

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



2021/HP/1563

BETWEEN:

**JONAS LUDIYA****PLAINTIFF**

AND

**PRIDE MWELWA  
WELLES NJOLOMBA  
PRIMPICHI TRAVEL AND TOURS LIMITED**

**1<sup>st</sup> DEFENDANT  
2<sup>nd</sup> DEFENDANT  
3<sup>rd</sup> DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 26<sup>th</sup> DAY OF  
SEPTEMBER, 2024**

*For the Plaintiff : Mrs. F. Muchiya, Messrs Florence Muchiya and Associates*  
*For the 1<sup>st</sup> Defendant : No appearance*  
*For the 2<sup>nd</sup> Defendant : No appearance*  
*For the 3<sup>rd</sup> Defendant : No appearance*

---

## **J U D G M E N T**

---

CASES REFERRED TO:

1. *Kelly v Solari 1841 9 M & W 502*
2. *Cavmont Merchant Bank Limited v Amaka Agricultural Development Company Limited SCZ No 12 of 2001*

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court of England, 1965, 1999 Edition*

OTHER WORKS REFERRED TO:

1. *Black's Law Dictionary, 8<sup>th</sup> Edition*
2. *Chitty on Contracts, Volume 1 General Principles, 33<sup>rd</sup> Edition, Sweet and Maxwell Thomas Reuters, 2018*
3. *Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 32*

## **1. INTRODUCTION**

1.1 Jonas Ludiya, seeking repayment of funds that he paid for the purchase of a property, commenced these proceedings against Pride Mwelwa, a director in a company known as Primpichi Travel and Tours Limited, which company is also a third defendant in these proceedings, as well as against Welles Njolomba, the purported owner of the property which was up for sale.

1.2 The proceedings were commenced by Writ of Summons which was accompanied by a statement of claim, and the other documents seeking:

- i. An Order for the refund of the sum of K250, 000.00 being the amount that Jonas Ludiya paid to Pride Mwelwa and Welles Njolomba for the purchase of the property known as Stand No 23773/M, Silverest Lusaka;*
- ii. Damages for breach of contract;*
- iii. Interest;*
- iv. Costs;*
- v. Any other relief that the Court may deem fit.*

## **2. STATEMENT OF CLAIM**

2.1 In the statement of claim, Jonas Ludiya stated that sometime in November, 2021, he was approached by Pride Mwelwa, who informed him that he was selling two plots in Silverest Lusaka, which were valued at K300, 000.00 and K250, 000.00 respectively. He averred that he entered into an agreement with Pride Mwelwa for the purchase of the

property known as Plot Number L/23154/M Silverest at the sum of K300, 000.00.

- 2.2 Thereafter, Jonas Ludiya and Pride Mwelwa decided to transact in another property, being Plot No 2377/M Silverest, which was valued at K250, 000.00, and which property was registered in Welles Njolomba's name. It was stated that Pride Mwelwa presented himself as the joint owner of the said property, Plot No 2377/M Silverest, even though it was registered in Welles Njolomba's name.
- 2.3 Further averment was made, that Pride Mwelwa received part of the purchase price for the property with the full knowledge and consent of Welles Njolomba. He added that the purchase price of K250, 000.00 was paid in three instalments totaling K250, 000.00. Then when Jonas Ludiya moved onto the property with a view to start construction on it, he was stopped by Mrs. Chisha, who claimed to be the owner of the property.
- 2.4 That was how he engaged Pride Mwelwa and Welles Njolomba for a refund of the money that he had paid for the purchase of the property, as a search at the Ministry of Lands revealed that the certificate of title for the property was illegally issued. This was because the property that Jonas Ludiya was shown by Pride Mwelwa and Welles Njolomba belonged to Mrs. Chisha, and the one that had the names of Pride Mwelwa belonged to a Victor Mulenga.
- 2.5 He averred that Pride Mwelwa issued cheques in the name of Primpichi Travel and Tours Limited, a company in which

Pride Mwelwa and his wife were Directors and Shareholders in an attempt to refund him the monies that he paid. However, the cheques could not be paid, due to insufficient funds in the account.

