IN THE COURT OF APPEAL OF ZAMBIA **CAZ APPEAL No. 143/2017**

HOLDEN AT LUSAKA

(Civil Jurisdiction**)**

BETWEEN:

DAVID TEMBO **APPELLANT**

AND

DOYLE B. KAPAMBWE **1ST RESPONDENT**

MACHONA KAPAMBWE **2ND RESPONDENT**

HENRY MACHINA **3RD RESPONDENT**

ROSE MADINA KAMUNGU **4TH RESPONDENT**

CORAM: CHISANGA JP, MAKUNGU, KONDOLO SC, JJA

On 24th April, 2018 and on 30th March, 2021

For the Appellant : *Dr. OMN Banda Messrs. OMN Banda & Co.*

For the Respondents : *Mr. K Mwondela, Messrs. Lloyd Jones and Collins Legal Practitioners*

J U D G M E N T

KONDOLO SC, JA delivered the Judgment of the Court.

STATUTES REFERRED

1. **Section 4 of the statute of frauds, 1677**.

CASES REFERRED TO:

1. **Ndongo v Moses and Roostico Banda (2011) 1 Z.R. 187**
2. **Collins Syakweebwa v The Administrator General Appeal No. 105/2010**
3. **Development Bank of Zambia and Livingstone Saw Mills Limited v Jet Cheer Development (2000) Z.R. 144**
4. **Zambia Revenue Authority v Hitech Trading Company Limited**
5. **Jane Mwenya and Jason Randee-v-Paul Kapinga (1998) Z.R 2**
6. **Nora Mwenya Kayoba and Alizani Banda-v-Eunice Kumwenda Ngulube v Andrew Ngulube SCZ Judgement No. 19 of 2003**
7. **Wesley Mulungushi v Catherine Bwale Mzi Chomba (2004) ZR 96 (S.C)**
8. **Chieftainess Shimukunami, Melos Mabenga v Alfred Kaira CAZ Appeal No. 172/2018**
9. **Victor Zimba v Elias Tembo, Lusaka City Council and the Commissioner of lands CAZ Appeal No. 26 of 2016**
10. **Zambia Revenue Authority v Hitech Trading Limited SCZ Judgment (2001) Z.R. 17**

This appeal is against the Judgment of Judge Chitabo SC entered against the Appellant for breach of contract and specific performance on an agreement of sale relating to Stand No. 30274, Lusaka (the "**property**").

The background is that the Appellant was offered a piece of land by the Ministry of Lands which he, in turn, offered to the Respondents for the total consideration of K110,000. The parties

executed an agreement on 8th August, 2006 whose terms were that the Appellants would immediately pay the sum of K30,000 towards service charges and other Council fees; followed by payment of the sum of K50,000 within 10 days of the Appellant acquiring the Title Deeds and the balance of K30,000 to be paid 30 days after the title had been issued.

The Appellant delayed in obtaining the Title Deeds and the Respondents, on 7th April, 2009 decided to conduct a search at the Ministry of Lands. They discovered that the Appellant had obtained Title without informing them and about 2 months later, the 1st Respondent visited the plot and discovered that it had been subdivided and the Appellant was selling the said subdivisions.

The Respondents had been unable to complete the conveyance because of the Appellants failure to inform them that he had obtained the Title Deeds. However, according to the Appellant, the Respondents put themselves on notice when they conducted a search and the Ministry and from that moment, they had 10 days to pay the next instalment. He considered the contract terminated and wrote a letter on 23rd May, 2009 terminating the agreement. Dissatisfied with

the transpiring events, the Respondents commenced an action in the High Court for specific performance and damages for breach of contract.

At trial, the 1st Respondent stated that the sum of K50, 000 was paid into Court but the final K30,000 was not paid because the Title was not delivered. He denied receiving a letter from the Appellant withdrawing the agreement. The 3rd Respondent, Henry Machina gave a similar account.

The Appellant testified that he collected the Title Deeds the day after the Respondents told him that they had been issued but he declined to hand them over because the K50,000 hadn't been paid to him. According to him, the Respondents should have paid him the K50,000 within 10 working days of obtaining the Title Deeds and the balance of the money to be paid within the following 30 days. That he was to surrender the Title to them after they completed payment of the purchase price. He then informed the Respondents that they were in breach and he terminated the contract by a letter dated 23rd May, 2009. He thereafter subdivided the plot and paid back the

K30,000, paid by the Respondents by paying it into court on 14th April, 2015.

