

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA**

APPEAL NO. 13/2017

(Civil Jurisdiction)

B E T W E E N:

HITESHBHAI PATEL

AND

AGYEN-FREMPONG KOFI

AGYEN-FREMPONG OSEI



APPELLANT

1ST RESPONDENT

2ND RESPONDENT

Coram: Musonda DCJ, Wood and Kajimanga, JJS.

On 3rd March, 2020 and 11th March 2020.

For the Appellant: Mr. M. Lisimba & Ms N Sameta Mapushi – Mambwe
Siwila & Lisimba
For the Respondents: No Appearance

JUDGMENT

Wood, JS, delivered the judgment of the Court.

Cases Referred to:

1. *Mohamed S. Itowala v Variety Bureau De Change* (2001) Z.R 96.
2. *Gideon Mundanda v Timothy Mulwani and the Agricultural Finance Company Ltd and S.S.S Mwiinga* (1987) Z.R. 29.
3. *Zambia Extracts Oils and Colorants Limited and Another v Zambia State Insurance Pension Trust Fund Board of Trustees* (2016) 2 Z.R. 316.
4. *Yango Pastoral Company (Pty) v First Chicago Australia Ltd* (1978) 139 CLR 410.

Legislation Referred to:

1. *Sections 5, 9A and 12 of the Property Transfer Tax Act Cap 340 of the Laws of Zambia.*
2. *British Acts (Extensions) Act Cap 10 of the Laws of Zambia.*

This is an appeal from a judgment of the High Court dismissing the appellant's claim for specific performance of the sale of property, a refund of excess moneys paid, damages and interest.

The facts are that the appellant and the respondent entered into a contract for the sale to the appellant of a property known as subdivision "MR16"/16 of Farm No. 748 Ndola for the sum of K105,000.00. The appellant paid the full purchase price of K105,000.00. He also paid an additional sum of K47,800.00 to cover various expenses which included building a perimeter wall, ground rent, municipal rates and incidental expenses. There is no dispute that these payments were made by the appellant to the respondents. The parties then drew up an assignment in which the appellant indicated that the purchase price was K80,000.00. The reduction of the purchase price in the assignment turned out to be the catalyst for the respondents to resile from the contract as they felt that this reduction in the purchase price did not reflect the

correct position and was intended to avoid paying the correct Property Transfer Tax to the Zambia Revenue Authority. It was for this reason and what the respondents termed circumstances beyond their control in their letter of 13th June, 2012; family and other factors in their letter of 20th February, 2014 and that the appellant was potentially going to be a hostile neighbour that the contract was terminated and the respondents offered to refund the total sum of money paid in instalments. The appellant did not accept any of the respondents' explanations and proceeded to issue an originating summons which was later converted into a writ of summons due to the nature of the dispute.

In his judgment the learned trial Judge held that the purchase price was K105,000.00 but that the appellant had knowingly and intentionally reduced the purchase price to K80,000.00 so as to pay less Property Transfer Tax. The learned trial judge further held that the act of avoiding to pay the correct tax was an illegal act which made the contract unenforceable and dismissed all the appellant's claims with costs.

The appellant has now appealed against the judgment on the following grounds:

- i) The trial court erred at law and fact when it found that the appellant's case should completely fail as it was tainted with illegality, when no such contract was produced by any of the parties thereto.
- ii) The trial court erred at law and fact when it held that the appellant had abandoned all his other alternative claims in the writ of summons when in fact no such averment appears anywhere in the record.
- iii) The trial court erred at law in respect to the said alternative claims when it failed to find for the appellant under the head "*any other relief as by leave of the court will be found due*" and or in terms of section 13 of the High Court Act Chapter 27 of the Laws of Zambia, in respect of the said alternative claims.

The appellant has, with regard to the first ground, strenuously argued that the only document which was tendered before the lower court to the extent and effect of proving the purchase price of the

property was the deed of assignment which showed that the purchase price was K80,000.00. This argument was based on the finding by the learned trial judge that the purchase price was K105,000.00 and not K80,000.00 and that the sum of K80,000.00 was indicated in the deed of assignment so as to reduce the Property Transfer Tax which was payable to Zambia Revenue Authority on the consideration of K105,000.00. Contrary to what the appellant has argued, there is overwhelming evidence by the appellant himself in paragraph 5 of his affidavit in support of the originating summons that the agreed purchase price was K105,000.00. In paragraph 7 of the same affidavit, there is reference to the sum of K152,800.00 which was a combination of the purchase price and other expenses. The record of appeal shows that three cheques each in the sum of K10,000,000.00 (unrebated) and dated 8th September, 2011, 8th October, 2011 and 8th November, 2011 respectively were part of the purchase price. In addition, there are a number of notes acknowledging receipt for items connected to the property. The assignment makes reference to the payment of K50,000,000.00 in cash towards the purchase price. The respondents admit having received the sum of

