

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

IT  
2023/HP/2249

*BETWEEN:*

**DANIEL LUNGU**

**PLAINTIFF**

**AND**

**OWEN JOHN NDEBELE**

**DEFENDANT**



**BEFORE: HONOURABLE, LADY JUSTICE G. C. CHAWATAMA**  
**ON THE 30<sup>TH</sup> JANUARY, 2025**

*For the Plaintiff* : Mr. A. Malando, Legal Aid Counsel from Messer  
Legal Aid Board.  
*For the Defendant* : No appearance

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**JUDGMENT**

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**CASES REFERRED TO:**

1. *Khalid Mohammed V Attorney General* (1982) Z.R 49
2. *Gillian Kasempa Mutinta V New Future Financial Company and Another Appeal No 13 of 2023*

## 1.0 INTRODUCTION

1.1 The Plaintiff on the 8<sup>th</sup> December, 2023 commenced this matter by way of a writ of summons accompanied by a statement of claim. The writ was endorsed with the following claims:

- 1. Specific performance and complete the sale of subdivision L/8324/M.**
- 2. A declaration that the Defendant receives ZMW 75,000.00 being money paid as refund in a breached agreement.**
- 3. The Damages for inconvenience from 7<sup>th</sup> January, 2023.**
- 4. Interest on sums found due.**
- 5. Any other relief as the court may deem fit.**
- 6. Costs**

2.2 In the statement of claim filed, it was averred the Plaintiff is, and was at all material times, a businessman resident within the jurisdiction of this Court. That the Defendant is and was at all material times a businessman resident of Lusaka.

2.3 That the Defendant through a Facebook post did cause to advertise for sale subdivision L/8324/M in Kalundu Area of Lusaka west, which measures 1 acre including the orchard for the total sum of ZMW 250,000.

2.4 That the advert further stated that he was putting up for sale half acre together with the orchard and that is what enticed the Plaintiff to buy the piece of land. That later the Defendant

approached the Plaintiff, asked to be lent money and promised to pay back in 45 days time.

- 2.5 It was averred that the Defendant knew from the onset that he was selling 1 acre of land, that when the Plaintiff had paid for half of an acre. That when the Plaintiff was approached to lend the Defendant money and that when he failed to pay back the money, the Defendant told the Plaintiff that he was adding another half-acre to make it 1 acre in total extent.
- 2.6 That the Defendant even encouraged the Plaintiff to proceed and engage a land surveyor and started the process of getting the certificate of title.
- 2.7 It was further averred that the Plaintiff was taken aback when the Defendant came back and said that his children had refused him to sell the land together with the orchard, forgetting that at one point in time he said his children had allowed him to sell the land in extent of 1 acre.
- 2.8 That the Plaintiff through his legal representative Legal Aid Board caused to be issued a letter of demand in April, 2023 to which the Defendant entered into an agreement through his lawyers that he completes the sale of half-acre and refused ZMW 125,000.00.

2.9 That the Defendant paid ZMW 25,000 to the Plaintiff immediately and promised to pay the full outstanding balance in a week's time, on 30<sup>th</sup> June, 2023, ZMW 50,000 was paid through counsel and the Plaintiff refuses such alteration to the initial agreement which he has breached with impunity even after several reminders. That the Defendant has refused or neglected to complete the sale of the 1acre land to the detriment and inconvenience of the Plaintiff.

2.10 That the Plaintiff made several demands on the Defendant to complete the sale of the piece of land described as subdivision L/8324/M measuring the extent of 1 acre.

### **3.0 THE DEFENDANT'S DEFENCE**

3.1 The Defendant filed its defence on the 8<sup>th</sup> February, 2024. Wherein it was averred that the Defendant denies so far as it states that the Defendant at all material times through a facebook post did cause to advertise for sale subdivision L/8324/M in Kalundu area of Lusaka West, which measure 1 acre including the orchard for the total sum of K250,000. According to the Defendant he only advertised for a portion measuring 50 meters square by 25 meter acre and that the Plaintiff purchased the same at a consideration K152,000 on the 7<sup>th</sup> January, 2023 through a bank transfer and that the

transaction was successfully done and that the Plaintiff erected some structure.

- 3.2 It was further stated that the Defendant approached the Plaintiff to lend him some money and that half an acre was used as a collateral.
- 3.3 That according to the Defendant the only money he got from the Plaintiff was K98,000 and not the mentioned amount in the demand letter and the statement of claim. That the Defendant was misguided by his lawyers but that the Defendant refunded part payment as stated in the statement of claim amounting to K75,000 and leaving a balance of K23,000 and no K75,000 as claimed by the Plaintiff.
- 3.4 It was averred that whilst the internal process between the parties' lawyers were negotiating on the payment, the Defendant was looking for means and ways how to offset the balance.

