

IN THE HIGH COURT FOR ZAMBIA

2008/HK/119

AT THE DISTRICT REGISTRY

HOLDEN AT KITWE

(CIVIL JURISDICTION)

BETWEEN:

CHAMBESHI COPPER SMELTER LIMITED - PLAINTIFF

AND

**BERNADETTE CHAPEWA (Administrator of the estate of
the late Frederick Mubanga Chapewa) - DEFENDANT**

For the Plaintiff: Mr. W. Forrest of Messrs Forrest Price & Co.

For the Defendant: Mr. N Simwanza of Legal Aid

JUDGMENT

Case referred to:

1. *Cetina Transport vs Commissioner of Lands SCZ Appeal No. 79 of 1999*

Legislation referred to:

1. *Chitty on Contracts page 30 paragraph 5 - 0019*

The defendant in this case was initially Frederick Mubanga Chapewa who died in or about July 2010 and was by consent of the parties replaced by the administrator of his estate the surviving spouse Bernadette Chapewa on 12th July 2010.

The plaintiff's claim is for the sum of US\$ 21,600.00 paid to the defendant pursuant to a contract in writing between the plaintiff and defendant dated the 18th

August 2007 for a consideration which wholly failed, with interest and costs.

In the amended statement of claim it is alleged that the defendant falsely represented to the plaintiff on or about 18th August 2007 that he was the registered proprietor of Lot No. 4208 situated in the Copperbelt Province of the Republic of Zambia and that the defendant agreed with the plaintiff for the defendant to grant to the plaintiff a right of way and easement over the said property for the construction of a water pipeline. In consideration thereof the defendant paid \$21,600.00 to the defendant. On or about 29th January 2008 the Plaintiff was informed by the Commissioner of Lands that the Zambian Government had repossessed that piece of land in 2007 before the said contract was made.

The defence as pleaded is that it is admitted that there was a contract between the plaintiff and the defendant as described in the statement of claim. The defendant did receive \$21,600.00 from the plaintiff as consideration for the same. The defendant is the rightful owner of Farm No. 6512 Kalulushi which is on sketch No. 312/90 through which the plaintiff's pipeline passes. Save as admitted, the defendant denies each and every allegation contained in the statement of claim.

In the "Reply" filed on 16th April 2003, the defendant alleges that the contract in issue was null and void as the defendant is not the registered owner of Farm No. 6512 Kalulushi which has not been allocated to any one - therefore there was failure of consideration.

A summary of the evidence adduced herein is as follows:

PW1 George Jambwa testified that in August 2007 he was working for the plaintiff Company as a Public Relations Officer. The Company was undertaking a pipeline project from Kafue river to Chambishi Smelter main premises. So he was assigned the job of getting permission from the owners of the farms where the pipeline would pass. He got permission from Frederick Chapewa for the pipeline to pass through Plot No. 4208, Copperbelt Province. Later a contract was made between the plaintiff and Frederick Mubanga Chapewa for the grant of an easement and right of way for an initial period of five years from 15th July 2007 with an option to renew for a further five years at the occupation charge of twenty one thousand six hundred United States dollars for each year paid in advance yearly to the owner by the company. Upon signing the contract and paying US\$21,600.00, the plaintiff requested Mr Chapewa for a copy of his title deed to be attached to the agreement. Mr Chapewa said that he had submitted it to the Ministry of Lands for renewal of the 14 year lease which had expired. He said he wanted to get a 99 year lease. PW1 added that he made a search at the Ministry of Lands in Ndola and found out that the plot belongs to the State and not Frederick Chapewa. It had been repossessed from him for demarcation long before the said contract between the plaintiff and defendant was made. PW1 added that he got a Land Surveyor to check if the pipeline passed through the Plot 4208. That Surveyor said it did not. The said contract had nothing to do with Lualuo Farms Ltd and Plot No. 6512 was not mentioned during negotiations for the contract.

