IN THE HIGH COURT FOR ZAMBIA **2014/HP/0493**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

RONALD VAN VLAANDEREEN **PLAINTIFF**

AND

VDF PROPERTY MANAGEMENT LIMITED **1ST DEFENDANT**
DESSISLAVA FINDLAY **2ND DEFENDANT**
ADAMS AZIZ HUSEIN DAWOOD **3RD DEFENDANT**
JOSEPH PHIRI *(sued as Personal Representative Of the Estate of William Roy Needham Baker)* **4TH DEFENDANT**

Before: ***The Hon. Mr. Justice Charles Zulu.***

For the Plaintiff: Mr. S. Chisulo SC, & Ms. L. Hamweemba, Messrs Sam Chisulo & Company.

For the 1st and 2ndDefendants: Mr. E.B. Mwansa SC, & Mr. F. Kachamba of Messrs EBM Chambers.

For the 3rd Defendant: Mr. M. Desai & Mr. K. Daka Messrs Christopher, Russel Cook & Company.

For the 4th Defendant: Mr. N.K.R. Sambo, Messrs Sambo & Company.

J U D G M E N T

Cases referred to:

1. ***Zambia Consolidated Copper Mines Limited v. Eddie Katalayi and Max Chilongo (2001) Z.R. 28.***
2. ***Kitechen v. Royal Air Forces Association (1958) 2 A LL ER 214.***

3. ***Briggs and Another v. The Law Society [2005] EWHC at page 1830.***
4. ***United Mining and Finance Corporation Ltd v. Becher (1910) 2 K.B. 296.***
5. ***Hammond v. Law Society of British Columbia (2004) BCCA 369.***
6. ***Central London Property Trust Ltd v. High Trees House Ltd [1947] K.B. 130.***
7. ***Galaunia Farms Ltd v. National Milling Company Ltd (2002) Z.R. 135.***
8. ***Wesley Mulungushi v. Catherine Bwale Mizi Chomba (2004) Z.R. 96.***
9. ***Grigsby v. Melville [1973] 3 ALL E.R. 455.***
10. ***Masterton Homes Pty Ltd v. Palm Assets PTY Ltd [2000] NSWCA 234,***
11. ***County Securities v. Challenger Group Holdings Pty Limited [2008] NSWCA 193.***
12. ***Chishala Karabasis Nivel and Another v. Mwale (SCZ Appeal No.161/2015) (2018).***
13. ***Atlantic Bakery v. ZESCO Limited (S.C.Z SJ No.47 of 2018).***
14. ***Rooks Rider (A firm) v. JR Steel & Others [1993] 4 ALL E.R. 716.***
15. ***Bhandari v. Advocates Committee [1956] 3 All E.R. 742.***
16. ***Colorado v. New Mexico 467 US 310 (1984).***

Legislation referred to:

1. ***The Land Survey Act, Chapter 188 of the Laws of Zambia.***
2. ***Town and Country Planning Act, Chapter 283 of the Laws of Zambia. (repealed).***
3. ***The Legal Practitioners Act, Chapter 30 of the Laws of Zambia.***
4. ***The Statute of Frauds, 1677.***

5. ***The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.***

Other materials referred to:

1. ***Halsbury's Laws of England 4th Edition Volume 4 (1) at paragraph 930.***
2. ***Halsbury's Laws of England, 4th Edition, Volume 16 paragraph 1219.***
3. ***Snell's Equity, 13th Edition, at page 47, paragraph 406***
4. ***The Guide to the Professional Conduct of Solicitors 1999, 8th Edition at page 351.***
5. ***Halsbury's Laws of England, 4th Edition – Reissue Volume 16 (London: Butterworths (1992) paragraph 951.***
6. ***Lewis and Kyrou, "Handy Hints on Legal Practice" (Second Edition, South Africa, LexisNexis, 2011 reprinted***

INTRODUCTION

The Plaintiff, Ronald Van Vlandereen, by way of writ of summons and statement of claim dated March 20, 2014, took out an action against the Defendants seeking the following reliefs:

1) ***a declaration that the 1st Defendant through its servants or agents or its Directors or officers has acted fraudulently since it procured title to the disputed lot;***
2) ***a declaration that 1.0244 Hectares of disputed lot as described in Paragraph 23 (v) hereof belongs to the Plaintiff;***
3) ***an injunction to restrain the 1stDefendant until further order or until judgment in the action whether by its respective servants or agents or any of them, or by its directors, officers, subsidiary companies, or any of them or otherwise howsoever from constructing the perimeter***

wall, or any building or fixtures or encroaching onto the subsidiary companies, or any of them or otherwise howsoever from constructing the perimeter wall, or any building or fixture or encroaching onto the Plaintiff's proposed subdivision on the disputed lot 3293/M Lusaka;

4) ***an order to enforce the professional undertakings granted to the Plaintiff by the 2nd and 3rd Defendants that the conveyance of the disputed lot to the 1st Defendant should take into account the Plaintiff's interest in the proposed subdivision on the disputed lot which the Plaintiff purchased from the deceased and that the Plaintiff's said portion of land should be subdivided from the whole of the disputed lot and assigned to the Plaintiff;***
5) ***an order that the 1st Defendant subdivides the said 1.0244 Hectares of the disputed lot by measuring eastwards from the boundary A-F-E of the figure A-B- C-D- E-F-A shown in Diagram Number 513/1983 annexed to Certificate of Title No. 276602 issued to the 1st Defendant and that the 1stDefendant should convey the same to the Plaintiff at its own cost;***
6) ***costs of and incidental to this action; and***
7) ***any other relief, which may seem just and equitable to the Court.***

BACKGROUND

The deceased, Mr. William Roy Needham Baker, was sued via his personal representative (administrator, the fourth Defendant). Mr Baker was the registered proprietor of three adjoining farms, namely: the remaining extent of subdivision J of Farm No. 487a; Lot No. 3293/M; and the remaining extent of subdivision H of Farm No. 487a, all situated along Leopards Hill Road, Lusaka.

The Plaintiff alleges that in February 1998, he purchased a parcel of land in extent of 3 acres from Mr. Baker, at the price of

K6, 000, 000.00 (unrebased), and that the purchase price was paid in several instalments, and in full. The parcel of land sold to the Plaintiff was to be delineated from part of subdivision H of Farm No. 487a, and Lot No. 3293/M. Notably, the Plaintiff gave his residential address to be subdivision H of Farm No. 487a.

According to the Plaintiff, the exact extent and boundaries of land to be marked off from Mr. Baker's farms were well known, and that the Certificate of Titles for subdivision H and Lot No. 3293/M were only released to him by Mr. Baker in 2006. The Plaintiff averred that 5528 square meters was to be marked off from subdivision H of Farm No. 487a, while 1.0244 hectares (2.5 hectares) was to be marked off from Lot No. 3293/M. And the dispute herein is centred on Lot No. 3293/M, and this was how the dispute came to be.

