

IN THE HIGH COURT OF ZAMBIA

2010/HN/112

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

BRIAN BANDA

PLAINTIFF

AND

BERVEN KANA

1ST DEFENDANT

LEONARD KALINGA

2ND DEFENDANT

OCCUPANTS OF STAND NO 641 (B11)

3RD DEFENDANTS

KALULUSHI

CORAM: SIAVWAPA J

FOR THE PLAINTIFF:

MR. MUZENGA SENIOR LEGAL
AID COUNSEL

FOR THE 1ST DEFENDANT:

NOT IN ATTENDANT

FOR THE 2ND AND 3RD DEFENDANTS:

MR. MOONO OF MESSRS NKANA
CHAMBERS

J U D G M E N T

The Plaintiff took out a writ of summons accompanied by an affidavit against the three Defendants asking for the following reliefs;

- i. A declaration that he is a bona fide purchaser for value without notice
- ii. A declaration that he is the rightful owner of stand No 641 (B11) Kalulushi
- iii. An order for vacant possession of the premises at stand No 641 (B11) Kalulushi
- iv. Mesne Profits
- v. Costs
- vi. Any other relief the Court may deem fit

The brief facts of the case are that on or about July 2009, the Plaintiff purchased Stand No 641 Flat B11 from the 1st Defendant at the price of K55 million. He however, did not take vacant possession of the house because the 1st Defendant's mother and brother were in occupancy of the house. He later issued a notice to vacate to the 1st Defendant. He later discovered that the same house had been renovated and occupied by someone who informed him that she was renting the property from the 2nd Defendant. The said occupant called the 2nd Defendant who confirmed that he had purchased from the 1st Defendant.

In his evidence in chief, the Plaintiff said that in June 2009, the 1st Defendant went to his office in the company of one Aongola Muyunda. The 1st Defendant asked him for a credit of K20, 400, 000.00 to settle a loan he had with a bank to enable him get another loan. He said that since he knew both the 1st Defendant and Aongola before, he gave the 1st Defendant the requested amount of money. He said that in turn, the 1st Defendant handed him a copy of the letter of offer issued to him for the

purchase of a house in Kalulushi and copies of receipts of payment of the purchase price as collateral for the loan. He identified the document marked 3 in the Plaintiff's bundle of documents as the copy of the letter of offer the 1st Defendant gave him. He also identified the documents marked 1, 2, 4 and 5 as the copies of receipts he got from the 1st Defendant.

He said that a few days later, the 1st Defendant approached him again for a further credit of K34, 600, 000.00 but that he declined to give him at which point the 1st Defendant told him that he had decided to sell him the house he had used as collateral to enable him to buy the car. He said that after he had viewed the house, they agreed on the purchase price of K55, 000, 000.00. He and the 1st Defendant then proceeded to Kalulushi Municipal Council to start the process of sale but that they were advised that the property in question was under the jurisdiction of the Ministry of Lands. They then proceeded to Ndola where they met a Mr. Mbewe, the Senior Lands Officer, who made a computer print out with the details of the property as stand No 641 Flat No B11 which he identified as the document marked 11 in the Plaintiff's bundle of documents.

He further said that upon telling Mr. Mbewe that he wished to purchase the house, he issued him with a letter of consent which he identified as the document marked 7 in the Plaintiff's bundle of documents. He in turn presented the letter of consent to the Zambia Revenue Authority for Property Transfer Tax which was paid and the receipt he identified as document marked 8 in the Plaintiff's bundle of documents was issued. Thereafter, a letter of sale was signed by both parties and witnessed by the 1st Defendant's mother and brother, who were the occupants of the

house at the time. He identified the letter of sale as the document marked 6 in the Plaintiff's bundle of documents. He said that he paid the 1st Defendant the sum of K34, 600, 000.00 in the presence of the 1st Defendant's mother and brother.

