IN THE HIGH COURT FOR ZAMBIA 2013/HP/0747
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil jurisdiction)

BETWEEN:

COSY CORNER GUEST HOUSE LIMITED APPLICANT

AND

LADY ROSS CHRISTIAN SCHOOL LIMITED 1ST RESPONDENT

ZAMBIA REVENUE AUTHORITY 2ND RESPONDENT

BEFORE HON. MRS. JUSTICE M.S. MULENGA THIS 11TH DAY OF NOVEMBER 2013

FOR THE APPLICANT	:	MR. W. MUBANGA- MESSRS CHILUPE AND PERMANENT CHAMBERS
FOR THE 1ST RESPONDENT	:	N/A
FOR THE 2ND RESPONDENT	:	MS CHABALA KASESE- IN HOUSE LEGAL COUNSEL

J U D G M E N T

CASES CITED:

1. **Khalid Mohamed v Attorney General (1982) ZR 49 (SC)**
2. Jasuber R. Naik and Naik Motors Ltd v Agness Chama SCZ
3. Bridget Mutwale v Professional Services (1984) ZR 72
4. G.F. Construction (1976) Limited V Kudnap (Zambia) Limited and Unitechan Limited (1999) ZR 131

LEGISLATION REFERRED TO:

1. High Court Act Cap 27, Section 13, Order 6 rule 2
2. Property Transfer Tax Act Cap 340, Section 4
3. Lands and Deeds Registry Act Cap 185 Sections 4 and 6
4. Lands Act Cap. 184, Sections 5 and 6
5. Land conversion of Titles Act 1975 (Repealed), Section 13
6. Companies Act Cap 388 Section 374

WORKS REFERRED TO:

1. Halsbury laws of England 5th Edition paragraphs 554, and 561
2. Phipson on evidence 14th Edition paragraph 402

This action was commenced by way of Originating Summons pursuant to Order VI Rule 2, Cap 27 of the Laws of Zambia, claiming the following reliefs:-

1. *That Property Transfer Tax due to the 2nd Respondent herein and relating to the sale of the property herein by the 1st Respondent to the Applicant be paid by and through the Applicant instead of the 1st Respondent.*

2. *That upon payment in full of Property Transfer Tax the Applicant do proceed to register the assignment herein in its favour upon payment of registration fees thereof.*

3. *That the costs of and incidental to the application herein be paid by the 1st and 2nd Respondents in any event.*

4. *That liberty to apply to either of the parties hereto is hereby granted.*

5. *Further or other relief.*

Mr. George Khwawe, Administration and Human Resources Manager, stated in his Affidavit in Support of Originating Summons on behalf of the Applicant that in or about June 2008, the Applicant purchased from the 1st Respondent, property known as Stand No. 7122 Kitwe at a cost of ZMW375,000.00. He deposed that the purchase price was fully paid by the Applicant and that a deed of assignment was executed between the Applicant and 1st Respondent, which assignment was exhibited and marked as "GK1."

Further, that on 14th September 2010, state's consent to assign was granted to the 1st Respondent. The said consent to assign was not formally produced into Court but was only later attached to the submissions upon the 2nd Respondent raising it, as the document exhibited was an application for state's consent to assign.

It was further deposed on behalf of the Applicant, that following the grant of the state's consent to assign, the Applicant was advised by its counsel that he was unable to procure the payment of property transfer tax relating the transaction as the 1st Respondent was not registered with 2nd Respondent for purposes of payment of any tax as it was never issued with tax payer identification number (TPIN).

That to the best of the deponent's knowledge, the Applicant made every effort to locate the directors and shareholders of the 1st Respondent but failed as they were all understood to have permanently left Zambia to stay in a country not known to the Applicant. As a result, the Applicant has not been able to procure the payment of property transfer tax so as to have the property registered in its name.

The Applicant was thus seeking for an order to have it, as the purchaser, pay the property transfer tax through its TPIN following the 2nd Respondent's refusal to allow it to do so. That once the property transfer tax was paid, the registration of the property in the Applicant's name would then be done.

In response, the 2nd Respondent in the Affidavit in Opposition deposed to by Joy Muleya, the Assistant Director for the small Taxpayer Office (STO) averred that the tax obligation is imposed on the seller as opposed to the purchaser of the property being transferred and that even in instance where the seller and buyer agree otherwise, the relevant tax receipt and tax clearance certificate are issued in the name of the seller by the 2nd

Respondent using that seller's Taxpayer Identification Number (TPIN) notwithstanding that the tax burden has been passed onto the purchaser.