1n 2008, Mr. Baker represented by his advocate, Mr. Adam Aziz Hussein Dawood SC, entered into a contract of sale of land with the first Defendant, VDF Property Management Limited (VDF). The second Defendant, Mrs. Dessisslava Findlay was at the material time representing the first Defendant in the said sale. She was also the wife to Mr. Findlay (DW2) the shareholder in VDF.

The contract of sale between Mr. Baker (vendor) and VDF (purchaser) was executed on January 15, 2008. The land sold to VDF was described as:(i) remaining extent of subdivision J of farm No. 487a in extent of 6.0212, and Lot. No 3293/M in extent of 3.0444 hectares. The agreed purchase price was USD$450,000.00 for a total of 9.0656 hectares. The contract of sale in respect of Lot No. 3293 was made pursuant to the Law Association of Zambia General Conditions of

Sale 1977, subject to agreed special conditions between the parties. The contract of sale in terms of special conditions *inter alia* in clause 12 provided that, 1.5 acres of Lot No. 3293/M sold to a third party (the Plaintiff) by Mr. Baker was to be marked off from Lot No. 3293 for the benefit of the third party (the Plaintiff).

The whole Lot No. 3293/M was assigned to VDF, in the hope that after the Certificate of Title was issued in the name of VDF, there would be a subsequent subdivision of the Plaintiff's piece of land marked off from Lot No. 3293/M. According to the Plaintiff, this was acceptable on the professional undertakings by VDF's advocate, Mrs. Findlay (second Defendant), and Mr. Baker's advocate, Mr. Adam SC, (third Defendant), that his interests would be secured.

In April 2014, the Plaintiff obtained an interlocutory injunction restraining VDF from constructing a perimeter wall fence on Lot. No. 3293/M.

Whereas the Plaintiff alleges that what was to be marked off from Lot No. 3293/M after the purchase of the same by VDF for his benefit was 2.5 acres (1.0244 hectares), the Defendants allege that it was 1.5 acres (0.6070 hectares). It is for this reason that the Plaintiff through this suit seeks a declaration and an order of enforcement that his land to be marked off from Lot No. 3293/M, now in the name of VDF, is 1.0244 hectares (2.5acres) and not 1.5 acres.

SUMMARY OF THE PLAINTIFF'S CASE(TESTIMONY)

In addition to the above stated facts, the Plaintiff testified that after purchase of approximately 3acres of land from Mr. Baker, and having

been given the Certificates of Titles in 2006, in 2007, he engaged a Land Surveyor, Mr. A.J. Lungu to prepare a sketch plan depicting the proposed subdivision. He made reference to the proposed site plan exhibited at page 11 of his bundle of documents, concurring with his testimony. He said the sketch plan was approved by Mr. Baker, and that it was made available to the second Defendant, Mrs. Findlay.

He said his desire was first to subdivide his piece of land, but at a meeting held in 2008, attended by Mr. Baker, Mrs. Findlay, and Mr. Adam SC, he was persuaded to release the Certificate of Title for Lot No. 3293/M to Mr. Adam SC, and Mrs. Findlay to fast track the process of completing all the subdivisions. He said he was reluctant to release the Certificate of Title. He said Mr. Adam SC, assured him that his interests would be secured. He added that Mr. Baker equally pleaded with him to release the Certificate of Title, and that since Mr. Baker was ill and needed money from the Findlays for his medical bills, he decided to help.

He said the subdivisions as anticipated in his favour were not done by the Findlays. He recounted that in 2012, the Findlays started to construct a perimeter wall fence and encroached into his piece of land sitting on Lot No. 3293/M. He said he confronted Mrs. Findlay, and was told that the measurements were incorrect, by stating that his subdivision on Lot No. 3293/M was one (1) hectare and not 1.0244 hectares. He added that he was not aware of the contract executed between Mr. Baker and VDF, and that he only saw a copy of the contract given to his advocate, Mr. Chisulo SC, when the matter was in court. He said when he initially approached Mr. Adam SC, to ask

about the contract, Mr. Adam SC, told him that he was not aware of the contract.

In cross examination, he said the parcel of land he purchased was pointed to him by Mr. Baker, in extent of approximately 3 acres. He referred to a hand written memorandum (note) as written evidence regarding the transaction between he and Mr. Baker. The note indicates the number of instalments paid from March 1998 to September 1998, with notes on top of the document and at the bottom. The note at the top reads:

> ***Amounts paid to WRM Baker for purchase of Approx. 3 acres Land.***

In respect of the above note, the Plaintiff said it was him that wrote this note.

And at the bottom, it was recorded as follows:

> ***Received as final payment for the section of land bordering plot sub of sub H comprising of 1 hectare (2.4 acres) of land being parts of my two plots Lot 3293 and sub division H of farm 487a.*** (words in brackets supplied)
>
> ***Signed WRN Baker 24/09/98***

In respect of the above note, he said it was written by Mr. Baker. He, however, stated that Mr. Baker had no objection to the sketch plan drawn by the Surveyor, Mr. A.J. Lungu. He said according to the sketch plan, from subdivision H of Farm No. 478a he was to get 5528 square meters (0.055 hectares), and from Lot No. 3293/M, he was to get 1.0244 hectares (2.5 acres). He said the sketch plan was done in the presence of Mr. Baker. He also stated that the 1 hectare was written before the formal measurement.

He disputed that it was 1.5 acres to be marked off from Lot No. 3293/M for his benefit. He said he blamed Mr. Baker for agreeing with VDF to mark off the said 1.5 acres.

The Plaintiff was also referred to a letter by Mr. Baker addressed to Mr. Adam Aziz dated January 22, 2008, in which Mr. Baker was advising Mr. Adam Aziz that 1.5 acres was to be marked off for the benefit of the Plaintiff.

He admitted that Mr. Adam SC, did his part to the best of his ability, by giving him the 1.5acres, but maintained that he expected his interests to have been protected. He said he never showed Mr. Adam SC, the memorandum in respect of his transaction with Mr. Baker.

He stated that according to the contract of sale between Mr. Baker and VDF, he was supposed to get 1.5 acres from Lot No. 3293/M, and that the remainder was to be recovered from subdivision H of Farm No 478a. He said the administrator of the estate of Mr. Baker never refused to alienate to him the portion recoverable from subdivision H of Farm No. 487a.

When it was proposed to the Plaintiff by Counsel representing the estate of Mr Baker, if he was willing to get the 1.5 acres from the remainder of the estate of Mr. Baker, the Plaintiff responded that, he was prepared to get 1.5 acres from the estate of Mr. Baker to make up 3 acres. And in re-examination he stated that he was not happy with the offer of 1.5 acres because he felt short changed.