### **3. DEFENCE**

- 3.1 In a defence which was filed on 23<sup>rd</sup> May, 2022, Pride Mwelwa denied having been the co-owner of the property, Lot No 23773/M, stating that he only had an interest in the property, as it was collateral for a loan that Welles Njolomba had obtained from him. He further denied having received the full purchase price, contending that he only received K100, 000.00, with K10, 000.00 having been sent to him through e-wallet, while K90, 000.00 was transferred through an ABSA account.
- 3.2 The assertion that the property Lot No 23773/M belonged to Welles Njolomba was said to be within Jonas Ludiya's peculiar knowledge. Pride Mwelwa denied having approached Jonas Ludiya and informing him that he had a property for sale, contending that he was introduced to Jonas Ludiya by agents, as he was seeking to buy land. That was how Pride Mwelwa had told Jonas Ludiya that Welles Njolomba had land in Silverest, which he was selling at K300, 000.00 and K250, 000.00 respectively.
- 3.3 It was denied that the property, Plot Number L/23154/M was sold at K300, 000.00, the defence being that it was sold at K250, 000.00, and that the said property was registered in Welles Njolomba's names. Therefore, the contract of sale

was entered into between Welles Njolomba and Jonas Ludiya, while Pride Mwelwa signed as a witness.

- 3.4 Pride Mwelwa denied that he presented himself as a joint owner of the property, and he maintained that he only received K100, 000.00 for the sale of the property to recover what he lent out to Welles Njolomba. He also stated that Jonas Ludiya reported the matter to Chalimbana police.
- 3.5 The allegation that Jonas Ludiya was stopped from constructing on the property by a Mrs Chisha who claimed ownership of the property, was said to be within Jonas Ludiya's peculiar knowledge, and Pride Mwelwa alleged that he only came to know about the discrepancies in the certificate of title, when Jonas Ludiya brought it to his attention.
- 3.6 He denied having been elusive and contended that Jonas Ludiya put him under duress to issue out cheques in the names of his company, Primpichi Travel and Tours Limited, as a security measure, when the company had no funds in its' account.
- 3.7 The assertion was that Pride Mwelwa had made efforts to pay back the money to Jonas Ludiya, and at the time that he settled the defence, he had paid back K38, 500.00, and he had been trying to locate Welles Njolomba whose whereabouts remained unknown.

#### **4. DEFENCE BY WELLES NJOLOMBA**

- 4.1 Welles Njolomba did not enter appearance or file a defence. This Court on 28<sup>th</sup> January, 2022, granted an Order in

favour of Jonas Ludiya to serve Welles Njolomba the Court process by substituted service, by advertisement in the daily newspapers which enjoy wide circulation in the country. An affidavit of service was filed on 17<sup>th</sup> February, 2022, which showed that the Court process was advertised in the Zambia Daily Mail newspaper on 7<sup>th</sup> and 8<sup>th</sup> February, 2022.

- 4.2 A default Judgment was entered against Pride Mwelwa and Welles Njolomba on 28<sup>th</sup> February, 2022, and Pride Mwelwa applied to set aside the said Judgment on 14<sup>th</sup> March, 2022. The default Judgment against Pride Mwelwa was set aside on 9<sup>th</sup> May, 2022, and instead Judgment on admission was entered against him for the sum of K100, 000.00, with the disputed amount of K150, 000.00 to proceed to trial.

## **5. EVIDENCE LED AT TRIAL**

- 5.1 At trial, only Jonas Ludiya was before Court. An affidavit of service was filed on 8<sup>th</sup> May, 2024, which showed that Pride Mwelwa was served the notice of hearing for trial. Jonas Ludiya produced his witness statement as his evidence before Court.
- 5.2 It was his testimony, in that witness statement, that sometime in November, 2021, he was looking for land to buy in Lusaka, so that he could build a house, having resigned from his employment. He explained that he approached an estate agent, named Christine, who is a teacher by profession. The evidence that was further given, was that Christine informed him that Pride Mwelwa had plots in Silverest that he was selling.

- 5.3 Thus, when Jonas Ludiya contacted Pride Mwelwa, he was informed that Pride Mwelwa was selling two plots in Silverest at K300, 000.00 and K250, 000.00 respectively. That was how he had opted to buy the plot which was being sold at K250, 000.00. However, a few days later, Pride Mwelwa had called him, and informed him that he had changed his mind about selling the land, and that he would instead sell him another plot.
- 5.4 It was stated that Jonas Ludiya was offered the property 23733/M also situate in Silverest, which was in the names of Welles Njolomba. He further testified that he was informed that Pride Mwelwa and Welles Njolomba would share the proceeds of the sale, as they were business partners.
- 5.5 Jonas Ludiya's testimony was that he was given a copy of a certificate of title, which was in Welles Njolomba's name by Pride Mwelwa, which was at pages 1-7 of his bundle of documents.
- 5.6 Thereafter, a contract of sale was executed between himself and Welles Njolomba, and Pride Mwelwa signed as a witness. Pages 8-15 of Jonas Ludiya's bundle of documents were identified as the said contract of sale.
- 5.7 His testimony was that he paid the purchase price of K250, 000.00 in three instalments, that is K150, 000.00 cash to Pride Mwelwa, who was in the company of Welles Njolomba. Then K10, 000.00 was paid to Pride Mwelwa's mobile money account, and K90, 000.00 was paid to an account that Pride Mwelwa provided in the names of Mukuka Mukuka. The

deposit slip for that amount was stated as being at page 16 of Jonas Ludiya's bundle of documents.

