DATSON SIULAPWA v FALESS NAMUSIKA (1985) Z.R. 21 (H.C.)

HIGH COURT
(COMMR. C.M. MUSUMALI)
26TH FEBRUARY, 1985
CASE NO. 1984/HN/CA/16

Flynote

Land Law - Land (Conversion of Titles) Act, 1975 - Presidential Consent - Village house - whether Consent necessary for Sale.

Civil Procedure - Reconciliation - Instructions to parties by court - Undesirability of

Headnote

Section 13 of the Land (Conversion of Titles) Act provides that no land may be dealt with without the prior consent of the President. Without the said prior consent a village house was sold.

For the seller it was contended that the house fell under s.13 and that there having been no Presidential consent the sale was a nullity as result of which the seller was entitled to repossess the house.

For the purchaser the contention was that the Land (Conversion of Titles) Act having been aimed at land held under the English system of tenure could not have been intended to affect land held under the jurisdiction of chiefs in the villages; and therefore that the sale was valid and that the seller had to honour it.

Held:

In so far as s.13 provided no exception, all types of dealings in land, including the sale of village houses had to comply with it.

Per Curiam:

Promoting a reconciliation between the parties does not entail the telling by the court of one of the parties to the dispute what to do or not to do as such action by the court may be interpreted as exhibiting agreement with one of the parties to the dispute.

Cases Referred to:

(1) Mutwale v Professional Services Ltd. (1984) Z.R. 72
(2) Zambia Oxygen Ltd v Gardner Bros Ltd (Unreported- 1982/HN/809)

Legislation referred to:

Land (Conversion of Titles) Act Cap 289, s.13(1)

For the appellant: L.V. Siame of Lloyd Siame and Co.
For the respondent: Mr H. Chama of Mwanawasa and Co.

Judgment

C.M. MUSUMALI, COMMISSIONER: This is an appeal against a decision of the learned magistrate at Mbala. The facts of the case are that in September, 1983, the respondent sold a house to the appellant at a price of K1,000.00. Before selling the said house to the said appellant a condition was given to him by the said respondent. This condition was that the house was not to be bought for one Pearson Silumbwe as he was an objectionable character to the respondent. After buying the said house, the appellant stayed there for a short while. After that he moved out and let his cousin, the said Pearson Silumbwe, to occupy it. Upon the respondent learning of that, she sued the appellant to court for the purposes of rescinding the contract of sale of the house and paying back the K1,000.00 to the appellant because she was cheated, she says, by the appellant who did not buy the house for himself and with his own money, but did so for Pearson and using Pearson's money. As already stated, judgment was entered on her behalf.

In the course of arguing this appeal before me a number of issues were raised by counsel for the parties. In the view that I have taken, which will become apparent in the course of this judgment, I will not deal with all those issues. I propose to only deal with two issues which have an immediate bearing on the outcome of this appeal. The first such issue was raised by Mr Siame. In his submissions the learned counsel quoted from page J2 line 1 of the learned trial magistrates judgment as follows:

> "I should at this stage make a mention that from the beginning of the proceedings in this case, this court had been trying to advise and persuade the defendant to take occupation of the house and ask his cousin to vacate but he has refused to do so. He has been evasive and unco-operative."

The learned counsel then submitted that the foregoing quotation suggests that the learned magistrate had already reached a decision from the very beginning. He went on and argued that a decision had been reached in the matter well before even evidence was adduced.

Replying to Mr Siame's submissions on this point, Chama for the respondent said that it was his submission that he was in total agreement with Mr Siame that the comments were very unfortunate. He went on and said that if such or those comments were made in a criminal case, they would entitle the person appealing to an acquittal. He then submitted that the case now before this court is a civil one. As such the comments of the learned magistrate should not entitle the appellant to succeeding, as the decision arrived at was the correct one in so far as our laws are concerned. If this court finds that these comments went

to the root of this case, he went on, the proper order would be that of retrial of the matter. A retrial order would not be the proper order in this case as there was no consent obtained pursuant to the provisions of section 13 of the Land (Conversion of Titles) Act, Cap.289, he contended.

