

THERESA KASONDE SEFUKE v CHRISTOPHER HAPANTI CHIMANYA (SUED IN HIS CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF S. CHIMANYA) (1993) S.J. 70 (H.C.)

HIGH COURT
COMMISSIONER M.E. MWABA.
24TH FEBRUARY, 1993.
1989/HN/418

Flynote

**Contract Law - Specific Performance - General and Special Damages
Land Law - State Consent to Assign - Registration of Deeds**

Headnote

The Plaintiff's claim was for specific performance of the contract entered into on 20th August, 1985 for the sale of plot No. 4500, Hill Crest, Ndola for a consideration of K32,000.00. Alternatively, for payment of general and special damages for breach of contract or such special damages to be inclusive of loss of business on the bottle store that the Plaintiff had intended to operate on the said property and costs arising from the claim.

Held:

- (i) The equitable jurisdiction of the doctrine of specific performance of the contract requires that the person relying on it has taken a step beyond the executory stage of the contract.
- (ii) The Plaintiff is entitled to specific performance of the contract

Cases referred to:

1. *Chaproniere v Lambert* 1917 2 Chancery Division 356
2. *Mutwale v Professional Services* 1984 Z.R. 72
3. *NAIK v Chama* 1985. Z.R. 227

For the Plaintiff: Mr. B.C. Mutale, Messrs Ellis and C. Ndola.

For the Defendant: Mr. H. Chama, Messrs, Mwanawasa and Co. Ndola.

Judgment

M.E. MWABA,C.: delivered the judgment of the court.

The Plaintiff's claim is for specific performance of the contract entered into on 20th August, 1985 for the sale of plot No. 4500, Hill Crest, Ndola for a consideration of K32,000.00. Alternatively, for payment of general and special damages for breach of contract or such special damages to be inclusive of loss of business on the bottle store that the Plaintiff had intended to operate on the said property and costs arising from the claim.

In her oral evidence, the Plaintiff informed the Court that when the agreement was reached on 20th August, 1985, she paid a deposit of K5,000.00 and that she was expecting the Defendant to deliver title deeds to-date the same have not been delivered. She stated that she

commenced the present proceedings because the Defendant wants to sell the same property to another person and that in 1988 when she advertised for a licence the Defendant refused on the ground that the property did not belong to her. Further, the Defendant wanted to repossess the premises because the Plaintiff had not paid the balance. She explained that she was supposed to pay the balance of K27,000.00 upon delivery to her of title deeds in respect of the said premises. The Plaintiff explained further that a state consent has already been to Ndola District Council and that the property has already been assigned to the Defendant by the Ndola District Council.

In cross-examination, the Plaintiff said that the total price for the property was K32,000.00 and that after paying a deposit of K5,000.00 she took possession of the house and the balance was supposed to be paid upon receipt of the title deeds. She denied knowledge of the contract having been terminated because of failure on the part of the Plaintiff to pay the balance. She revealed that since she took possession of the building she has never used it, but she has put people there to look after the building and that she did not know that the building was now valued at K950,000.00.

In re-examination, the Plaintiff informed the Court that she is not prepared to pay the new price, but that she is willing to pay the balance of the original price.

P.W. 2, Francis Muungu, Legal Assistant, Ndola City Council informed the Court that Ndola City Council obtained state consent which was valid from 7th July, 1989 to 7th July, 1990. Thereafter, the assignment between the Council and the Defendant was executed.

The case for the Defence is that there was an express term in the said agreement that the agreed purchase price will not be effected until after the Vendor had obtained Consent to assign in respect of the said unexhausted improvements on the said land and that in the alternative even if later title should vest in the Defendant the agreement cannot be effected because the consideration has been overtaken by events due to an act of Government aforesaid. Further, the agreement is null and void as it was not registered in terms of the provisions of the Lands and Deeds Registry Act.

The Defendant further counter claims for:

- (a) Mesne profits from date of possession till vacant possession is given;
- (b) Possession of the premises; and
- (c) Costs of and incidental to this suit

The Plaintiff's Defence to the counter claim is that the Commissioner of Lands has already granted State Consent to Ndola Urban District Council and that the agreement in question is valid and enforceable as a memorandum in writing in terms of Section 4 of the Statute of Frauds 1677.

