claims to possess is a land situated in Lusaka Province as evident in the aforesaid paragraph. Furthermore, it was stated that the parent title for farm D24 ought to equally reflect that the farm is situate in the Eastern Province and not in Lusaka. Notably the Certificate of Title exhibited is incomplete for not having the memorials on how the land has moved from one party to the other.

5.9 The Plaintiff further brought evidence to the effect that Dean Mitchell finished paying for the said piece of land. The Plaintiff also submits that there is evidence by the PW2 a brother to the Defendant to the effect that he had been given authority by the family to sale the subdivisions of the land in issue.

5.10 The Plaintiff submits that Defendant has conceded that he took over the land which was his late father's estate in his capacity as the firstborn son and administrator of his late father's estate.

6.0 FINAL SUBMISSIONS IN OPPOSITION

6.1 The Defendant submits that the Plaintiff does not have a Certificate of Title for subdivision E of farm D24 to warrant him being declared the legal owner of the property. Further the Defendant submits that the Plaintiff is squatter who should be evicted for failure to show proof of legal ownership to the land which ought to be evidenced by a Certificate of Title. Reference was made to ***Josiah Tembo, Henry Jawa vs Peter Mukuka Chiambala 2005/HP/0208***¹ wherein this Court stated that

“Legal ownership to land as the applicants are seeking is evidenced by way of production of Certificate of Title to the property in issue”

6.2 Further reference was made to section 33 of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia which provides as follows,

“A certificate of Title shall be conclusive as from the date of its issue and after the issue thereof, notwithstanding the existence in any other person of any estate or interest... the Registered Proprietor of land compromised in such Certificate shall except in

case of fraud, hold the same subject only to such encumbrances, liens or interests as maybe shown on such Certificates of Title...”

6.3 The Defendant therefore submits that the Plaintiff does not have a Certificate of Title to the property in issue to warrant him being declared the legal owner by this Court. Reference was made to the case of **Josia Tembo, Henry Jawa vs Peter Mukuka Chiambala**² Supra in which it was stated as follows;

“further, apart from the agreement and the letter alluded to above, no further steps were taken by the applicants or the deceased in the direction of obtaining title to the said portions. The steps I have in mind are such as pursuing the subdivisions, obtaining State Consent to Assign and indeed having the deceased or his estate execute a Deed of Assignment.”

6.4 The Defendant submits that the Plaintiff has not taken any steps in the direction of obtaining a Certificate of Title and a further perusal of the documents filed by the Plaintiff reveals that there is no contract of sale between the Plaintiff and the

Defendant. And there is no State Consent to Assign or Deed of Assignment executed for onwards lodging with the Registrar of Lands. So, the Plaintiff is a squatter on the property who has no right to the reliefs sought. It was submitted that in the case of **Fabiano Humane V.D.P Chinkuli 1971/HP/407³** unreported, where it was held as follows;

“a squatter is a person in mere adverse possession. And that the position in law was that his want of title dis-entitles him to any remedy in a Court of law”

6.5 Similarly, reference was also made to the case of **Raphael Ackim Namung’andu vs Lusaka City Council [1978] ZR 358⁴**, the Commissioner opined as follows;

“squatters build at their own risk and if the owner of the land withdraw their permission licence or if they decide to demolish a structure built in the absence of any permission or other lawful relationship, the squatter losses though very much regrettable, are not reversible in Court of law.”

6.6 The Defendant prays that the Plaintiff is not a legal and *bonafide* owner of the land in issue and the effect is assailed by the want

of the Certificate of title to the subject property. Therefore, there is claim by the Defendant that the Plaintiff ought to be found a squatter on the subject property with no entitlement to the reliefs sought.

6.7 The Defendant submits that the disputed property is a subdivision of the farm for which the Defendant has Certificate of Title as shown by the survey diagram exhibited in his Bundles of Documents at page 13. And that until a separate Certificate of Title is obtained the Defendant is the registered proprietor.

6.8 The Defendant states that he is a registered proprietor as evidenced by a Certificate of Title, thus he ought to be protected from unwarranted claims for possession or recovery of the said land. Reference was made to section 34 of the Lands and Deeds Registry Act which provides to this effect'

"No action for possession, or other action for the recovery of any land, shall lie or be sustained against the Registered Proprietor holding a Certificate of Title" for estate or interest in respect to which he is registered ..."

