

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

2010/HPC/0464

BETWEEN:

FELIX ZAYONI NGOMA
MARY KATONGO NGOMA

1ST PLAINTIFF
2ND PLAINTIFF

AND

MUSOMBO ESTATES LIMITED

DEFENDANT

***Before the Hon. Mr. Justice Justin Chashi in Open Court on
the 31st day of January, 2014***

*For the 1st and 2nd Plaintiffs: M. Z. Mwandenga, Messrs. M. Z. Mwandenga &
Company*

For the Defendant: L. Banda, Messrs T. S. Chilembo Chambers

J U D G M E N T

Cases referred to:

1. *Gideon Mundanda v. Timothy Mulwani and The Agricultural Finance Co. Ltd and S.S.S. Mwiinga (1987) Z.R. 29*

Legislation referred to:

2. *The High Court Act, Chapter, 27 of the Laws of Zambia*

Other works referred to:

3. Chitty on Contracts, 30th Edition Vol.1

The 1st and 2nd Plaintiffs herein namely **Felix Zayoni Ngoma** and **Mary Katongo Ngoma**, respectively commenced these proceedings against the Defendant, **Musombo Estates Limited** on the 4th day of August, 2010 by

way of Writ of Summons accompanied by a Statement of Claim seeking the following reliefs:

1. *Specific performance of the Contracts;*
2. *Damages in lieu or in addition to specific performance of the Contracts;*
3. *Alternatively to 1 and 2, the recovery of the sum of seventy-five million Kwacha (K75, 000, 000) being refund of the deposit(s) paid pursuant to the Contracts;*
4. *In addition to (3) the agreed interest at the current bank lending rate to be calculated from the date of payment by the Plaintiffs to the Defendant to the date of actual payment by the Defendant to the Plaintiffs and the agreed costs;*
5. *Further damages for breach of contract;*
6. *Interest on the damages claimed in 2 and/or 5 and/or on the money claimed in 3 at the average of the short-term deposit rates from the date of the cause of action to the date of judgment and thereafter at the rate to be determined by the Honourable Court but not exceeding the Commercial lending rate determined by the Bank of Zambia until actual payment;*
7. *Further or any other relief; and*
8. *Costs for and incidental to these proceedings;*

The evidence led by the 1st Plaintiff at the hearing of the matter on the 17th day of December, 2013 in support of the claim as per his witness statement filed on the 22nd day of October, 2010 was that the 1st and 2nd Plaintiffs, who are husband and wife, respectively, jointly entered into two separate contracts of sale with the Defendant in respect of two portions of the property known as Subdivision J of Subdivision No. 1 of Subdivision C of Farm No. 87a, Lusaka. It was his evidence that the said portions were temporarily described as Plots No. 15 and 16 and that the contracts of sale in respect thereof were executed on the 15th day of November, 2007 and the 15th day of October, 2007, respectively.

According to the witness, it was agreed by virtue of these contracts that the Defendant would sale the two pieces of land to the Plaintiff at the price of fifty-five million Kwacha (K55,000,000.00) or its equivalent in the United States Dollars for each one of them. It was his evidence that in terms of the provisions of the contracts; the Plaintiffs were entitled to take possession of the properties upon execution of the contracts although they did not do so. He further asserted that the Defendant was obligated under the contracts to obtain Town and Country Planning approval of the proposed subdivisions and survey diagrams as well as to create a road reserve that would give the Plaintiffs access to the land in question. According to him, it was also agreed during the negotiations for the terms of the contracts that the Defendant would be responsible for the provision of the power supply line to the property. However, his assertion was that for some unknown reason, the lawyers who drafted the contracts did not include this provision therein. That concerns about this omission were nonetheless brought to the attention of the Defendant's lawyers, Messrs Chilupe and Company who were also the Plaintiffs' lawyers at the time.

It was the witness' evidence that in pursuance of the terms of the contracts, the Plaintiffs paid a deposit in the sum of fifteen thousand, six hundred and eighty-six United States Dollars, twenty-seven cents (US\$ 15, 686.27) to the Defendant on the 12th day of October, 2007 through its lawyers. According to him, a further payment of the sum of five million and fifty Kwacha (K5,000,050.00) was subsequently made on the 2nd day of November, 2007 and the two instalments at the time translated into seventy-five million and thirty-two Kwacha, seventy-five Ngwee (K75,000,032.75).