#### **4.0 THE PLAINTIFF'S REPLY**

- 4.1 It was averred that according to the Defendant's defence, the Plaintiff avers that half of acre was advertised and paid for in full but that the Defendant approached the Plaintiff with a view of borrowing money and actually did borrow. That when

he failed to pay back the Defendant offered to add another half of acre of land to offset the debt.

4.2 That as regards the contention that the Defendant was misguided by his lawyers, it was contended that this issue was never raised anywhere. That the Defendant agreed to every term of the agreement at his lawyer's firm.

4.3 That the Defendant paid at the meeting ZMW 25,000 and gave himself 2 weeks without cohesion to clear the balance of ZMW 100,000.

## **5.0 HEARING**

5.1 At the hearing of this matter, the Defendant was not before Court. The affidavit evidence on record reveals that the Defendant was served notice of hearing by counsel for the Plaintiff.

5.2 The Plaintiff testified as **PW1**, the sum total of his evidence was that sometime on the 21<sup>st</sup> February, 2023, the Plaintiff entered into a sale agreement with the Defendant for an entity known as subdivision of Lot No. 8324/M/AA Kalundu, Lusaka. That the agreement was for a consideration of K250,000 of a 70meters x70meters plot as per sketch map.

5.3 The Plaintiff told the Court that even after being paid in full, the Defendant held over and declined to give vacant

possession of the land to the Plaintiff. That the Defendant has without the Plaintiff's consent continued to occupy certain parts of the land.

5.4 The Plaintiff is unaware of any agreement or arrangement between the Defendant and his children with regards to the sale of the land. That in any event, if there was any such agreement between the Defendant and his children, such agreement or arrangement was never brought to the attention of the Plaintiff either in the advert or at the point of receiving the purchase price. Also, that, if there was any agreement that existed on the property between the children and the Defendant, such agreement came to an end when the property was assigned to the Plaintiff as the Plaintiff bought the property free of any encumbrances.

## **6.0 SUBMISSION**

6.1 It was submitted that the counsel for the Plaintiff insofar as it relates to the relief sought by the Plaintiff that, the Plaintiff will rely on the copy of the certificate of title given to him by the Defendant. As regards specific performance, the Court was referred to the case of **Wesley Mulungushi v Catherine Bwale Mzi Chomba**<sup>1</sup>, wherein the Court held that:

*"The Court will decree specific performance only if it will do more perfect and complete justice than the award of damages. When the matter in dispute is land a very valuable commodity whose*

*loss may not adequately be atoned in damages, specific performance would do more perfect justice”.*

## **7.0 ANALYSIS AND THE DECISION OF THIS COURT**

7.1 I have considered the contents of the pleadings in this matter together with the evidence adduced by the Plaintiff. As stated above, the Defendant's filed a memorandum of appearance and defence. When this Court issued orders for direction on the 28<sup>th</sup> March 2024, the Defendant was before Court. He however, did not comply with the orders for direction. The Defendant did not even attend Court when this matter came up for trial. The Defendant has exhibited, deliberate disregard to Court proceedings in this matter. Be that as it may, I must state that it is the settled position of the law that this case being a civil matter, the standard of proof applicable is the balance of probabilities and that the Plaintiff being the claimant, bear the onus to prove its case. The case of ***Khalid Mohamed V The Attorney General***<sup>2</sup>, aptly explains this position. The Supreme Court in that case put it as follows:

*“A plaintiff should succeed automatically whenever a defence has failed is unacceptable... A plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment.... I would not accept proposition that even if a plaintiff's case has collapsed of its inanity or for some reason or other, judgment should nevertheless be given to him on the ground that defence set up by the opponent has also*

***collapsed. Quite clearly a defendant in such circumstances would not even need defence”.***

- 7.2 Therefore, the major question for determination in this matter is whether the Plaintiff is entitled to the reliefs prayed. Simply, put, has the Plaintiff proved his case with convincing clarity on the balance of probabilities to be entitled to the relief sought in the statement of claim.
- 7.3 To ably determine this matter, the starting point is for this Court to set out the finding of facts which shall form the basis of my decision. Although, the Plaintiff alleged in the statement of claim that through a Facebook post advertised for sale subdivision L/8324/M Kalundu area of Lusaka measuring a 1 (one) acre with an orchard for the total consideration of ZMW 250,000. The Defendant, on the other hand, contended that the Defendant advertised a portion measuring 50 meters by 25 meters acre which the Plaintiff purchased at a consideration of K152,000. I have considered the evidence on record produced by the Plaintiff. The Facebook post produced in evidence by the Plaintiff reproduced hereunder states that:

***“Half an acre on title. Kalundu area Lsk West farms. 13 KMs from CDB, 1.4 Kms off Mumbwa road. Semi semi-fenced and with an orchard”.***

7.4 I, therefore, find as a fact that the land advertised was half of an acre, semi-fenced with an orchard on title. Furthermore, the evidence on record, namely the Land Sale agreement produced by the Plaintiff, reproduced hereunder states that:

***I, Mr. Owen John Ndebele bearer of NRC 443655/11/1 residing at Lot 8324/M/AA, Kalundu, Lusaka West farms do enter into a land sales agreement of a portion measuring 50 meters 25 meters to Mr. Daniel Lungu bearer of Nrc 238840/15/1 residing in Chinika off Mumbwa road at a cost of one hundred and fifty two thousand kwacha only K152,000 payment made in full on this day 7<sup>th</sup> January, 2023.***

7.5 I therefore find, as a fact, that the purchase of K152,000 was for the plot measuring half an acre. This payment is confirmed by a bank transfer payment from ZANACO produced in evidence. I, therefore, do not agree with the Plaintiff's assertion in the statement of claim that the Defendant knew from the onset that he was selling 1 (one acre) of land when the Plaintiff paid for half an acre. This is because the advert placed on Facebook, as well as the contract of sale reproduced above, clearly reveals that the Defendant was selling half of an acre of land.

- 7.6 In view of the above, I hereby Order and direct the Defendant to complete the sale of the half of an acre of subdivision L/8324/m to the Plaintiff forthwith.
- 7.7 As regards the Plaintiff's contention that the Plaintiff was approached by the Defendant and that the Defendant wanted the Plaintiff to lend the Defendant money. The Plaintiff vehemently argued that the Defendant failed to pay back the money. That the Defendant told the Plaintiff that he was adding another half of an acre to make it one (1) acre in total extent. In response to this allegation, the Defendant, in his defence, maintained the position that the Defendant approached the Plaintiff for the Plaintiff to lend him some money and that half of an acre was used as collateral of the K98,000 obtained from the Plaintiff.
- 7.8 I have considered this allegation and I have also examined the evidence on record produced by the Plaintiff, namely "agreement" reproduced hereunder:

***I, Mr. Owen John Ndebele bearer of nrc number 443635/11/1 residing at lot 8324/M/AA, Kalundu, Lsk West do hereby let half an acre of my Lot 8324/M/AA farm at kwacha ninety Eight Thousand (K98,000) to Mr. Daniel Lungu bearer of Nrc 238840/15/1. I promise to pay back within forty-five days from Today, the***

***31<sup>st</sup> January 2023. Failure to payment, a sale will be affected.***

- 7.9 The issue which this Court ought at this point determine is whether this transaction according the above agreement and pleadings on record is a loan or sale agreement of an extra half acre.
- 7.10 The Plaintiff in the statement of claim alleges that the Defendant borrowed money from the Plaintiff and when the Defendant defaulted it was converted into a sale of an acre, making the total extent of land to 1 (one) acre. Therefore, to me, the Plaintiff's pleadings suggest initially the transaction was a loan agreement then converted into a sale as the result of the Defendant's default.
- 7.11 I have further examined the narration of the agreement reproduced above, it states that it was a loan agreement. The document further states that the Defendant promised to pay back within 45 days, failure to pay, a sale will be effected. This document was conditional and to this Court, it defies logic, as to why a sale agreement can be conditional on the part of the defendant who would want to pay back the consideration of sale received from the Plaintiff. The ordinary and natural meaning of this agreement leads to the conclusion that the "agreement" was meant to be a loan agreement and not a sale. This is the position taken by the Supreme Court whose decision is binding on this Court in

the case *Gillian Kasempa Mutinta v New Future Financial Company and Another Appeal No 13 of 2023*<sup>2</sup>.

7.12 It is, therefore, my considered view that the Plaintiff is only entitled to the balance of the loan advanced of K98,000. The balance of K98,000 arises from the fact that the Defendant already paid the Plaintiff the sum of K25,000 and K50,000 as acknowledged by the Plaintiff in his statement of claim and evidence before this Court. The balance in the sum of K23,000 must be paid together with interest at the Bank of Zambia, commercial Bank lending rate from 31<sup>st</sup> January, 2023 until final payment.

7.13 It is, therefore, a fact that the Plaintiff was put to some expense in preparing for the matter as well as his Counsel's attendance to court proceedings to prosecute their case. It is on this basis that I award costs to the Plaintiff to be taxed in default of agreement.

7.14 Leave to appeal to the Court of Appeal is hereby is granted.

**DELIVERED AT LUSAKA THIS 03<sup>RD</sup> DAY OF APRIL, 2025.**

  
**G.C. CHAWATAMA**  
**HIGH COURT JUDGE**