The Plaintiff called one witness, Mr. Mailos Mwanza, he said he used to work for Mr. Roy Baker and had worked for him for a period of 30

years. He said when Mr. Baker started selling the land he was with him. He said the first person to purchase land was Mr. McDonough, an Indian, then the Plaintiff, who bought two pieces of land, and then the Findlays. He said the Plaintiff bought his first piece of land and built on it, and later purchased the second piece of land. He said Mr. Baker showed him the boundaries of the second piece of land.

SUMMARY OF THE DEFENDANTS' CASE (TESTIMONIES)

The second Defendant, Mrs. Dessisslava Findlay, testified on her own behalf and on behalf of VDF. She confirmed that she was a shareholder and director in VDF. She also confirmed that in 2007-2008 she was retained by VDF as a legal practitioner to represent VDF in the subject land transaction.

She said the draft contract of sale was drafted by Mr. Baker's, advocate, Mr. Adam SC. She explained that she effected some amendments, which were later approved by Mr. Adam SC. That she executed instructions given to her by VDF, which included, amending the contract of sale to reflect that 1.5 acres was to be marked off from Lot 3293/M, in favour of a third party. She said she later came to learn that the third party was the Plaintiff.

She said the contract of sale between Mr. Baker (vendor) and VDF (purchaser) involving the purchase of two pieces of land was assented to in January 2008. She said all formalities were done, resulting in VDF obtaining the Certificates of Title.

She said the 1.5 acres reserved for the Plaintiff had not yet been marked off, because the Plaintiff was yet to complete preliminary

steps incidental to the transactions, such as, preparation of survey diagrams, approval of the subdivision, obtaining state consent to assign and payment of property transfer tax. She said these documents were never availed to VDF or to her by the Plaintiff to enable VDF surrender title to the Plaintiff. She added that instead of receiving the above stated documents, the Plaintiff through his lawyers made a demand for marking off of 2.6 acres from Lot No. 3293/M, instead of 1.5acres. She said her understanding of the memorandum between the Plaintiff and Mr. Baker was that, the one (1) hectare of land for the Plaintiff representing 2.6 acres was to come from two properties, that is to say, Lot No. 3293/M and subdivision H of Farm No. 487a.

She denied making any professional undertaking to carry out work on the Plaintiff's behalf relating to the subject matter.

She said Mr. Baker died in 2010, and observed that while Mr. Baker was still alive, the Plaintiff raised no concerns, until after the death of Mr. Baker. She said the Plaintiff was averse to the construction of the wall fence because according to him, the developments were going to inflate property transfer tax than when the land was bare. She said she still indicated to the Plaintiff that the Certificate of Title was available to mark-off his 1.5 acres, provided that he made available the requisite documents. She said the precondition was meant to avoid delays, having noticed that the Plaintiff had not effected the transfer regarding the other property since 1998, despite being in possession of the other Certificate of Title.

The second Defence Witness (DW2) was Mr. Henry Velden Findlay (hereinbefore mentioned), his testimony was materially similar to that of the second Defendant, Mrs. Findlay. I will, therefore, not extensively recapitulate the same; suffice to state that he said that at the site, in his presence, the Plaintiff was told by Mr. Baker that it was 1.5 acres that was to be marked off, and that Mr. Baker signed for it in the contract of sale with VDF.

The third Defendant, Mr. Azziz Hussein Dawood Adam SC, testified. The reception of his testimony was via video conference under *zoom*, because he could not physically attend court due to his health challenges. He confirmed that in the conveyance matter between Mr. Baker and VDF, as an advocate, he acted on behalf of Mr. Baker.

He made reference to the contract of sale, between Mr. Baker and VDF dated January 15, 2008, in particular to clause 12, special conditions. He said the third party referred to, and entitled to a mark-off of 1.5 acres was the Plaintiff. He said the letter dated January 22, 2008, by Mr. Baker to he, was confirmatory, post the sale that it was 1.5 acres that was to be marked off from Lot No. 3293/M.

He denied giving the Plaintiff any professional undertaking. He said the memorandum relied on by the Plaintiff to support the transaction between Mr. Baker and the Plaintiff was never brought to his attention, until the matter was in court. He said without being shown the contract between Mr. Baker and the Plaintiff, Mr. Baker only gave him verbal instructions relating to the 1.5 acres, and that he did not find out the basis of marking off 1.5 acres.

The fourth Defendant did not call witnesses. In fact, at the last sitting, the fourth Defendant was inexcusably not in attendance, consequently I had to deem the fourth Defendant's case closed.

THE PARTIES' SUBMISSIONS

I will summarize the submissions by segmenting them into issue by issue. The first issue is: **whether the Plaintiff is entitled to have 2.5acres (1.0244 hectares) marked off from Lot No. 3293/M or 1.5 acres as alleged by VDF.**

The Plaintiff's Counsel, Mr. Chisulo SC, argued that the Plaintiff was deprived of his interest in Lot No. 3293/M due to fraudulent conduct of the first, second, and third Defendants. I was thus urged to order that VDF subdivides the said 1.0244 hectares from Lot No. 3293/M in favour of the Plaintiff.

Mr. Mwansa SC, in his submissions argued that VDF has always been willing and was willing to surrender the original Certificate of Title in respect of Lot. No. 3293/M to the Plaintiff to mark off 1.5 acres. It was submitted that the Plaintiff in seeking to get 1.0244 hectares of land from Lot. No 3293/M, was contrary to the terms contained in the memorandum of sale between he and Mr. Baker. That the instructions issued by Mr. Baker to his advocates were that only 1.5 acres, and not 1.0244 hectares was to be conveyed to the Plaintiff from Lot No. 3293/M.

Reliability on the sketch plan by the Plaintiff was questioned on account that the same: was not signed, either by the purported Surveyor or Mr. Baker, that it was not referred to in the

memorandum, that the extent of the total land in the sketch plan (3.89735 acres) was more than the land specified in the memorandum (more or less 3 acres), and that whereas the memorandum or note relied on by the Plaintiff was dated September 21, 1998, the sketch plan was dated January 2007. It was added that the sketch plan was insufficient to disapprove instructions issued by Mr. Baker indicating the extent of land that was to be marked off from Lot No. 3292/M. And that the sketch plan was inadmissible to contradict, vary or add terms to the contract.

It was also argued that the sketch plan could not be relied on because it was in contravention of section 21 and 22 of the ***Land Survey Act, Chapter 188 of the Laws of Zambia***, prescribing the lodging of the proposed site plan for approval by the Surveyor General, and registration of diagrams. It was added that in terms of section 22 of the then existing law, the ***Town and Country Planning Act, Chapter 283 of the Laws of Zambia*** no prior permission was obtained to sanction the subdivision.

