

**IN THE HIGH COURT OF ZAMBIA  
HOLDEN AT NDOLA  
(Civil Jurisdiction)**

**2010/HN/306**

**BETWEEN:**

**MOSES NONDO MUBANGA**

**PLAINTIFF**

**AND:**

**GEORGE SEPE NKANDU FICHITE**

**DEFENDANT**

**CORAM: SIAVWAPA J.**

FOR THE PLAINTIFF: MR. MAGUBBWI OF MESSRS MAGUBBWI &  
ASSOCIATES

FOR THE DEFENDANT: MR. MUPETA OF MESSRS D.B. MUPETA &  
CO.

---

**J U D G M E N T**

---

**AUTHORITIES REFERRED TO:**

**CASES:**

- 1. Galaunia Farms Limited V National Milling Company Limited**
- 2. Mwenya & another V Kapinga**
- 3. Tito V Weddel**
- 4. Kayoba & another V Ngulube & another**
- 5. Gideon Mudenda V Timothy Mulwani**
- 6. William V Moss' Empires Limited**
- 7. McCauseland & another V Duncan Lawrie & another**

**WORKS:**

## **1. Chitty on Contracts 25<sup>th</sup> edition**

## **2. Sutton & Shannon on Contracts 6<sup>th</sup> edition**

The parties herein executed a contract of sale with the Defendant agreeing to sell and the Plaintiff to purchase house No. 36 Yarrow Avenue Luanshya at the price of K215, 000, 000.00. The Plaintiff, however, defaulted in making the payments as per the contract. The Defendant then invoked clause 18 of the contract and re-advertised the house for sale. The Plaintiff later approached the Defendant for completion of the sale but that the Defendant rejected the offer. The Plaintiff now claims for an order of specific performance of the said contract of sale as per his writ of summons supported by an affidavit filed on 4<sup>th</sup> October 2010.

The Plaintiff testified and called one witness while the Defendant testified but called no witness. PW1 testified that he was an Estate Agent who came to know the Plaintiff as a client when he approached him as a prospective purchaser of house No. 36 Yarrow Avenue. He further said that he knew the Defendant earlier when he acted as his agent to purchase the same house. The Defendant approached him on 8<sup>th</sup> January 2010 and told him that bailiffs had seized his household goods and asked him to find a buyer for the house so that he could save his household goods from sale by the bailiffs. He identified the document exhibited as "23" in the Plaintiff's bundle of documents as the authority on

which he approached the Plaintiff's wife to inquire whether she was still interested in buying a house.

Mrs. Mubanga requested to view the house first and after he had taken her to view the house, she said that she first needed to inform her husband. On 4<sup>th</sup> January 2010, the Plaintiff viewed the house but stated that he could only buy it if the price was reduced from K250, 000, 000.00 to K215, 000, 000.00 because of its poor state of repair to which the Defendant agreed. He then prepared a contract of sale which the parties executed on 15<sup>th</sup> January 2010 which he identified as exhibit "24" in the Plaintiff's bundle of documents.

The contract stipulated that the Plaintiff pays K25, 000, 000.00 upon signing of the contract, which he did with the balance payable in two instalments of K150, 000, 000.00 on 5<sup>th</sup> March 2010 and K40, 000, 000.00 on 5<sup>th</sup> April 2010. The Plaintiff however, informed him that he would not be able to pay the 2<sup>nd</sup> instalment as agreed on 5<sup>th</sup> March but that he would instead pay on 11<sup>th</sup> March 2010. On that date however, the Plaintiff told the Defendant at a meeting that he only had K70, 000, 000.00 which he asked the Defendant to accept instead of the K150, 000, 000.00. The Defendant accepted the K70, 000, 000.00 for which a receipt, exhibited as "30" in the Plaintiff's bundle of documents, was issued. The parties further agreed that the whole balance of K120, 000, 000.00 would now be paid on 5<sup>th</sup> April 2010.

On 5<sup>th</sup> April 2010, the Plaintiff phoned him and told him that he had not yet got his money and requested that he be allowed to pay on 21<sup>st</sup> April 2010. On that date, the Plaintiff explained his failure to pay as per the agreement on 5<sup>th</sup> April and requested that he be given up to 20<sup>th</sup> May 2010. The Plaintiff however, only appeared on 22<sup>nd</sup> May 2010 and at another meeting with the Defendant, he apologized for his failure and asked to be given up to 6<sup>th</sup> June 2010 but that the Defendant was not pleased with the delay by the plaintiff to pay him the balance stating that 6<sup>th</sup> June 2010 would be the final date of payment.

