

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2010/HPC/0256

BETWEEN:

FEBIAN MUSIALELA

PLAINTIFF

AND

EVANS CHIPMAN

DEFENDANT

BEFORE THE HON. JUSTICE NIGEL K. MUTUNA ON 21st DAY OF JULY, 2011.

For the Plaintiff : Mr. R. Mainza of Messrs Mainza & Company.
For the Defendant : Mr. W. Mweemba of Messrs Mweemba &
Company

JUDGEMENT

Cases referred to:

- 1. Redgrave -VS- Hurd (1881) 20 Chd 1.**
- 2. Alexander Adam and Robert Smith -VS- William Newbigging and Walter Townend (1888) 13 App. cases 308.**
- 3. Spence -VS- Crawford (1939) ALL ER page 271.**
- 4. Sithole -VS- State Lotteries Board (1975) ZLR page 106.**
- 5. Holmes Limited -VS- Buildwell Construction Company Limited (1973) ZLR page 97.**
- 6. Printing and Numercial Registering Company -VS- Simpson (1875) LR 19 EQ 462.**
- 7. Colgate Palmolive (Z) Inc -VS- Able Shemu Chuka and 110 Others Appeal No. 181 of 2005.**

Other authorities referred to:

- 1. *Misrepresentation Act, Cap 69.***
- 2. *Blacks Law Dictionary by Bryan A Garner, 8th edition.***
- 3. *Lands and Deeds Registry Act, Cap 185.***

The Plaintiff, Febian Musaillela commenced this action against the Defendant, Evans Chipman on 30th April, 2010, by way of writ of summons and statement of claim. The endorsement as appears on the summons is for the following relief;

- “(a) Rescission of the letter of sale obtained by the Defendant from the Plaintiff by means of fraudulent misrepresentation.*
- (b) A declaration that the Plaintiff is the legal owner of Stand No. SESH/68, Mulima Mbango Road, Sesheke.*
- (c) An injunction restraining the Defendant whether by himself or by his servants or agents or otherwise howsoever from taking possession of or interfering with the Plaintiff’s quite enjoyment of Stand No. SESH/68, Mulima Mbango Road, Shesheke and/or trespassing upon the said Property pending trial of the main matter.*
- (d) Costs of the Proceedings.”*

The Defendant responded by way of a memorandum of appearance and defence filed on 19th May, 2010.

In the statement of claim, the Plaintiff averred that by letter dated 10th June, 2008, he was offered stand number Sesh/68 by Alison Arwot Mapulanga (the

vendor). The consideration was initially K70,000,000.00 then reduced to K50,000,000.00. Upon receipt of the offer he proceeded to borrow the sum of K50,000,000.00 from the Defendant to enable him purchase the said property. The Defendant agreed to lend the Plaintiff the said moneys on condition that they were paid directly to the vendor, in his presence. Pursuant to this, on or about 3rd July, 2008, the Defendant duly availed the Plaintiff the said moneys which the Plaintiff immediately paid to the vendor in his presence.

After the Plaintiff paid the vendor, the Defendant demanded that he writes a letter of sale in respect of the property in favour of the Defendant to secure the moneys. In order to induce the vendor to write the said letter of sale, the Defendant represented to the Plaintiff that the letter would merely serve as security for the moneys advanced to the Plaintiff in the unlikely event that one of them died. Acting on this representation, the vendor wrote the said letter of sale. The Plaintiff has since discovered that the said representation was untrue and that same was made by the Defendant fraudulently as he now contends that he purchased the said property from the Plaintiff when in fact it is not so. The Defendant has since threatened to take possession of the property from the Plaintiff. This is notwithstanding efforts made by the Plaintiff to partially settle the K50,000,000.00 owed, which offer the Defendant has rejected.

In the Defence, in denying the claim the Defendant stated thus; the property was initially offered to the Plaintiff who having no funds requested the Defendant to purchase it; the initial offer from the vendor was K70,000,000.00 which the Defendant requested the Plaintiff to negotiate downwards to K50,000,000.00; after the purchase price was reduced to K50,000,000.00 the Defendant as buyer paid the purchase price to the vendor; and the Defendant took occupation of the property immediately upon paying for it and caused a caretaker to be resident there in.

The matter came up for hearing on 18th May, 2011. The two parties testified on their own behalf as PW and DW respectively.