It was argued that where there is ambiguity relating to land to be conveyed to two parties by the same owner, in determining the boundaries, the Court may admit other conveyances to assist in resolving the matter. Recourse was had to the learned authors of ***Halsbury's Laws of England 4th Edition Volume 4 (1) at paragraph 930*** in which they submit that:

> ***Where an owner divides into parts and conveys each part to a different person, the Court, in seeking to determine the boundaries defined by one of the conveyances, may***

admit the other conveyances in evidence to assist in resolving an ambiguity.

Mr. Mwansa SC, invited me to have regard to the contract of sale between Mr. Baker and VDF. It was submitted that the Court should consider the contract of sale dated January 15, 2008 as to the extent of the Plaintiff's land in resolving any ambiguity.

It was observed that in seeking the relief sought to be granted 1.0244 hectares as against VDF, the Plaintiff was seeking specific performance. It was thus submitted that this was at variance with the principles of contract law, to the extent that specific performance is unenforceable against a third party. And that it was unfair for the Plaintiff to seek to over burden VDF with the expenses connected to conveyancing such as the payment of property transfer tax. In support of this assertion reference was made to the case of ***Zambia Consolidated Copper Mines Limited v. Eddie Katalayi and Max Chilongo (2001) Z.R. 28***, the Supreme Court held:

There would be no justification to inflict injustice on the third party in the name of justice for the appellant.

And the Supreme Court further stated:

It is not possible without basis to ignore the rights of an innocent purchaser for value and who had no reason to suspect that there would be an adverse claim.

It was contended that the Plaintiff was aware that, the late, Mr. Baker was transacting with VDF for sale of the disputed lot, and that the surrender of the Certificate of Title by the Plaintiff to VDF was done voluntarily.

In conclusion on this issue, it was stated that VDF was justified in refusing to mark off 1.0244 hectares or 2.531 acres, and that VDF was equally justified in refusing to bear the cost of the conveyance earmarked to be expended on marking off.

The second issue as pleaded is: **whether the first and second Defendants acted fraudulently by refusing to convey to the Plaintiff 1.0244 hectares of land on the disputed lot, and whether the second and third defendants made professional undertakings to the Plaintiff to guarantee the marking-off of 1.0244 hectares from the disputed lot.**

Mr. Chisulo SC, first made reference to the learned authors of ***Halsbury's Law of England 4Th Edition Volume 16 para. 1219*** regarding to the meaning of fraud, thus:

> ***The court has never ventured to lay down as a general proposition, what constitutes fraud. Actual fraud arises from and circumstances of imposition. It usually takes the form of statement that is false or suppression of what is true. The withholding of information is not in general fraudulent unless there is special duty to disclose it.***

Further, the case of ***Kitechen v. Royal Air Forces Association (1958) 2 A LL E.R. 214*** was cited in which it was held:

> ***Fraud under the Limitation Act 1939 is not confined to deceit and dishonesty. That equitable fraud covers conduct which, having regard to the special relation between the parties concerned, was an unconscionable things for one to do towards the other....***

It was argued that it was unconscionable for the second Defendant, Mrs. Findlay acting for VDF to go ahead and obtain the Certificate of

Title to Lot 3293/M, without ascertaining and ensuring that the Plaintiff was in agreement to the portion intended to be marked off. And whether the Plaintiff was agreeable to the conditions upon which they purported to withhold the transfer of the Plaintiff's portion to the Plaintiff.

It was submitted that fraud on the part of Mrs. Findlay and Mr. Adam SC, was supported by the fact that they falsely caused the Plaintiff to hand over the Certificate of Title on the basis of their undertakings, which were relied upon by the Plaintiff.

Allied to the allegation of fraud was the allegation hinging of breach of professional undertakings on the part of the Mrs. Findlay and Mr Adam SC, respectively. As to the meaning of the word 'undertaking' a couple of cases were vouched. In ***Kaitlin v. Auerbach 1988 CanLII 3227 (BC CA)***, the Court of Appeal of British Columbia adopted the principle stated in the publication dubbed, ***Professional Conduct of Solicitors (1986), the Law Society, London***, that:

> ***An undertaking is any unequivocal declaration of intention addressed to someone who reasonably places reliance on it and made by:***
> ***A solicitor in the course of his practice, either personally or by a member of his staff: or***
> ***A solicitor as 'solicitor', but not in the course of his practice; whereby the solicitor (or in the case of a member of his staff, his employer) becomes personally bound."***

And as to the *niche* of the word 'undertakings' in the field of land conveyance, the rationale was elaborated in the case of ***Briggs and Another v. The law Society [2005] EWHC at page 1830*** wherein it was held:

> ***Undertakings are the bedrock of our system of conveyancing. The recipient of an undertaking must be able to assume that once given, it will be scrupulously performed. If property purchasers and mortgage lenders cannot have complete confidence in the safety of the money they put in the hands of a solicitor in the course of a property transaction our system of conveyancing would soon break down. The breach of undertaking given by a solicitor damages public confidence in the profession and in the system of undertakings upon which property transactions depend.***

And in ***United Mining and Finance Corporation Ltd v. Becher (1910) 2 K.B. 296*** adverted to by Mr. Chisulo SC, it was held:

> ***The court has jurisdiction summarily to enforce solicitor's undertakings given out of Court, even where there is no suggestion of impropriety. The failure to honour an undertaking is itself prima facie evidence of misconduct. The court would be exercising a special control over its officers.***

It was argued that the fact that the second and third Defendants made assurances to the Plaintiff to take care of his interest in respect of the disputed lot, by marking off the Plaintiff's parcel of land; the assurances amounted to professional undertakings, discharged in their capacities as legal practitioners.

Mr. Mwansa SC, on behalf of Mrs. Findlay filed written submissions. As to the meaning of the word "undertaking" he started by citing ***Black's Law Dictionary 9th Edition***, in which it is recorded:

> ***Undertaking a promise, pledge, or engagement***
>
> ***Undertaking: to take on an obligation or task; to give formal promise; to guarantee; to act as surety for an***

> ***another; to make oneself responsible for a person. Fact or the like.***

It was acknowledged that a legal practitioner's undertaking handed out in the professional capacity when abrogated had serious consequences, because it borders on professional conduct. And while acknowledging that an undertaking can be oral, the case of ***Hammond v. Law Society of British Columbia (2004) BCCA 369*** was cited to demonstrate the importance of having a written undertaking, the Court remarked:

> ***It is imperative that an undertaking be in writing or confirmed in writing because the actual words used are crucial to determining the existence of an undertaking. It is not an undertaking to convey a message on behalf of your client: likewise, it is not an undertaking to make a suggestion as to a course of action.***

It was observed that the Plaintiff had failed to: firstly, demonstrate whether or not there was an undertaking given by Mrs. Findlay, and secondly, that the Plaintiff had equally failed to demonstrate whether or not the undertaking was given by Mrs. Findlay in her professional capacity or personal capacity, thirdly that the exact terms and conditions of the undertaking were not stated. It was thus argued that this was not a clear case for the court to exercise its discretion to enforce an undertaking. It was added that the Plaintiff had failed to establish breach of undertakings bordering on professional conduct to the required standard of proof, thus to prove the allegations with a degree of certainty.

