

IN THE SUPREME COURT OF ZAMBIA

SCZ APPEAL NO.15 OF 1992

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

B E T W E E N:

BERNARD LEIGH GADSEN

APPELLANT

and

VINCENT JOSEPH CHILA

RESPONDENT

Coram: Sakala, Chirwa and Musumali JJJS at Lusaka on 18th
August and 13th December 1993

For the Appellant : Mr. J.H. Jearey SC of Messrs D.H Kemp

For the Respondent: Mr. A.M. Kasonde of Messrs Kasonde & Co.

J U D G M E N T

Chirwa JS delivered the judgment of the court.

Cases referred to: Lyons Brooke Bond v Zamtan [1977]Z.R 317

This is an appeal by Bernard Leigh Gadsen (hereinafter referred to as the plaintiff for that is what he was in the court below) against the dismissal of his application for possession of Stand No. 2 Matero under Order 113 of the Rules of the Supreme Court. Vincent Joseph Chila the respondent was the defendant in the court below and will be referred to as such in this judgment.

The undisputed facts established by the evidence in the court below are that the plaintiff was appointed liquidator of Industrial Finance Company. Stand No. 2 Matero belonged to Kapiya and Sons and they obtained a mortgage from Industrial Finance Company in the sum of K17,750.00. Kapiya and Sons defaulted in re-paying this mortgage and interest and the plaintiff exercising the powers of mortgagee of the right of

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sale entered into/agreement with the defendant to sell the same property to him at K35,000.00. To this end the Law Association of Zambia Contract and Conditions of Sale was signed between the parties on 20th March 1985. The property was sold subject to the Law Association of Zambia General Conditions of Sale 1976 but General Condition 2(a) was excluded. The defendant was required to pay K18,000 by way of deposit on signing the contract and the balance of K17,000 together with interest at 14% per annum from the date of completion to be paid in seventeen monthly instalments. It was also established that the defendant did not pay the K18,000 deposit to the plaintiff or anyone authorised by him, but continued to be in possession of the property.

On 25th January 1989 the advocates for the plaintiff wrote the advocates for the defendant informing them that the advocates for Building Society had obtained State Consent for the first mortgage of the property and requested them to return immediately the assignment and second mortgage duly executed by the defendant which had been sent to them under cover of their letter dated 6th May 1985. The advocates for the plaintiff warned that if the documents were not received by 9th March 1989 they would advise their client to take immediate steps to rescind the contract for sale and recover possession of the property. On 13th February 1989 the advocates for the plaintiff wrote another letter to the advocates for the defendant enclosing a completion statement as at 20th February 1989 and stated that time was then of essence so far as completion of the matter was concerned. There was no response to these two letters.

In January 1991 the plaintiff took out an originating summons under Order 113 of the Rules of the Supreme Court for possession of Stand No.2, Matero in Lusaka supported by an affidavit.

The defendant with new advocates, filed an affidavit in opposition. At the trial viva voce evidence was led in addition to the affidavits filed therein. At the end of the trial the learned judge having found that time was of essence in the contract held that since there was no evidence that the defendant had been told that the State's Consent had been obtained hence the need to complete the transaction within 28 days, this time had not started to run and there could not be any completion without consent. It is against this judgement that the plaintiff appealed to this court.

After the appeal had been set down for hearing, a number of adjournments were made at the instance of the advocate of the defendant to file the first contract between the defendant and Messrs Kapiya and Sons; but this was never done and at the last occasion the court had to proceed in the absence of the advocate. Also during the hearing of the appeal, the court asked Mr. Jearey, counsel for the plaintiff, to file in court the letters written to the then advocates for the defendant calling upon them to complete the transaction and informing them that time was of essence in the transaction and this he did.

There were 6 grounds of appeal filed and argued. Grounds 1, 3 and 5 were argued jointly to the effect that the grounds on which the learned trial judge non-suited the plaintiff, namely that the plaintiff had not established that the period given by the notice to complete was reasonable and that he had not established that State Consent to assign had been given, hence, not establishing that the period stipulated by the contract for completion had commenced, were not issues raised by the pleadings. It was submitted that the defendant in his affidavit and evidence merely stated that he was not aware of the notices given, he never raised the issue of reasonableness of the notice nor the issue of State Consent.

Mr. Jearey submitted that only issues raised by the pleadings or affidavits fall for decision at a trial and for his authority he referred to Halsbury (4th Ed.) Vol. 17 paragraph 21 and the case of Lyons Brooke Bond v Zamtan [1977]Z.R. 317 at 330. It was therefore a misdirection, it was submitted, for the learned trial judge to non-suit the plaintiff on issues not raised.

In the second ground of appeal, it was argued that the trial judge having found as a fact that the notice to complete was given on 13th February 1989 and the notice rescinding the contract was given on 22nd June 1989, he ought to have found that the notice was more than reasonable bearing in mind that the Law Association of Zambia General Conditions of Sale dealing with notice to complete in the event of the purchaser's default required "at least 14 days notice in writing."

The fourth ground of appeal was to the effect that if the State Consent was in issue, the period stipulated in Special Condition 3 of the contract for obtaining State Consent was sixteen weeks from the date of the contract and that period having expired he ought to have found that the plaintiff was entitled to rescind the contract.

