

**IN THE HIGH COURT FOR ZAMBIA  
AT THE DISTRICT REGISTRY  
HOLDEN AT NDOLA  
(Civil Jurisdiction)**

**2013/HN/CA.27**

**BETWEEN:**

**ESTHER KAFUNGA**

**AND**

**GRACE KEFA**



**APPELLANT**

**RESPONDENT**

**BEFORE THE HONOURABLE MADAM JUSTICE M.C. MULANDA IN  
CHAMBERS**

**For the Appellant:**

**Mr Z. Musonda**

**National legal Aid Clinic For Women**

**For the Respondent:**

**In Person**

---

**JUDGMENT**

---

**LEGISLATION AND OTHER WORKS REFERRED TO:**

**1. The Sale of Goods Act, 1893**

2. **“CHITTY ON CONTRACTS - General Principles”**, 25<sup>th</sup> Edition, Volume 1 (1983), London, Sweet and Maxwell, Page 779, paragraph 1402.

3. **CHITTY’S TREATISE ON THE LAW OF CONTRACTS**, 20<sup>th</sup> Edition (1947), London, Sweet and Maxwell, Page 193.

This is an appeal by one Esther Kafunga against a decision of the Subordinate Court of the Second Class for the Luanshya District made on the 16<sup>th</sup> March, 2012, ordering her to vacate House No. 350/22 Mpatamatu, Luanshya which she had bought from the Defendant and partly paid for.

The Appellant filed two grounds of appeal, which are as follows:

1. That the lower court erred in not considering the evidence that she had on numerous occasions attempted to pay the balance, but the Respondent herein had been refusing to take it.
2. That the Court below erred in not considering that the Appellant herein had already paid a substantial portion of the agreed price (which would have been cleared if the Respondent had not been refusing to take the balance).

I wish to sincerely apologise to the parties in this matter for the delay in writing and delivering this judgment. The delay has been

due to various official commitments. Further, I wish to state that all amounts of money in this matter are expressed in the rebased currency.

The facts of this case, as can be deciphered from the evidence on record, are that in the year, 2005, there was a verbal agreement between the Plaintiff, who is the Appellant in this matter, and the Defendant, who is the Respondent in this matter, for the sale of House No. 350/22, Mpatamatu Township, Luanshya on the Copperbelt Province of the Republic of Zambia and that the Appellant paid, and the Respondent accepted a sum of K5,000.00 as part payment of the purchase price. According to the Appellant the agreed purchase price was K6,500.00 which the Respondent had reduced from the original price of K8,500.00, and the balance was K1,500.00. The Respondent on the other hand said the agreed purchase price was K8,000.00, to be paid in cash on the spot, meaning that the balance was K3,000.00. According to the Appellant, the Respondent and her did not agree on when the balance of the purchase price was to be paid. However, the Respondent stated that the Appellant told her that she would pay the price within a month, but did not do so, as each time the Respondent went to check on the Appellant she only found her children. It was only in February, 2011, that the Appellant went to the Respondent and told her that she had taken her some money, but she did not disclose the amount. The Respondent told her that it was too late as it had taken too long for her to complete the

payment for the house. The Respondent admitted that the Appellant had paid her the sum of K5,000.00 cash, between May and April 2005, but stated that they did not sign any document in respect of the K5000.00 paid by the Appellant. The Respondent later changed her mind and withdrew the sale of the house to the Appellant because, according to her, it took six (6) years without the Appellant paying the purchase price in full.

According to the Appellant, she has not paid for the house in full, because when she took the balance of K1,500.00 to the Respondent, the Respondent refused to accept it and told her that she now wanted a sum of K32,000.00 as the purchase price for the same house. By then, the Respondent had already found someone else to buy the house at the new price of K32,000.00.

Counsel for the Appellant filed written submissions. However, the Respondent, who was not represented, did not do so. She had, however, on the 15<sup>th</sup> June, 2016, indicated to the Court that she had attempted to engage the Legal Aid Board for legal representation, but that she was told that they were fully booked and asked her to go back to them in July, 2016, when they would then represent her.

When the matter came up before me for hearing of the appeal on the 15<sup>th</sup> June, 2016, the Respondent had not yet engaged a lawyer. Counsel for the Appellant informed the Court that the Appellant

wished to rely on her arguments filed into court on 16<sup>th</sup> September, 2015. I, therefore, decided to proceed with the hearing of the appeal by relying on the written submissions filed by Counsel for the Appellant, and gave the Respondent up to 29<sup>th</sup> July, 2016, to file her submissions, failure to which I was to proceed to write the judgment in the absence of her submissions. I then reserved the judgment in this appeal in order to give chance to the Respondent to file her heads of argument. However, as at the time of writing this judgment, long after the deadline that I had given to the Respondent to file her submissions had passed, the Respondent had not filed any submissions.