Under cross examination PW1 said that when he initially approached Frederick Chapewa and his wife, they did not tell him that they acquired the Plot through their Company and that it was on a 14 year lease. However, the couple did inform him that they intended to have their land extended on one side which was bordered by a railway line. He was only shown a map of the portion of land in issue which

has been produced on page 2 of the plaintiffs bundle of documents and a sketch of the proposed extension. PW1 further stated that he did not consult the Ministry of Lands in Lusaka or Kalulushi Municipal Council about the plot in issue. When the agreement was made the land had not yet been subdivided.

PW2 Deng Yua upon affirmation said that he is the Administrative Manager of the Plaintiff Company. He referred to page 9 of the Plaintiffs bundle of documents which is copy of the US\$21,600.00 cheque made to Frederick Chapewa on 23rd August, 2007 in relation to the contract in question. Under cross examination he said the Company has removed the pipeline and has not built a substation instead.

DW1 Frederick Mubanga Chapewa testified that he owns a farm in Luongo area of Kalulushi which used to be plot 4208 but the number has changed. Under cross examination he admitted having signed the contract with the plaintiff Company for the right of way for a pipeline pursuant to which he was paid US\$21.600.00. He said the plot was never repossessed. The company Lualuo Farms Ltd was not involved in the said contract. He used his own name in the contract as he had personally applied for the land. He asked the Plaintiff to pay in his own name because his company had no bank account at that time.

DW2 Bernadette Chapewa testified that she was allocated plot No. 4208 with her husband (DW1) in 1982 by the Ministry of Lands. They were given a 14 year lease under Lualuo Farms Ltd of which they are both directors. They settled there to farm and later applied to Kalulushi Municipal Council for an extension of the land up to the railway line. By July 1990, the Council had approved their application for an extension. She referred to page 9 of the Defendants bundle of documents where there is a map showing the approved extension and full

extension of the plot. She said they had a title deed for plot 4208 which was surrendered to the Ministry of Lands when they applied for a 99 year lease. They paid for the survey of the whole plot on 15th September 2004. By then the authorities had changed the plot number to 6512 as shown in the exhibited survey quotation at page 13 of the Defendants bundle of documents. In 2006 when Surveyors went to survey the land her husband who was supposed to accompany them had an attack of diabetes so the survey was aborted.

DW2 added that in March 2007 they were approached by PW1 Mr Njambwa of Chambishi Copper Smelter who proposed that a contract be made to the effect that a road and a water pipeline for the Company should pass through the said farm. They explained to PW1 that they had not yet obtained a certificate of title to that land as it was supposed to be re-surveyed. Thereafter, the contract in issue was made and \$21,600.00 accordingly paid. DW2 further stated that the said plot has never been, re-possessed. It is the plaintiff who wrote to them in November 2007 saying that the plot had been re-possessed by the Government.

Under cross examination she said the Farm has always been registered under Lualuo Farms Ltd. It was agreed with PW1 to put the contract in her husband's name. A certificate of title has not yet been issued for plot 6512. The 14 year lease expired in or about 1999 before a 99 year lease was paid for. She added that the plaintiff has not withdrawn the contract because the pipeline and road are still there and they have constructed an electric power station on the farm taking up a very large area. The plaintiff was in a hurry to get the easement so the matter was dealt with as if it were personal. She said she asked Mr Njambwa if the next payment could be made to Lualuo Farms Ltd and he accepted.

DW3 Chanda William Chapewa testified that he is the son of the defendant who owns Farm No. 6512 formerly numbered 4208 which is registered in the name of Lualuo Farms Ltd. His parents are directors of the said Company. In 2008 his father asked him to find out from the Ministry of Lands why the farm was being re-possessed. He later met with the Commissioner of Lands who looked through the file for Farm No. 6512 and advised him that there was no document indicating that the land was re-possessed. He later had the opportunity of checking the file where he found a letter of offer and site plan relating to plot No. 6512. The file was marked on top 4208. There was correspondence between his father and the Ministry of Lands up to the time the property number was changed but nothing suggesting that the land had been re-possessed. The file also contained the documents exhibited as No. 14 and 15 in the defendants bundle of documents. These are computer printouts for land rates relating to the same piece of land. On document 14 it is written that “.....property appears cancelled for sub-division.” He said the Chief Registrar explained to him that it meant that the land is either being extended or subdivided. On document 14 the property number shown is 4208, on document 15 the property number is 6512. Document 15 shows that Farm 6512 was offered to Lualuo Farms. Both documents were issued on 5th June 2008. He added that he visited the Farm in Kalulushi and found a water pipeline and what he perceived as a ZESCO sub-station in the premises.