The sixth and final ground of appeal was that the application for possession was made on the grounds that the defendant had not paid the purchase price or any part thereof and the learned trial judge having found that in fact the defendant defaulted, he ought to have granted the application and that he misled himself in saying that had the application been brought on the grounds of failure to pay the deposit the outcome may have been different.

Mr. Kasonde, counsel for the defendant filed in on behalf of the defendant heads of argument which are to the effect that there were two contracts involving this property in issue.

The first one was between the defendant and Kapiya and Sons, under which contract it is said he paid some K3,000.00 deposit out of the purchase price of K25,000.00 and that a further K16,000.00 was paid by way of a mortgage granted to the defendant by the Zambia National Building Society and remitted to Kapiya and Sons. The second contract was between the present parties and that it was expressly stated that monies paid in the first contract would be taken into account towards the new purchase price of K35,000.00. This was the view or stand taken even in the court below and just as in the court below, in this court Mr. Kasonde applied for adjournments on a number of occasions to produce the first contract. He failed to do so in the court below and in this court as well as we have already stated he failed to either file the first contract or appear in person on behalf of the defendant. The court therefore had to proceed with the appeal in Mr. Kasonde's absence but in the presence of his client, the defendant and after the argument of the plaintiff's appeal we heard the defendant's appeal which he argued in person. We had to proceed because we are of the view that what is in issue here is the contract between the parties before us. The evidence is clear that the plaintiff was not a party to the first contract if it existed. The law on contract is clear where the contract is reduced in writing and the terms of the documents are clear as stated in Chitty on Contracts 23rd Edition at page 582:-

"Where the agreement of the parties has been reduced to writing and the document containing the agreement has been signed by one or both of them, it is well established that the party signing will be bound by the terms of the written agreement whether or not he has read them and whether or not he is ignorant of the precise legal effect."

6...Applying that law

Applying that law to our present case, the contract between the parties is very clear. Special Condition 8 is very clear, it required the defendant to pay a deposit of K16,000.00 and 'the balance of the purchase price being K17,000.00 together with interest thereon or any part thereof at 14% per annum from the date of completion shall be paid by seventeen monthly instalments.....' It is clear to us that if whatever monies paid to Kapiya and Sons were to be treated as part-payment, there would have been no balance of purchase price because the defendant claims to have paid first K3,000.00 cash, the K16,000.00 by way of a mortgage. In fact no reference was made to the so-called first contract. We therefore do not see what further assistance this so-called first contract could have added to the defendant's case. We will therefore proceed with the appeal, considering the defendant's case on what he submitted in court and the evidence in the court below.

The originating summons is very clear; it is for possession of the property in issue. The grounds for possession are clearly spelt out in the affidavit in support of the summons, namely that having contracted to purchase the property in issue the defendant defaulted and even after giving reasonable notice the defendant still failed to complete the sale as he failed to pay the purchase price or any part thereof but he still occupies the property.

In his affidavit in opposition, the defendant denies having entered into contract with the plaintiff for the purchase of the property at K35,000.00. He further states that he has no knowledge of any notice to complete issued in this matter.

The defendants' oral evidence in the court below shows that in the transactions with the plaintiff he was dealing with him through his advocates, Messrs Chalansi; the Law Association of Zambia Contract and Conditions of Sale confirms this. This contract was signed on 20th March 1985, the plaintiff's advocates were Messrs D.H. Kemp and for the defendant were Messrs Chalansi. As we quoted the law from Chitty on contract above as we have already stated, this contract makes no mention of the money paid to Kapiya and Sons, but it states that the purchase price agreed upon was K35,000.00 and the defendant was required to pay K18,000.00 deposit. In view of this written agreement the defendants denial of any contract for the purchase of the property with the plaintiff at K35,000.00 cannot stand. He is bound by his signature on this document. As he was acting through his advocates, the plaintiff had to go through the same advocates. It would have been unethical for the advocates of the plaintiff to have direct dealings with the defendant. With the evidence before us now, we are satisfied that the defendant was given notice to complete the transaction by letter dated 13th February 1989 through his advocates and was informed that time was of essence and the contract was rescinded on 22nd June 1989. The notice was more than reasonable taking into account that the contract provided for "at least 14 days notice." It is also clear from the evidence that the defendant has not paid the purchase price or any part thereof. Taking the totality of the evidence and the findings of the trial judge, we hold that the trial judge misdirected himself in non-suited the plaintiff on the grounds that the plaintiff had not proved that the period given by the plaintiff for completion was reasonable for what the defendant put forward was "non-knowledge" of the notice and not reasonableness of the notice. We therefore agree with Mr. Jearey's submission that the learned trial judge decided on something that was not on issue per the pleadings.

Further with the evidence before us now in the form of a letter from the plaintiff's advocates to the defendant's advocates dated 25th January 1989, the defendant became aware that the State's Consent to Assign and for the second mortgage had been obtained and that they were to expire on 9th March, 1989. The time under Condition 4 of the Special Conditions under the Law Association of Zambia Contract and Conditions of Sale began to run and the defendant was required to complete the sale within 28 days on being told of the State's Consent to Assign was available and the defendant has failed to complete the contract. On the totality therefore, we allow this appeal and order that the plaintiff do get possession of the property. Costs in this court and the court below to the plaintiff.

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E.L. Sakala
SUPREME COURT JUDGE

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D.K. Chirwa
SUPREME COURT JUDGE

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C.M. Musumali
SUPREME COURT JUDGE