The 1st Plaintiff's further evidence was that when the Defendant demanded for the payment of the remaining balance of the purchase price, the Plaintiffs had problems in paying the balance because the Defendant had not attended to a number of issues particularly those relating to the survey diagrams and the provision of an access road. His evidence was that when

he wrote to their lawyers about these concerns, the lawyers advised the Plaintiffs to take possession and start developing the property whilst waiting for the Defendant to construct an access road. That in accordance with the advice, they took possession but did on various occasions verbally raise the issues of an access road, electricity supply and survey diagrams but to no avail. The witness asserted that the lawyers further advised the Plaintiffs that their letter dated 28th July, 2008 formed part of the contract. He then went on to complain about the lawyers' failure to protect their interest in completing the transaction.

According to the 1st Plaintiff, when they engaged new lawyers who later wrote a letter to the Defendant's lawyers demanding that the Defendant should perform its part of the contracts, their response was that the transaction was faced with serious challenges which could make completion impossible and proposed that the money which had thus far been paid be refunded to the Plaintiffs. It was his evidence that following the Defendant's proposal, the Plaintiffs found an alternative piece of land to purchase but they lost the opportunity to purchase that piece of land as the vendor preferred on the spot cash which was offered by other interested buyers. That after exchange of correspondence between the lawyers for the parties, the Defendant's proposal was accepted and it was agreed that the refund would be made within sixty (60) days from 28th January, 2009. However, the witness' evidence was that the Defendant failed to refund the Plaintiffs within sixty (60) days as agreed.

It was his further evidence that after several exchange of correspondence between the lawyers for the parties thereafter, the Defendant through its lawyers sent a cheque for fifty million Kwacha (K50,000,000.00) to the Plaintiffs which sum of money was not accepted by the Plaintiffs. The Plaintiffs' position, according to the witness, was that the Defendant ought to have refunded them the whole amount inclusive of interest and costs as well as compensation for their loss of opportunity to develop the

property they had intended to purchase from the Defendant otherwise they would not be interested in receiving the refund anymore. That they would instead be interested in completing the transaction as originally contemplated.

The witness further added that the Plaintiffs had earmarked some money for purchase of land and construction of a house but that money has largely depleted by payments of rentals for the house they are now occupying. According to him, the Defendant's conduct has made the Plaintiffs lose the opportunity to own land in the area of their choice and the money which they paid to the Defendant has since depreciated and cannot be used to buy the same pieces of land. He further informed the Court that it has now been brought to the Plaintiffs' attention that the Defendant has sold the portion temporarily known as Plot No. 15 to another person.

The 2nd Plaintiff did not give evidence at trial. Instead, by way of her witness statement also filed on the 22nd day of October, 2010, she entirely endorsed the 1st Plaintiff's evidence and indicated that she had nothing to add thereto.

However, for no apparent reason or excuse, neither Counsel for the Defendant nor its intended witness appeared at the hearing of the matter despite being aware of the date of hearing. I therefore proceeded to determine the matter on the evidence adduced by the Plaintiffs in accordance with the provisions of **Order 35, Rule 3 of the High Court Rules¹**.

The foregoing notwithstanding, I have perused the defence which was filed on behalf of the Defendant on the 17th day of August, 2010 and I am satisfied that the Defendant's attendance would have had little or no bearing at all on the decision of the Court taking into account the fact that parties are bound to adduce evidence of only that which is pleaded. I have taken this view because the said defence largely constitutes admissions of the Plaintiffs' averments as set out above.

In particular, the Defendant admits in its defence that the parties entered into two written contracts of sale in respect of the two pieces of land under the terms asserted by the Plaintiffs. The only disputed term of the contracts is as regards the provision of a central point from which electricity would be tapped. The Defendant also admits the failure to obtain survey diagrams and provide an access road although it endeavours to give an explanation for the failure. Further, the Defendant admits that the parties mutually agreed to cancel the contracts and that the deposit paid by the Plaintiffs be refunded together with interest at the prevailing bank lending rate from the date of payment to the date of such refund and costs to cover other charges such as lawyers' fees. The failure to refund the money as agreed is also admitted although the Defendant asserts that such failure did not revive the cancelled contracts.

I have carefully considered and fully addressed my mind to all the evidence adduced in this matter as well as the written submissions filed by Counsel which I find irrelevant to reproduce for the current purposes.