After a careful consideration of the evidence, the judgment and the two learned counsel's submissions in this case, I have found that the comments of the learned magistrate quoted above

give the impression that he had decided the case well before hearing and considering the evidence. With due respect to the learned magistrate, it is clear from his own words that he had taken it upon himself to begin advising the appellant that he should order his relative to vacate the house. That was not proper thing for him to have done; because by so doing he was clearly siding with one of the parties to the dispute which was before him for hearing and determination without favour or appearing to favour any of the parties. What the learned magistrate did, went beyond the role a judicial officer can play in promoting a reconciliation between the parties. Promoting a reconciliation between the parties does not entail the telling of one of the parties to the dispute what to do or not to do. It means that the parties should be allowed time to discuss the matter between them selves amicably. The court should never be involved in such discussions because it has to be appreciated that the parties may fail to arrive at an amicable solution. When that happens the matter would then have to be litigated upon in a court of Law. Now if the judicial officer who would be required to preside over the hearing of such a dispute would have participated in the efforts of reconciliation, he would inevitably have exhibited agreement to some degree with one of the parties to the dispute. As a human being there is no way he could avoid showing in one way or the other his agreement or disagreement with one of the sides to the dispute. Now immediately that happens, he ceases to appear to be impartial in the matter. And when it comes to his deciding of the matter in a court of law, no matter how flawless his decision might he, it will not be viewed as an impartial decision as it would have been viewed if he had not been involved in the reconciliation discussions. Judicial officers i.e. Local Court Justices, Magistrates and Judges should always remind themselves of the maxim: Justice must not only be done, but be seen to be done. This principle should in fact be the guiding principle of all people or organs of our society whose functions involve the hearing and determination of disputes, complaints and/or accusations before they make decisions in favour of one party against the other. In this particular case because of the stand taken by the learned magistrate, justice was not seen and could not be seen to have been done. It is my view that justice which is not seen to be done or could not be seen to have been done is no justice at all. With due respect to the learned magistrate in his handling of this case Justice was not done. I would therefore allow the appellant's appeal on this ground.

This then brings me to the question: What is the proper order to make in this case in view of this finding? Mr Chama, as already stated contended that retrial would not be the most ideal order in this case as

it had been conceded by the other party that the State consent under section 13 (1) Cap.289 was not obtained. As such, in view of the Supreme Court's decision in *Bridget Mutwale v Professional Services Ltd.* (1), the transaction in question was illegal and thus null and void. This argument makes it imperative for me to first determine it before deciding what order should be made in this judgment.

Mr Chama's full arguments on this issue were that the main issue this court has to decide in this case is whether or not the property in issue is arrested under the provisions of The Land (Conversion of Titles) Act 10 Cap.289. If it is arrested under that Act, the learned counsel went on then the whole transaction was a nullity and the respondent is then entitled to have possession of the property and to keep the K1,000 paid for its price. If on the other hand this court finds that the

provisions of Cap.289 do not arrest the said property, then the appeal must succeed, he said.

To show that the house in question falls within the provisions of Cap.289 Mr Chama went on with his submissions and said that section of that Act converted all land in the Republic which was governed by the English tenure system into statutory leasehold of 100 years. Section 20 of the same Act provides that all land referred to in section shall not be occupied without lawful authority. This, went on the learned counsel clearly showed that the legislature had in mind the distinction that existed before the passing of this Act. But notwithstanding that knowledge, the same legislature then provided in section 13 of the said Act 25 that no land should be dealt with without the consent of the President. Mr Chama then went on and submitted that this court in its ruling in the case of *Zambia Oxygen Limited v Gardner Bros Limited* (2) and the Supreme Court in its judgment of *Bridget Mutwale v Professional Services Ltd*. (1) have held that any transaction relating to land without the consent of the President is null and void. Since there was no State consent issued in this case this upped should be dismissed, submitted Mr Chama.

Mr Siame on the other hand started his submissions on this question by asking the question: Is this proper case for which these authorities cited by Mr Chama regarding compliance with The Land (Conversion of Titles) Act, Cap. 289 should apply? His answer to this question was that this was not the kind of case the legislature had in mind when passing the said Act. He went on and said that the legislature did not address their mind to village houses which fall within the Chief's jurisdiction. It would be unthinkable, the learned counsel went on, to expect the Commissioner of Lands and his officers to control the sale or transfer of properties in villages particularly those in remote areas. The house in question, he said, is village house. For the law to have expected villager to make an application to the Commissioner of Lands for the sale of his house, and expect the Regional Valuation Officer who is based in Kitwe to travel to Mbala to valuate the house in question before he could make his report is something that the legislature never thought of. The kind of house in question does not have house number, plot number, diagram, sketch

plan and title deeds. In the absence of all these things, one wonders where any valuation surveyor would start from. He went on and submitted that this question of State consent did not arise in the court below, and that in any case it was the respondent's job to have applied for one.

