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



**1997/HP/5016**

**BETWEEN:**

**THE REGISTERED TRUSTEES OF THE  
AFRICAN NATIONAL CONGRESS OF  
SOUTH AFRICA**

**PLAINTIFF**

**AND**

**DEREK MHANGO**

**DEFENDANT**

**BEFORE HONOURABLE MR. JUSTICE MWILA CHITABO, SC**

*For the Plaintiff: Mr. D. Kasote of Messrs Chifumu Banda & Company*

*For the Defendant: In Person*

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**JUDGMENT**

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**Legislation Referred to:**

1. *High Court Rules, Chapter 27 of the Laws of Zambia*

Delay in delivering this Judgment is regretted. It is however attributed to the parties overtures of exploring *excuria* resolution of the dispute which regrettably failed. The situation was

compounded by the temporal misplacement of the file shortly after the parties attended Court in chambers on 29<sup>th</sup> November, 2019.

The genesis of this matter is that the Plaintiff in 1997 launched proceedings by mode of Specially Endorsed Writ and Statement of Claim against the Defendant. The reliefs sought was

- (i) For a sum of K16,000,000 (unrebased) and interest at prevailing bank rates from the last day of September, 1995 to the date of payment in respect of an agreement by the Plaintiffs to the Defendant a property known as Stand No. 10061, Lusaka.
- (ii) Further relief for the Court to determine the period within which the Defendant is to pay the said sum and for an order that should the Defendant fail to pay by the date to be specified by the Court and order rescinding the agreement between the Plaintiff and the Defendant and for an order for possession of the said Stand.
- (iii) Award and assessment of *mesne* profits, and
- (iv) Damages to be assessed for the Defendants occupation of the said property.

An application for summary Judgment was by Ruling dated 13<sup>th</sup> June, 2003 was declined with costs to the Defendant. It would

appear the file went missing and file was reassigned to this Court on or about 20<sup>th</sup> May, 2014.

On 27<sup>th</sup> June, 2014, I granted leave for service of process by substituted service who could not be traced. Both parties appeared before Court on 12<sup>th</sup> January, 2015 and matter was adjourned to 24<sup>th</sup> August, 2015 at 10:30 hours.

On 5<sup>th</sup> November, 2015, the Plaintiff filed summons for entry of Judgment on admission. The application was supported by an affidavit deposed to by one **Evans Sosala** a Conveyancing Manager in the Law Firm of Messrs Chifumu Banda and Associates, the Advocates for the Plaintiff. The gravamen of which was that on 1<sup>st</sup> September, 1999 a Contract of Sale of No. 10061, Buluwe Road, Woodlands was entered into by the parties herein as shown by exhibit "**ES1**".

The agreed purchase price was K30 million (unreabsed) to be paid in 2 equal installments of K15 million on exchange of contract and the balance on the completion or sooner if the purchaser was able to pay. The purchaser paid K13 million on signing the contract on 1<sup>st</sup> September, 1995 leaving a balance of K16 million which had remained outstanding for more than 20 years as at 5<sup>th</sup> November, 2015 at time of signing the affidavit.

Clause 8 of the Special Conditions of the Contract of Sale provided for payment of K15 million on exchange of contract and balance to be paid on completion.

Clause 11 provided that any delay in payment of the balance of the purchase price, the purchaser was to pay interest at the Standard Chartered Bank lending rate from the date the money was due.

Clause 13 provided that upon completion, the vendor was to give a letter to the purchaser to the National Housing Authority authorising the latter to transfer the property to the purchaser.

That the Defendant in order to find the money for him to pay the balance of K16 million tried to obtain a loan from the National Building Society by pledging the same property to serve as a mortgage security as shown by exhibit "**ES2**", notwithstanding that that was not his property.

That the purchaser did not reveal that he had no money to pay the balance but that he instead wanted to mortgage the same property he wanted to buy in order to find money to pay for the property he wanted to buy.

The Defendant having failed to find the money to complete asked the court to cancel the contract for breach of contract by the Plaintiff and order the property to revert to the vendor and for payments of damages for breach of contract.

That the Defendant should pay rent with effect from the date he took occupation of the property to the date he would vacate the property that is for 20 years at the average monthly rent of K4 million.

The Defendant **Derek M'hango** filed an opposing affidavit. The gravamen of which was that he admitted applying for bridging finance from the Zambia National Building Society. He denied hiding this fact as there is correspondence to that effect between the vendors Advocates and the Zambia National Building Society. That according to him the Plaintiff had failed to complete, so it would be unjust to cancel the contract.

I observe at this stage that the portions of the affidavit that amount to legal argument and submissions have been ignored. The Defendant without leave of the court filed additional affidavit. The essence of which was that interest cannot be paid on the unpaid balance because the certificate of title is still in the name of National Housing Authority.

The Defendant without leave of the court paid the K15 million deposit but the Plaintiffs Advocates received their fees from the said payment. That he took possession upon payment of the amount as required by the contract of sale.

That the Plaintiff has failed to change ownership from the National Housing Authority to itself to enable the transaction to complete. That there are no grounds to justify rescinding of the contract.