- 5.8 Then when Jonas Ludiya started building on the land, he was stopped by a lady named Mrs. Chisha, who claimed that the land was hers, and she asked him to demobilize from the property. It was also his testimony, that when he decided to inform Pride Mwelwa and Welles Njolomba about the state of affairs, and he demanded that they refund him the money that he had paid, as only Five (5) days had elapsed since he had paid the money, they became elusive.
- 5.9 The evidence that Jonas Ludiya also gave, was that when they met at Pride Mwelwa's house, which also has an office, Pride Mwelwa had asked Jonas Ludiya to direct all the questions at him, and not Welles Njolomba, as the said Welles Njolomba was working under him. Jonas Ludiya's continued testimony was that Pride Mwelwa called his wife, and informed her that he was issuing cheques to the tune of K250, 000.00 from their company, being Primpichi Travel and Tours Limited.
- 5.10 It was stated that Pride Mwelwa made Welles Njolomba sign a document agreeing on which date he would refund him since they had shared the money equally. With reference to pages 17-21 of his bundle of documents, Jonas Ludiya testified that the cheques could not be cashed at the bank due to insufficient funds.
- 5.11 His evidence was that he reported the matter to Chalimbana Police where the investigations established that Pride

Mwelwa and Welles Njolomba had acted fraudulently, as the property that they attempted to sell to him was not genuine, as it did not belong to them.

5.12 Then from there, Jonas Ludiya engaged Counsel from Messrs John Chibalabala Legal Practitioners, who conducted a search at the Ministry of Lands on the property, which revealed that the land that he was shown physically belonged to Mrs. Chisha, and that the land that he had bought, was not bare land, but had a flat of four houses, and that the said property belonged to Victor Mulenga. The printout from the Lands Register was stated as being at pages 22-26 of Jonas Ludiya's bundle of documents.

5.13 He stated that during the course of investigations, Pride Mwelwa made some payments at the police, but the said money could not be given to him until the refund was made in full. That was how this matter was commenced. Jonas Ludiya testified that he had suffered loss, as he could not buy another property as the money was being paid in bits and pieces.

#### **EVIDENCE BY PRIDE MWELWA**

5.14 Pride Mwelwa did not testify but he did file a witness statement.

5.15 ***Order 38 Rule 2A (11) of the Rules of the Supreme Court of England*** provides as follows with regard to witness statements:

***“(11) Where a party serves a witness statement under this rule, no other person may make use of***

*that statement for any purpose other than the purpose of the proceedings in which it was served*

*(a) unless and to the extent that the party serving it gives his consent in writing or the Court gives leave; or*

*(b) unless and to the extent that it has been put in evidence (whether pursuant to a direction under paragraph (7)(a) or otherwise).*

5.16 **Rule 7 (a)** states that:

*“(7) Subject to paragraph (9), where the party serving the statement does call such a witness at the trial -*

*(a) except where the trial is with a jury, the Court may, on such terms as it thinks fit, direct that the statement served, or part of it, shall stand as the evidence in chief of the witness or part of such evidence;*

5.17 Therefore, while the witness statement for Pride Mwelwa was filed, it was not produced as evidence, as he did not testify in this matter.

## **6. DECISION OF THIS COURT**

6.1 I have considered the evidence.

### **FACTS NOT IN DISPUTE**

6.2 It is not in contention, that Jonas Ludiya and Welles Njolomba executed a contract of sale for the property known as Plot No 23773/M Silverest, Lusaka, on 5<sup>th</sup> November,

2021, at a consideration of K250, 000.00. It is also not in dispute, that Pride Mwelwa was introduced to Jonas Ludiya as the person who was selling the said property, Plot No 23773/M Silverest Lusaka.

- 6.3 It is common cause that Jonas Ludiya claims that he paid the purchase price of K250, 000.00 in full to Pride Mwelwa. The facts which are further not in contention, are that Pride Mwelwa claims that he only received K100, 000.00 out of the K250, 000.00, and contends that Welles Njolomba received the K150, 000.00.
- 6.4 What is also common cause, is that Pride Mwelwa has paid some amounts of money towards the sum of K250, 000.00 that is claimed.