Furthermore, that from time to time, it has come across incidents where attempts to fraudulently transfer properties are made without the knowledge of the property owner and thus the 2nd Respondent has had to take precautionary measures by demanding for documents such as the contract of sale and proof of payment for the property in question.

That the Applicant did not avail the contract of sale and has not produced any documentary evidence to show that payment for the property was ever made. Further that the Applicant had not exhibited a valid consent to assign and the application for consent to assign which was exhibited showed that, the consent granted, if any, expired a long time ago as it was only valid for one year. In addition the assignment exhibited was null and void for want of registration and there was need for a fresh one to be executed.

The 2nd Respondent further stated that the Applicant simply contended that the 1st Respondent's directors and shareholders have since relocated to another country unknown to it without providing any names or other details of the same. Further that the Applicant did not state the names of the 2nd Respondent's officers to whom the Applicant had made several verbal approaches and efforts.

The 2nd Respondent stated that it would be obliged to accept the payment of property transfer tax if all relevant details and documentation were availed to it.

Both parties filed submissions.

In his oral submissions, counsel for the Applicant in response to the 2nd Respondent's Affidavit in Opposition, stated that the fact that the 1st Respondent has been cited as a party to the proceedings confirms any attempt at effective or actual that there is no fraud intended by the Applicant. I wish to quickly state that mere citing of apart is not enough in the absence of any attempt at actual service of process. Order 10 rule 15 High Court Rules provides for the procedure to serve out or jurisdiction. Counsel further submitted that the execution of a deed of assignment takes over the purpose of the contract of sale between the vendor and purchaser in that the execution of the assignment marked "GK1"confirms the fulfilment of terms and conditions of the terms by the parties and it confirms that the purchase price has been paid.

In his written submissions, counsel for the Applicant, Mr. Mubanga, referred to Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia and stated that this court has power to grant either absolutely or on such reasonable terms and conditions as shall seem just all such remedies or reliefs whatsoever, interlocutory or final to which any of the parties may appear to be entitled so that as far as possible all matters in controversy between the said parties may be completely and finally determined.

Section 13 further provides that in any matter in which there is a conflict or variance between the rules of common law and equity the rules of equity shall prevail.

It was submitted that the 2nd Respondent would not suffer any prejudice if it allowed the Applicant to pay property transfer tax in the 1st Respondent's stead. That the matter in controversy in relation to section 13 of the High Court Act cited supra, is the refusal by the 2nd Respondent to permit the Applicant to pay the property transfer tax on behalf of the 1st Respondent so as to enable the Applicant register the property with the Registrar of Lands and Deeds. Counsel contended that since the common law rules were not met by the Applicant, this court should apply the rules of equity by allowing the application.

The Applicant's counsel further cited the Property Transfer Tax Act No. 30 of 2005 and Amendment Act No 50 of 2010 to support the criteria for the payment of tax and the fact that the 2nd Respondent's duty is merely to charge and collect tax. That the legislation does not provide for a situation where the seller or transferor has disappeared or cannot be located and that is why this Court has been called upon to interfere. That this is a proper case for the Court to apply not only common law rules but also the rules of equity for issuance of an order that the Applicant assumes the responsibility of paying the property transfer tax in place of the 1st Respondent.

The Applicant's counsel further submitted that the issues of the assignment being outdated are for the Registrar of Lands and

Deeds and not the 2nd Respondent. He cited section 4(1) and section 6 of the Lands and Deeds Act Cap 185 of the Laws of Zambia to support this contention.

Counsel for the 2nd Respondent, Ms. Kasese, also made both written and oral submissions. She emphasised that the Property Transfer Tax Act in Section 4 places the obligation on the vendor to pay the tax and therefore notwithstanding that in some circumstances, the parties agree to pass the obligation onto the purchaser, the 2nd Respondent still recognises the seller as making the payment and all relevant documents are issued in the seller's name but only if the seller has been issued with a TPIN by the 2nd Respondent. It does not matter if any such person has had no previous dealings with the 2nd Respondent, upon requesting for any such transaction the 2nd Respondent avails the person an application form so that it can issue the relevant TPIN before accepting payment of any type.

