File

PRINCIPAL
23 JAN 2024
REGISTRY - 9
P.O BOX 50067, LUSAKA

IN THE HIGH COURT FOR ZAMBIA **2021/HP/0317**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

FELICITY LIYEMPE	**1ST PLAINTIFF**
SHABBY MULOPWE	**2ND PLAINTIFF**
ELAINE ZULU	**3RD PLAINTIFF**
LIGHTON TEMBO	**4TH PLAINTIFF**
DOROTHY CHEMBO TEKA	**5TH PLAINTIFF**
MUBANGA LIBUWE	**6TH PLAINTIFF**
PEGGY MWAPE MELENGA	**7TH PLAINTIFF**
CHARITY LUNGU	**8TH PLAINTIFF**
MUSHIMBEI NDOLO	**9TH PLAINTIFF**
TOPSY HANTEBE SIKALINDA	**10TH PLAINTIFF**
AND	
MUTAFYA SIMWAYA	**RESPONDENT**

(Sued in his capacity as administrator of the estate of the late Ahmed Simwaya)

BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 22ND JANUARY, 2024 - IN CHAMBERS

For the Applicant : *Ms. N. Nambayo – Messrs. Mulungushi Chambers*
For the Respondent : *Mr. A. Musadambwa – Messrs. M. Wamunyima Legal Practitioners*
Mr. M. Banda & Mr. M. Chipompo – Messrs. George Kunda & Company

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RULING

AUTHORITIES & OTHER WORKS REFERRED TO:

1. *The Supreme Court White Book, 1999 Edition*
2. *Black's Law Dictionary 8th Edition*
3. *Author Fredrick S. Mudenda, Land Law in Zambia Cases and Material*
4. *Mergarry's Manual of Law of Real Property*

5. *High Court Act Chapter 27 of the Laws of Zambia*
6. *John Mc Ghee Q.C in his book entitled Snells Equity (Thomson Reuters) Legal (Limited 2008) in which at paragraph 4-03 at page 56*
7. *Halsbury and Martin, Morden equity (Sweet and Maxwell Limited, 1997*
8. *The High Court Act Chapter 27 of the Laws of Zambia*

The matter came by way of originating summons and affidavit in support filed on the 24th March, 2021. The court was to hear an application on the part of the applicant Felicity Liyempe for an Order for the removal of the caveat placed on L/15287/M, Lusaka by the respondent on the grounds set out in the affidavit in support.

The paragraphs I was referred to state as follows:

1. *That Wealth Vision Estate Development and Consultancy Limited had land known as Lot No. 15287/M Lusaka.*
2. *That he bought a portion of land from Wealth Vision Estate Development and Consultancy Limited at a cost of K50,000.00. Produced and marked* ***"FL1"*** *is photostat copy of contract of sale.*
3. *That at the time of the purchase the portion he had bought had not yet been subdivided.*
4. *That the portion of land has now been subdivided at his expense. Produced and marked* ***"FL2"*** *is photostat copy of the survey diagram.*
5. *That he has not been able to register the assignment as the defendant had placed a caveat on the property.*

*Produced and marked **"FL3"** is photostat copy of the land register showing the entry.*

6. *That a demand letter was written to the defendant's Advocates and response has been received. Produced and marked **"FL4"** is the said letter of demand.*
7. *That collectively the individuals mentioned in the letter of demand have plots as per site plan which is produced and marked **"FL5".***
8. *That some of his fellow purchasers have gone to the extent of obtaining consents and paying property transfer tax. Produced and marked **"FL6"** and **"FL7"** respectively is evidence to that effect.*
9. *That he is desirous of completing the conveyance.*
10. *That he was advised and verily believe that at the time of caveating the property, the defendant had no registerable interest in the same.*
11. *That the contents of his affidavit are correct and true to the best of his knowledge information and belief.*

Exhibits **"FL1"** to **"FL7"** included a Law Association of Zambia contract of conditions of sale, a diagram of the said land, a registrar print-out from Ministry of Lands, a letter from Messrs. Mulungushi Chambers to Messrs. Mwanawasa Company proposed subdivision on Lot 15271/M for Lusaka Province, a consent or refusal to grant consent to assign form and a Zambia Revenue Authority Tax clearance certificate under the Property Transfer Tax Act Chapter 340.

Filed on the same day was a list of Authorities and skeleton arguments in support of originating summons to remove the caveat placed on the property known as Lot No.1528/M on behalf of the plaintiff.

When the matter came up on the 17th February, 2022, the respondents were not before court. The court was informed that the respondent Ahmed Simwaya was deceased and that no one substituted him. The matter was adjourned in order to effect service in which Serge Chamukwenu an employee of Mulungushi Chambers deposed that he personally did on 11th day of February, 2022 served the respondent's Advocates with a notice of hearing scheduled to be heard on the 17th day of February, 2022 at 09:00 hours before me. Photostat copy of acknowledgement of service was provided.