#### **ISSUES IN DISPUTE**

- 6.5 It is in dispute whether Pride Mwelwa and Welles Njolomba owe Jonas Ludiya the amount of K150, 000.00?

#### **ANALYSIS**

- 6.6 The evidence which was given by Jonas Ludiya, was that he was introduced to Pride Mwelwa in November, 2021, by an estate agent, a teacher called Christine, who informed him that Pride Mwelwa was selling two plots in Silverest at K300, 000.00 and K250, 000.00 respectively. He was offered the property No 23773/M which is also situated in Silverest, which was in Welles Njolomba's name, and he was informed that Pride Mwelwa and Welles Njolomba would share the proceeds of sale as they were business partners.

- 6.7 Thus, a contract of sale was executed between Welles Njolomba and Jonas Ludiya, and Jonas Ludiya paid the K250, 000.00 to Pride Mwelwa in three instalments, that is K150, 000.00 in cash, K10, 000.00 through mobile money and K90, 000.00 through the bank in an account, which was in the names of Mukuka Mukuka, which Pride Mwelwa provided.
- 6.8 Then after payment, Jonas Ludiya went to the property with a view to start construction, and he was stopped from doing so by a lady called Mrs Chisha, who claimed ownership of the property. That was how Jonas Ludiya informed Pride Mwelwa and Welles Njolomba about the development, and he demanded a refund of the payment.
- 6.9 He also engaged the advocates, John Chibalabala Legal Practitioners, who on conducting a search on the property at the Ministry of Lands, established that the physical property that Jonas Ludiya was shown belonged to Mrs Chisha, and that the property that he had contracted to buy, was in fact not bare land, but had a flat of four houses on it, and it belonged to Victor Mulenga.

### **DECISION**

- 6.10 The evidence that is on record, shows that Welles Njolomba and Jonas Ludiya executed a contract of sale for the property known as Plot No 23773/M Silverest, on 5<sup>th</sup> November, 2021 at K250, 000.00. What the evidence also shows, is that Pride Mwelwa is the person that concluded the sale with Jonas Ludiya, and according to Jonas Ludiya's testimony, the

contract of sale was between himself and Welles Njolomba because the certificate of title for the property, was in Welles Njolomba's name.

- 6.11 He further stated that Pride Mwelwa had informed him that he would share the proceeds of the sale with Welles Njolomba as they were business partners.
- 6.12 On the face of it, there was a valid contract of sale. However, it later turned out that the physical property that Jonas Ludiya was shown, as the property that he had purchased, belonged to Mrs Chisha. The document at page 23 of Jonas Ludiya's bundle of documents, which is a report of the location of the property, Lot No 23773/M Silverest, which shows that the actual location of the property which was shown to Jonas Ludiya, as Plot No 23773/M, was in fact Plot No 23771/M, and that the actual property, Plot No 23773/M had actually been developed with four flats.
- 6.13 The Lands Register at page 21, shows that the property, Plot No 23773/M is in Victor Mulenga names. Therefore, the certificate of title in Welles Njolomba's name, which is at pages 1-7 of Jonas Ludiya's bundle of documents, was not a genuine document.
- 6.14 It consequently follows that Welles Njolomba and Pride Mwelwa could not have legally sold the property, Plot No 23773/M to Jonas Ludiya, as they did not own it. Further, it will be noted that Pride Mwelwa acted as an agent in this matter, as the property was presented as purportedly owned by Welles Njolomba.

6.15 In the case of ***Cavmont Merchant Bank Limited v Amaka Agricultural Development Company Limited*** <sup>(2)</sup> it was held that:

***“We agree that it is trite law that where an agent, in making a contract discloses both the interests and names of the principal on whose behalf it purports to make a contract, the agent, as a general rule is not liable on the contract to the other contracting party. This is the law of agency and we have no problem with it.... Where an agent is the contracting party, he will be held personally liable even if he names his principal.”***

6.16 In this matter, the evidence clearly shows that Pride Mwelwa was the contracting party as the agent, even if he named the principal, Welles Njolomba. It has been seen that there was in fact no property which was owned by Welles Njolomba that could have been legally sold to Jonas Ludiya. Therefore, there was no valid contract at law.

6.17 Jonas Ludiya established that while Pride Mwelwa negotiated the sale, Welles Njolomba was also present as the seller of the property. Therefore, both Pride Mwelwa and Welles Njolomba as agent and principal participated in the sale.