6.9 The Defendant submits that indeed there was a contract of sale where half of the purchase price as agreed was paid and the balance was to be paid on receipt of the Certificate of Title. The Defendant informed the Court that he had begun the process of change of ownership of title. But that following the passing of the Dean Mitchell none of his personal representatives approached the Defendant to conclude the process. It is in light of this that the Defendant submitted that the sale of the land in question to Dean Mitchell never materialized and thus title did not pass. Reference was made to the case ***Ackim Namung'andu vs Lusaka City Council (1978) ZR 358⁵***, where the Supreme Court held;

“A Contract of Sale of Land does not per se transfer ownership of land to the buyer and a mere payment of a deposit towards the purchase price does not transfer and Unitechna Limited SCZ Judgment No. 18 of 199 equally guided;

“we take judicial notice of the fact that a contract of sale does not per se transfer ownership of land to the buyer. Much more is required. There must be a Deed of

Assignment executed by the parties which must be lodged with the Registrar of lands together with necessary consents or licences.”

6.10 The Defendant thus submits that title to the subject property did not pass to Dean Mitchell when he paid the deposit. As instructed by the cases referred to, much more was required to be done. The record shows that Consent to Assign was not obtained, the parties did not execute a Deed of Assignment for further lodgment with the Registrar of Lands. Simply put, Dean Mitchell died before the sale transaction materialized and change of ownership effected.

6.11 The Defendant submits that the Plaintiff was duty bound to conduct due diligence to ascertain ownership before purchasing the subject property. Reference was made to the case of ***Ndongo vs Moses Mulyango, Roostica Banda***⁶ guided that;

“The purchasing of real property should not be taken as casually as purchasing of household goods.”

6.12 Defendant submits that the Plaintiff concedes to the unsettling purchase price for a property whose valued ranged between ZMK30,000.00- ZMK40,000.00 for ZMK7,600.00. The Plaintiff

also admitted that he did not deal directly with the Defendant.

PW3 further admitted that they did not conduct any due diligence on the property.

6.13 In relation to the exhibit produced, the contract of sale which is on page 1 of the Plaintiff's bundle of documents, the Defendant submits it is of no effect for the reason that it was entered into with PW2 who had no authority to sale on behalf of the Defendant and PW2 failed to prove that the proceeds from the purported sale of the subject property to the Plaintiff as per receipts on the record on pages 3,4 and 11 of the Plaintiff's bundle of documents were shared with or remitted to the Defendant.

6.14 Further, the Defendant submits that in view of the aforesaid issues in the preceding paragraph, the purported sale of farm D24 subdivision E to the Plaintiff was illegal and without force.

6.15 Additionally, it was also stated that no title to the land in issue had passed to Dean Mitchell prior to his death to justify the Plaintiff's claim that the title had passed to him. Therefore, the Plaintiff is a squatter on the subject property and should be evicted.

6.16 The Defendant further submits that the claims that Graham Mitchell, the Deceased's father consented to the transfer of the property in question to the Plaintiff on the basis of the letter produced on page 16 of the Plaintiff's bundle of documents makes it a proper case in which the principle of *nemo dat quod non-habit* rule should apply.

6.17 The father did not pass good title to the Plaintiff because he is not the owner of the subject property. Thus, the Plaintiff did not acquire good title to the property in question. Reference was made to the case of ***A.M.G Global Trust Limited vs The Administrator General and Caldoms Properties Limited Appeal No. 25 of 2020***⁷ where it was held:

"Therefore, no being an owner, he could not have passed good title to the purchaser."

6.18 Similarly, reference was also made to the case of ***Lonrho Cotton Zambia Limited vs Mukuba Textiled Limited vs Mukuba Textiles Limited [2002] Z.R. 43***⁸ where the said principle was applied and the Court held as follows:

"Where the goods are sold by a person who is not the owner thereof, and does not sell them under the

authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had.”

6.19 The Defendant submits that they have proved that title to the subject property had not passed to Dean Mitchell at the time of his death. As a consequence, neither his estate, nor administrator as the case may be, acquired any because the sale transaction did not materialize. Therefore, the letter on page 16 of the Plaintiff's bundle of documents has no effect.

6.20 Finally, it has been submitted that the Plaintiff's claim for a declaration that he is the legal owner of subdivision E of farm No. D24 is not tenable at law because he has no title to the land. The Defendant on the other hand is said to be the registered proprietor of the subject property as evidenced by the Certificate of Title. The Plaintiff is thus a squatter on the subject property and he is not entitled to any of the reliefs sought.

6.21 The Defendant prays that the injunction obtained by the Plaintiff against the Defendant on the subject property be lifted.