Under cross examination he said that as at 18th August 2007 when the contract in issue was made the owner of the Farm was Lualuo Farms Ltd and not the defendant.

DW4 Mafuma Nkhunga testified that he is the Acting chief Registrar in the employ of the Ministry of Lands. Farm No 4208 was sometime in 1981 offered to Lualuo

Farms Ltd. That Company accepted the offer and paid lease charges. The Ministry of Lands record shows that a certificate of title was not issued but a 14 year lease was granted to the Company. The record shows that the only reason why a certificate of title was not issued was because the land had not been surveyed. The person allocated with land is responsible for having it surveyed. However, when lease charges and ground rent are paid a contract is deemed to have been made.

DW4 explained that what was available to him was a temporary file. There is supposed to be a parent file in the Registrar's Office in Lusaka but some files had been packed for onward transmission to the Ndola Office. Its difficult to verify that that's where the parent file is. The temporary file could have been made in September, 2009. The temporary file contains only photocopies of documents. He said sometime in 1990 Lualuo Farms wrote to Kalulushi Municipal Council seeking to have the size of plot 4208 enlarged. The Council in turn submitted their recommendations to the Ministry of Lands for final approval. Meanwhile Lualuo Farms engaged the services of the Surveyor General to carry out survey of the property as extended on the basis of the approved site plan which process is yet to be concluded. DW4 said he had a detailed letter from Mr Chapewa indicating that he paid the Surveyor Generals Office. However, he had seen no receipt or the approval of the Commissioner of Lands for the extension of the farm or an offer letter from the office of the Commissioner of Lands as was the case when the farm was initially allocated. He said that lack of approval meant that the renumbered Farm No. 6512 was not approved. If it were approved an offer letter could have been given for Farm No. 6512 to Lualuo Farms Ltd. which they should have accepted in order to have a basis for their claims.

DW4 further stated that he had a limitation as regards information as he assumed that there was more information on the primary file. There is no dispute to the claim by Lualuo Farms Ltd to Farm No. 4208 as there is clear evidence on record that they paid the necessary fees except that they have not renewed the 14 year lease. As regards farm 6512 the Ministry of Lands has difficulties to agree that they have a valid claim to it in the absence of a letter of offer from the Commissioner of Lands. Farm No. 6512 is a portion of land where a substation has been built by the plaintiff Company.

DW4 went on to explain that when one applies for an extension of a plot, two scenarios may apply: Firstly, the plot may retain the same number. Secondly, the initial property number is cancelled, an extension made and then consolidated portion is re-numbered. He said it seemed to him that the second scenario is what was envisaged in this case. He said he may not be aware that the plaintiff was offered the plot where they made the improvements because he did not have the file relating to the land where they put up the substation. He has not seen an offer to the plaintiff who has approached Kalulushi Municipal Council to regularize the allocation. To his knowledge there is no certificate of title relating to the land where the sub-station is. He further stated that if the land is at offer stage, there is no printable document as there is no land record yet. So at that stage a principal system analysis would give the information. If the property is on title the record can easily be printed. There is no lands register record for Farm 6512 as there was no offer and survey has not been concluded.

DW4 referred to page 12 of the defendant's bundle of documents where there is a receipt issued by the Surveyor Generals Office for survey fees of K1,810,000.00 to Lualuo Farms for farm No. 6512, Kalulushi. He also referred to page 10 of the

same bundle of documents where there is a site plan. He said it was difficult for him to tell if it was approved or not. He said if it was approved, Kalulushi Municipal Council should have stamped it. He said the document on page 9 of the same bundle indicates that the Council wrote to the Commissioner of Lands recommending an extension of Farm 4208. He said he did not conduct a search at Kalulushi Municipal Council. The Council made the recommendation on 9th July 1990 and the defendant paid to the Surveyors Office on 15th September 2004.