It was his further evidence that at the Ministry of Lands, there was no record of any other transaction relating to the house. He said that he gave a month's notice to the 1st Defendant to yield vacant possession of the house to him but that in due course the 1st Defendant requested for more time as he had failed to secure alternative accommodation for his mother. Two months later, the house was still occupied until January 2010 when he decided to issue a written notice to vacate which he identified as the document marked 12 in the Plaintiff's bundle of documents. In February 2010, he learnt that the 1st Defendant's mother had died and the funeral was at the same house as a result of which he allowed another month on compassionate grounds.

The following month, in March 2010, he visited the house and found that it had been renovated and a woman he found there told him that she was renting the house from the 2nd Defendant. The 2nd defendant came and confirmed being the owner of the house and produced some documents suggesting that he had bought the house from the 1st Defendant but that he did not have a letter of consent from the Ministry of Lands and a Property Transfer Tax receipt from Zambia Revenue Authority. He said that all efforts to call the 1st Defendant failed as a result of which he decided to report him to Ndola Central Police. He was subsequently apprehended and

when asked about his alleged sale of the same property to the Plaintiff and the 2nd Defendant, he admitted.

In cross-examination he said that his report to the police was that his house was being occupied by people he did not know. He also said that the police officers told the 1st Defendant that it was wrong for him to have sold the same house to two people. He said that he testified for the prosecution against the 1st Defendant in the subordinate court but that he did not know the outcome of the case. He further said that the document marked 1 in the Defendant's bundle of documents bore two different dates namely; 2nd February 2009 and 13th October 2009. He further denied giving testimony in the subordinate court to the effect that the 1st Defendant had sold him property which did not belong to him.

In re-examination he said that his evidence in the subordinate court was to the effect that he had bought the house from the 1st Defendant after verifying with the Ministry of Lands that it was not sold to any other person at the time.

In his evidence in chief, the 2nd Defendant, Mr. Leonard Kalinga said that on 2nd February, 2009, he had a transaction with Berven Kana, the 1st Defendant who offered to sell him a house at plot 641 flat B11 in Kalulushi. He identified the document marked 1 in the 2nd Defendant's bundle of documents as the contract of sale he signed in relation to plot 641 flat B11 Zamclay Kalulushi. He explained that he paid K68, 000, 000.00 for the property although the contract of sale states the purchase price as K50, 000, 000.00 because the 1st Defendant increased the price after they had

already executed the contract of sale and that he accepted to pay more because he was in a desperate situation.

He said that when he went to the Ministry of Lands to commence the process of obtaining a Certificate of Title, he was told that nobody had title to the house. He then went to Kalulushi Municipal Council where he was given a letter to take to the Ministry of Lands. On presenting the letter to the Ministry of Lands he was told that the property was on block title and a file was opened for the property. He was then issued with a document he did not name after he had paid an undisclosed amount of money. He further said that the 1st Defendant then declared no further interest in the house through the document marked 12 in the 2nd Defendant's bundle of documents. He said he finally took vacant possession of the property in January 2010 and renovated it after which he rented it out in February 2010. He referred to the documents marked 11 and 10 in the 2nd Defendant's bundle of documents as receipts on which he paid council rates and water and sewerage respectively.

With regard to the claim by the Plaintiff, he said that about January or February 2010, he was called by his former tenant who told him that a Mr. Banda, the Plaintiff in this case, was claiming ownership of the house. He went to the house and found the Plaintiff whom he showed his papers and told that the house belonged to him at which point the Plaintiff left. He said that a week later, the Plaintiff went back to the house in the company of two police officers and the 1st Defendant. He then accompanied them to Kalulushi police station where he was asked to produce his documents.

He said that a few weeks later, he was summoned to the Ndola subordinate court where he testified in the criminal case in which the 1st Defendant was the accused. He was asked to produce evidence that he had bought and paid for the house which he did. He expressed ignorance of the outcome of the criminal proceedings and maintained that flat B11 was his house because he bought it before the Plaintiff did. He further said that he could not pay mesne profits to the Plaintiff because the house belonged to him. As regards the two conflicting dates on the document marked 1 in the 2nd Defendant's bundle of documents, he said that the date at the bottom of the document represented the date on which the same was certified and not the date of the contract of sale.