The evidence of PW was in line with his statement of claim which was that he received an offer from Alison Arwot Mapulanga for the sell of the property in dispute. He then approached the Defendant for a loan of K50,000,000.00 to enable him pay for the property. The Defendant lent him the said sum of money and they executed a letter dated 19th June, 2008 to that effect. The funds were released in two portions namely, K10,000,000.00 and K40,000,000.00. The second payment of K40,000,000.00 was evidenced by letter dated 3rd July, 2008. On the same day, the Defendant demanded security for the moneys that he had lent the Plaintiff, pursuant to which a letter was prepared which purported that he had sold the house to the Defendant.

Under cross examination PW began by stating that the K50,000,000.00 he received from the Defendant was a loan for purposes of his purchasing the property. He went on to state that there were no conditions attached to it such as interest. He stated further that the Defendant paid the funds directly to the vendor because he did not want the funds to go through him.

In reference to the documents on the record, the Plaintiff conceded that the one in his supplementary bundle of documents indicated that he had agreed to sell the property to the Defendant. He however stated that that was not the initial agreement.

In re-examination, the Plaintiff stated that the letter of sale to the Defendant was an afterthought which was intended to provide security to the Defendant for the moneys lent.

DW's evidence highlighted the agreement he entered into with the Plaintiff for the sell of the property to him by the Plaintiff. He also referred to the documents executed in that respect.

Under cross examination, DW conceded that the document at page 1 of the Plaintiff's bundle of documents indicated that the Plaintiff was the purchaser of the property. Further, that he was purchasing from vendor. He conceded further that by the document at page 2 of the Plaintiff's bundle of documents he was lending K10,000,000.00 to the Plaintiff. He went on to disagree that the moneys were not advanced to the Plaintiff but paid to the vendor. He also clarified that the documents reflected that he was lending the Plaintiff the money because the two did not want the vendor to know that it was he who was purchasing the property. This was because, the vendor would have raised the purchase if he knew that it was the Defendant buying the property. Further that, the Plaintiff sold him the house on 3rd July, 2008, soon after the payment was made to the vendor.

DW's, testimony went on to reveal that the vendor had signed the document to change ownership of the property into the name of the Plaintiff. Further, that when he released the K10,000,000.00 initial payment, it was conditional upon the Plaintiff surrendering all documents to him. He denied signing the document at page 3 of the Plaintiff's bundle of documents claiming that it was a forgery.

At the close of the Defendant's case, I directed the parties to file submissions 20 days apart. Pursuant to the said directive, the Plaintiff filed submissions on 13th June, 2011, while the Defendant's submissions were filed earlier on 7th June, 2011.

The Plaintiff's submissions are a ten page document. Pages 1 to part of page 5 are a restatement of the endorsement in the pleadings and evidence

tendered. I will not reproduce the said portion of the submissions because I have summarized the pleadings and evidence in the earlier part of this judgment.

Mr. R. Mainza, for the Plaintiff begins his submission proper by identifying the issues in contention thus; whether the letter dated 3rd July, 2008, titled purchase agreement signed by the Plaintiff and Defendant was obtained by means of fraudulent misrepresentation by the Defendant; and whether the Plaintiff is entitled to rescind the purported sale of Stand No. SESH/68, Mulima Mbango road Sesheke, on account of fraudulent misrepresentation. Counsel argued that the remedy open to a party who is induced to enter into a contract by misrepresentation is to rescind the contract. In advancing the said argument my attention was drawn to section 2 of the **Misrepresentation Act** and the cases of **Redgrave -VS- Hurd (1)**, **Alexander Adam and Robert Smith -VS- William Newbigging and Walter Townend (2)** and **Spence -VS- Crawford (3)**. He argued that the Defendant induced the Plaintiff to sign the purchase agreement appearing at page 1 of the Plaintiff's supplementary bundle of documents by means of fraudulent misrepresentation. It was argued that all the documents appearing at pages 1 to 6 of the Plaintiff's bundle of documents indicate that the Plaintiff purchased the property from the vendor. In particular the document at page 3 which indicated that the Defendant lent the money to the Plaintiff to purchase the property. The attempt by the Defendant to disown the document on the ground that it is forged is untenable because it was not specifically pleaded, my attention in this respect was drawn to order 18 rule 12 (1) of the **Supreme Court Practice (white book)**. The Defendant is therefore estopped from alleging that the document is forged.

Counsel ended by arguing that the Plaintiff has proved on a balance of probabilities that the letter titled purchase agreement and dated 3rd July,

2008, was obtained by means of fraudulent misrepresentation by the Defendant from the Plaintiff.

In the Defendant's submissions, Mr. W. Mweemba advanced his arguments in line with the claims made by the Plaintiff in the pleadings.