DW4 further explained that the Surveyor General can survey land on approved plans whether or not that property has been offered to anyone but only the Commissioner of Lands can offer or allocate land. The approval of a site plan would come first, then numbering of the land and subsequently, the Commissioner of lands would allocate the land to the person or company recommended by the Council or other successful applicant. He said he had no idea why there was no approval of the defendants application but saw nothing wrong with the recommendation.

Under cross examination he said that on 18th August, 2007 Lualuo Farms Ltd was the registered owner of lot 4208. The registration was done manually, so it will not show on the computerized record. He said there was no change of ownership to Frederick Mubanga Chapewa. Currently plot 4208 belongs to Lualuo Farms Ltd but the 14 year lease has expired. However it may be renewed.

He further stated that the plot has been subdivided by Kalulushi Municipal Council and re-allocated to various people and that Frederick Chapewa's personal representative has challenged that.

The temporary file was created by the Ministry of Lands in September, 2009 using documents obtained from Mr Frederick Chapewa and Kalulushi Municipal Council.

In re-examination he said that it is not in dispute as to who owns plot 4208. He did not know if subdivision thereof was made with the approval of the Ministry of Lands.

It is not in dispute that the late Frederick Chapewa and the surviving spouse Bernadette Chapewa were the directors of a Company called Lualuo Farms Ltd which was incorporated on 23rd July 1981. On 19th September 1981 the Ministry of Lands granted Lualuo Farms Ltd a 14 year lease of the Farm. The Company paid the lease charges on 17th September 1981 and the Chapewa's have since been legally in possession of that Farm. In 1990 Lualuo Farms Ltd applied to Kalulushi Municipal Council for an extension of the plot which application was approved by the Council on 9th July 1990.

It is also not in dispute that Lualuo Farms Ltd applied for a 99 year lease by 1992 before the 14 year lease had expired. The letter dated 24th August, 1992 from the Acting Surveyor General to Lualuo Farms which is in the defendants bundle of documents, indicates clearly that a 99 year lease was applied for by the Company before the same letter was written. As a result the Company was given two copies of the approved site plan which were enclosed in the letter and requested to have the land which has been renumbered 6512 surveyed by a qualified surveyor. The Company went ahead and engaged a Surveyor from the Government Survey Department of Ndola region and paid K1,810,000.00 as survey fee in respect of Farm 6512, Kalulushi for which they were given a Republic of Zambia General

receipt No. 173574 on 15th September 2004. On the computer printout dated 5th June 2008 from the Ministry of Lands which is in the Defendants bundle of documents, it is handwritten that “*Richard-property appears cancelled for subdivision please confirm.*” On the other computer printout in the same bundle it is handwritten “*Offered to Lualuo Farms Ltd Box 20494 Kitwe farm situate in Kalulushi.*” There is no evidence on record as to who wrote that.

However, it is important to note that there is only one farm in issue which was renumbered and only Lualuo Farms Ltd has ever been allocated that land by the Commissioner of Lands.

It is also not in dispute that on 18th August, 2007 the plaintiff and defendant entered into a contract whereby the defendant allowed the plaintiff to construct a pipeline through Farm No. 4208. The easement was for an initial period of five years from 15th July, 2007 with an option to renew for a further period of five years at the initial charge of US\$21,600.00 for each year paid in advance yearly to the owner. The Plaintiff paid the said sum to the late Frederick Chapewa by cheque on 23rd August 2007. I find that the plaintiff has since passed a pipeline and put up a substation on the farm.

Although Lualuo Farms Ltd is a separate legal entity from the individual Frederick Mubanga Chapewa who has since died, and the Company was not mentioned in the contract in question, it is clear from the evidence of DW1 and DW2 that PW1 was informed by DW1 and DW2 that the farm was registered in their Company name and they had applied for renewal of the lease. DW1 and DW2 were in control of the Company property as directors of the Company and were going to

benefit from the money realized from the transaction even if the contract was written in the name of the Company instead of Frederick Chapewa.