In this oral evidence, the Defendant informed the Court that he inherited the property in question from his late father Mr. S.H Chimanya and that his father did not have a certificate of title for the said property. He agreed that on 20th August, 1985 he signed an agreement with the Plaintiff for the sale of the said property at K32,000.00 and the same Advocates (I.e) Cave, Malik and Company was acting for both parties. He explained that the balance of the agreed price was to be paid upon receipt of the title deeds which were supposed to be issued in his late father's name. He admitted that when the agreement was signed, he received a sum of K5,000.00. Thereafter, his advocates failed to obtain State Consent and since the balance was not paid in time, he rescinded the contract but to-date the Defendant has not vacated the premises. He stated further that he is not willing to sell the property to the Plaintiff at the agreed price because the property is valued at K2.4 Million. The Defendant revealed that he

was not aware that the property had been assigned to him by the Council and that he was not bound to do anything on this matter since the State Consent was issued after the contract of sale had been terminated.

The Defendant admitted in cross-examination that, the balance was to be paid after the State Consent has been obtained and the assignment made and that the Plaintiff was authorised to take possession of the premises before the State Consent was obtained.

The Defendant informed the Court further that he was not aware that the property had been assigned to him by the Council and that he did not write to the Plaintiff to pay the balance before a letter to terminate the contract was written to her as that was orally done. The Defendant concluded by saying that he had not been told why the purchaser has not prepared the deed of assignment as it was their duty to do so.

I have considered this matter and I find that the issues set out below are not disputed:

- (a) That the agreement for the sale of the property at the consideration of K32,000.00 was entered into by the parties on 20th August, 1985 upon payment of deposit of K5,000.00 to the Defendant.
- (b) That it was a condition of the contract that the purchase could not be effected until the Vendor had obtained State Consent in respect of the said property.
- (c) That the purchaser took possession of the property upon execution of the contract.
- (d) That State Consent has already been obtained by Ndola District Council and that the property has already been assigned to the Defendant by Ndola District Council.
- (e) That the said Agreement was not registered with the Lands and Deed's Registry.

In his submission Mr. Chama, Advocate for the Defendant informed the Court that where the Contract is made conditional upon some act being done within a reasonable time then time is of the essence. He stated that in the present case the parties hereto entered into this contract expecting that State Consent would be granted within a reasonable time so that the balance could be paid. Therefore, State Consent having not been granted after more than 2 years the Defendant was justified in rescinding the Contract.

He submitted further that the remedy of specific performances is discretionary, though the discretion is not exercised in an arbitrary or capricious manner, but according to the rules which have been established by Judges and that if the Defendant can show any circumstances independent of the written contract which makes it inequitable to decree specific performance as for instance where the vendor or purchaser has not acted fairly or where the completion of the contract would cause hardships to an innocent vendor or purchaser the Court will not grant the remedy. Mr. Chama urged this Court not to grant the remedy because at his time the property is worthy K2.4 Million.

On the question of counter claim, Mr Chama submitted that by letter dated 22nd December, 1987, the Defendant rescinded the contract in issue so that the innocent party is entitled to recover anything paid or delivered under the contract since the Plaintiff was in possession of the property in issue the Defendant is entitled to mesne profits at the rate to be determined by the Court.

Mr. Mutale, Advocate for the Plaintiff submitted that the agreement still subsists because the Defendant has not adduced any evidence to show that he had informed the Plaintiff of his intention to terminate the agreement. He stated further that there was overwhelming evidence confirming that the Plaintiff did not breach the Agreement and urged this Court to

make an order for specific performance of the Agreement.

Further, Mr. Mutale told this Court to dismiss the Defendant's counter claim on the grounds:

- (i) That the Plaintiff was not in breach of the agreement,
- (ii) That the Defendant gave possession of the property to the Plaintiff in accordance with the terms of the agreement after the Plaintiff had paid the deposit of K5,000.00:
- (iii) That the Ndola Urban District Council had transferred the property to the Defendant who in turn should have transferred it to the Plaintiff;
- (iv) That the agreement was not frustrated by lack of State Consent as such Consent was in fact obtained and the deal could have been finalised.