Regarding claim (a), he argued that to the extent that the claim is premised on an alleged fraudulent misrepresentation on the part of the Defendant, Section 2 of the **Misrepresentation Act** does not apply. He argued that the said section allows a party to a contract to rescind it based on misrepresentation, but without alleging fraud. The case cited by the Plaintiff of **Alexander Adam and Robert Smith Adam -VS- William Newbigging and Walter Townend (2)** is of no relevance to this case for the same reason.

Counsel went on to argue that since the alleged misrepresentation is styled as fraudulent, the allegation is criminal. The evidence required to prove the allegation is therefore higher than that required in ordinary civil matter. It was argued that the standard of proof required is that of proof beyond reasonable doubt as per the case of **Sithole -VS- State Lotteries Board (4)**. Counsel argued that the Plaintiff has not adduced sufficient evidence to prove the alleged fraudulent misrepresentation. It was argued that the evidence was to contrary, because the Plaintiff under cross examination admitted freely and voluntarily that he signed the letter of sale in his supplementary bundle of document. Counsel therefore urged the Court to be guided by the express terms of the said document. The testimonies by the Plaintiff which are not supportive of the said document must be treated as extrinsic evidence. They must therefore, not be admitted for purposes of contradicting or overriding what was signed by the parties. My attention in this respect was drawn to the case of **Holmes Limited -VS- Buildwell Constructors Company Limited (5)**.

As regards claim (b) counsel argued that should claim (a) fail it becomes otiose. While claim (c) was determined by the ruling of the Court delivered on 2nd June, 2010.

On the last claim relating to costs, counsel argued that same were in the discretion of the Court, but should, however, follow the event.

I have considered the pleadings, evidence and submissions tendered in this matter. In determining this matter, I propose to consider it by way of the order in which the claims have been presented. Claim (a) in the writ of summons is for rescission of letter of sale allegedly obtained by the Defendant from the Plaintiff by fraudulent misrepresentation. Reliance was made to Section 2 of the **Misrepresentation Act** and the cases of **Redgrave -VS- Hurd (1)**, **Alexander Adam and Robert Smith -VS- William Newbigging and Walter Townend (2)**, and **Spence -VS- Crawford (3)**. Section 2 of the **Misrepresentation Act** states as follows;

“Where a person has entered into a contract after a misrepresentation has been made to him, and -

***(a) the misrepresentation has become a term of the contract
or***

(b) the contract has been performed;

or both, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this Act, notwithstanding the matters mentioned in paragraphs (a) and (b)”

(The underlining is the Court’s for emphasis only).

The foregoing provision clearly indicates that one can only have recourse to rescission of the contract by virtue of Section 2 if fraud is not alleged in the

misrepresentation. In this matter the claim is not for misrepresentation *per se*, but fraudulent misrepresentation. I therefore endorse the argument by counsel for the Defendant that the Plaintiff can not avail himself to the provisions of that Section.

In arriving at the foregoing finding, I have considered the cases cited by counsel for the Plaintiff of ***Redgrave -VS- Hurd (1)***, ***Alexander Adam and Robert Smith -VS- William Newbigging and Walter Townend (2)*** and ***Spence -VS- Crawford (3)***. The facts in the ***Redgrave (1)*** and ***Alexander Adam (2)*** cases indicate that the alleged misrepresentation complained of there was not fraudulent. To that extent those two cases do not in any way aid the Plaintiff's case. As regards the ***Spence (3)*** case the allegations are of fraudulent misrepresentation in which the Court ordered rescission of the contract. However, in view of the provisions of Section 2 of the ***Misrepresentation Act*** which prescribes the remedy of rescission being available only in instances where fraud is not alleged, it is not applicable.

Further, even if we were to assume that the Plaintiff could avail himself of the provisions of Section 2 of the ***Misrepresentation Act***, the evidence adduced falls far short of the standard prescribed by the law. As counsel for the Defendant has argued, the standard of proof in cases alleging fraud is higher than that of the usual balance of probabilities prescribed in civil matter. This is as per the case cited by counsel for the Defendant of ***Sithole -VS- The State Lotteries Board (4)*** which states at page 106 as follows;

“If a party alleges fraud the extent of the onus on the party alleging is greater than a simple balance of probabilities.”

It is however not proof beyond reasonable doubt as prescribed in criminal matters, as counsel for the Defendant has argued. From the evidence adduced by the Plaintiff, the misrepresentation alleged to be fraudulent is the request by the Defendant for the letter of sale, allegedly for purposes of

securing the K50,000,000.00 lent to the Plaintiff. **Blacks Law Dictionary** in defining fraudulent misrepresentation at page 1022 had this to say;

“a false statement that is known to be false or is made recklessly - without knowing or caring whether it is true or false and that is intended to induce a party to detrimentally rely on it.”