In the Appellant's Heads of Argument, the Appellant's Advocate opted to argue the two grounds of appeal together. He argued that it is not in dispute that there was an agreement between the parties, sometime in 2005, for the sale of House No. 350/22, Mpatamatu Township, Luanshya and that the Appellant paid, and the Respondent accepted the sum of K5,000.00 as part payment of the purchase price. According to Counsel, the only dispute seems to relate to the actual purchase price, since the Appellant said the agreed purchase price was K6,500.00, which meant that there was a balance of K1,500.00, while the Respondent said the agreed purchase price was K8,000.00, which meant that the balance was K3,000.00

According to Counsel, the crux of the matter appears to be the time of payment of the balance of the purchase price, as the Appellant said there was no time frame agreed upon for payment of the same, while the Respondent said it was agreed that the balance was to be offset within a month of the initial payment of the K5,000.00. Counsel argued that since there was no memorandum, in writing, it was the Appellant's word against the Respondent's word.

On the issue of time, Counsel referred to **Chitty's Treatise on the Law of Contracts, 20<sup>th</sup> Edition, at page 193.**

It was Counsel's further submission that it would appear that time was not of the essence in the contract for sale or purchase of the house in issue by the parties herein. He contended that if that were so, they would have expressly stated so in some memorandum. According to Counsel, the Respondent cannot, in the absence of such memorandum, be justified in refusing to take the balance when the Appellant took it to her, on account that it had taken too long. Consequently, he contended that the lower Court fell into error when it purported to agree with the Respondent, and prayed to this Court that it should also find as such.

Counsel further referred to, section 10(1) of the **Sale of Goods Act, 1893.**

The other issue that Counsel brought into play was that of substantial performance. In this regard, he submitted that the Appellant paid a substantial portion of the agreed purchase price and that she is, therefore, entitled to specific performance on the part of the Respondent, considering that the balance of the purchase price was unreasonably refused by the Respondent. He contended that the Respondent cannot take advantage of her refusal to accept the balance and purport to offer the house to someone else. He submitted that ***“The general rule is that a party to a contract must perform exactly what he undertook to do.”***

In conclusion, Counsel submitted that the Respondent undertook to pass on title to the Appellant upon payment, and that she should, therefore, do just that, and not offer the house to someone else when the Appellant has already made a substantial payment and has always been ready to complete the payment which the Respondent has unreasonably been refusing to take.

Counsel urged the Court to find that the lower Court misdirected itself when it made the order that it made, and direct that the transaction between the parties herein be concluded with the payment of the balance of the purchase price and the handing over of the house to the Appellant. He submitted that that was the intention of the parties, which the Respondent cannot abandon with impunity.

I have perused the evidence before the Lower Court, the submissions by Counsel for the Appellant and the Judgment of the Lower Court.

The fact that there was an agreement between the Appellant and the Respondent, sometime in 2005, for the sale of House No. 350/22, Mpatamatu Township, Luanshya and that the Appellant paid, and the Respondent accepted a sum of K5,000.00 as part payment of the purchase price, is not in dispute. In my view, what is in dispute is the actual purchase price agreed upon by the parties and the period of total payment of the same. I say so, because, in the lower court, the Appellant said that the initial purchase price that was fixed by the Respondent was K8,500.00, but that the Respondent had reduced it to K6,500.00. Therefore, according to the Appellant, the agreed purchase price was K6,500.00, while the Respondent said the agreed purchase price was K8,000.00. If the agreed purchase price was K6,500.00, then the balance on the purchase price, after the Appellant had paid the Respondent a sum of K5,000.00 was K1,500.00. On the other hand, if the agreed purchase price was K8,000.00, the balance was K3,000.00. For the purposes of this judgment, I take it that the agreed purchase price for the house was K6,500.00, as stated by the Appellant in the lower Court. I say so, because, there is no evidence that when the Appellant paid the Respondent the K5,000.00, the issue of the balance of K1,500.00 was raised or



discussed. This indicates that there was no dispute that the purchase price agreed upon by the parties was K6,500.00.