Taking into account the submissions made by both advocates, I wish to state that the equitable Jurisdiction of the doctrine of specific performance of the contract requires that the person relying on it has taken a step beyond the executory stage of the contract.

Yet it is well settled that payment of money is not by itself a sufficient act of part performance as it is easy enough to reinstate the Plaintiff by returning his money.

In the case of *Chaproniere v Lambert* (10) at page 359 Lord Justice Swinfen Eady had this to say:

"There was no sufficient memorandum of the agreement to satisfy the Statute of frauds. He continued : then it is said that at all events there has been a payment of 25 Shillings for rent in advance and that amounts to part performance of the contract. In my opinion the mere payment of rent in advance is not such a part performance as to take the case out of the Statute. Even in the case of sale of land the payment of the whole of the purchase money would not of itself be sufficient to do so."

The issue to be considered in relation to this matter is whether there was a valid contract and that the Plaintiff had done something more apart from payment of money to warrant an order for specific performance.

It is not disputed that the parties entered into a written contract on 20th August, 1985 on condition that the purchase could not be effected until the vendor had obtained State Consent in respect of the said property.

In the case of *Mutwale v Professional Services* (2), the Supreme Court held:

"We find therefore as the purported subletting by the Respondent was without prior presidential consent as required by Section 13 (1) of the Land Conversion of Titles Act, 1975, the whole of the contract including the provision for payment of rent, is unenforceable."

From the principles set out above, I would not be wrong to state that the contract under consideration was made on the understanding that a State Consent is obtained by the vendor. I should make it clear here that after sometime Ndola City Council obtained State Consent at nil value and assigned the property to the Defendant, so that, at his stage the vendor was supposed to apply for another State Consent which would have stated the amount the property was to be sold to the purchaser. This was not done by the vendor. In the case of *Naik v Chama* (3) the Supreme Court put the onus on the Landlord to obtain State Consent and said that a tenant should not lose any Rent Act protection by such default.

Similarly, the vendor in this case was under legal obligation to obtain State Consent in order to satisfy the condition of the contract. This I should state was a serious default on the part of the vendor.

The question as to whether the contract was invalid because it was not registered with the Lands and Deeds Registry was also discussed at length by the Supreme Court in the same *Mutwale* case. The Court held:-

“Prior to the passing of the Land Conversion of Titles Act legal contracts could be entered into, but if they were not registered within a specific time limit, they were statutorily held to be void. The same situation does not arise with contracts relating to land which are entered into without the prior consent of the president.”

In the final analysis I find that there was a written contract which the Defendant was supposed to finalise by obtaining State Consent, but the Defendant did not even apply for the second State Consent to enable the vendor and the purchaser finalise the sale because the first State Consent was given to Ndola City Council at NIL value. The purchaser cannot, therefore, be blamed for this anomaly.

Further, under the doctrine stated in the case of *Cheproniere v Lambert* (Supra) the purchaser did something more apart from executing the contract and payment of deposit because she was granted occupation of the premises and she obliged.

In view of all these considerations, I hold that the Plaintiff is entitled to specific performance of the contract and that the parties are instructed to amend the contract taking into account the fact that deposit was paid to the Defendant at the time when the Zambian currency was still strong. This goes without saying that the current purchase price will have to be reduced to that extent. Upon completion of the contract the vendor should immediately apply for a State Consent anew stating the price which would have been agreed upon by the parties after taking into consideration the fact that deposit was paid to the Vendor as aforesaid.

It is the new State consent if granted by the Commissioner of Lands which will state the actual purchase price because the price which will be indicated in the contract will merely be regarded as a proposed price until such time that it is approved by way of State consent.

I wish to state further that there is no need to deal with other claims such as loss of mesne profits at this stage as the need to do so will only arise when the sale is completed.

Since the Defendant has partly succeeded in the alteration of the contract price, I order that each party should bear its costs.
Judgment for plaintiff.