Under cross examination, the Appellant admitted that he contracted with one Luka Phiri who offered to pay K290,000 for a portion of the same piece of land. He agreed that he never issued the Respondents with a notice to complete and that he didn't provide them with a photocopy of the Title Deed to enable them deduce Title. He said he drafted the letter terminating the contract but it was delivered by his wife. He denied that the Respondents had offered to pay the K50,000 but agreed that they had paid the sum of K80,000 into Court. He reiterated that he had paid K30,000 into Court.

DW2 the Appellant's wife, gave a similar account save for stating that the Respondents offered to pay the Appellant K50,000 but he refused to accept it because there was a breach of contract as the money should have been paid in April, 2009. She insisted that she personally delivered the letter of termination of the agreement which she handed over to the 1st Respondent's daughter who refused to sign for it. She was heavily cross examined on this point and the trial judge noted as follows; *"witness cornered, she is evasive"*.

After considering the evidence on record, the trial Court found that there was a valid contract entered into by the parties at a consideration of K110,000 and a deposit of K30,000 was paid towards the purchase price. The learned trial Judge further found as an undisputed fact that the Respondents financed the acquisition of the Title Deeds. The lower Court held the view that the Appellant had collected the title deeds from the registry of Lands and Deeds or the Commissioner of Lands and deliberately withheld the information from the Respondents thus preventing them from triggering the 2nd stage of the Contract, which was payment of K50,000.

The lower Court further found that after acquiring the title deeds the Appellant became uncooperative and proceeded to subdivide the property into 33 plots. Further, the Appellant did not deduce title to the Respondents, give notice for completion nor demand payment of the K50,000. It was the finding of trial court that the letter terminating the agreement was never communicated to the Respondents but was manufactured at a later date and only disclosed in the bundle of documents dated 7th May, 2014. On the evidence before him, there was nothing to show that the Appellant

had repudiated the contract as he had not paid back the deposit of K30,000 which is what anchored the agreement.

With regard to whether or not the contract had been partly performed, the trial Court had already found in the affirmative and held that the only thing that remained to be done was for the Appellant to give the Respondents the necessary notice so that the process of completion and obtaining the necessary consent and payment of attending statutory impositions could be attended to.

The trial Judge noted that there was no stipulation in the contract that time was of the essence and he ordered specific performance of the Contract of sale and stated that was sufficient to cover any compensation due for breach of contract.

Disgruntled by the decision of the lower Court, the Appellant has assailed the Judgement on five (5) grounds, namely:

1. **The learned trial Judge erred both in law and fact by holding that the Appellant was and is in breach of the Contract dated 8th August, 2016 [sic] contrary to the terms and conditions of the Contract dated 8th August, 2006.**

2. **The learned trial Judge erred both in law and facts by holding an applying terms and conditions which were not in the Contract dated 8th August, 2006.**
3. **The learned trial Judge erred both in law and facts by holding the Respondent's claimed for specific Contract of sale when the Respondents breached the terms and conditions of the Contract dated 8th August, 2006.**
4. **The learned trial Judge erred both in law and facts by holding that there is no credible evidence on record to show or tend to show that the letter of 23rd May, 2009 purporting to terminate the tenancy was served in the Plaintiffs.**
5. **The learned trial Judge erred both in law and facts by condemning the Respondent [sic] in costs.**

In support of the Appeal, the Appellant argued grounds 1, 2 and 3 together and the gist being that the agreement dated 8th August, 2006 must be examined and the Court ought to find that time was of the essence. That time started running when the 1st Respondent conducted a search at the Ministry of Lands on 7th April, 2009 which revealed that title had been issued. It was thus submitted that whether or not the Appellant collected the title, the Respondents

breached clauses 4 and 5 of the agreement requiring them to pay K50,000 within 10 days of acquiring title by the vendor and subsequently pay K30,000 after title has been issued. In this regard, the trial Court misdirected itself as the Respondents requested title before paying.

It was pointed out that K50,000 was only paid into Court by the Respondents in October 2009 whilst the K30,000 was paid in September 2015 which, according to the Appellant, proves inordinate delay and a clear lapse of time which terminated the contract. It was therefore submitted that there was no breach on the part of the Appellant because he was only mandated to hand over title after payment in full which was only done in September 2015. Consequently, the trial Judge's finding that the payment of K50,000 would have triggered the last payment of K30,000 was in contradiction with the terms of the agreement.