On the 15th February, 2022 an affidavit of service was filed. On the 28th March, 2022 an ex-parte summons for joinder pursuant to Order 14 of the High Court Act Chapter 27 of the Laws of Zambia, for eight intended applicants was filed. An affidavit in support of summons for joinder were also filed.

After hearing Counsel and perusing the documents filed and the skeleton arguments and in particular ***Order 14 rule 5 of the High Court Rules*** the ex-parte Order that the intended applicants be joined to proceedings as applicants was granted.

On the 26th may, 2022 ex-parte summons for alteration of parties pursuant to Order XVI Rule 7 of the High Court Rules, High Court Act Chapter 27 of the Laws of Zambia as read together with Rule 8 of the High Court (Amendment) Rules, 2020 Statutory Instrument No. 58 of 2020 was filed.

The application was on the part of the intended respondent Mutafya Simwaya the Administrator of the Estate of the late Ahmed Simwaya. Filed on the same day was an affidavit in support of the ex-parte summons for alteration of parties and skeleton arguments and list of authorities. The court was referred to the ***High Court Act Chapter 27 of the Laws of Zambia as well as the High Court (Amendment) Rules, Statutory Instrument No. 58 of 2020.*** That the respondent died intestate on the 5th July, 2021 at Mediclinic in Namibia and the intended respondent was issued with letters of Administration by Ndola High Court on the 1st September, 2021. The ex-parte order was granted on the 8th June, 2022.

On the 13th July, 2022 Counsel for the applicant informed the court that they would like the matter to be adjourned to enable them file skeleton arguments and list of authorities. That it was their submission that once the skeleton arguments were filed the court can render a decision.

The Court ordered the parties to file their skeleton arguments and list of authorities and that thereafter the court would render its

decision. On the 20th July, 2022 the applicants filed their skeleton arguments and list of authorities.

In support to an application for removal of caveat on Lot No. 15287/M Lusaka, I was referred to the fact that the respondent placed a caveat on Wealth Vision Limited on Lot 15287/M based on Judgment obtained in favour for the respondent on the 25th January, 2019. That the respondent bought land from Wealth Vision Limited, a company that sold the land to the applicants.

That the applicants bought their subdivided property from the aforementioned Lot before 2019 the year that Counsel the late Mr. C.K. Phiri Counsel who had conduct of the matter died. That proof that the applicants have an equitable right to the property was established as a result of the various contract of sales, survey diagrams, assignments etc exhibited in the affidavit in support of the Order to remove the caveat.

The court's attention was drawn to the learned ***Author Fredrick S. Mudenda, Land Law in Zambia Cases and Material*** in which he defined an equitable right as follows:

> *"An equitable right is a right in person; it is enforceable against certain persons only. It binds every transferee of land except a bonafide purchase for value of a legal estate in the land who had no notice of the equitable right."*

In addition, I was referred to ***Mergarry's Manual of Law of Real Property*** which summarises the distinction between the legal and equitable rights thus:

> *"There is great difference between legal and equitable rights. This is sometimes expressed by saying that legal rights are rights in rein, equitable rights are rights in personam. A legal interest in land is a right in the land itself, so that whoever acquires the land is bound by that right, whether he knew of it or not. A legal right is like a live electric wire which shocks those who touch it whether or not they know of it. Equity on the other hand would enforce equitable rights only against certain persons... Legal rights are good against the world; equitable rights ae good against all persons except a bonafie purchaser of a legal estate, for value without notice and those claiming under such a purchaser... the extent to which a purchaser is bound by third party rights when acquiring property is often determined by whether the rights are equitable or legal..."*

I was also referred to ***John Mc Ghee Q.C in his book entitled Snells Equity (Thomson Reuters) Legal (Limited 2008) in which at paragraph 4-03 at page 56*** is stated that:

> *"At law, as in equity, the basic rule is that estates, and interests primarily rank in the order in which they are created. In equity, the result is expressed more directly in terms of temporal priority. The maxim is this: "qui prior est tempore potior est jure." That is, "he who is earlier in time is stronger in law." The learned author of Snells Equity, (supra), goes on to state in the same paragraph4-03, that, accordingly, 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 entitle to priority over the other. Where the equities are equal and neither claimant has the legal estate, the first in time prevails, since:*

"Every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity possess only that which he is justly entitled to and no more."

Lastly, I was referred to Jill Martin who in his book entitled, ***Halsbury and Martin, Morden equity (Sweet and Maxwell Limited, 1997)*** puts the point in this way at page 27:

"Thus, prior equitable interest in land can only be defeated by a bonafide purchaser, and without notice, then the equities are equal, and his legal estate prevails. If he took with notice, the position is otherwise, as the equities are not equal. If he does not acquire a legal estate, then the first in time, i.e the prior equitable interest prevails, as equitable interests rank in order of creation."

On the 7th September, 2022 a notice of appointment as Co-Advocates was filed by Mesdames M. Wamunyima Legal Practitioners, (being Co-Advocates to Messrs. George Kunda and Company).