I would start my examination of the two learned counsels' submissions on this issue by stating that it is irrelevant as to who between the parties had the duty to apply for a State consent under section 13(1) of Cap.289, as to the question of what the legal consequences are with non-compliance to that section. As long as there is no such consent the transaction entered into is illegal and unenforceable altogether i.e. it is void ab initio. This will take care of Mr Siame's last submission that it was the respondent's duty to have applied for consent.

Section 13(1) of the Land (Conversion of Titles) Act, Cap. 289 provides as follows and I quote:

> " 13 (1) Notwithstanding anything contained in any other law or in any deed, instrument or document, but subject to the other provisions of this Act, no person shall subdivide, sell, transfer, assign, sublet, mortgage, charge or in any manner whatsoever encumber, or part

with the possession of, his land or any part thereof or interest therein without the prior consent in writing of the President."

The wording of this subsection has not made any exception to any kind of land. According to this subsection every kind of land whether it was freehold land prior to 1st July, 1975, or not falls within its provisions. This means that even ordinary villagers in some very remote parts of this country have to apply for State consent if they propose to deal in land. Land here includes a house.

Now examining the history of why it was deemed necessary to pass this piece of legislation, one finds that it was not meant to cover every kind of land tenure other than the former freeholds which under section 5 of Cap.289 were converted into statutory leaseholds. When it came to drafting the necessary legislation every type of land was embodied .My own view is that it is not possible for some classes of people in this country to comply with the Act in question. This is because their systems of land tenure are and have been typically traditional and have not known the kind of procedure covering the British type of land ownership where we derive our land tenure system provided for under the Lands and Deeds Registry Act, Cap.287 and other related pieces of legislation. The other problem which would come in with the making of Cap. 289 applicable to all types of land tenure is the very exorbitant charges attendant on conveying matters. Many villagers would not be able to afford the charges. There is also the general problem of the Act, i.e. Cap 289 greatly inconveniencing the rural populace who normally and convenient just make representations to their chiefs regarding requests for land and once the chief grants their requests, they get the land or part of it asked for and they settle on it or begin tilling it as their land. It is my considered view that in enacting the Land (Conversion of Titles) Act.

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Cap.289, the draftsman ought to have excepted land held other than by former freeholds. But whatever the consequences of an Act of Parliament the duty of this court is to construe what it says and not "to modify the language of an Act of Parliament in order to bring it into accordance with (my) own views as to what is right or reasonable" as the learned author says at page 91 second paragraph of Craisie on Statute - Law 17th Edition. That same author at page 90 second paragraph says and I quote:

"Where the Language is explicit, its consequences are for Parliament and not for the courts to consider. In such a case the suffering citizen must appeal for relief to the lawgiver and not to the lawyer."

And earlier on at page 87 the same learned author had the following to say in the second paragraph and I quote:

" . . . where the words of an Act of Parliament are plain the court will not make any alteration in them because injustice may other wise be done. "Where the language of an Act is clear and explicit, we must give effect to it whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature."

The wording of The Land (Conversion of Titles) Act and especially section 13 subsection 1 is plain

and unambiguous. If the wording had been ambiguous and one construction of those words or that Act leads to a lot of inconveniences and another construction does not, the one which leads to least inconveniences would be preferred. But in a case like the one in issue namely the provisions of section 13(1) of Cap.289, where there is no ambiguity in the wording, this court, as can be seen from a very long chain of authorities which have been dealt with in Craisies on Statute law dealing with the interpretation of statutes the court has and must as a matter of duty interpret what the legislature has enacted, the consequences of that interpretation notwithstanding . I for one am a very firm proponent of the doctrine of separation of powers. It is my very strongly held view that at no point in time should that separation be interfered with. The three arms of a democratic government namely the legislature the judiciary and the executive should be left to function independently in the fullest sense of the words 'left to function independently." Thus much as I may have reservations regarding he wording of s.13 (1) Cap.289 in so far as it provides for no exceptions to its provisions of land previously held and/or to be held otherwise than as freeholds or statutory leaseholds respectively my task is to interpret what has actually been enacted by that section. According to that section all types of dealings in land in this country after 1st July, 1975, have to comply with it. This means that the sale of the house in question was illegal and void ab initio as there was no State consent obtained before entering into that sale. What this means is that the parties are taken back to where they started from before the illegal sale i.e. that the house in question belongs to the respondent and the K1,000.00 paid by the appellant to the former to the latter. As an illegal transaction courts of law would not have anything to do with it. Thus although

the appellant would have succeeded on the ground earlier discussed in this judgment, the matter cannot be ordered to be retried before another court of competent jurisdiction because of the illegality surrounding the transaction.

Each party has to bear its own costs.
Appeal dismissed due to illegality of transaction