In cross-examination he said that he visited the Ministry of Lands for the second time after 13th October 2009 with the first visit said to have been about March 2009. He said that he did not obtain any document from the Ministry on his first visit and that he only learnt of a search fee on the second visit to the Ministry. He then said that he went to the Ministry of Lands for the second time two days after the 13th October 2009 but that he did not conduct a search. He further said that no letter asking for consent to assign was written to the Ministry at the time of the signing of the contract of sale. He also stated that at the time there was no record at the Ministry showing that the 1st Defendant had sold the property to him and conceded that in the circumstances the Plaintiff could not have known that the 1st Defendant had sold the property to him.

In re-examination he said that he made a search at the Ministry of Lands in November 2009 having first gone there in May 2009 with a view to

conducting a search. He stated that he went back to the Ministry of Lands for the second time in October 2009 but again failed to conduct a search.

Although both Mr. Moono and Mr. Muzenga had indicated that they would file written submissions neither filed although Mr. Moono attempted to file way after the agreed upon date I was not satisfied with the reason advanced for his failure to file at the agreed time. I will accordingly decide the matter on the evidence on the record.

It is beyond dispute that the 1st Defendant sold the property known as Plot 641 Flat B11 Zamclay Kalulushi to both the Plaintiff and the 2nd Defendant at different times but between February and October 2009 for consideration. It is also not in dispute that the 1st Defendant was prosecuted in relation to his having sold the said property to two different people and both the Plaintiff and the 2nd Defendant were witnesses for the state at the trial. The evidence further establishes as a fact that the Ministry of Lands granted the 1st Defendant consent to assign the said property to the Plaintiff after which Property Transfer Tax was paid in accordance with the law. The 2nd Defendant, on the other hand, has shown that he executed a contract of sale to purchase the property from the 1st Defendant and thereafter paid the purchase price of K68, 000, 000.00. It is however, a fact that at the time the 2nd Defendant purchased the property, no consent to assign was obtained from the Ministry of Lands and neither was Property Transfer Tax paid to the Zambia Revenue Authority.

The issues that come to the fore are the following;

1. Who between the Plaintiff and the 2nd Defendant bought the property first?
2. What is the effect of purchasing real property without obtaining state consent to assign?

The evidence on the record suggests that the 2nd defendant contracted to buy the property from the 1st Defendant on 2nd February 2009 as per the Contract of Sale exhibited at page 1 of the 2nd Defendant's bundle of documents. The document exhibited as 5 in the 2nd Defendant's bundle of documents also shows that the 2nd Defendant instructed his bank to transfer the sum of K68, 000, 000.00 into a named account in the name of the 1st Defendant held at Standard Chartered Bank, Buteko Branch Ndola. On the other hand, the evidence shows that on a date unknown but in June 2009, the 1st Defendant declared house No 11 Zamclay Kalulushi, sold to the Plaintiff upon payment of a consideration of K55, 000, 000.00. Further, the State Consent to assign the said property was granted to the 1st Defendant on 1st July 2009 and Property Transfer Tax was assessed and paid and a Tax Clearance certificate issued on the same day. Documents exhibited as 6,7,8,9 and 10 refer accordingly.

Going by the above stated facts, it is easy to come to the simple conclusion that the 2nd Defendant bought the property earlier than the Plaintiff. To suggest that the 2nd Defendant's documents are not genuine lacks support from the evidence on the record. Having established that the 2nd Defendant bought the property earlier than the Plaintiff, I will now move to the second issue, to establish whether or not failure to obtain consent to assign has any effect on the sale of land.

In that regard section 5(1) of the **Lands Act, Chapter**¹ provides as follows;

"A person shall not sell, transfer or assign any land without the consent of the President and shall accordingly apply for that consent before doing so."

Note is taken of the peremptory nature of the above cited provision both as to the prohibition to sell, transfer or assign land without Presidential consent and the requirement to apply for consent before doing so. It is clear from the evidence in this case that on 2nd February 2009, the 1st Defendant decided to execute a contract for the sale of the property in issue to the 2nd Defendant and received consideration for the contract on the same day thereby effecting the sale of the said property to the 2nd Defendant because, once consideration moved from the purchaser to the vendor, the sale was complete. However, in view of the mandatory requirement to obtain Presidential consent before sale prescribed by the above cited provision of the law, there is no question that the 1st Defendant acted in breach of the law and such breach has consequences.