According to Mr. Mwansa SC, the Plaintiff by his testimony confirmed that the process of marking off was to be undertaken by the Plaintiff at his own cost, and not by Mrs. Findlay.

Mr. Mwansa SC, went further to consider the legal position of Mrs. Findlay. That if Mrs. Findlay had to convey the subdivision to the Plaintiff, she could only do so if she was instructed by the Plaintiff. The basis for this was anchored on section 52(a) of the ***Legal Practitioners Act, Chapter 30 of the Laws of Zambia***, which provides:

> ***No practitioner shall-***
>
> ***(a) take instructions in any case except from the party on whose behalf he is retained or some person who is the recognised agent of such party, or some servant, relation or friend authorised by the party to give such instructions.***

It was submitted that, apart from the Plaintiff's testimony, there was no supporting evidence to show that the second defendant made an undertaking to convey the said parcel of land to the Plaintiff, or that the second Defendant made any professional undertaking to him.

Furthermore, it was argued that there was no actual or presumed undue influence exerted by Mrs. Findlay. And as regards presumed undue influence, it was argued that there was no relationship of trust and confidence between the Plaintiff and Mrs. Findlay to presume undue influence. That it was only after VDF had paid the full purchase price that was when Mrs. Findlay asked for the release of the Certificate of Title.

I was thus urged to dismiss the Plaintiff's claim against the second Defendant with costs.

On the issue argued by Mr. Mwansa SC, that fraud was not pleaded with sufficient particulars, Mr. Chisulo SC, rejoined that the ruling dated September 15, 2015, by Chisanga J., (as she then was) having conduct of the matter at the material time, addressed the issue as to whether fraud was sufficiently disclosed by stating that:

> ***With regard to paragraph 21 of the statement of claim, the Plaintiff has averred in effect that the 2nd defendant has acted fraudulently by neglecting and refusing to convey to the plaintiff the 1.0233 hectares of the proposed subdivision on the disputed Lot. He has further averred that the 2nd defendant has reneged on her undertaking that she would ensure to convey to the Plaintiff the proposed subdivision of the disputed Lot. As I understand it, paragraph 21 of the statement of claim avers that the 2nd defendant has neglected and refused to convey the disputed Lot to the plaintiff. She has as a result acted fraudulently. The averment in that respect sufficiently particularises the alleged fraud as required by the rule. In Exp Watson' Wills J said the following on frauds:***
>
> ***"fraud" is in my opinion, a term that should be reserved for something dishonest and morally wrong, and much mischief is, I think, done a well as much pain inflicted by its use where illegality and illegal are the really appropriate expression***

It was argued that the ruling having not been appealed against the matter is *res judicata.*

As regards the sketch plan, it was argued that the sketch plan existed since 2007, way before the first and second Defendant came on the scene. And that the same was prepared with the approval of the late

Mr. Baker. It was submitted that the notes recorded in the memorandum of sale as to the extent of the land were not binding because they were mere estimates by two untrained persons.

In respect of the alleged undertakings, it was argued that at a meeting held at Mr. Adam's chambers attended by Mr. Adam SC, and Mrs. Findlay, the Plaintiff was assured that his interest would be taken care of during the conveyance to VDF. And that Mrs. Findlay assured the Plaintiff that the release of title was expedient to fast track the process of changing land ownership. It was submitted that it would be unfair to allow Mr. Adam SC, and Mrs. Findlay to depart from the professional undertakings, or act in a manner inconsistent with the said undertakings. And reference was had to the case of ***Central London Property Trust Ltd v. High Trees House Ltd [1947] K.B. 130*** wherein it was stated:

> ***There are cases in which a promise was made which has intended to create legal relations and which, to the knowledge of the person making the promise must be honoured. These are promises intended to be binding, intended to be acted upon and the courts have refused to allow the party making it to act inconsistently with it. It is in that strict sense and that sense only, that such a promise gives rise to estoppel.***

And the case of ***Galaunia Farms Ltd v. National Milling Company Ltd (2002) Z.R. 135*** was also cited where it is was held:

> ***The basis of estoppel is when a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs, another has taken to be settled or correct.***

I was urged to invoke the Court's equitable jurisdiction and take into account the professional undertakings made to the Plaintiff by the second and third Defendants, and allow the Plaintiff's claims.

DETERMINATION

I have carefully considered the evidence adduced and the submissions respectively rendered by Counsel. It is not in dispute that the late Mr. Baker, was the registered proprietor of three adjoining farms, namely: the remaining extent of subdivision J of Farm No. 487a; Lot No. 3293/M; and the remaining extent of subdivision H of Farm No. 487a, all situated along Leopards Hill Road, Lusaka.

And I am satisfied that in September 1998, the Plaintiff purchased a parcel of land from Mr. Baker, at the price of K6, 000, 000.00 (unrebased). The said parcel of land sold to the Plaintiff was to be delineated from part of subdivision H of Farm No. 487a, and Lot No. 3293/M.

I am content that in 2008, Mr. Baker represented by his advocate, Mr Adam SC, entered into a contract of sale of land with the first Defendant, VDF. The second Defendant, Mrs. Findlay was at the material time acting for VDF in the said sale. The contract of sale between Mr. Baker (vendor) and VDF (purchaser) was executed on January 15, 2008. The land sold to VDF was described as: (i) remaining extent of subdivision J of farm No. 487a in extent of 6.0212, and Lot. No 3293/M in extent of 3.0444 hectares.

The contract of sale in respect of Lot No. 3293/M was pursuant to the Law Association of Zambia General Conditions of Sale 1977, subject to agreed special conditions between the parties. And in terms of special conditions, in clause 12 it was *inter alia* provided that, 1.5 acres of Lot No. 3293/M sold to a third party (the Plaintiff) by Mr. Baker was to be marked off from Lot No. 3293 for the benefit of the third party (the Plaintiff). I find it probable that the Plaintiff was unaware about said clause 12. In any event, he was not privy to the contract between Mr. Baker and VDF.