In this case the 1st Respondent has since left the country and according to the Applicant, the directors cannot be traced. The 2nd Respondent acknowledged that it is not treating the Applicant's case as one of fraud but it is only a fact that frauds have been experienced by the 2nd Respondent. That is why they have made it mandatory procedure that any person wishing to make any payment of property transfer tax must first of all avail the 2nd Respondent with documentation such as the contract of sale and proof of payment other than the acknowledgment in the deed of assignment. The consent to assign equally has to be granted before payment of the tax, in line with Section 5(1) of the Lands Act Cap 184 which provides that:

> **"a person shall not sell, transfer or assign any land without the consent of the President and shall accordingly apply for that consent before doing so."**

Counsel submitted that the 2nd Respondent had not had sight of the contract of sale and acknowledgement of payment and no valid consent to assign was availed which is mandatory before one pays the tax. That consent to assign was not automatically renewed but a fresh application needed to be made contrary to arguments by the Applicant's counsel.

Ms. Kasese argued that a deed of assignment does not take over the purpose the contract of sale serves and it only comes into play after a contract of sale is already executed and thus the 2nd Respondent's insistence to have sight of the contract of sale in addition to the assignment and any other evidence to show that money was actually paid as opposed to the mere mention in the deed of assignment. It was argued that there was no way such a colossal sum of money would exchange hands without proof by way of bank record or acknowledgment.

She further argued that the deed of assignment exhibited by the Applicant is null and void by virtue of Section 6 of the Lands and Deeds Registry Act Cap. 195 which provides that:

> **"any document required to be registered as aforesaid and not registered within the time specified in the preceding section shall be null and void."**

That the proviso under section 6 on extension of time to register a document may only be invoked if the court is satisfied that the failure to register was unavoidable, or that there were special circumstances which afford ground for giving relief, and that no

injustice will be caused by allowing the registration. The 2nd Respondent added that the Applicant's failure to register its assignment was not unavoidable and the Applicant did not show any evidence of its purported efforts to locate the Directors and shareholders of the 1st Respondent whom they claim to have left Zambia. That it was not impossible for the Applicant to trace the whereabouts of any shareholder or director of the 1st Respondent in this era of cyberspace technology.

The 2nd Respondent further contended that some injustice may be caused if the period within which to register the exhibited deed of assignment were to be extended by this Court in that the Applicant has not, thus far, availed sufficient evidence to show that the transfer of the said property is being done with the full knowledge and consent of the 1st Respondent.

The 2nd Respondent's counsel also submitted that it was not averse to issuing a TPIN which could be issued even without physical presence of the 1st Respondent as the forms were available online. That it simply requested the Applicant to attend to the irregularities and adhere to the proper procedure before the tax aspect could be executed. It prayed that the Applicant's claim be dismissed.

I have considered the affidavits and submissions by both parties. It is trite law that the burden of proof lies upon the party who asserts the issue. **Phipson on Evidence**, 14th edition, paragraph 402 at page 50 states that **"the burden of proof lies upon the party who substantially asserts the affirmative of the issue. The rule which applies is EI qui affirmat non ei qui negat incumbit probation**..." This is translated to mean proof

rests on he who affirms not he who denies. This principle has been reiterated in a number of authorities such as the case of **<u>Khalid Mohamed v Attorney General (1982) ZR 49 (SC)</u>** that the burden of proof entirely rests on the Plaintiff and where one fails to prove one's case, a defendant does not even need a defence in such a case.

In this case the Applicant is contending that the 2nd Respondent should allow it to pay property transfer tax using its TPIN as a purchaser and not that of the 1st Respondent as a vendor. The Applicant has argued that it has searched but has been unable to locate the shareholders and directors of the 1st Respondent who are said to be out of jurisdiction and who do not possess a TPIN. That based on the rules of equity, this Court should grant an order compelling the 2nd Respondent to accept the payment of property transfer tax through the Applicant's TPIN.

The 2nd Respondent's position is that the Applicant must adhere to the proper procedure for payment of the tax and attend to the irregularities that have been observed.

Section 4 (1) of the Property Transfer Tax Act Cap 340 provides:-

> **"Whenever any property is transferred, there shall be charged upon, and collected from, the person transferring such property a property transfer tax in accordance with the provisions of this Act."**

This provision is clear and unambiguous and makes it mandatory for the 2nd Respondent to charge and receive the property transfer tax from the person transferring the subject property, who in this instant case is the 1st Respondent. The word "*shall*" is used. The

undisputed procedure is that when a seller sells or transfers a property the property transfer tax is paid through its TPIN. It does not matter whether the parties have contracted to the effect that the purchaser is to pay the property transfer tax, the same can only be paid by the purchaser through the seller's TPIN.

The argument by the Applicant is that the Property Transfer Tax Act does not provide for what is to happen when the seller disappears or cannot be located. This is the correct position with regard to the Property Transfer Tax Act. However our legal system has other relevant legislation that provide for a purchaser in a situation where the seller cannot be located after diligent search, to apply to Court for vesting orders for the purposes of effecting the formal transfer of the property and this can extend to incidental issues as taxes and charges.