The Appellant submitted that a refund of the initial K30,000 was paid into Court in April 2015 which again terminated the agreement. A number of authorities were cited to support his position that a contract of sale does not transfer title but there is a need to fulfil the

obligations therein. Amongst the cited cases were, **Ndongo v Moses and Roostico Banda** (1) and **Collins Syakweebwa v The Administrator General** (2). We were directed to Clause 4 of the agreement and the Appellant's submission was that, after being aware of a Certificate of Title, the 10 days began running from 7th April, 2009 and expired on 17th April 2009 and the payment of K50,000 into court was only made in on 28th October, 2009, once again demonstrating a breach of contract.

With regard to the issue of the sub-divisions the Appellant was undertaking, it was submitted that these were only done on 13th May, 2013 and not 2009 as alleged by the Respondents.

It was the Appellant's further submission that the contract was terminated by a letter dated 23rd May, 2009 and which was only written out of courtesy as the Respondents would never have acknowledged service because they were in breach. After the said termination the Appellant entered into another agreement with Luke Phiri. We were urged to uphold the 3 grounds of appeal.

In arguing ground 4, it was submitted that the contract was not varied and there was no written documentation to prove variation.

That the Respondent's breach of the agreement disqualified them from seeking specific performance of the contract because it was an equitable relief which could not be obtained with dirty hands. Several cases were cited to support this position including **Development Bank of Zambia & Livingstone Saw Mills Limited v Jet Cheer Development**. (3)

With regard to the requirement of Notice to complete, the Appellant opined that the Parties did not enter into a Law Association of Zambia contract of sale as found by C.B. Phiri J on 8th April, 2013. It was submitted that on account of the foregoing, the fact remained that the Respondents were in breach of the agreement.

The 5th ground of appeal was on costs but the Appellant argued in relation to the payment of interest. It was submitted that since the contract had been terminated and monies refunded on 14th April, 2015, the Respondents were not entitled to interest. The case of **Zambia Revenue Authority v Hitech Trading Company Limited** (4) was cited to show that money paid into court cannot earn interest.

We were urged to uphold the appeal.

The Respondents equally filed submissions which they augmented orally and by which they emphasized that the cases of **Jane Mwenya and Jason Randee v Paul Kapinga** (5) and **Nora Mwenya Kayoba and Alizani Banda v Eunice Kumwenda Ngulube v Andrew Ngulube** (6) were on all fours with this case.

In opposing grounds 1 and 2, it was submitted that the agreement was signed by both parties and was therefore binding and the performance of certain clauses was a condition precedent to the performance of other contractual actions. The case of **Theresa Kasonde Sefuke v Christopher Hapanti Chimanya** (7) was referred to with respect to the effect of conditions precedent. It was argued that before any purported recission, the Appellant ought to have stated when the title was issued. Further, **Jane Mwenya and Jason Randee v Paul Kapinga (supra)** was called in aid to show that time was not of the essence and that there being no notice of completion, recission was unnecessary. It was then submitted that his failure to notify the Respondents was a breach of contract. Further the trial Court was on firm footing when it found that the Appellant's conduct after acquisition of the title clearly demonstrated that he did not intend to complete the transaction.

It was argued that it was trite for courts to imply terms into an agreement to give it commercial efficacy and it was simply logical to conclude that the obligation to pay the K50,000 to the Appellant was predicated on his notifying the Respondents that he had acquired title. The Respondents opined that they had performed their part of the contract by paying the initial K30,000.

Under ground 3, the gist of the Respondents argument was that an order for specific performance was suitable in this case and the case of **Nora Mwenya Kayoba and Alizani Banda v Eunice Kumwenda Ngulube & Andrew Ngulube (supra)** was called in aid to demonstrate that the doctrine of specific performance of a contract requires that the person relying on it has taken a step beyond the executory stage of the contract and in this case, the Respondent had paid K30,000 towards the purchase price.

The respondents further cited a number of cases which advance the principle that in contracts involving land damages for breach of contract should only be ordered where an order for specific performance was not suitable. The cited cases included the case of

Wesley Mulungushi v Catherine Bwale Mzi Chomba [8] in which it was held as follows;

> ***"The court will decree specific performance only if it will do more perfect and complete justice than the award of damages. When the matter in dispute is land, a very valuable commodity whose loss may not adequately be atoned in damages, specific performance would do more perfect justice"***

The Respondents' arguments under ground 4 were basically that the trial judge was on firm ground because the Appellant failed to prove that the Respondents received the letter dated 23rd May, 2009 which purported to terminate the agreement for the sale of the subject land. It was further argued that the Appellant was not entitled to terminate the agreement because he had not issued a notice to complete. The Respondents cited the case earlier cited by the Appellant; **Development Bank of Zambia & Livingstone Saw Mills Limited v Jet Cheer Development (Z) Limited (supra).**

Lastly, under ground 5, it was submitted that costs are at the discretion of the Court.