7.0 CONSIDERATIONS AND DECISION

- 7.1 I have critically considered the evidence in this matter and the eloquent submissions of the Parties.
- 7.2 It is common cause that the Defendant is a holder of a Certificate of Title for the remaining extent 1800.9131 of Farm D24 and title No 36253 which land was acquired in 1975. The said piece of land is said to be situate in Lusaka Province of Zambia which piece of land is more particularly delineated and described on Diagram No. 636 of 1998 and was surveyed in 1904. The diagram describes the property being 1802.870 hectares, of land being Farm D24 situated in Eastern Province and surveyed in 2017.
- 7.3 The Plaintiff has submitted that the discrepancies on the title are distinct and incurable thus making the title questionable and cannot be said to be true title of farm D24 subdivision E, Kauzu area. And further that the title which the Defendant is claiming to possess is the land situate in Lusaka Province as evidenced in the title exhibited in his bundles of document.
- 7.4 It is also common cause that subdivision E of Farm D24 was sold to Dean Mitchell at the price of ZMK48,000.00. And after

this the Defendant began the process of change of ownership such as signing the application form for state consent to assign upon receipt of the deposit. The said Dean Mitchell died before change of ownership was effected and later on the Plaintiff took possession of subdivision E of Farm D24. The Defendant demolished the Plaintiff's structures on the subject property.

7.5 My role is to establish whether the Plaintiff is the Legal owner of the property known as subdivision E, Kauzu area of farm D24 in Chipata. Further whether the sale of the property to Dean Mitchell was finalized and whether the Defendant as the owner of the property in issue authorized the sale of the property to the Plaintiff.

7.6 This claim is anchored on ownership of land and the effect of a having a certificate of title. The starting point is **Section 33 of the Lands and Deeds Registry Chapter 185 of the Laws of Zambia**, which provides that:

“A Certificate of Title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from

the President or otherwise, which but for Parts III to VII might be held to be paramount or to have priority; the Registered Proprietor of the land comprised in such Certificate shall, except in case of fraud, hold the same subject only to such encumbrances, liens, estates or interests as may be shown by such Certificate of Title and any encumbrances, liens, estates or interests created after the issue of such Certificate as may be notified on the folium of the Register relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever:

- (a) Except the estate or interest of a proprietor claiming the same land under a current prior Certificate of Title issued under the provisions of Parts III to VII; and*
- (b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and*

(c) *Except so far as regards any portion of land that may be erroneously included in the Certificate of Title, evidencing the title of such Registered Proprietor by wrong description of parcels or of boundaries.*

7.7 I also took time to look at **Section 58 of the Lands and Deeds Registry Chapter 185 of the Laws of Zambia, Section 58 of the Lands and Deeds Registry Act** which states as follows;

“Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer or mortgage from the Registered Proprietor of any estate or interest in land in respect of which a Certificate of Title has been issued shall be required or in any manner concerned to inquire into or ascertain the circumstances in or the consideration for which such Registered Proprietor or any previous Registered Proprietor of the estate or interest in question is or was registered, or to see to the application of the purchase money or of any part

thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.”

7.8 Furthermore, **Section 35 of the Lands and Deeds Registry Chapter 185 of the Laws of Zambia, Section 58 of the Lands and Deeds Registry Act** provides as follows;

“After land has become the subject of a Certificate of Title, no title thereto, or to any right, privilege, or easement in, upon or over the same, shall be acquired by possession or user adversely to or in derogation of the title of the Registered Proprietor.”

7.9 From the authorities cited above, it is clear that except in cases of fraud, a certificate of title shall be conclusive evidence of ownership as from the date of its issue, notwithstanding the existence in any other person of any estate or interest.

7.10 Further that except in cases of fraud, no person contracting or dealing with any estate or interest in land in respect of which a certificate of title has been issued shall be required to inquire on the circumstances in or the consideration for which such Registered Proprietor or any previous Registered Proprietor of the estate or interest in question is or was registered.

7.11 It is in the spirit of the above provisions that, no title, any right, privilege, or easement in, over the same, shall be acquired by possession or user adversely to or in derogation of the title of the Registered Proprietor.

7.12 In the case *in casu*, the Defendant has demonstrated that he is the Registered Proprietor of the property in issue and there is no dispute. The Plaintiff has exhibited documents that show that indeed the Defendant is the owner of the property. Therefore, for this reason the distinct discrepancies in the title identified by the Plaintiff are curable and I find them to be mere typographical errors on the title. Thus, Plaintiff's argument that the title is questionable at this point in their

final submission is without merit as there is no claim of fraudulent dealings in relation to the title in issue.

7.13 In order for this Court to establish whether the Plaintiff is the legal owner of the property it is imperative to go back to the background of how does the property in issue end up with the Plaintiff. It is not in dispute that the Plaintiff's claim arose from the letter dated 13th May, 2016 authored by the father to Dean Mitchell, Graham Mitchell transferring the property to the Plaintiff.

7.14 However, the Defendant also argues that title had not been passed to Dean Mitchell and for that reason Graham Mitchell in his capacity as his father cannot pass title to the Plaintiff which had not yet passed to Dean Mitchell at the time of the alleged transfer to the Plaintiff by Graham Mitchell.