6.18 At page 16 of Jonas Ludiya’s bundle of documents is a transfer of K90, 000.00 into Mukuka Mukuka’s account which is dated 10<sup>th</sup> November, 2021. Jonas Ludiya testified that Pride Mwelwa gave him that account number, so that

the money could be transferred there. Pride Mwelwa admitted that he received that money together with K10, 000.00 which was sent to him through mobile money. Therefore, he admitted having received K100, 000.00.

6.19 That said, Jonas Ludiya in the scheduling conference brief argued that Pride Mwelwa had been unjustly enriched by the receipt of the money. ***Black's Law Dictionary, 8<sup>th</sup> Edition at page 1573*** was referred to, which defines *unjust enrichment* as:

***“Retention of a benefit conferred by another without offering compensation in circumstances where compensation is reasonably expected.”***

6.20 ***Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 32 at paragraph 67*** states that:

***“A mistaken payment, may in principle be recovered, whether the mistake was of fact or of law.”***

6.21 In the case of ***Kelly v Solari*** <sup>(1)</sup> it was held that:

***“The knowledge of the facts which disentitles the party from recovering must mean a knowledge existing in the mind at the time of payment. And that generally speaking, the money may be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact”.***

6.22 **Chitty on Contracts, Volume 1 General Principles, 33<sup>rd</sup> Edition, Sweet and Maxwell Thomas Reuters, 2018 in paragraph 29-002 at page 2114** states that:

*“The obligation to make restitution can arise in a wide variety of situations, but their common framework is that they involve a special relationship between two persons, where the law imposes a duty on one person to pay a sum of money or exceptionally, to deliver specific property to another or hold property for another. This relationship is based either upon the involuntariness of an initial payment of money, transfer of property or the provision of a service... Indeed, the law of restitution is subordinate to the law of contract in that if a contractual relationship subsists between the parties, the contractual regime will prevail. Restitutionary liability, although like tortious liability, in that it is imposed upon the Defendant by operation of the law, differs from such liability, in that it need not be founded on the commission of any wrong doing, although as will be seen, such remedies are sometimes available where a defendant has profited from the commission of a tort.”*

6.23 Then in **paragraph 29-003 at page 2115**, the learned authors state that:

*“The common law has not been alone in providing restitutionary remedies. Equity independently developed some principles which are aimed at the same result of giving up to the claimant benefits obtained. In equity, such restitutionary remedies may involve restoring the value to the claimant or the return of property obtained or its’ traceable substitute. In equity, restitutionary principles have been influential in a number of ways. First in the constructive trust, whereby the Defendant is deemed to be the trustee of the property for the claimant by operation of the law, so that the claimant as beneficiary is able to recover what is due to him.*

*Secondly, the better developed rules of tracing in equity enable the claimant to recover the property or its’ substitute from the Defendant despite being mixed with other property. Thirdly, there is the equitable remedy of an account of profits which involves the return of the value to the claimant when the Defendant had profited from the commission of an equitable wrong. Fourthly, the equitable doctrine of acquiescence has enabled relief to be given to a person who has expended money on the property of another. Fifthly, the equitable concept of unconscionability has proved*

***important in the development of certain grounds of unjust enrichment.”***

## **5. CONCLUSION**

5.1 Pride Mwelwa having been a purported contracting party, he is liable to pay Jonas Ludiya the full amount of K250, 000.00 which was paid as the purchase price for the property. The record shows that he made payments as follows:

- i. K20, 000.00 on 6<sup>th</sup> May, 2022
- ii. K10, 000.00 on 26<sup>th</sup> May, 2022
- iii. K15, 000.00 on 18<sup>th</sup> August, 2022
- iv. K15, 000.00 on 11<sup>th</sup> November, 2022

Total	K60, 000.00
-------	-------------

5.2 I had earlier entered Judgment in Jonas Ludiya's favour for the amount of K100, 000.00 against Pride Mwelwa. K60, 000.00 having been paid leaves a balance of K40, 000.00 unpaid.

5.3 I accordingly enter Judgment in favour of Jonas Ludiya against Pride Mwelwa, for the sum of K150, 000.00, bringing the total amount unpaid to K190, 000.00. For Welles Njolomba the purported seller of the property, Judgment is entered against him for the entire K250, 000.00. The amount due shall carry interest at the average short-term deposit rate from the date of issue of the Writ of Summons until Judgment, and thereafter, at the Bank of Zambia lending rate until payment.

5.4 Jonas Ludiya having succeeded, he is awarded costs of the action, which shall be taxed in default of agreement. Leave to appeal is granted.

**DATED AT LUSAKA THE 26<sup>th</sup> DAY OF SEPTEMBER, 2024**

*kaunda*  
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**