In the case of **Jean Mwamba Mpashi V Avondale Housing Project Limited**² the Supreme Court, in clarifying its earlier decision in the case of **Mutwale V Professional Services limited**³ stated as follows;

"Our decision in that case related to a contract which was performed without State Consent and it was the entering into such contracts – which the parties then perform or purport to perform which we said offended the Statute."

In the Mutwale case, the Respondent had obtained judgment in the High Court to recover rent arrears on a property sub - let to the Appellant

¹ Chapter 184 of the Laws of Zambia

² (1988 – 1989) ZR 140

³ (1984) ZR 72

without prior Presidential Consent contrary to section 13(1) of the **Land (Conversion of Titles) Act 1975**⁴ which prohibited sub- letting among others of property without prior Presidential consent in writing. It is noteworthy that the peremptory nature of section 13 (1) was similar to that in section 5 of the Lands Act. In that case, the Supreme Court held that;

"If prior Presidential Consent is not obtained for a sub- lease the whole of the contract including the provision for payment of rent is unenforceable."

Going by the decision in Mutwale, the law is clearly stated as being that failure to obtain prior Presidential Consent before alienating land renders the contract to do so unenforceable. Applied to the case at hand, it means that neither the vendor nor the purchaser can find assistance from the court to enforce his rights on a contract of sale of land effected without prior Presidential consent.

What this case seeks to do is to empty the 2nd Defendant of the right of claim to the ownership of Flat B11 Zamclay Kalulushi. The reality however, is that in default of obtaining prior Presidential Consent to assign to the 2nd Defendant; the 1st Defendant had no authority so to do. Consequently, he lacked the power to pass the property in the Flat to the 2nd Defendant rendering the purported sale null and void ab initio.

Having found the purported sale to the 2nd Defendant null and void ab initio, where does that leave the second sale to the Plaintiff effected in June 2009? First and foremost, there is evidence on the record that the Plaintiff took all the necessary steps to satisfy himself that not only did the

⁴ Repealed

1st Defendant own the Flat but that it was also free of any encumbrance by making an inquiry at the Ministry of Lands. By granting consent to assign, the Ministry of Lands declared officially to the Plaintiff that the property was available for sale thereby paving the way for the assessment and subsequent payment of Property Transfer Tax. In the circumstances, I can comfortably state that no blameworthiness can be placed on the Plaintiff as he did everything right. The 1st Defendant fraudulently decided not to disclose to the Plaintiff that he had already collected money from the 2nd Defendant for the same property.

On the other limb, the Plaintiff has argued that he was an innocent purchaser for value without notice. I shall not dwell much on this argument as it has been sufficiently covered in the previous paragraph. I will merely add that the Plaintiff had no reason to put himself on inquiry as to ownership of the Flat as the vendor was in actual possession at the time of the contract. I must however, hasten to state that even assuming that the Plaintiff did become aware of the purported sale of the property to the 2nd Defendant, he would still not be affected by the doctrine of innocent purchaser for value without notice because of the nullity of the purported sale for want of prior Presidential Consent.

In conclusion, it has been established on the evidence that even though the sale to the 2nd Defendant took place earlier, the said sale is null and void ab initio and consequently unenforceable for want of Presidential Consent as required by section 5 (1) of the Lands Act.

This conclusion inevitably yields only one result, the result that the Plaintiff's claim must succeed on the ground that he bought the property from the 1st Defendant in accordance with the provisions of the general principles of contract and in compliance with section 5 (1) of the Lands Act.

Consequently, I order that the 2nd Defendant yields vacant possession of the property known as Stand No 641 B11 Kalulushi to the Plaintiff within ninety days hereof. The 2nd Defendant may pursue the 1st Defendant for the recovery of the consideration paid for the failed sale.

My further order is for each party to bear own costs.

DATED THE 29TH DAY OF SEPTEMBER 2011

**J.M. SIAVWAPA
JUDGE**