

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

APPEAL NO. 202/2020
CAZ/08/210/2020



BETWEEN:

**MEANWOOD PROPERTY DEVELOPMENT
CORPORATION LIMITED**

APPELLANT

AND

ORPAH TEMBO MALINGSE BANDA

RESPONDENT

CORAM: KONDOLO SC, MAKUNGU, MAJULA JJA

On 18th May, 2023 and 26th June, 2023

For the Appellants : Ms. M. Moonga of Messrs Tembo Ngulube &
Associates

For the Respondent : Not Present

J U D G M E N T

KONDOLO SC, JA delivered the Judgment of the Court.

LEGISLATION REFERRED TO:

- 1. Lands and Deeds Registry Act, Chapter 185, Laws of Zambia**
- 2. The Rules of the Supreme Court of England 1999 Edition
(The White Book)**

1. INTRODUCTION.

- 1.1. This is an appeal against the Ruling on the Respondent's application under **Order 14A/ 1 and Order 33 Rule 3 Supreme Court Practice, Whitebook, Edition 1999 (RSC)** delivered by the Honorable Mrs. A.M. Banda-Bobo on the 29th October, 2021.

2. BACKGROUND

- 2.1. The Appellant (Plaintiff), is a Private Limited Company incorporated under the Companies Act.
- 2.2. According to the record, the Appellant sold the 2nd Defendant (Respondent) and five other purchasers various properties. The contracts of sale for each transaction had a standard clause which restricted the Defendant's right to subdivide, merge or amalgamate the properties at any time without the approval of the Appellant (Special Condition No. 18).
- 2.3. After the sales were completed, the purchasers including the 2nd Defendant, were issued with title deeds for their respective properties. They all decided to subdivide their properties and some of them even proceeded to convey title to the purchasers of their sub-divisions.

- 2.4. Unimpressed by the sub-divisions and sale, the Plaintiff commenced an action in the High Court for damages for breach of contract against the purchasers who were the 1st to 6th Defendants.
- 2.5. The Plaintiff further sought a prohibitory injunction restraining the Defendants from continuing with the sub-divisions and an order of mandatory injunction directing the Defendants to restore the prior position by reversing the creation of subdivisions on their respective properties.
- 2.6. The Defendants filed their respective defence's but the 2nd Defendant went further and filed an application under **Order 14A/1 and Order 33 RSC** raising preliminary issues on a points of law as follows;
1. *Whether or not the Plaintiff has a cause of action as against the 2nd Defendant herein in light of the provisions of section 54 of the Lands and Deeds Registry Act and all the other prevailing legislation as to ownership.*
 2. *Whether or not the Plaintiff has any locus standi to commence this action as against the 2nd Defendant (Respondent) herein.*
 3. *Whether or not this action is capable of being sustained at law arising from a fully and wholly performed Contract of Sale.*

4. *Whether or not the contractual clauses relied upon by the Plaintiff in this action have been superseded, frustrated and/or rendered void by operation of Lands and Deeds Registry Act and all other prevailing legislation as to ownership of land in Zambia evidenced by a Certificate of Title and;*
5. *Whether or not the reliefs sought in paragraph 15 (i) (ii) and (iii) of the Plaintiff's statement of claim and as canvassed in Plaintiff's writ of summons warrant any further interrogation by means of a full trial.*

3. PROCEEDINGS ON THE APPLICATION UNDER ORDER 14A RSC

- 3.1. Because of the course of action we intend to take, we shall not recount the arguments advanced by the parties before the lower Court.

4. HIGH COURT DECISION

- 4.1. After considering the process and arguments filed and advanced by the parties the trial Judge stated that resolving ground 4 of the 2nd Defendant's application would resolve all the issues in the application, i.e.

4. Whether or not the contractual clauses relied upon by the Plaintiff in this action have been superseded, frustrated and/or rendered void by operation of Lands and Deeds Registry Act and all other prevailing legislation as to ownership of land in Zambia evidenced by a Certificate of Title.

4.2. The learned trial Judge stated that the question was therefore, whether clause 18 subsisted beyond the completion of the sale and issuance of the certificate of title.

4.3. The lower Court observed that it was not in dispute that the parties entered into a contract for the sale of land and that the 2nd Defendant paid the full purchase price, took possession and was issued with a certificate of title. That she later subdivided the land and sold the subdivisions to third parties.

4.4. The trial Judge reproduced Clause 18 as follows,

"18. The purchaser shall not be allowed to subdivide, merge or amalgamate plots either at the stage of purchase of the plot or upon completion or after developing the said plot without the express approval of the vendor. For avoidance of doubt, the purchaser shall not at any stage whatsoever subdivide, merge or amalgamate plots without the express approval of the vendor."

- 4.5. The trial Judge found that the parties entered into a legally binding contract of sale but because it was a contract for the sale of land, the performance of the conditions in the contract would lead to the creation of a new interest in the land for the purchaser but subject to the mandatory provisions of the **Lands and Deeds Registry Act** (the **Act**) and specifically, **sections 33, 54, 48 and 59**.
- 4.6. The lower Court agreed with the 2nd defendant that clause 18 did not subsist beyond the contract because the contract only regulated the parties' relationship leading to the performance of the conditions embodied in it and once the certificate of title was issued to the purchaser, the Plaintiff's interest in the property was extinguished.
- 4.7. The trial Court stated that Clause 18 offends the mandatory provisions of **sections 33 and 54 of the Act** which allow the 2nd defendant upon obtaining her certificate of title, to do as she pleased with the land including sub-dividing it.
- 4.8. The trial Judge further agreed with the 2nd Defendant's submissions with regard to **section 48 of the Act** vis-à-vis encumbrances and interests on land being limited to those appearing on the memorials of the certificate of title and those recorded in the register at the lands and deeds registry.