In reply the Appellant repeated its arguments in support of the Appeal which we shall not reproduce.

We have considered the impugned Judgment, the record of appeal and the arguments advanced by the parties.

Grounds 1, 2 and 3 all revolve around the assertion that there was no requirement for the title deed to be handed over to the Respondents before completion of the payments. That the Respondents should have paid the 2nd Instalment of K50,000 the moment they became aware that the title deed had been issued and their failure to pay amounted to a breach of contract.

The learned trial Judge, after analyzing the evidence before him, arrived at the conclusion that the Appellant did not deduce title to the Respondents and neither did he give them a notice to complete nor demand payment of the K50,000. The trial Court also found that the letter rescinding the contract was never communicated to the Respondents but was manufactured at a later date and only disclosed in the bundle of documents dated 7th May, 2014.

A number of the arguments advanced by the Appellant under grounds 1, 2 and 3 are requesting this Court to reverse findings of fact. In the case of **Chieftainess Shimukunami and Melos Mabenga v Alfred Kaira** (9) we stated that we will only reverse findings of fact where there has been a misapprehension of facts or where the facts are not supported by evidence and where the findings are perverse such that no reasonable tribunal would make a similar finding. In the cited case we referred to the case **Victor Zimba v Elias Tembo, Lusaka City Council and the Commissioner of Lands** (10) in which we stated that the function of an appellate court is primarily one of review and a Judge's decision must only be reversed in cases where the appellate court is satisfied that the judge erred in principle by giving weight to something he ought not have taken into account or by failing to give weight to something which he ought to have taken into account.

We have carefully examined the Record and we shall, for purposes of clarity, reproduce the portion of the Agreement entered into by the parties detailing the specific conditions to be met:

AGREEMENT BETWEEN MR. DAVID TEMBO AND THE KAPAMBWE FAMILY

..."The buyer shall:

1. ***Buy the land from the vender***
2. ***Pay service charges for the same plot on behalf of the vender and in the vender's name, amounting to twenty four million five hundred and seven thousand eight hundred and thirty kwacha (K24,557,830.00) and any other costs to be paid the government or surveyors including the Zambia Revenue Authority of the said land. All such payments shall be deducted from the total selling price.***
3. ***Pay a sum of thirty million Kwacha (K30,000,000) only as down payment to cater for the service charges and other related costs as said in (2) above.***
4. ***Pay a sum of fifty million Kwacha (K50,000,00) only within ten working days once the vender has acquired title deeds to the said plot.***

5. *Pay the remaining balance of thirty million Kwacha (K30,000,000) thirty working days after the title has been issued.*
6. *Pay half the costs of any legal fees that may be required throughout the period of this agreement.*

The Vender shall:

1. *Sell the land to the buyer at one hundred and ten million Kwacha (K110,000,000) only upon acquiring title deeds*
2. *Allow the buyer to start minor developments on the said land while waiting for the title deed*
3. *Surrender title deeds to the buyer to keep after the buyer has paid up to eighty million Kwacha (K80,000,000) of the total amount*
4. *Facilitate change of title to the buyer to change ownership*
5. *Pay half the cost of any legal fees that may be required throughout the period of the agreement."*

It is easily discernable that when the parties entered into the agreement, the only available document in relation to Plot Number 30274 was a letter of offer from the Ministry of Lands which explains the manner in which the conditions in the letter of sale were set out. It is not disputed that the initial payment of K30,000 was made and in order for the Appellant to receive the 2nd payment of K50,000, title had to be acquired. From the facts on Record, the Appellant stated that he collected the certificate of title a day after he was informed by the Respondents that it was ready. What is in contention is whether the Appellant was under an obligation to demand payment or whether the Respondents were under an obligation to make payment after becoming aware of the existence of the title deeds.

It can be gleaned from the Record that after obtaining the certificate of title, the Appellant did nothing to demand payment nor inform the Respondents that he had managed to acquire the title. He simply expected payment of the K50,000 because according to him, the Respondents knew that the title was in his possession.

The trial Judge weighed the evidence of the 1st Respondent and the Appellant and attached more weight to the evidence of the 1st Respondent. The trial Court found that the Appellant deliberately

withheld information that he had received the title deed. His finding was fortified by the Appellant's conduct when he proceeded to subdivide the property into 33 subdivisions and sold some to one Luke Phiri. This coincided with the evidence of the 1st Respondent at pages 224-225 of the Record, when he stated that he found that the land had been demarcated and plots were being sold by the Appellant.