And with the release of the Certificate of Title in respect of Lot No. 3293/M by the Plaintiff to VDF, the whole of Lot No. 3293/M was assigned to VDF, with the expectation that after the Certificate of Title was issued in the name of VDF, a subdivision from Lot No. 3293/M would be created, to mark off the Plaintiff's piece of land.

In the resolution of this matter, a determination ought to be made in terms of section 4 of the ***Statute of Frauds 1677 Act*** which provides that:

> ***No action shall be brought upon any contract for the sale or other disposition of land or an interest, unless the agreement upon which such action shall be brought, or some memorandum or note thereof. Shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.***

In the case of ***Wesley Mulungushi v. Catherine Bwale Mizi Chomba (2004) ZR 96*** the Supreme Court held:

> ***For a note or memorandum to satisfy section 4 of the Statute of Frauds 1677, the note or memorandum it is***

sufficient, provided that it contains all the material terms of the contract, such as names, or adequate identification of the subject matter and the nature of the consideration.

I need not to disproportionately waste time on this issue because there is consensus in principle, between the Plaintiff and the Defendants generally that, the Plaintiff is entitled to some portion of Lot. No. 3293, except the dispute is on the extent of what is to be marked off. Therefore, in my considered view the validity of the memorandum in terms of the Statute of Fraud forming the basis of the contract between the Plaintiff and Mr. Baker, to the inclusion of his personal representative, the fourth Defendant is non-contentious. And for the avoidance of doubt, the said memorandum considerably satisfies the requirement spelt out in section 4 of the Statute of Frauds.

Mr. Mwansa SC, also raised an argument to the effect that, the failure by the Plaintiff to register the contract of sale or the bill of sale of land, in compliance with section 4(1), section 5(1) and 6 of the ***Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*** rendered the transaction between Mr. Baker and the Plaintiff null and void. The memorandum did not require registration within the import of the said sections.

As earlier noted, the Plaintiff alleged that what was to be marked off, from Lot No. 3293/M after the purchase of the same by VDF for his benefit was 2.5 acres (1.0244 hectares), whereas, the Defendants, VDF in particular allege that it was 1.5acres. This is what is at the centre of this dispute. Clearly, there are two competing and

conflicting positions. And it remains for the Court to judiciously balance the scales of justice to the required standard of proof, so as to effectually determine in whose favour either in part or in full the judgment of the court will be.

Whether the Plaintiff is entitled to have 2.5acres (1.0244 hectares) marked off from Lot No. 32992 or 1.5 acres as alleged by VDF.

The source of a vendor and purchaser relationship between the Plaintiff and Mr. Baker is based on the memorandum or note dated September 1998, relating to the sale of the said land. It is trite law as stated in ***Grigsby v. Melville [1973] 3 ALL E.R. 455***, that "evidence of the circumstances surrounding the transaction was not admissible to contradict the plain language of the conveyance". Yes, the sale of land between the Plaintiff and Mr. Baker took place, but the language of the memorandum is not plain and clear in terms of the exact extent of land to be marked off from Lot. No. 3293/M and subdivision H of Farm No. 487a, respectively.

I acknowledge that as submitted by Mr. Mwansa SC, relying on ***Halsbury's Laws of England 4th Edition Volume 4 (1) at paragraph 930*** that in resolving a dispute of this nature, the court is entitled to consider other conveyances made to other parties from the same vendor. However, the other conveyance, in this case, the contract of sale between Mr. Baker and VDF is not solely conclusive evidence as to the transaction between the Plaintiff and Mr. Baker relating to Lot No. 3293/M. Generally, other factors may have to be considered, such as the principle that states that: "at law, as in

equity, the basic rule is that estates and interests primarily rank in order in which they are created" (see ***Snell's Equity***, at page 47, paragraph 4-06).

It is without doubt that between the Plaintiff and VDF, the first interest that was created in respect of Lot. No. 3293 was that of the Plaintiff.

It is, therefore, imperative to consider the surrounding circumstances that existed prior to the second conveyance to VDF involving Lot No. 3293/M. In this regard, I have recourse to the case of ***Masterton Homes Pty Ltd v. Palm Assets PTY Ltd [2000] NSWCA 234*** at page 90, wherein it was held:

> ***In determining what are the terms of a contract that is partly written and partly oral, surrounding circumstance may be used as an aid to finding what the terms of the contract are.***

Further in ***County Securities v. Challenger Group Holdings Pty Limited [2008] NSWCA 193*** at 7-8, Lord Spigelman CJ., held:

> ***The relevant surrounding circumstances include the history of the relationship between the parties and their conduct prior to and the time the contract was entered into. Where there is a dispute concerning the words spoken, the surrounding circumstances may assist in determining which account is more likely....***
>
> ***In my opinion, subsequent conduct, especially how a contract for purchase and sale was settled, is relevant, on an objective basis, to the identification of the subject matter of a contract or the determination of necessary terms as distinct from deciding the meaning of words.***

While the memorandum or note relating to the sale of land between the Plaintiff and Mr. Baker is silent, on the fact alleged by the Plaintiff that land in extent of 1.0244 hectares was to be delineated from Lot No. 3293/M in his favour, and the remainder from subdivision H of Farm No. 487a, the Plaintiff relied on the sketch plan drawn in January 2007 by Messrs AJL Land Surveyors. The sketch plan clearly depicts the parcel of land the Plaintiff bought from Mr. Baker. That is to say, 1.0244 hectares was to be marked off from Lot. No. 3293/M, and 5528 square metres was to be marked off from subdivision H of Farm No.487a.

The sketch plan in terms of evidential value cannot be discounted for want of approval by the Surveyor General or want of registration under the Land Survey Act.

I am content that the Plaintiff and Mr. Baker relatively shared a long-term peaceful relationship anchored on good friendship and trust. The manner in which the payments for purchase of land were made, covering 25 instalments attest to the type of friendship the two shared. I believe the Plaintiff's testimony that when the physical features representing the boundary of the land sold to the Plaintiff were pointed out to the Surveyor, Mr A.J Lungu, it was done in the presence of Mr. Baker. The sketch plan was drawn with the approval of Mr. Baker. The lack of signature from Mr. Baker on the sketch plan in my view does not cast aspersion on the document. The Plaintiff was sincere and reliable. Undoubtedly, the Plaintiff had no motive to give false testimony in this regard.

Similarly, the sketch plan cannot be discounted simply because there is a marginal difference in the size of the land sold to the Plaintiff between what was described in the sketch plan and the memorandum of sale. As rightly noted by Mr. Chisulo SC, what was stated in the memorandum were lay approximations. The exact extent of the land sold to the Plaintiff was as depicted in the sketch plan. The letter by Mr. Baker to his advocate, Mr. Adam SC, dated January 22, 2008, advising him that it was 1.5 acres that was to be marked off from Lot. 3293/M, after the land was assigned to VDF, has no effect to renounce my finding above, because the letter came after the sketch plan. And in fact, it came after Mr. Baker had already sold the land to VDF.