While there are these differences in the verbally agreed purchase price between the parties, the main contention appears to be the time of payment of the balance of the purchase price, since the Appellant said there was no time frame agreed upon for payment of the same, while the Respondent said it was agreed that the balance was to be paid within a month of the initial payment of K5,000.00. According to the Respondent, she refused to accept the undisclosed balance of the purchase price, from the Appellant, because of the large time lapse from the time of the first payment up to the time that the Appellant offered to make the last payment. There was however, no written agreement between the parties concerning the period of completion of payment of the purchase price.

On the issue of time, the Learned authors of **Chitty's Treatise on the Law of Contracts, 20<sup>th</sup> Edition**, referred to by Counsel have, at page 193 of this Treatise, said that:

*"In equity, the Court is in the constant habit of relieving against the lapse of time, and particularly in the cases of vendors and purchasers of land, so that in such contracts, time was never of the essence, unless of course expressly made so by the parties..... The matter then stands thus - the parties, if they wish to make time of the essence their*

*contract should do so in express terms. If they do not, it will depend on their implied intention or the general circumstances of the case.... In contracts with regard to the sale of land, stipulations as to time will be disregarded unless injustice would be worked by so doing."*

This quotation tells us that in the cases of vendors and purchasers of land, if the parties wish to make time of the essence they must expressly state this in their contract and, if they do not do so, the Court will depend on their implied intention or the general circumstances of the case and disregard stipulations as to time unless injustice would arise if the court did so.

Further, section 10(1) of the **Sale of Goods Act, 1893** provides that:-

*"Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale..."*

In the case at hand, it is clear that time was not of the essence in relation to the sale or purchase of the house in issue by the parties herein, since they did not sign any agreement relating to when the full payment of the purchase price was to be made. That being the case, the Respondent had no legal right to refuse to accept the balance of the purchase price when the Appellant took it to her, on account that the appellant had taken too long to pay the same.

Accordingly, I find that the lower Court erred when it agreed with the Respondent in deciding to get back the house on the ground that the Appellant had taken too long to complete the payment of the purchase price for the house in issue.

As regards the issue of substantial performance, the learned authors of **“CHITTY ON CONTRACTS - General Principles”**, 25<sup>th</sup> Edition, Volume 1, stated, at page 779, in paragraph 1402, that:

*“The main exception to the principle that the partial performer of an entire contract cannot recover the agreed price is the doctrine of substantial performance; by this doctrine, a failure to complete only an unimportant part of the plaintiff’s obligation does not prevent his claim for the agreed price,.....What is substantial performance will depend upon the nature of the contract and all the circumstances of the case.”*

In the current case, there was no written contract as to the time frame for the payment of the full purchase price, but the Appellant paid a substantial portion of the agreed purchase price and, in her wisdom, made numerous attempts to pay off the balance, which the Respondent refused to accept. She is, accordingly, entitled to specific performance of the verbal contract for the purchase of the house, on the part of the Respondent, considering that the Respondent unreasonably refused to accept the balance of the purchase price, from the Appellant. The Respondent was wrong to

have refused to accept the balance of the purchase price and purport to offer the house to someone else, to purchase, when the Appellant had always been ready to pay the balance, and had, in fact, already paid a substantial portion, of the purchase price. The Respondent, therefore, should have allowed the Appellant to continue staying in the house, as purchaser of the same. This is because the Respondent was expected to perform according to what he had agreed with the Appellant, *albeit*, verbally.

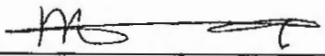
Accordingly, I find that the lower Court misdirected itself when it ordered the Appellant to vacate House No. 350/22 Mpatamatu, Luanshya, for which she had made a substantial payment towards the purchase price. That being the case, and in order to respect the sanctity of the verbal contract between the Parties and their intention, I order specific performance of the verbal contract between the parties. I further order that the Appellant pays the balance of the purchase price in the amount of K1,500.00, within thirty days from the date of this judgment, and the Respondent, accepts the same. In addition, the Respondent shall hand over the house to the Appellant within 7 (seven days) from the date of payment of the balance of the purchase price.

As far as the payment of rentals is concerned, had the Appellant not already paid a substantial portion of the purchase price, and had she not been making efforts to pay the Respondent the balance of the purchase price, I would have ordered that she pays rentals for

the period she had stayed in the Respondent's house without completing the payment of the purchase price. In the current circumstances, I shall not order so. This appeal, therefore, succeeds. Leave to appeal to the Court of Appeal is granted.

Each party to bear her own costs.

**DATED THE** 3<sup>1st</sup> **DAY OF** May **2017.**

  
\_\_\_\_\_  
**M.C. MULANDA**  
**JUDGE**