As earlier alluded to, the Plaintiffs herein are seeking an order for specific performance of the contracts of sale relating to two portions of Subdivision J of Subdivision No. 1 of Subdivision C of Farm No. 87a, Lusaka, which portions were temporarily described as Plots No. 15 and 16, respectively and/or damages in lieu thereof. In the alternative, the Plaintiffs are seeking to recover the deposit paid to the Defendant in the sum of seventy-five million Kwacha (K75,000,000.00) or seventy-five thousand Kwacha (K75,000.00) in the rebased currency, together with the agreed interest thereon and costs. They further claim damages for breach of the said contracts.

In a case of this nature, the Court has a duty to first consider whether specific performance should be granted before considering the possibility of damages which should only be awarded where, for some compelling reason, specific performance would be an inappropriate remedy. Although the

equitable remedy of specific performance is discretionary, the Court's discretion in relation to contracts for the sale of land is therefore limited as the remedy of specific performance is preferred to damages. Thus, in the case of ***Gideon Mundanda v. Timothy Mulwani and The Agricultural Finance Co. Ltd and S.S.S. Mwiinga***¹ the Supreme Court adopted the view that damages cannot adequately compensate a party for breach of a contract for the sale of an interest in a particular piece of land or of a particular house, however ordinary. It was therefore the Court's view that the remedy of specific performance should always be preferred to damages unless the circumstances of the case make it inappropriate to grant such remedy.

Although the evidence on record suggests that the transaction herein fell through owing to the Defendant's failure to perform its obligations under the contracts, I find it inappropriate on the facts of this case to grant the Plaintiffs the remedy of specific performance being sought. In the view I have taken, the question of whether or not the said failure on the part of the Defendant is legally justifiable is immaterial. I have taken this view because the parties expressly agreed under Clause 10 of the contracts that in the event that the transaction fell through for whatever reason, the Plaintiffs would be entitled to a refund of the deposit as opposed to specific performance. Ironically, none of the parties has made reference to this clause. The said clause, which is identical in both contracts, states as follows:

"In the event that this Agreement shall be rescinded or cancelled due to failure on the part of the Vendor to complete for whatever reason even after the expiration of the Notice to Complete served by the Purchasers on the Vendor all monies paid by the Purchasers to the Bank and or to the Vendor towards the agreed purchase price aforesaid shall be refunded to the Purchasers by them in one lump sum plus interest thereon at the Bank of Zambia lending rate in force from time

to time to be calculated from the date on which the Vendor or the Bank shall receive such monies up to and including the date on which the refund thereof shall be made.”

It would appear from this clause that the parties did contemplate from the outset that the transaction would possibly fall through for some reason, perhaps because the Defendant had to fulfill certain conditions before completion could take place and due to the fact that the property in issue was encumbered by a mortgage.

The parties therefore appear to have merely invoked this clause by adopting it in their subsequent agreement as evidenced by several letters exchanged between the lawyers for the parties. Among these is a letter dated 1st January, 2009 on page 40 of the Agreed Bundle of Documents written by the Defendant's lawyers to the Plaintiffs' lawyers which *inter alia* reads as follows:

“RE: SALE OF A PORTION OF SUBDIVISION J OF SUBDIVISION 1OF SUBDIVISION C OF FARM NO. 87a, GREAT EAST ROAD, LUSAKA: MUSOMBO ESTATES LIMITED TO FELIX Z. NGOMA AND MARY K. NGOMA

We thankfully acknowledge receipt of your letter dated December, 17 2008 addressed to us concerning the subject matter and note the contents thereof. It is without any doubt and this is our considered view, that the subject sale transaction is faced with very serious challenges which we doubt will make it rather impossible for the completion to be achieved. Accordingly, it is the Vendor's proposal that the part payment of the purchase money thus remitted by the Ngomas be refunded to them with interest at the current bank lending rate to be calculated from the date of payment to date. It is

envisaged that this approach will free the parties from the obligation herein which in any case cannot be achieved.

Please obtain your clients' instructions, after which let us know their position in this regard so that we can advise the Vendor accordingly."

