

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2014/HP/082

(Civil Jurisdiction)

BETWEEN:

ALEXANDER NG'ANDU

AND

JOYCE ASSAN BANDA



PLAINTIFF

DEFENDANT

Before the Honourable Lady Justice F.M Chisanga on the 29th day of March 2018

For the Plaintiff:

Mrs. F. M. Chani, Messrs Chongo Manda & Associates

For the Defendant:

Mr. L. Zulu, Messrs Tembo Ngulube & Associates

J U D G M E N T

Cases referred to:

1. *Holmes Limited v. Buildwell Construction Company Limited (1973) Z.R. 97 (H.C.)*
2. *Mercantile Bank of Sydney v. Taylor (1893) A. C. 317*
3. *Colgate Palmolive (Z) Inc v. Able Shemu Chuka and 110 Others Appeal No. 181 of 2005*
4. *Printing and Numerical Registering Company v Simpson (1875) LR 19 EQ 462*
5. *Hulme v. Brigham [1943] 1 ALL E R 204*
6. *Spyer v Phillipson [1931] 2 CH 183*
7. *Namung'andu v Lusaka City Council (1978) ZR 358*
8. *Hellawell v. Eastwood [1851] 6 ExCh 295 at 312*
9. *Philips v Lamdin (1949) 1 All ER 770*
10. *Clifford v Turrell (1845) 14 LJCh 390*
11. *Frith v. Frith (1906) AC 254*

12. *Turner v. Forwood and Another (1951) 1 All ER*

Other works referred to:

- 1. *Cheshire, Fifoot and Furmstone's Laws of Contract 14th Edition***
- 2. *Powell's Principles and Practice of the Law of Evidence, Tenth Edition 1921, London, Butterworth & Co***
- 3. *Fry on Specific Performance of Contracts, 6th Edition***

By writ of summons, the plaintiff claims from the defendant a sum of K33,000.00 being the balance of the purchase price of Stand Number 34333 Lusaka, interest on the amount, any other reliefs the Court may deem fit and costs of this action.

The statement of claim exemplifies the plaintiff's claim. It is averred therein that in March, 2014, the plaintiff advertised his property for sale in the Post Newspaper at the price of K350,000.00, but was ready to sell it at K330,000.00. In response to the said advert, the defendant inspected the property and was interested. She indicated to the Plaintiff that she was entitled to a loan of K300,000.00 from ZANACO, her employer, but that she was ready to purchase the property at K330,000.00. She then instructed the Plaintiff to prepare two offer letters, one indicating K330,000.00 and the other K300,000.00, the latter being for her employer's consideration. The balance of K30,000.00, it was agreed, would be paid by the defendant in three instalments to be agreed.

On 1st April, 2014, the defendant informed the plaintiff that the Bank would only pay K292,000.00 of the purchase price. She requested the plaintiff to prepare another

offer letter and assured him that the balance of K8,000.00 would be paid the following day. When, collecting the said letter, the Defendant's husband made a payment of K5,000.00 with a promise to clear the balance the following day.

By 6th June, 2014, the Bank had paid the purchase price of K292,000.00 and title passed to the defendant but the balances of K30,000.00 and K3,000.00 were still outstanding. That upon being reminded of the balance, the defendant became hostile and further claimed a refund of K5,000.00 as an overpayment. To date the balance of the purchase price remains outstanding, thus the claim.

In her defence and counter claim, the defendant avers that the advertisement to which she responded advertised the property at K330,000.00. After negotiations, the defendant accepted her offer of K292,000.00 and the same was reduced into a contract of sale. It is averred that no private arrangements were made between the parties.

It is the defendant's further defence that the plaintiff requested a payment of K8,000.00 as commitment fee so as to reserve the property for the defendant. A sum of K5,000.00 was paid, leaving a balance of K3,000.00. The understanding between the parties was that the same would be refunded once the transaction was completed.

In her counter claim, the defendant avers that the parties agreed that commitment fee was refundable but the plaintiff has since neglected to refund the same. It is also

averred that the defendant contracted to purchase the property with a working borehole and a chicken run. However, at the time of delivering vacant possession, the borehole was not in a working condition and the chicken run had been uprooted. It cost the defendant K13,000.00 to repair the borehole and K10,000.00 to fix the chicken run. There was also an outstanding ZESCO bill of K2,500.00. The defendant claims for the above sums and a further K8,000.00 for two months' rents and an additional K2,170 being lodging fees at Cosmic Lodge and Amaka Lodge. It is averred that when the plaintiff refused to complete the contract by surrendering vacant possession of the property, the defendant was forced find alternative accommodation.

The defendant therefore claims a total sum of K35,670.00, interest on the sum, costs and any other relief the court may deem fit.

The plaintiff in response to the counterclaim, avers that the defendant's claim for a refund of the commitment fee came after the plaintiff asked for the balance of the purchase price. It is contended that the chicken run was not advertised as part of the property as it was a ram shackle which did not make part of the valuation report. It is stated that the defendant was aware that the borehole was defective and the drilling company had always been ready to correct the defects. The plaintiff had been willing to settle the ZESCO bill upon payment of the outstanding balance of the purchase price. It was due to this balance that the plaintiff delayed to give the defendant vacant possession.

At trial, the plaintiff testified that in March, 2014 he advertised his property for sale in the post newspaper at K350,000.00. When no one contacted him towards the end of that month, he re-advertised for K330,000.00. On the 31st of April, 2014, a Mr. Jere phoned him requesting to view the property which he did in the presence of the plaintiff's nephew. Mr. Jere was interested in the property and sought to negotiate with the plaintiff, who however, was not willing to negotiate because he had initially advertised the property at K350,000.00. After a telephone conversation with his wife, Mr. Jere agreed to the purchase price of K330,000.00. He explained to the plaintiff that his wife was entitled to a loan of K300,000.00 from her employer and that she was the purchaser. He then requested the plaintiff to prepare two offer letters in the two sums; one for the defendant's employers and the other for the defendant.

The plaintiff testified that the following day, he gave Mr. Jere the two offer letters, a copy of the title deed and a copy of his National Registration Card. That afternoon, Mr. Jere informed the plaintiff that his wife was only entitled to a loan of K292,000.00. and requested for another offer letter in that amount with a promise to pay the K8,000.00 balance on that very day. He then paid K5,000.00 and assured the plaintiff that he would settle K3,000.00 the following week. He also requested for a valuation report and it was availed to him by the plaintiff. That report was rejected by the bank and another one done, in which the value of the property was placed at K370,000.00.