There are therefore two elements, being a false statement and recklessness. Applying this test to the current case, I find that the element of the alleged representation being false has not been proved to the standard set out in the **Sithole (4)** case, because the conduct of the Plaintiff proves otherwise. The Plaintiff subsequent to paying the vendor signed a clear and unequivocal letter of sale which demonstrated his intention to sell the property to the Plaintiff. There is no deceit or indeed fraudulent misrepresentation of the facts by the Defendant in the said letter nor has sufficient proof been presented to show that the signing by the Plaintiff was induced by fraud. Further, I find that the element of recklessness on the part of the Defendant has also not been proved, and perusal of the pleadings also indicates that it has not been pleaded. The Plaintiff, therefore has not discharged the burden placed upon him to prove the fraudulent misrepresentation.

Despite my findings in the preceding paragraphs, I am compelled to make a determination in respect to the effect of the letter of sale contained in the Plaintiff's supplementary bundle of documents. This is what has caused the controversy in this matter. It states as follows;

“I Fabian Musialela have sold my above mentioned house to Mr. Evans Chipman the completion of sale of above house from Mr. Alison Arwot Mapulanga. The purchase price is ZMK 50,000,000.00. I have received ZMK 40,000,000.00 on this day as balance remained on 19th June 2008. The total amount paid is now Fifty Million Kwacha (K50,000,000.00).”

The said letter is signed by both parties.

The Plaintiff has alleged that his understanding at the time was that it was intended to secure the moneys advanced to him by the Defendant. As counsel for the Defendant has argued the said testimony is extrinsic evidence which is intended to add to or vary the terms of a written agreement entered into by the two parties. It is therefore, inadmissible in line with the decision in the case of ***Holmes Limited -VS- Buildwell Construction Company Limited (5)*** which states as follows at page 98;

“Where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally admissible to add to, vary, subtract from or contradict the terms of the written contract.”

The purchase agreement is clear and unequivocal and requires no interpretation by way of extrinsic evidence. Further, the two parties having freely and voluntarily entered into the purchase agreement, I am, as a Court obliged to enforce it, as counsel for the Defendant has urged me to do. This is in line with the holding in the case of ***Printing and Numerical Registering Company -VS- Simpson (6)*** quoted at page 8 in the case of ***Colgate Palmolive (Z) Inc -VS- Able Shemu Chuka and 110 Others (7)*** as follows;

“If there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by Courts of justice.”

Applying this test to this case, in view of the fact that there is no counterclaim by the Defendant for specific performance of the purchase agreement the best I can do in enforcing the parties' agreement, is to

dismiss claim (a), for rescission of the said agreement. I therefore dismiss the Plaintiff's claim in this respect.

As regards claim (b), having dismissed claim (a), I find that it lacks merit and I accordingly dismiss it. Further, legal ownership of a property is evidenced by a certificate of title to the property. The Plaintiff in this matter has not claimed or proved he is in possession of such certificate of title to enable me make a finding that he is the legal owner of the property. This is as per Section 33 of the **Lands and Deeds Registry Act** which states as follows;

"A certificate of Title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to VII might be held to be paramount or to have priority; the Registered proprietor of the land comprised in such Certificate shall, except in case of fraud, hold the same subject only to such encumbrances, liens, estates or interests as may be shown by such Certificate of Title and any encumbrances, liens, estates or interests created after the issue of such Certificates as may be notified on the folium of the Register relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever:

(a) Except the estate or interest of a proprietor claiming the same land under a current prior Certificate of Title issued under the provisions of parts III to VII; and

(b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and

(c) Except so far as regards any portion of land that may be erroneously included in the Certificate of Title, evidencing the title of such Registered Proprietor by wrong description of parcels or of boundaries.”

(Underlining is the Court's for emphasis only).

Therefore, in the absence of proof of title to the property in issue the Plaintiff's claim in (b) can not be sustained.

As regards claim (c), as counsel for the Defendant has ably argued the same has been determined with finality by the ruling of this Court dismissing the application for an injunction.

By way of conclusion, the Plaintiff's claim lacks merit in its totality and I dismiss it with costs. The same are to be agreed in default taxed.

Leave to appeal is granted.

Delivered on the 21st day of July, 2011.

Nigel K. Mutuna
HIGH COURT JUDGE