- 4.9. The lower Court analyzed Clause 18 and found that, in any event, the clause only prohibited subdividing the property at purchase, or completion or after developing the plot but did not say that authorization to do those things was required after a certificate of title had been issued. She added that the phrase, "*any stage whatsoever*" could only refer to the period before title is issued because after it is issued the mandatory provisions of the **Act** apply.
- 4.10. The trial Judge accepted the 2nd Defendant's evidence that she had, in fact, sought permission from the Plaintiff to subdivide the property. The lower Court stated that this evidence was undisputed and found as a fact that the Plaintiff granted permission to the 2nd Defendant to sub-divide the land.
- 4.11. She concluded that the Plaintiff had no interest and no legal right in the said property and therefore, lacked *locus standi* in the matter.

6. **APPEAL**

- 6.1. Dissatisfied with the decision, the Appellant filed four grounds of appeal as follows;

1. **The Court below erred in law and in fact when it held at page J17 that the nature of the Contract of Sale was such that it was only limited to facilitating the sale of the land**

in contention between the Appellant and the Respondent and therefore Clause 18 of the Contract of Sale could not subsist beyond the contract when in fact, Clause 18 was couched in a way that it would survive the termination of the contract.

2. The Court below erred in law and in fact when it held that clause 18 embodied in the Contract of Sale offends the mandatory provisions of the law and that such a clause cannot subsist beyond the issuance of the title to a purchase of land.
3. The lower Court erred in law and in fact, when it held that the authorization to subdivide, amalgamate or merge plots could not be sought post issuance of a certificate of title and that the sentence that at "any stage whatsoever" only meant the period before issuance of the certificate of title.
4. The Court below erred in law and in fact, when it relied on the Respondent's mere assertion that the Respondent had obtained permission to subdivide and sell the property without the Respondent providing any evidence to buttress her allegation.

7. APPELLANT'S ARGUMENTS

7.1. Again because of the manner in which we wish to proceed with the case we shall not recite the full arguments advanced by the parties on appeal.

7.2. The gravamen of the appeal is that contrary to the trial Judge's decision, clause 18 survived the contract of sale as agreed by the parties and that the Respondent breached the said clause.

5. RESPONDENT'S ARGUMENTS

5.1. The Respondent did not file any heads of argument.

6. HEARING

6.1. When the matter came up for hearing only the Appellant was present and informed us that the Respondent had not served them with her heads of argument in opposition.

6.2. The Respondent being absent without notice and not having filed arguments in opposition, we decided to proceed and hear the appeal.

6.3. The Appellant submitted that it would rely entirely on the filed heads of argument.

7. ANALYSIS AND CONSIDERATION

- 7.1. We have considered the record of appeal and the heads of argument but shall address all the grounds of appeal together.
- 7.2. We have determined the need to be guarded in the manner in which we deliver this Judgment to avoid influencing the proceedings before the lower Court.
- 7.3. The trial Judge was called upon to determine questions of law and she proceeded accordingly with the net result of dismissing the Appellant's suit.
- 7.4. We are reluctant to state whether or not the trial Judge erred in her analysis of Clause 18 of the Contract of Sale but we disagree with her that it was merely meant to facilitate the sale transaction. In our view, the clause was an integral part of the contract of sale and cannot be severed from it.
- 7.5. The trial Judge interpreted the term "*any stage whatsoever*" as only applying to stages of the transaction that occurred before the Respondent obtained a certificate of title. It is, however, inescapable that Clause 18 refers to subdivision, merging and amalgamation of plots and to nothing else. These activities can, really, only be done by a title holder.

7.6. The trial Judge stated that the contract between the parties is not illegal but simply subject to the requirements of the Act. She however went further and stated that Clause 18 offends the mandatory provisions of **sections 33 and 54 of the Act** which allow the 2nd defendant, upon obtaining her certificate of title, to do as she pleases with the land, including subdividing it.

7.7. It appears to us that clause 18 was intended to limit what the purchaser could do after the sale of the land but as correctly stated by the trial Judge the contract of sale must conform to **sections 33 and 54 of the Lands and Deeds Act**.

7.8. We note that whilst agreeing with the Appellant that **section 48 of the Lands and Deeds Act** which provides for the registration of encumbrances before issuance of a certificate of title was applicable, the trial Judge did not address the effect of the said section on clause 18.

7.9. The trial Court further considered affidavit evidence with regard to the Appellant allegedly granting permission to the 2nd Defendant to subdivide the land. The trial Judge's determination of the issue was premature as it was not a point of law but a matter of evidence best settled at trial.

7.10. We hold the view that the full effect of clause 18 and a determination as to whether it offends **sections 33 and 54 of the Lands and Deeds Act** vis-à-vis **Section 48** of the Act can only be properly and fully determined after the reception of evidence during a trial.

7.11. In the premises, we allow the appeal and order that the matter proceeds to trial before a different Judge and further order that each party shall bear its own costs.


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M.M. KONDOLO SC
COURT OF APPEAL JUDGE


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C.K. MAKUNGU
COURT OF APPEAL JUDGE


.....
B.M. MAJULA
COURT OF APPEAL JUDGE