Therefore, I come to the conclusion that the land sold to the Plaintiff by Mr. Baker is as depicted in the sketch plan dated January, 2007, drawn by Mr. A.J. Lungu. Accordingly, 1.0244 hectares must be marked off from Lot. No. 3293/M in favour of the Plaintiff. The acceptance by VDF to firstly take the whole of Lot No. 3293/M, and later mark off the Plaintiff's land had an inherent implied obligation on the part of VDF, thus to assume and take the place of Mr. Baker to assign to the Plaintiff his portion from Lot No 3293/M, by signing the necessary documents once ready.

The argument that an order of specific performance or an order akin to specific performance is untenable against VDF, because no such order can be made against a third party is immaterial. VDF was not a mere third party. As earlier stated, accepting to take the whole land

and later parcel out to the Plaintiff, his portion presented a special circumstance, upon which VDF was obliged to assign to the Plaintiff its parcel of land. It will not do perfect justice to simply end at stating that the Plaintiff is entitled to 1.0244 hectares from Lot No. 3293/M without imposing an obligation on VDF to sign all relevant documents in order to convey to the Plaintiff, his land as ordered herein. The directive does not mean that the cost of conveyance is on VDF, it remains for the Plaintiff and possibly the estate of Mr. Baker.

The said clause 12 in the special condition in the contract of sale dated January 15, 2008, having been created post the interest of the Plaintiff cannot rank superior to the Plaintiff's interest. The said clause 12 would have only been enforceable against the Plaintiff, if there was something preferably in writing to show that the Plaintiff was agreeable that indeed it was 1.5 acres. The sole reliance on Mr. Baker's statement was not enough under the circumstance. Clause 12 of the contract between VDF and Mr. Baker is unenforceable against the Plaintiff, since he was not only unaware of its existence, but was also not privy whatsoever to the said contract.

Whether the first and second Defendants acted fraudulently by refusing to convey to the Plaintiff 1.0244 hectares of land on the disputed lot.

I now turn to allegations of fraud. An allegation of fraud especially against a legal practitioner is a serious allegation. And given the gravity of the allegation, the standard of proof placed on one who alleges is beyond the ordinary standard of proof in civil matters. In

the case of ***Chishala Karabasis Nivel and Another v. Mwale (SCZ Appeal No.161/2015) (2018)*** the Supreme Court stated that:

> ***...fraud must be pleaded specifically. The standard of proof is higher than a mere balance of probabilities. In*** *Sithole v Zambia State Lotteries Board* ***we stated that if a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities.***

The purview of the allegations of fraud and breach of undertaking will be confined to what was pleaded, and any suggestion of fraud beyond what was pleaded either in a witness's testimony or in Counsel's submission will not be considered. This approach is perfectly in conformity with what the Supreme Court held in the case of ***Atlantic Bakery v. ZESCO Limited (S.C.Z SJ No.47 of 2018)*** in a unanimous judgment in which Musonda J.S., (as he then was) had this to say:

> ***Probably motivated by the zeal to stymie delay that would result by insisting that the respondent should make a specific claim for what it regards as outstanding in respect of the September 2017 bill, the learned judge made an order which violates a fundamental rule of civil procedure, namely that evidence can only be considered where a plea which that evidence supports has been put forward in the pleadings. A court is not to decide on an issue which has not been pleaded. Put differently, a court should confine its decisions to the question raised in the pleadings. It cannot thus grant relief which is not claimed. Litigation is for the parties; not the court. The court has no business extending the boundaries of litigation beyond the scope defined by the parties in their pleadings.*** (Emphasis added.)

The specific paragraph that seems to touch on fraud is paragraph 21 of the statement of claim. The other paragraphs, in particular paragraphs 15, 16, 17 and 18 specifically relate to breach of undertakings. In paragraph 21, it was specifically alleged that VDF through its human agent, Mr. Henry Valden Findlay and the second Defendant, Mrs. Findlay acted fraudulently by neglecting and refusing to convey to the Plaintiff the said 1.0244 hectares from the disputed lot. And that Mrs. Findlay reneged on her undertaking to the Plaintiff to convey to him the proposed subdivision.

I agree with Mr Mwansa SC, that the allegation of fraud and the connection thereof to breach of undertaking was not proved. The Plaintiff without factual or legal justification seems to suggest that the cost of conveying his portion should have been shouldered by VDF and Mrs. Findlay. It is inconceivable to suggest that non-fulfilment of such generosity constituted dishonest on the part of VDF or/and Mrs. Findlay. In fact, what is probable is that VDF was willing to do the needful to parcel out 1.5 acres as agreed with the owner of the land, provided the Plaintiff did his part as well.

It was alleged that the Plaintiff showed no willingness to pay the requisite statutory fees and taxes, and perfect his conveyance. It appears the Plaintiff has had an antecedent of being somewhat indifferent in matters involving land conveyance. While he was the first purchaser, but took no steps to obtain title in both instances involving Lot No. 3293/M and subdivision H of Farm No. 487a. Conversely, the second purchaser, VDF showed more diligence and timely obtained title.

Whether the second and third defendants made professional undertakings to the Plaintiff to guarantee the marking-off of 1.0244 hectares from Lot No. 3293/M.

In addition to the authorities cited providing insight as to the meaning of an undertaking in legal parlance, the word "undertaking" means:

> ***An undertaking is a verbal or written promise either to do, refrain from doing something. Undertakings may take a variety of forms. They are most commonly given in the course of legal practice to avoid delays either in the conclusion of a transaction (e.g. in the course of the sale of land and the payment of the purchase price) or the progress of litigation.*** (see ***Lewis and Kyrou, "Handy Hints on Legal Practice"*** (Second Edition, South Africa, LexisNexis, 2011 reprinted page 165)

Generally, undertakings are in two categories, one is a personal undertaking given by a legal practitioner on his own behalf, and the second one is an undertaking given by a legal practitioner on behalf of a client with the client's authority. The former is binding on the legal practitioner, and the latter is only binding on the client (see ***Lewis and Kyrous*** (supra).

Indeed, as lucidly stated in ***Briggs*** (supra), undertakings are the bedrock of our system of conveyancing. This is so, because "a legal practitioner's word is his or her reputation" (see ***Van der Merwe SW (1974) DRP 384***). Therefore, breach of an undertaking may constitute professional misconduct. And the Court in the exercise of its supervisory jurisdiction over its officers, may enforce undertakings, and take appropriate actions, such as ordering performance of the undertaking.