On 15<sup>th</sup> June, the he had a meeting with the Plaintiff and the Defendant in his office at which the Defendant indicated his desire to re-advertise the house to which the Plaintiff did not object. He further said that it was agreed at that meeting that he would re-advertise the house and once sold; he would notify the Plaintiff and refund him the K95, 000, 000.00 that he had paid the Defendant. The Plaintiff also asked whether, he would be allowed to pay the balance off if he got the money before the house was sold to another person to which the Defendant agreed. He further said that prospective purchasers approached him between 15<sup>th</sup> June and 27<sup>th</sup> September 2010 but indicated their unwillingness to buy it at the stated price of K250, 000, 000.00.

On 28<sup>th</sup> September 2010, the Plaintiff phoned him to inquire whether the house had been sold or not and when he informed

him that it had not, he requested for a meeting with the Defendant on the same day. At the meeting, the Plaintiff indicated that he now had the K120, 000, 000.00 balance and ready to pay. The Defendant however, indicated that he had since changed his mind and would not accept the K120, 000, 000.00. All pleas by the Plaintiff, including an offer to top up on the balance were rejected by the Defendant who opted to refund the money the Plaintiff had paid.

In cross-examination he said that he was agent for the Defendant as the seller and that some of the changes that had been made to the dates of payment had been recorded on the receipts while others were verbal. He further said that he had received his 10% fees on the K95, 000, 000.00 that the Plaintiff had paid the Defendant. In re-examination he said that when the decision to re-advertise was made, the parties agreed that the Defendant would refund the Plaintiff once the house was sold and further that the Plaintiff had the option to pay the balance.

PW2, the Plaintiff, testified that he was looking for property to buy through his wife who told him that someone, whom he later came to know as Mr. Lwatula, an estate agent, had contacted her. Mr. Lwatula, PW1, later arranged a meeting between him and the Defendant who was the seller. At the meeting the Defendant explained to him his situation that put his house at risk of being seized and sold by the bailiffs. When he told him that he did not

have the money at the time, the Defendant pleaded with him that he needed some money so that he could redeem his house hold goods which had already been seized. The Defendant went on to suggest that he could be paid the rest of the money later to enable him buy a smaller house.

Following the discussion, a contract of sale was drawn by PW1 which he and the Defendant signed with his wife as a witness. He identified the contract of sale as exhibit "24" in the Plaintiff's bundle of documents. He said that he fulfilled clause 14 of the contract but that he breached clause 15 thereof. He said at a meeting with the Defendant in the presence of PW1, the Defendant accepted a payment of K70, 000, 000.00. He further admitted failing to meet the subsequent deadlines for the payment of the balance until the Defendant decided to re-advertise the house with an option for him to pay the balance if he raised the money before the house was sold.

He said that he later informed PW1 that he had got the money and asked for a meeting with the Defendant. The Defendant however, refused to accept the money on the grounds that it was late and he could get attacked by criminals. The Defendant further stated that he could not take the money as he had delayed in paying. It was finally resolved that the Defendant refunds him the money he had paid. The Defendant however, informed him that he did not have the money as he had used it

and walked out never to see him again. He then decided to commence this action.

He further stated that a week before he took the balance to the Defendant, the Defendant had gone to his house to ask for K60, 000, 000.00. He said that prior to his taking the balance of K120, 000, 000.00; the Defendant did not write him to rescind the contract. He has accordingly prayed for specific performance of the contract or in the alternative, a refund of the K95, 000, 000.00 with interest and costs.

In cross-examination he said that the Defendant and PW1 had a private meeting during their last meeting but that he did not know what they discussed. He also said that the Defendant agreed to refund him the K95, 000, 000.00 with interest in the presence of PW1.

In his defence, the Defendant, who testified as PW1, said that he had problems with the bailiffs who wanted K16, 000, 000.00 from him as a result of which he decided to sell his household goods to raise the money. He and the family however, thought that they would need the goods and so they decided to sell the house instead. The family then decided to approach PW1, who had helped them buy the house in 2007. PW1 informed them of a lady who had approached him looking for a house and promised to contact her.

The following day he went to PW1's office who called PW2's wife. PW2's wife then went to the office and after PW1 had made the introductions and explained the issue, she asked for time to consult with PW2 who was in Solwezi at the time and suggested that they meet the following day. The following day, he met PW2 at PW1's office after which they went to view the house. Later in the evening, PW2 and his wife went to his house where they had a meeting in the presence of PW1. They eventually agreed on the sale of the house at the price of K215, 000, 000.00 and they both executed the contract of sale (24 to 28 in the Plaintiff's bundle of documents).