The Plaintiff filed in a reply through **Evans Sosala**, the essence of which was that the deponent reiterated that the Defendant did not disclose at the time of signing the contract that he had no money to pay for the house. That on the contrary he had indicated that he

would borrow money from money lenders. That the Defendant admitted the Plaintiff's claims as shown in the Defendant's claim shown as exhibit "**ES1**".

Reference was also made to a without prejudice letter of the Defendant dated 22<sup>nd</sup> February, 2016 wherein the K16 million (unrebased) debt (K16,000.00) was acknowledged and proposals for settlement made.

In his further affidavit in opposition, the Defendant has deposed that to date, the Plaintiff has failed to prove ownership by providing a certificate of title.

The application before me is for entry of Judgment on admission. The genesis of this matter is that the parties entered into a contract on 1<sup>st</sup> September, 1995 which provided for purchase price of K30 million (unrebased). The following were the relevant conditions:-

- 1) The contract was subject to the Law Association of Zambia conditions of sale of 1976 in so far as they were not inconsistent with the special conditions.
- 2) The vendors Advocates were indicated as Messrs A.D & Company. For purposes of clarity Messrs AD & Co. were acting for both parties.
- 3) There was no time fixed for obtaining the State's consent and any other necessary licence to assign.

- 4) Time fixed for completion was 30<sup>th</sup> June, 1995 or sooner if the purchaser was able to pay the purchase price sooner in which event completion would be upon payment.
- 5) Vendor was selling as Beneficial owner. The record will show that there is no evidence that the Plaintiff was selling as beneficial owner since no such evidence has been proved by way of deducing title.
- 6) The title to commence with certificate of title.

As observed in the immediate preceding paragraph, there is no evidence that the Plaintiff has deduced title to demonstrate that it has title to the property being all that piece of land in extent 889 square metres more or less being stand number 10061 situate in Lusaka which piece of land is more particularly delineated and described in diagram number 477 of 1984 except and reserved all minerals, oils and precious stones whatsoever upon or under the said land.

Of interest is condition 11 which stipulates that:-

*“on completion the vendor shall give a letter to the purchaser addressed to the National Housing Authority authorising them to transfer the property to the purchaser”*

It is noted that the National Housing Authority was not and is not a party to these proceedings. It is therefore not bound by the contract of sale subject to this action.

Condition 8, the purchase price of K30,000.00 (unrebased) provided for the purchaser to pay the same as follows:

- (a) K15,000,000 (unrebased) on exchange of contract
- (b) The balance to be paid on completion or sooner if the purchaser was able to pay. The purchaser was to take vacant possession on exchange of contract.

The evidence is that the purchaser did pay the K15, 000,000 but instead the Advocates unilaterally deducted a sum of K1,500,000. The Defendant took vacant possession upon exchange of contracts, rent free and interest free pursuant to condition 9.

The Plaintiff launched the summons for entry of Judgment on admission on 5<sup>th</sup> November, 2015. This is over 24 years from the time of the contract of sale.

The legal maxim "equity assists the vigilant and not the indolent" militate against the Plaintiff. The maxim will surely militate against the Plaintiff.

The Plaintiffs application for Judgment on admission has no prospects of succeeding on the following grounds.

Firstly, the Plaintiff has not deduced title to the property as a bonafide registered owner of the property. Secondly, the Plaintiff has not shown that an appropriate notice to complete has never been given to the Defendant. This is understandable because the Plaintiff is not in possession of the certificate of title in its name.



A stranger to the said contract of sale namely National Housing or its successors in title are not privy to the contract.

I therefore hold that condition 12 of the contract of sale which purports to draw into contract and to place a duty on the party of the named National Housing Authority is ineffectual and it is severed from the contract of sale.

In my view, the duty to provide authority to sale the house so as to give good title rests on the Plaintiff. On the foregoing, the Plaintiff's application for summons on admission is destitute of merit.

Taking into account that this action has been raging on for almost a quarter of a century, I will make the following orders so that this matter comes to an end:-

- (1) The Plaintiff is ordered to deduce title to the Defendant by the 30<sup>th</sup> of March, 2020.
- (2) Upon deduction of title, that is proof that the Plaintiff is the beneficial owner of the property in dispute, the Defendant shall pay the sum due on the purchase price less all payments made towards inclusive the sums paid into court within 60 days from deduction of title but not later than 30<sup>th</sup> May, 2020.
- (3) The sum found to be due on the purchase price under order (2) above shall not attract any interest and the property shall be rent free. This is in line with condition 10 of the contract of sale.

(4) The Plaintiff is hereby ordered to effect service on the National Housing Authority or its successors in title who are known by the Plaintiff and the Plaintiff is directed to file proof of service of the within written Ruling.

(5) The Plaintiff and the Defendant and the National Housing Authority should the later be interested in proceedings are to appear on 30<sup>th</sup> of March, 2020 at 08:30 hours for status conference without fail.

(6) The Defendant shall continue to enjoy quite possession.

(7) The costs will be in the cause.

Leave to appeal to the superior Court of Appeal is granted.

**Delivered under my hand and seal this 26<sup>th</sup> day of February, 2020**



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**Mwila Chitabo, SC**  
**Judge**