On the17th March, 2023 summons for an Order to arrest judgment pursuant to Order 35 Rule 2 of the Supreme Court 1999 Edition was filed. Filed on the same date was an affidavit in support of summons for an Order to arrest judgment deposed to by **Emmanuel Tembo** in which he deposed as follows:

1. *The plaintiff in her affidavit in support of notice of motion for removal of caveat, has deposed that she bought a*

portion of the said property L/15287 and that her interest is only to the portion she bought.

2. *That the property (No. L/15287) the plaintiff herein applied for removal of caveat on the aforesaid property which is owned by Wealth Vision Estate Development and Consultancy Limited.*
3. *That the defendant under cause 2016/HP/1489 obtained judgment against the said Wealth Vision Estate Development and Consultancy Limited and they were ordered to reimburse the defendant an amount of K265,000.00 being a purchase price for the land the Wealth Vision failed to provide after full payment in land transaction, special damages worth K800,000.00, interest and costs. There is now produced and shown to me exhibit marked* ***"ET1"*** *a copy of the said judgment.*
4. *That in the pursuance of the said judgment the defendant registered and caveated the said property Lot No. 15287/M to recover the judgment sum from the said Wealth Vision Estate Development and Consultancy Limited.*
5. *That the court under cause 2016/HP/1489 granted the defendant charging Orders absolute under a ruling dated 24th May, 2022 on the property in issue that is to say stand No. 15287/M. There is now produced and shown to him exhibit marked* ***"ET2"*** *a copy of he said ruling on charging Orders Absolute.*

6. *That the defendant's lawyers did not file opposition to the originating summons as the firm with conduct of the matter (Mwanawasa and Company) was suspended by Law Association of Zambia (LAZ) Legal Practitioners Committee and later the file was allocated to the caretaker Messrs. George Kunda and Company.*
7. *That the defendant unfortunately had passed earlier in July, 2021 and Mustafa Simwaya was appointed Administrator of his Estate.*
8. *That it became difficult for the caretaker Messrs. George Kunda and Company to obtain instructions over this matter appropriately.*
9. *That the plaintiff filed his submissions and the Court has reserved the matter for judgment.*
10. *That for the foregoing reasons it has become necessary to have the judgment arrested and address the charging Orders that have been issued against the subject property in issue.*

Exhibited was **"ET1"** a judgment where cause number was 2016/HP/489. The plaintiff was Ahmed Simwaya. The defendants were Innocent Matyola, Wealth Vision Estate Development and Beyond International Limited.

Counsel who had conduct of the matter were as follows:

Order 35 rule 2 the rules of the Supreme Court 1999 Edition provides that any judgment Order or verdict obtained where one party does not appear at the trial may be set aside by the court on the application of that party on such terms as it thinks just. Similarly ***Order 35 rule 5 of the High Court Rules Chapter 27 of the Laws of Zambia*** provides for the same.

Based on the above Rules one would be right to conclude that the Court has jurisdiction to order a new trial if the judgment had been obtained in the absence of a party. In this matter the Court ordered that the parties were required to file skeleton arguments and authorities after which the court would render its decision.

Before the court could render its decision the application to arrest the judgment was filed by the defendants. At this stage the issue is whether or not there is a judgment which the defendants wish to arrest. Another issue to consider is whether arrest of judgment in civil proceedings is available in Zambia.

In the Rules of the Supreme Court (the White book) no meaning is assigned to the word Judgment. However, ***section 2 of the High Court Act Chapter 27 of the Laws of Zambia*** simply states that:

> *"Judgment includes decree, order, conviction sentence and decision in an order handed down by a Judge that resolves the issue in a court case."*

One can safely state that judgment includes obligations of the parties in a case. That it includes an equitable decree and any order from which an appeal lies.

In the matter before me is an order in which the parties were obliged to file skeleton arguments and authorities. The court went ahead to give a date (29th July, 2023) for the purposes of ensuring that the parties had adhered to the Order of the court. Clearly the Order which is defined as a written direction or a command delivered by a court or Judge which embraces final decrees as well as interlocutory directions or commands was not adhered to by the defendants.

Based on the fact that the applicants are of the view that all parties have an equitable interest in the land. That neither have a legal interest in the same. The first being the applicants who delayed in the completion of the transaction owing to the illness and death of Counsel the late Mr. C.K. Phiri as stated in the applicant's affidavit in support, prevailing against the interest of the respondent. Plus, the prayer that the caveat placed by the respondent on Lot No. 15287/M Lusaka be removed.

Further taking into consideration the contents of paragraphs 5 to 12 of the affidavit in support of summons for an Order to arrest judgment found at page R5-7. Better the position of the law as found in Order 35 Rule 2 of the Supreme Court 1999 (White Book) of an Order obtained where one party did not appear I am of the

view that I ought to afford an opportunity to the defendant to file their skeleton arguments and authorities as per the Order of 13th July, 2022. They have twenty-one days with effect from 23rd January, 2024 within which to file and thereafter I will render my decision.

Costs in the cause.

Leave to appeal is hereby granted.

DELIVERED AT LUSAKA THIS 22ND DAY OF JANUARY, 2024.

G.C. CHAWATAMA
HIGH COURT JUDGE