7.15 I have also noted that the record does not show if the father to Dean Mitchell had obtained a court order as a vendor and or administrator to sell or transfer the property as per the provisions of the Intestate Succession Act Chapter 59 of the Laws of Zambia which provides under section 19(2) which provides:

“where an administrator considers that a sale of the property forming part of the estate of the deceased person is necessary or desirable in order to carry out his duties, the administrator may, with the authority of the court, sell the property in such manner as appears to him likely to secure receipt of the best price available for the property.”

7.16 Therefore, I find that Graham Mitchell had no good title to pass to the Plaintiff for the aforesaid reasons stated.

7.17 It is therefore my considered view that with the aforesaid finding in mind, the question whether the payment was made to PW2 in relation to the property in issue, whether PW2 had authority to sale the said property to the Plaintiff has been answered in determining the first question.

7.18 The property in issue was already a subject of a sale between Dean Mitchell and the Defendant. There is no dispute to that effect. And there is no dispute that this sale was incomplete thus title had not yet passed to Dean Mitchell or later on to his father as an administrator. And since PW2 admitted that the Defendant was the administrator for the estate of the

deceased and that title of the property in issue was in the name of the Defendant, therefore, with this in mind, it is only the Defendant who can transfer title of the property in issue to anyone of the following; to Dean Mitchell, to the father to Dean Mitchell and or the Plaintiff in his capacity as the title holder and administrator.

7.19 In the case at hand, I have found that title had not passed to the Dean Mitchell since the contract had not materialized. And I also find that there is no evidence that PW2 had any authority to sale to the Plaintiff since the person who ought to have given him that authority has denied it and there is no evidence to the contrary.

7.20 Therefore, with this in mind the documents signed by PW2 in relation to the property has no effect. So essentially the claim by the Plaintiff fails for having paid for the property to an unauthorized person and also for purchasing the property in issue from one who had no title or authority to sale.

7.21 The evidence on the record shows that the Defendant was only in the process of transferring the property to Dean Mitchell and there is nothing to show that the Defendant was

ever approached by any administrator upon the death of the Dean Mitchell to complete the transaction. Therefore, I agree with the submission by the Defendant and the case of **Josia Tembo, Henry Jawa vs Peter Mukuka Chimbala**⁹ in which it was noted as follows:

“further, apart from the agreement and the letter alluded to above, no further steps were taken by the applicants or the deceased in the direction of obtaining title to the said portions. The steps I have in mind are such as pursuing the subdivisions, obtaining State Consent to Assign and indeed having the deceased or his estate execute a Deed of Assignment.”

7.22 Therefore, the Plaintiff’s claim to have purchased the property in issue from Graham Mitchell who was not the owner has no merit. With the aforesaid analysis, the claim that Plaintiff be declared as the Legal and Registered owner of the property known as subdivision E of Farm D24 Kauzu area in Chipata of the Eastern Province fails.

7.23 As regards the issue of whether the Plaintiff is an are illegal squatters or not, I found comfort in the case of In **University**

of Essex v Djemal (1980) 1 W, R. 1301 (1980) ALL E.R.

742. CA¹⁰ wherein the Court held that as follows:

“the jurisdiction in question is a jurisdiction directed to protecting the right of the owner of the property to possession of the whole of his property, interfered with by unauthorized adverse possession. In my judgment, the jurisdiction to make a possession order extends to the whole of the owner’s property in respect of which his right of occupation has been interfered with...”

7.24 In the case of **RAPHAEL ACKIM NAMUNG'ANDU v LUSAKA CITY COUNCIL (1978) Z.R. 358 (H.C.)¹¹** Justice Ngulube as he was then had this to say;

“Squatters build on their own risk and if the owners of the land withdraw their permission or licence or if they decide to demolish a structure built in the absence of any permission or other lawful relationship, the squatters' losses though very much regrettable are not recoverable in a court of law.”

7.25 The Plaintiff's averment in the pleadings and statements of claim to the effect that the property in issue was transferred to him by Graham Mitchell after payment to the PW2 has failed. Consequently, the Plaintiff's claim for vacant possession is untenable. Also, since the Plaintiff has no consent or authority to be on the said property from the Defendant, the title holder, I find that the Plaintiff is a squatter who has no authority or consent from the Defendant.

7.26 By means of the above analysis, the claim by the Defendant to declare the Plaintiff as illegal squatter and to order for the Defendant to have possession of the said property succeeds.

7.27 As regards the claim for damages, the same fails as a consequence of the aforesaid finding.

7.28 It is further ordered that the Plaintiff and any other person in occupation of that land or carrying out any farming works on the said land should vacate within (60) days from the date of this judgment.

8.0 The interim injunction is herein discharged.

9.0 Each party to bear their own costs.

10.0 Parties are informed of the right to appeal to the Court of Appeal within thirty (30) days.

Dated at Lusaka, this 10th day of August, 2023.



**M.M.BAH-MATANDALA
HIGH COURT JUDGE.**