And as to the judicious exercise of the supervisory jurisdiction in ***Rooks Rider (A firm) v. Steel & Others [1993] 1 ALL E.R. 716***, the Court held:

> ***In that sense this supervisory jurisdiction will only be exercised in a clear case. Moreover, although the Court has the means to resolve disputed issues as maintained above, when exercising its summary jurisdiction over solicitors, the court will be careful to ensure that the solicitor defendant is not prejudiced by the course which is being followed in the circumstances of a particular case, and it will exercise the discretion which it has regarding this summary jurisdiction with that in mind.***

The standard of proof placed on one who alleges breach of an undertaking is beyond the ordinary standard of proof in civil matters, that is to say, beyond the balance of probabilities. In ***Bhandari v. Advocates Committee (1956) 3 All E.R. 742,*** the English Court of Appeal had this to say:

> ***We agree that in every allegation of professional misconduct involving an element of deceit or moral turpitude a high standard of proof is called for, and we cannot envisage anybody of professional men sitting in judgment on a colleagues who would be content to condemn on a mere balance of probabilities.***

Breach of undertaking in this case as alleged by the Plaintiff in his statement of claim against the Mr. Adam SC, and Mrs Findlay; is that at a meeting held in the office of Mr. Adam SC, the advocate for VDF, made an undertaking that if the Plaintiff released the certificate of title his "interest would be taken care of" in respect of Lot No. 3293/M. And that Mrs. Findlay asserted that "in order to fast track the change of ownership in favour of the first Defendant, the first

Defendant would transfer the whole of the disputed lot including the Plaintiff's portion of 1.0244 hectares into the first Defendant and thereafter the second Defendant would attend to marking off and subdivision of the Plaintiff's portion of the disputed lot from the whole and transfer the same to the Plaintiff". It was alleged that this undertaking was against the back drop that the Plaintiff had initially refused to release the Certificate of Title.

My understanding of the allegation regarding breach of undertakings deciphered from the statement of claim is that, Mr. Adam SC, and Mrs. Findlay as professionals made an undertaking which they failed to honour, i.e., to mark off 1.0244 hectares from Lot No 3293/M in the Plaintiff's favour, and convey the same to him. While an undertaking can verbal, the transaction herein being a land transaction as stated in ***Hammond v. Law Society of British Columbia*** (supra) it was imperative that such an undertaking be in writing. I agree with Mr. Mwansa SC, that it is unascertainable whether the undertakings were personal or made on behalf of clients. This uncertainty in addition to what I will say here-below reacts against the Plaintiff.

The meaning of the wording that, the standard of proof is higher than the ordinary standard of proof (balance of probabilities), can be decoded from the case of ***Colorado v. New Mexico 467 US 310 (1984)*** wherein the Supreme Court of the United States held:

> ***Clear and convincing evidence, which is higher than preponderance of the evidence but less rigorous than beyond all reasonable doubts, means that the evidence is highly probable and substantially more likely to be true***

than untrue; the fact finder must be convinced that the contention is highly probable.

I have no hesitation to hold that the allegation of breach of undertakings is not highly probable, likewise, it is not substantially more likely to be true than the testimony of Mr. Adam SC, and Mrs. Findlay, that no such undertakings were ever made. It is inconceivable how the duo could make such undertakings that they would ensure that 1.0244 hectares of land would be marked off than the 1.5 acres indicated to them by the vendor, when the Plaintiff did not show to Mr. Adam SC, in particular the sketch plan and the memorandum. In fact, in cross-examination the Plaintiff said Mr. Adam SC, did his best to take care of his interest. Accordingly, the Plaintiff was even magnanimous to accept that the one to find wanting is the late, Mr. Barker.

It should also be noted that Mr. Adam SC, and Mrs Findlay were not legal practitioners for the Plaintiff. Mr. Adam SC, acted on instructions from his client, Mr. Baker, and the instructions were that the portion for the Plaintiff from Lot No. 3293/M was 1.5acres. Similarly, the instruction from VDF to Mrs. Findlay was that VDF was buying Lot No. 3293/M, subject to marking off 1.5 acres for the Plaintiff. The Plaintiff has not adduced clear and convincing evidence that Mr. Adam SC, and Mrs. Findlay were more prepared to protect his interest as it related to marking off 1.0244 hectares, than to execute instructions given to them by their respective clients.

The Plaintiff misguided himself by thinking that by releasing the Certificate of Title, it meant at that VDF, Mrs. Findlay and Mr. Adam,

SC, would render legal services free of charge (*pro bono*), and that they would assume the responsibility of paying property transfer tax and other statutory fees. It is inconceivable to assume that the duo would perfect the transaction and convey title to him in the absence of a retainer. It is also fantastic to suggest that it was only the Plaintiff that was entitled to possession of the Certificate of Title, when others had similar equitable interests in it. In any case, what was the value of holding on to the document without demonstrating the urgency to perfect his conveyance? VDF too was entitled to the same title to perfect its entitlement in the land it had bought from Mr. Baker. The Plaintiff had no basis to hold VDF AT ransom given his inordinate delay to complete the sale with Mr. Baker.

The claim that VDF, Mr. Adam SC, and Mrs. Findlay exerted undue influence was equally not proved.

CONCLUSION

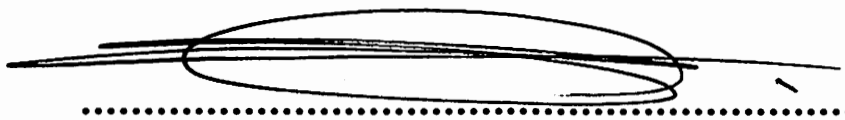
In the light of the foregoing, the Plaintiff's case succeeds in part; to the extent that, it is hereby declared that, the Plaintiff's entitlement from Lot No. 3293/M in terms of land size or what should be marked off from the purchase thereof is 1.0244 hectares. This is the extent of land to be assigned to the Plaintiff by VDF, that is to say, VDF signing the requisite documents transferring the said land to the Plaintiff. Accordingly, VDF should forthwith release the Certificate of Title to the Plaintiff. And the Plaintiff is ordered to complete the process of conveyance at his cost within 120 days from the date he shall have possession of the original Certificate of Title. This claim

succeeds with costs against VDF and the fourth Defendant to be taxed in default of agreement.

The claims alleging fraud, and breach of undertaking and seeking enforcement thereof are dismissed. It follows that costs are awarded to the second and third Defendants against the Plaintiff to be taxed in default of agreement.

Leave to appeal granted.

DATED THIS 15TH DAY OF MARCH, 2022.



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THE HON. MR. JUSTICE CHARLES ZULU


HIGH COURT OF ZAMBIA
09
PRINCIPAL
15 MAR 2022
REGISTRY
P.O. BOX 50067, LUSAKA.