PW2 paid K25, 000, 000.00 upon signing of the contract with the balance payable in two instalments of K150, 000, 000.00 and K40, 000, 000.00 as per contract. When the second instalment fell due, PW2 failed to raise the full amount but instead offered to pay K70, 000, 000.00 which he said he only accepted after much persuasion from PW1. This, he said, was after PW1 had promised to help him find a smaller house to buy. This however, was not to be as the prices for houses were higher than expected.

As for the balance of K120, 000, 000.00 which was due in April he said that PW2 did not show up as agreed until June when he and his wife went to his house and found him there. According to him, they went to PW2's house to complain to him that he had taken



too long to pay. He denied asking for K60, 000, 000.00 from PW2 because he owed him K120, 000, 000.00. The following morning, he had a meeting with PW2 in PW1's office where he asked for more time as he had failed to raise the balance. It was then that it was decided to re-advertise the house bringing the contract to an end and that PW2 be refunded his money once the house was sold. He refuted the assertions that there was an agreement for PW2 to pay the balance if the house was not sold.

He further said that on either 27<sup>th</sup> or 28<sup>th</sup> September 2010, PW1 and PW2 went to his house and PW1 told him that he had taken PW2 there because he now had the K120, 000, 000.00 and he wished to pay for the house but that he refused to accept the money. They later drove to PW2's office around 17:00 hours after much persuasion from PW1. His wife however, advised that the meeting be postponed to the following day since it was getting late. The following morning around 08:00 hours, they met at PW1's office where PW1 placed the K120, 000, 000.00 on the table. At that point he asked PW2 and his wife to leave them and while they were gone he asked PW1 why he had changed his mind to accept the money contrary to their earlier agreement and told him that he would not accept the money. When PW2 and his wife came back, he told them that he would not accept the money because the house had already been re-advertised.

He stated that the meeting did not end on a good note as PW2 had called him a swindler. He further said that he had not refunded the money because PW2 had brought the matter to court and that he had not been able to sell the house which was still on sale but at K400, 000, 000.00.

In cross-examination he said that clause 12 of the agreement provides for passing of ownership upon payment of the purchase price. He denied extending the payment date but admitted accepting the K70, 000, 000.00 on a later date than the one in the contract. He however, conceded to the allowing of changes to the payment terms when he accepted a reduced amount on a different date. He further conceded that he did not exercise his right to re-advertise the house on 5<sup>th</sup> March 2010 when PW2 defaulted and neither did he write PW2 informing him that he had cancelled the contract for default.

On the rejection of the K120, 000, 000.00, he said that he believed that he could sell the house for more than K215, 000, 000.00. In re-examination he said that he declined to accept the K120, 000, 000.00 because of the long period that had passed after he got the K70, 000, 000.00

In his final submissions on behalf of the Plaintiff, Mr. Magubbwi argued that the Defendant waived his right to repudiate the contract by extending payment time and that he was in breach of the Law Association of Zambia General Conditions of Sale for

failing to give notice. He further argued that the contract did not fix completion time implying that time was not of the essence and that ownership passed to the Plaintiff upon execution of the contract. To back up the arguments, he has cited the cases of **Galaunia Farms Limited V National Milling Company Limited**<sup>1</sup>, **Mwenya & another V Kapinga**<sup>2</sup>, **Tito V Waddel No.2**<sup>3</sup>, **Kayoba & another V Ngulube & another**<sup>4</sup> and **Gideon Mudenda V Timothy Mulwani & others**<sup>5</sup>. He also cited the Law Association of Zambia General Condition No.21 as well as the learned authors of **Chitty on Contracts 25<sup>th</sup> ed.p.174** and I will comment on some of the authorities later.

On the other hand, Mr. Mupeta has argued, on behalf of the Defendant, that the absence of a clause in the contract making time of essence does not estop the Defendant from repudiating the contract because circumstances become a determinant in such a case. He cited a passage from **Sutton and Shannon on Contracts 6<sup>th</sup> ed. P.281** with is to the effect that where a contract provides for performance on a particular day or within a specific time, the same ought to be performed on that day or within that time.

He further argued that even though the contract did not provide for notice to repudiate, the fact that the Plaintiff was in breach from 5<sup>th</sup> March to the extended date of 6<sup>th</sup> June 2010 entitled the

---

<sup>1</sup> (2002)ZR 135

<sup>2</sup> (1988)ZR 17

<sup>3</sup> (1997)CH. DP 106

<sup>4</sup> (2003)ZR 135

<sup>5</sup> (1987)ZR 30

Defendant to reasonable time rule as per Sutton and Shannon (supra). He finally submitted that the Plaintiff did acknowledge that the agreement was at an end and he accepted to be refunded the K95, 000, 000.00. Others authorities referred to will be dealt with in due course.