I find further that at the time that the contract was made the property had been re-numbered 6512 as the application for an extension made by Lualuo Farms Ltd was being processed. Lualuo Farms was not issued with a certificate of title for the farm but according to the evidence of DW4 they were regarded as the owners of the farm having complied with all the legal requirements. The 14 year lease which expired in 1995 has not yet been renewed by the Ministry of lands. The Farm has not been re-possessed by the Commissioner of Lands. Therefore, the Chapewa's as Directors of Lualuo Farms Ltd had the right to be in possession of the land and enter into the contract in question by August, 2007. From the record it is clear that the application for a 99 year lease is still being processed by the Ministry of Lands because Survey fees were received from Lualuo Farms Ltd by the Ministry of Lands, survey department who gave the defendants approved site plans for the re-numbered plot 6512.

It is in evidence that Farm No. 4208 has since been subdivided and allocated to new owners and that the Chapewa's have challenged that decision and action. That issue is irrelevant to this case because it seems that the subdivision and re-allocation was done by the Council after the contract in question was made without involving the Commissioner of Lands. If the Commissioner of Lands was involved, there would have been documents from the Ministry of Lands as proof of repossession.

Although DW4 referred to a temporary file containing photocopies of documents obtained from the defendant and the Kalulushi Municipal Council, the authenticity

of those documents has not been challenged and DW4 had explained that at that time that was the only evidence available to him. So that was the best evidence that the Court could receive from the Ministry of Lands in this case.

I have carefully considered the submissions made by both learned counsels. Mr Forrest submitted that the plaintiff is entitled to recover the money paid to the defendant as money had and received because consideration for the contract had totally failed. In support of these submissions he relied on **Chitty on Contracts (1) page 30 paragraphs 5 - 0019** where it is stated inter alia that:

“Where money has been paid by one party to the other in pursuance of a contract, the subject matter of which was not in existence at the time the contract was made, it can be recovered in an action for money had and received, for the consideration has totally failed.”

Mr Forrest also referred to the case of **Cetina Transport vs The Commissioner of Lands(1)** to fortify his argument that the defendant purported to grant to the plaintiff a right of way for a period of 5 years but could not grant interest in land which he does not possess. He further stated that the land was repossessed by the Zambian Government and re-allocated in sub-divisions to a number of small holders.

Mr Simwanza submitted that the plaintiff was fully aware under what capacity the defendant was transacting and cannot now seek to rescind the contract. He argued that there has been no failure of consideration as the terms of the contract had been fully performed. The plaintiff has been pumping water under the right of way granted to it. The case of **Cetina Transport and Commissioner of Lands (1)** cited by the plaintiff is distinguished from the case at hand as the issue in that case

was that of lack of recommendation by the Council. The Supreme Court stated at page J5: “Without a recommendation by the Council, we do not see how the Commissioner of Lands could allocate the land to the appellant even if he received the copy letter and treated it as an application.”

In the present case the Council had recommended Lualuo Farms Ltd to the Commissioner of Lands and a sketch plan was drawn, survey fees were paid and received. The property was officially re-numbered. It has not been explained on what basis the plaintiff is alleging re-possession as no such evidence was led. Mr Simwanza pointed out that DW4 stated that there had been no repossession of the defendant’s property by the Commissioner of Lands. Mr Simwanza further stated that the defendant having disclosed his position and role as regards Lualuo Farms Ltd had sufficient interest and authority to deal with the land and thereby legally placed to grant the plaintiff right of way. Therefore the plaintiff’s case must fail.

I totally accept Mr Simwanza’s submissions. I find and hold that there was no failure of consideration. The fact that the contract was not made in the name of Lualuo Farms Ltd did not inhibit either party from performing its part of the contract. For the foregoing reasons the case is dismissed with costs.

Delivered at Kitwe this day of 2011.

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C. K. MAKUNGU
JUDGE

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