K25,000,000.00 at the time when the cheque for K50,000,000.00 and the three postdated cheques were being paid. When all these amounts are added up, they come to the sum K152,800,000.00. The respondents admit owing the appellant this amount while the appellant has claimed the sum of K152,800,000.00. Paragraph 2 of the appellant's statement of claim refers to the sum of K105,000.00 as the purchase price which is admitted by the respondents in paragraph 5 of their defence. The deed of agreement (assignment) states a sum of K80,000.00. The respondents have admitted a debt of K152,800.00 and have also acknowledged that interest is due. In the light of all this documentary evidence which is in effect valid memoranda in writing sufficient to satisfy section 4 of the Statute of Frauds 1677 as amended by the Law Reform (Enforcement of Contracts) Act 1954 which applies in this country by virtue of the provisions contained in the British Acts (Extensions) Act, Cap 10, we do not see how the appellant can possibly argue that the only document which was tendered was the deed of assignment. If that were the case, then the appellant would have limited his claim to K80,000.00 and not to K105,000.00 which he claimed in paragraph 2 of his statement of claim. Further, the appellant is bound by his

own pleadings which refer to the purchase price as being K105,000.00. We accordingly reject the argument that there was no evidence in support of the sum of K105,000.00 and agree with the learned judge's finding that the purchase price was K105,000.00. We also reject the argument that K25,000.00 was for the construction of the perimeter wall because this sum was paid when the purchase price was being paid and subsequent payments specifically state that they were made for the perimeter wall.

The learned Judge took the view that the lower figure of K80,000.00 in the deed of assignment was a scheme to pay less Property Transfer Tax to Zambia Revenue Authority. As a result he found that the contract was tainted with illegality and therefore nullified it. He did not make any order for the refund of the money that had been paid by the appellant. Mr. Lisimba in his oral submissions submitted that this was a misdirection on the part of the learned trial Judge as he should have made an order to refund the money even after finding that the contract was tainted with illegality. We agree. In the case of *Mohamed S. Itowala v Variety Bureau De Change*¹ we held that a party's title to his money is unaffected by a tainted contract. The learned Judge should

therefore have ordered the respondents to refund the appellant. The learned Judge in his judgment did not also consider that parties to a contract should be presumed to contemplate a legal rather than an illegal course of proceedings and that the contract made between the parties might be capable of legal fulfillment as was held in *Gideon Mundanda v Timothy Mulwani and the Agricultural Finance Company Ltd and S.S.S Mwiinga*².

In this case, had the vendors proceeded to apply for state's consent to assign in the sum of K80,000.00 and consent granted on the basis of that sum, Property Transfer Tax could have been paid on K80,000.00 and not K105,000.00. It is however a notorious fact as was pointed out by Mr. Lisimba that Zambia Revenue Authority is not bound by the figure indicated in the state's consent form as it reserves the right under section 5 (2) of the Property Transfer Act Cap 340 of the Laws of Zambia to determine the value of the property being sold for Property Transfer Tax purposes. There is therefore, a possibility that parties could genuinely agree on a price but Zambia Revenue Authority would not be bound by it for Property Transfer Tax purposes. In that case, a contract between the parties cannot be said to be a nullity. In addition, Section 9 A

of the Property Transfer Tax Act provides that penalties under the Income Tax Act Cap 323 shall apply. Section 9 A of the Property Transfer Act states as follows:

“9A. Subject to the other provisions of this Act, the provisions of Part X of the Income Tax Act relating to offences and penalties shall apply, with necessary changes, to the offences and penalties under this Act.”

Section 12 of the Property Transfer Tax Act provides for the recovery of tax under the Property Transfer Tax Act. The Property Transfer Tax Act does not specifically make contracts such as the one entered into between the appellant and respondents illegal. In the circumstances, the court below should have made an order for specific performance of the contract for the sale of the land.

In Zambia Extracts Oils and Colorants Limited and Another v Zambia State Insurance Pension Trust Fund Board of Trustees³ we held that the fundamental principle in assessing the effect of statute law upon contracts is whether the statute intended to affect contracts and make them void thereby depriving the contracting party the benefits under the contract. In that case, we held further that although a mortgage transaction was made and performed contrary to section 17 of the Banking and Financial Services Act,

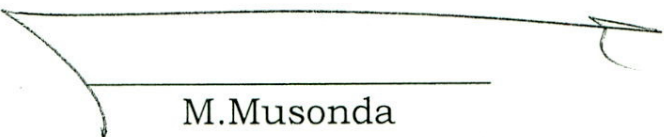
Cap 387 (since repealed) because the lender lent money without a licence, it did not invalidate the contract since the Act provided for a fine in the event of a breach. In the case of *Zambia Extracts Oils and Colorants Limited*³ we by and large adopted the reasoning in *Yango Pastoral Company (Pty) v First Chicago Australia Ltd*⁴.

The appellant has in his second ground of appeal argued that he had not abandoned his other claims in the statement of claim. A perusal of the record of appeal shows that the appellant had unequivocally stated that he did not want the money and that it was a mistake to ask for the money because all he wanted was the land.

The pleadings do not reflect that the appellant had abandoned his alternative claims nor does the evidence show that he had done so. It was therefore a misdirection on the part of the learned trial judge to conclude that the appellant had abandoned his alternative claim. We accordingly agree with the appellant that there is nothing in the record of appeal which shows that the appellant had abandoned his alternative claims. The second ground of appeal has merit.

Having found that the appellant had not abandoned his alternative claims and is entitled to specific performance of the contract, it would be otiose to deal with the third ground of appeal.

It follows from what we have said above that this appeal is allowed. We set aside the judgment of the court below and enter judgment in favour of the appellant for specific performance of the sale of the property. Costs to the appellant both here and in the court below to be agreed or taxed in default of agreement.



M. Musonda
DEPUTY CHIEF JUSTICE



A.M. WOOD
SUPREME COURT JUDGE



C. KAJIMANGA
SUPREME COURT JUDGE