From the evidence, the fact that the Plaintiff failed to meet the contractual dates for the payment of the instalments for the full purchase price of the house is not in dispute. What is in dispute is whether or not the Defendant had forfeited his right to repudiate the contract after accepting payment of a reduced instalment amount about six days after the due date.

The starting point is that the sale was subject to the Law Association of Zambia General Conditions of Sale 1976 in so far as the same were not inconsistent to or varied by the Special Conditions. That notwithstanding, it is the Special Conditions as agreed upon by the parties that will form the core of the contract with the Law Association of Zambia General Conditions of Sale only called upon to fill any gaps not provided for by the special conditions.

In order to understand the substance of the contract, it will be necessary to look at the key terms and conditions of the sale. Clauses 12 and 13 provide for the passing of ownership in the property and yielding of vacant possession to the purchaser upon

payment of the full purchase price. This means that for as long as the full purchase price was not paid, both property and possession could not pass to the Plaintiff.

Clauses 14 to 16 provide for the mode and schedule of payment of the full purchase price with K25, 000, 000.00 payable upon execution of the contract and the balance payable in two instalments of K150, 000, 000.00 on 5<sup>th</sup> March 2010 and K40, 000, 000.00 on 5<sup>th</sup> April 2010.

Clause 18, which, in my view is the key to the unlocking of the dispute provides as follows;

***“That once the purchaser fails to pay the instalment on either 5<sup>th</sup> March 2010 and or 5<sup>th</sup> April 2010, the vendor shall reserve the right to re-advertise the property and have the deposit paid by the purchaser refunded without costs after the sale of the said property to another person”***

What is significant about clause 18 is that firstly, it leaves it open to the vendor to re-advertise the property on failure of either or both instalments as stipulated in the special conditions of sale. Secondly, what the clause does is to give the vender the option to re-advertise rather than make it mandatory to re-advertise on failure of an instalment. Thirdly, I read no suggestion in that clause that the vendor may only exercise the option to re-advertise immediately the default occurs and not later. The net effect of the clause, in my understanding, is that the vender’s right to re-advertise the property upon default on one or both instalments does not fall away with the passage of time but

remains available to him until and unless the outstanding balance is paid.

It has been argued and submitted by the Plaintiff that by accepting a reduced amount on the first instalment later than the due date, the Defendant gave up his right to repudiate the contract under clause 18. This argument has however, not been supported by any legal proposition and as such, I reject it in view of what I have stated above. The correct position at law is that the parties altered the contract as to the dates and the amounts of the instalments as will be demonstrated in the course of this judgment.

As for the purported right reserved for the purchaser to pay the balance even after the property had been re-advertised provided it remained unsold at the time, it is clear that the arrangement was verbal. This has to be considered in the light of section 4 of the Statute of Frauds (1677) which requires that any sale or disposal of interest in land must be in writing or evidenced by a memorandum in writing for it to be enforceable. Since the contract was that of sale of land and it was in writing, it would require that any variation relating to the sale itself ought to be in writing or evidenced by a memorandum in writing. This principle was succinctly stated in the case of ***William V Moss' Empires Limited***<sup>6</sup> as follows;

---

<sup>6</sup> [1915]3 KB 242

***“The principle ----- is where there is alleged to have been a variation of a written contract by a new parol contract, which incorporates some of the terms of the old contract, the new contract must be looked at in its entirety, and if the terms of the new contract when thus considered are such that by reason of the Statute of Frauds it cannot be given in evidence unless in writing, then being an unenforceable contract it cannot operate to effect a variation of the original contract ---- whenever the parties vary a material term of an existing contract they are in effect entering into a new contract, the terms of which must be looked at in their entirety, and if the new contract is one which is required to be in writing, then it must be wholly disregarded and the parties are relegated to their rights under the original contract” (per Shearman J. at p. 246).***

This principle was cited with approval by the Court of Appeal in the case of ***McCausland & another V Duncan Lawrie & another.***<sup>7</sup>

This principle, in my view, settles the argument that there was a verbal arrangement for the Plaintiff to pay off the balance once the property had been re-advertised because, from that moment, there was no contract of sale in effect between the Plaintiff and the Defendant. The parol contract was to be viewed as totally new and since it related to the sale of land, it is unenforceable by reason of section 4 of the Statute of Frauds (1677). This also effectively puts to rest the arguments based on the doctrine of estoppel.