We accept the finding of the trail Judge that the Respondents could not have been expected to pay the K50,000 under those circumstances. What we find even more convincing is the fact that, in his evidence in chief, the Appellant stated that he had shown the Respondents the title but only refused to surrender it to them. Under cross examination, at page 253 of the Record, he admitted that he later found out that he could sell the plot for a lot more than the price agreed with the Respondents. He insisted that the Respondents were aware that he had obtained title in April 2009 but the court chose to believe PW1 and this cannot be assailed.

The trial Court's finding that time was not of the essence was based on the fact that the contract of sale did not stipulate that time was of

the essence and he cited the case of **Jane Mwenya and Randy v Paul Kapinga (supra)**. We further note that the contract of sale herein was executed in August 2006 whereupon the Appellant immediately paid the Respondent the sum of K30,000. It was only in 2009, some three years later that the Respondents discovered that Title Deeds were issued. The trial judge made a finding that upon acquisition of the title the Appellant became elusive and uncooperative. We accept the lower Courts finding on this issue and would hasten to add that the Appellant's demeanor or behavior was not reflective of an individual who considered time to be of the essence.

The relevance of Judge C.B. Phiri's ruling cited by Counsel for the Appellant *vis-à-vis* the non-issuance of a notice to complete is unclear. The submission that there was no contract of sale is preposterous because even though it wasn't done under the LAZ conditions of sale, it was in writing and therefore a valid contract for the sale of land and enforceable under **Section 4 of the statute of frauds, 1677**.

We find no reason to reverse any of the learned trial Judge's findings of fact and on account of the holding in the **Wesley**

Mulungushi Case (supra), the trial Judge was on firm ground when he ordered specific performance of the contract of sale.

Grounds 1, 2 and 3 consequently fail.

In ground 4, reference was made to the letter terminating the contract of sale but the arguments are in relation to an alleged breach of clauses 4 and 5 of the Agreement.

The record is crystal clear that the letter which purported to terminate the contract of sale was never served on the Respondents. We cannot fault the Judge's sentiments with regard to the said letter and we agree that it had no effect on the contract of sale.

The Appellant argued that the Respondents were in breach of the agreement the moment they knew that the title deed had been issued in the Appellant's name. The Appellant referred to clause 4 of the agreement which provides that the Respondents shall pay the sum of K50,000 within 10 days of the Appellant acquiring title and according to him, acquisition meant the title being issued in the Appellant's name.

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Clause 5 of the Appellants obligations provides that the Appellant was to surrender the Title Deeds to the Respondents upon receiving payment of K80,000 of the total amount due. Having already been paid K30,000, the Appellant was to surrender the Title Deeds to the Respondents after receiving the next instalment of K50,000. By implication, in the context of the agreement between the parties, acquisition meant a situation where the tittle deeds had not only been issued in the name of the Appellant but were in his possession and ready for handover as soon as the K50,000 was paid and not simply the fact that they had been issued.

The trial Judge found that the Respondents had partly performed the contract by paying the initial sum of K30,000 and that it remained with the Appellant to give the Respondents the necessary notice to enable them complete the transaction and the Respondents failure to do so put him in breach of contract. The Court found that the Appellant had concealed from the Respondents that he had the Title Deed in his possession and his conduct showed that he was not interested in completing or performing his part of the contract. We agree with the trial Judge that the Appellant was in breach of contract. Ground 4 therefore fails.

Ground 5, was in relation to costs but the arguments relate to the payment of interest where the Appellant's Counsel has argued that monies paid into Court do not attract interest. This is indeed the correct position of the law as enunciated by **Zambia Revenue Authority v Hitceh Trading Limited (Supra)**. However, the argument is misplaced because the trial Court at page J5 of its Judgment ordered the Respondents, having paid K50,000 into Court, to pay the remaining and last installment of K30,000. It was this last payment from the Respondents that was meant to attract interest from date of writ to date of Judgment. This amount was not paid into Court, as the only amounts paid into court were K50,000 from the Respondents and a refund of K30,000 from the Appellant. There is no record of the last instalment being paid into Court and as such the trial Court did not fall into error when he awarded that the said amount would attract interest. This order is in tandem with the holding in the **Zambia Revenue Authority v Hitech Trading Limited (supra)**.

With regard to costs, they are generally awarded to the successful party unless there are reasons to depart from the rule. The Respondents being the successful party in the lower Court were

entitled to costs as awarded and we see no reason to fault the learned trial Judge. This ground also fails.

The appeal fails in entirety and accordingly dismissed with costs to the Respondents.

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F.M. CHISANGA
JUDGE PRESIDENT

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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M.M. KONDOLO SC
COURT OF APPEAL JUDGE