In reply to this letter, this is what the lawyers for the Plaintiffs stated in their letter dated 22nd January, 2009 appearing on page 42 of the said bundle of documents:

"RE: SALE OF A PORTION OF SUBDIVISION J OF SUBDIVISION 1 OF SUBDIVISION C OF FARM NO. 87a, GREAT EAST ROAD, LUSAKA

....Kindly be informed that our instructions are that our client should be refunded the advance payment amounting to K75, 000, 000.00 with interest at the current lending ["rate"] from the date when the money was paid to the date when the refund will actually be done, together with costs to cover other charges inclusive of lawyer fees as soon as possible but not exceeding 21 days from the date hereof or such other time as may be agreed upon."

Thereafter, the Defendant did signify acceptance of the terms of the foregoing letter through its lawyers by way of a letter dated 28th January, 2009 appearing on page 43 of the same bundle of documents which *inter alia* reads as follows:

"RE: SALE OF A PORTION OF SUBDIVISION J OF SUBDIVISION 1 OF SUBDIVISION C OF FARM NO. 87a, GREAT EAST ROAD, LUSAKA: MUSOMBO ESTATES LIMITED TO FELIX Z. NGOMA AND MARY K. NGOMA

....Please be advised that our client is in the process of re-selling the property and as soon as the proceeds in this regard have been realized, arrangements will be made to refund your clients the part payment made on the purchase price herein. We expect that the re-sale aforementioned shall be concluded within 60 days from now."

Subsequent letters exchanged between lawyers for the parties further confirm that both parties were agreeable that the Defendant would refund the Plaintiffs the said sum of seventy-five thousand Kwacha (K75, 000.00) together with interest at the prevailing bank lending rate and costs as aforestated.

It therefore follows from the foregoing that the two contracts of sale herein were duly discharged by the parties' subsequent mutual agreement which is in consonance with the terms of clause 10 of the said contracts. Indeed contracting parties may mutually or bilaterally agree to discharge one another from the promises made in the original contract despite the fact that either or both of the parties have failed to perform as promised, or that only partial performance has taken place. Thus the learned authors of **Chitty on Contracts, 30th Edition**³ in paragraphs 22-025 to 22-026 have stated as follows:

"Where a contract is executory on both sides, that is to say, where neither party has performed the whole of his obligations under it, it may be rescinded by mutual agreement, express or implied. A partially executed contract can be rescinded by agreement provided that there are obligations on both sides which remain unperformed.... A contract which is rescinded by agreement is completely discharged and cannot be revived. The parties will frequently make provision for the restoration

of the money paid or payment for services performed or goods supplied under the contract prior to the rescission.”

This is precisely what transpired in the case in *casu*. The parties agreed to discharge the two contracts and that the Defendant should refund the Plaintiffs the money which they advanced towards the purchase of the property in issue. It is for that reason that the Plaintiff did not protest or indicate any form of disapproval of the Defendant's letter aforesaid wherein the Defendant informed the Plaintiffs that it was in the process of re-selling the subject property in order to refund the Plaintiffs the said part payment. Thus the Defendant acted on the agreement between the parties if it sold the portion temporarily known as Plot No. 15 to another person as asserted by the Plaintiffs and therefore cannot be faulted for so doing.

For the reasons I have given, I find it inappropriate to order specific performance of the two contracts of sale as the same were duly rescinded and thus discharged by the parties' own mutual agreement. The contracts cannot therefore be revived merely owing to the admitted failure by the Defendant to refund the deposit as agreed by the parties. Accordingly, I dismiss all the claims which are founded on the discharged contracts.

However, I agree that the Plaintiffs are entitled to the said refund together with interest and costs as the agreement to rescind the contracts was based thereon. I note from the record that the Defendant has since paid into Court the principal sum of seventy-five thousand Kwacha (K75, 000.00), which was paid by the Plaintiffs to the Defendant towards the purchase of the property in issue. Therefore, the Plaintiffs shall recover out of Court the said sum. The same shall attract interest, to be paid by the Defendant to the Plaintiffs, at the agreed contractual rate being the current bank lending rate calculated from 2nd November, 2007, the date when the money was paid to the Defendant to the 3rd May, 2012, the date when full payment into Court was made. Thereafter the amount shall not attract interest as monies paid into

court do not attract interest. The Defendant is further hereby ordered to pay the Plaintiffs' costs in respect of the lawyers' fees as agreed by the parties.

The costs of these proceedings shall also be borne by the Defendant. Same to be taxed in default of agreement.

Leave to appeal is hereby granted.

Delivered at Lusaka this 31st day of January, 2014

Justin Chashi
HIGH COURT JUDGE