The Plaintiff has also argued that the Defendant acted in breach of the Law Association of Zambia General Condition of sale 21 (a) which provides for the none-defaulting party to give a 14 day notice to the defaulting party with an ultimatum. Two factors ought to be noted in this regard firstly, that the clause is none

---

<sup>7</sup> [1996]4 All ER 996

mandatory but provides for good practice so that the defaulting party is given an opportunity to perform on the contract. This becomes critical where the parties are not in physical contact. This case is however, different in that the parties were in constant contact as evidenced by the several meetings that they had following the signing of the contract.

It will further be noted that on 11<sup>th</sup> March 2010, the parties met and they agreed to vary the terms of the contract as to the date and amount payable on the first instalment. The same was evidenced in writing by way of the endorsements by the parties on the receipt dated 11<sup>th</sup> March 2010 and exhibited as MNM3 (30) in the Plaintiff's bundle of documents thus complying with section 4 of the Statute of Frauds (1677).

Thereafter, there is uncontroverted evidence that other meetings were held at which further alterations to the date of the second and final instalment was to be paid but the same were not evidenced in writing and therefore not affecting the date of the instalment being 5<sup>th</sup> April 2010. On 27<sup>th</sup> or 28<sup>th</sup> September 2010, the Defendant decided to invoke clause 18 of the Special Conditions of Sale and re-advertised the property in the presence of the Plaintiff. This was, in my view, the point at which the Contract of Sale the parties had signed on 15<sup>th</sup> January 2010 as amended came to an end. I do not, as a matter of fact, believe that clause 21 (a) of the Law Association of Zambia General Conditions of sale has the effect of rendering the Defendant's right under special condition 18 null and void.



The claim for specific performance is premised on the argument that at the time the Plaintiff went to pay off the balance in September 2010, the property had not yet been sold and it was therefore, still open to the Plaintiff to complete the transaction and the case of **Mwenya & another V Kapinga** (supra) was referred to.

The cited case holds to the effect that the transaction was sufficiently evidenced in writing of which time was not of the essence and that there was no unreasonable delay to pay the balance. It further held that damages were inadequate to compensate a party for breach of contract for sale of land or interest in land or a house. The position as stated by the Supreme Court in that case resonates with the position of law as stated by the learned authors of Chitty on Contracts 25<sup>th</sup> edition cited by the Plaintiff.

The difference between the Mwenya case and the case before me is that whereas the court found that there was a breach of contract in that case, I have found that there was no breach of contract on the part of the Defendant in this case. In fact, all the evidence clearly establishes that it was the Plaintiff who was in breach and the Defendant simply exercised his contractual right to rescind the contract under clause 18. I therefore, find the two authorities misplaced in this regard and so are the other authorities cited on the claim for specific performance which I will not delve into as the position of the law is already cleared.

The Plaintiff, being the party in breach cannot therefore, be a beneficiary of his own default and as such he is not entitled to an order of specific performance. The only remedy he is entitled to is his right to a refund of the deposit of K95, 000, 000.00 under clause 18 of the contract which he had paid towards the purchase price at the time the Defendant repudiated the contract.

I will however, add that although the right to the refund as set out under clause 18 of the contract is intended to be enforceable after the house has been sold to another person, the same may be prejudicial to the Plaintiff. What if the Defendant does not sell the house or indeed nobody comes to buy the house? Is the Defendant entitled to keep both the deposit and the house? This will clearly not be in the best interest of the Plaintiff especially that the Defendant refused to consider the Plaintiff's offer to buy the house by either paying the balance or indeed even topping up on the balance so that he could take possession of the house.

It is further to be noted that the Plaintiff's application for an order of interlocutory injunction to restrain the Defendant from selling the house was dismissed. This meant that the Defendant's right to sell the house to another person was not put on hold but that he has failed to attract a buyer for his house since September 2010 when he exercised his option to re-advertise it.

In the circumstances, I see no guarantee that the house will be sold soon and the Plaintiff will not only be prejudiced but greatly inconvenienced. In order to mitigate the prejudice and

inconvenience to the Plaintiff, I order that the Defendant refunds the Plaintiff the sum of K95, 000, 000.00 within 90 days of this judgment or within fourteen (14) days of selling the house whichever will be the earlier. In default, the Plaintiff will be at liberty to seek enforcement of the order. Interest on the sum is at 10% with effect from the date of this judgment.

In the event, the claim for specific performance but since the Plaintiff has partially succeeded as to the claim for the refund, each party to bear their own costs.

**DATED THE 3<sup>RD</sup> DAY OF FEBRUARY 2012**

**J.M. SIAVWPA  
JUDGE**