In this current case, the Applicant has not shown that it has conducted diligent search for the 1st Respondent save for mere statements to that effect. It is inconceivable and unreasonable that a purchaser in the position of the Applicant would not know the names, particulars and nationalities of the directors or shareholders of the 1st Respondent with whom it executed the assignment. This raises questions on the authenticity of the transaction in issue as alluded to by the 2nd Respondent. The Applicant has apparently not made sufficient efforts to state the identities of the 1st Respondent's officers when this could be done with relative ease both at PACRA and Ministry of Lands.

The 2nd Respondent's position is that the Applicant was required to produce a valid assignment, contract of sale, acknowledgement of receipt of the purchase price or bank statement to attest the transfer and a valid consent to assign but failed to do so.

The explanations by the Applicant do not assist its case but highlights a number of irregularities and raises more questions. The Applicant in the Affidavit in Support states that it purchased Stand 7122 Kitwe from the 1st Respondent in or about June 2008 at the price of ZMW375,000.00 which was paid in full. The exhibited deed of assignment was then executed. This deed of assignment is undated but the cover highlights the year 2009. The application for consent to assign has the date 20th July 2010 and the consent to assign which is attached to the submissions is dated 14th September 2010.

The Applicant has remained silent on the issue of the contract of sale in this transaction despite the 2nd Respondent's request for it. It is common procedure that a contract of sale outlines the terms and conditions of the conveyance and preceed the signing of the deed of assignment. The Applicant has also failed to either give the 2nd Respondent an acknowledgment of receipt of the purchase price by the 1st Respondent independent of the deed of assignment or produce even a bank statement to show that the Applicant had indeed transferred the fairly large amount of money as purchase price.

There is currently no valid consent to assign with respect to the subject land. The consent which is dated 14th September 2010

expired on 13th September 2011 as the said consent was only valid for twelve months. The consent is a prerequisite to the transfer of property and once it expires, one has to apply afresh. It is not automatically renewable as argued by the Applicant. Section 5 (1) of the Lands Act Cap. 184 provides:-

> **"5. (1) A person shall not sell, transfer or assign any land without the consent of the President and shall accordingly apply for that consent before doing so."**

This being the case and in the absence of evidence that there was a consent to assign before the parties signed the deed of assignment of 2009, the same was thus invalid. The requirement for consent is mandatory.

In Bridget Mutwale v Professional Services (1984) ZR 72 the Supreme Court had occasion to consider the then Section 13(1) of the Land Conversion of Titles Act 1975 (Replaced) on the issue of consent. This section provided in part that:

> "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 Supreme Court held that even though the contract entered into without the required consent is not null and void, it is unenforceable. It was stated that:

> **"we find therefore that as the purported subletting by the Respondent was without prior presidential consent as required by Section 13 (1) ...the whole of the contract, including the provision for payment of rent, is unenforceable."**

In the later case of Jasuber R. Naik and Naik Motors Ltd v Agness Chama SCZ Judgement NO. 28 of 28 of 1985, the Supreme Court commented on the Bridget Mutwale case and stated that since the requirement for

consent was aimed at protecting the purchaser or tenant, the breach of that requirement by the vendor or landlord must work only against the Landlord whilst the tenant or purchaser would be afforded protection if there was no default on its part. In other words, the purchaser does not lose protection of the statute or law as a result of the vendor's failure to obtain consent.

The Land Conversion of Titles Act 1975was repealed by the Lands Act Cap 184 which now provides in Section 5 (1) that "a person shall not sell, transfer or assign any land without the consent of the president and shall accordingly apply for that consent before doing so."

This provision still makes it mandatory for the vendor to get consent before entering into any sale transaction but does not go further to specifically state the effect of non compliance. In line with the authorities above, it is clear that non compliance will be construed strictly against the vendor but not the purchaser in order to avoid unjust enrichment.

In the case of G.F. Construction (1976) Limited V Rudnap (Zambia) Limited and Unitechan Limited (1999) ZR 131 the Supreme Court stated that were a contract is found to be unenforceable but not illegal, that irregularity is curable. In this instant case the Applicant can legally pursue the 1st Respondent to have the irregularity cured but has not done so.

The 2nd Respondent's submission on the deed of assignment was that it was null and void as it was not registered within the prescribed time as provided in sections 5 and 6 of the Lands and

Deeds Registry Act Cap 185. This argument is valid as Section 6 of Cap 185 provides that any document which is required to be registered and is not registered within the prescribed period is null and void.

The Applicant's response was that based on the proviso in Section 6, the Applicant can apply to Court for extension of time to have the document registered. Although this is the case, the granting of the extension of time is not automatic as the Court has to be satisfied that the failure to register was unavoidable or that there are special circumstances which afford the ground for giving such relief and that no injustice will be caused. There is currently no application by the Applicant for extension of time to register the deed of assignment. There is a veiled reference to this under the second relief claimed that:

> **"upon payment in full of the property transfer tax the Applicant do proceed to register the assignment herein in its favour upon payment of registration fees thereof."**

Considering the Applicant's case as presented and the issues discussed above, if the second relief was to be considered as an application for extension of time to register the assignment, I find that the Applicant has not adequately met the requirements to satisfy the proviso in Section 6. The Applicant has not proved that the failure to register was unavoidable as it has not explained or provided evidence on how the assignment which was apparently executed in 2009 was not registered by the 1st Respondent prior to and even after the granting of the consent. The Applicant has also failed to supply pertinent details including nationalities of the 1st Respondent's directors or shareholders who signed the assignment

and the application for the consent to assign. This is despite the fact that Section 374 of the Companies Act Cap 388 provides for conducting of searches on company records. It is also not normal or usual that one would pay such a huge sum of money for a property in 2008 and do nothing about it until about five (5) years later when this action was instituted. Even within the two years prior to 2010 when the Applicant says it discovered that the 1st Respondent officials had relocated out of jurisdiction, nothing was done. The only action on record is the letter which was written to the 2nd Respondent dated 15th November 2012. The Applicant could also not provide the details of the 2nd Respondent's officers it said it had approached on several occasions over an unknown period.

I find that the Applicant has failed to make out a case for the extension of time to register the deed of assignment based on the current proceedings.

The Applicant has asked that equity should prevail and it should be granted on order to compel the 2nd Respondent to allow it to pay the property transfer tax through its TPIN. Despite this assertion, the Applicant has not specified which rules or principles of equity it is relying upon.

The three principles that come to mind are that of part performance equity follows the law and equity looks on as done that which ought to be done. For the Applicant to succeed under a claim of part performance, it would need to provide further proof of payment of the purchase price in light of the facts of this case where insufficient facts relating to the transaction have been availed. The

Applicant has also not provided copies of the certificate of title for the subject property or even the land register.

Regarding the first Maxim **<u>Halsbury's laws of England</u>** <u>5th Edition</u> at paragraph 554 states:

> **"Jurisdiction in equity is exercised upon the principle that equity follows the law... It means that equity treats the common law as laying the foundation of all jurisprudence and does not depart unnecessarily from legal principles. In matters coming before it which depend solely on legal rights, as in legal claims arising in the course of an administration claim, equity applies the rules of law as the appropriate system; in such cases the rules of law are in fact binding in equity. When equity has to regulate the equitable interests which it has itself created, it acts, so far as possible, on the analogy of the legal rules applicable to the corresponding legal interests, and departs from this analogy only in exceptional cases."**

The Applicant has not demonstrated any exceptional circumstance to warrant a departure from the legal principles or rules.

The second maxim is outlined at paragraph 561 of the same **<u>Halsbruy's Laws of England</u>** that:

> **"Equity looks on that as done which ought to be done or which is agreed to be done, but this maxim does not extend to things which might have been done; nor will equity apply it in favour of everybody, but only of those who had a right to pray that the thing should be done. Thus, where the obligation arises from contract, that which ought to be done is treated as done only in favour of some person entitled to enforce the contract as against the person liable to perform it. The true meaning of the maxim is that equity will treat the subject matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been done exactly as they ought to have been, but the contract itself is not varied. The doctrine does not make for the parties contracts different from those they have made for themselves."**

On the facts of this instant case it not

possible to read into the transaction or assignment as the Applicant has not produced into Court a contract of sale with clear terms and

conditions as to what the parties agreed should prevail on various issues such as on the payment of property transfer tax.

It is apparent from all that has been discussed above that the 2nd Respondent's demand that the Applicant should put its house in order by addressing the highlighted irregularities is highly reasonable. The Applicant cannot present invalid documents before the 2nd Respondent and expect to be allowed to have its way contrary to the clear provisions of the law as well as the administrative procedures, which I find to be reasonable.

The Applicant has failed to prove its case to the required standard. I find this action misconceived and lacking merit and hereby dismiss it.

Costs to the 2nd Respondent and are to be tax in default of agreement.

Leave to appeal granted

Dated this 11th day of November 2013.

M.S. MULENGA
HIGH COURT JUDGE