

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 40 OF 1993

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

YOUSUF MUSA

APPELLANT

And

A.S. ITOWALA

RESPONDENT

Coram: Gardner, Sakala and Chaila JJS.,

31st August, 1993

M. Sikatana of Veritas Chambers appeared for the appellant.

E.B. Mwansa of EBM Chambers appeared for the respondent.

J U D G M E N T

Gardner J.S. delivered the judgment of the court.

This is an appeal from a judgment of the High Court granting a claim in an originating notice of motion that a caveat on property plot No. 1069 Lusaka should remain in favour of the respondent.

The history of the case is that the respondent agreed to purchase the plot from one Dudhia but before the transaction could be completed the then vendor indicated that he was not satisfied with the method in which the purchase intended to pay the purchase price and it was agreed between the parties that the contract would be cancelled and the deposit be repaid to the purchaser. Prior to the cancellation of this contract the respondent had entered a caveat against the property as intending purchaser. After the cancellation of the contract the respondent entered a further caveat against the property still as intending purchaser but he maintained that now he had an option to purchase the

property as the landlord had said that he intended to sell the property to a relative but if that sale did not take place the respondent could have first refusal. The property was then sold to the appellant and the appellant made application to the Registrar of Lands and Deeds to have the latest caveat removed from the registry. In support of this application the evidence of the original contract having been cancelled by signed consent of the respondent was put before the Registrar and he cancelled the caveat. Because the respondent felt that he still had an entitlement under the option to purchase which he alleged he applied to the High Court to have the caveat re-entered on the register.

The learned trial judge having heard the parties found that no opportunity had been given to the respondent to put his version of facts of the case to the Registrar of Lands and Deeds. In consequence the rules of natural justice had not been followed because the principle of *audi alteram partem* applied. He therefore, ordered that the caveat should be restored to the register.

In this court, on our own motion, we raised the question as to whether the alleged option to purchase had been in writing. Mr. Nwansa on behalf of the respondent conceded that the option had not been in writing but he maintained that under section 76 of Lands Deeds Registry Act the respondent had an interest in respect of which a caveat could be entered against the land.

Mr. Sikatana maintained that as there was no contract in writing in respect of the option, there was no legal interest which could be entered as a caveat. We are quite satisfied that the legal interest referred to in section 76 of the Act is an enforceable interest, and, as a matter relating to an interest in land, such enforceable interest must be evidenced by a note or a

memorandum in writing in accordance with section 4 of the Statute of Frauds.

It follows therefore, that although the learned trial judge was correct when he said that the respondent had not had an opportunity to put his case before the Registrar of Lands and Deeds there was in fact no case which he could have put. The respondent never had a legal interest which could have been entered as a caveat on the land.

In view of what we have said this appeal is allowed. The judgment of the High Court is set aside and the caveat referred to in this action shall remain struck off by the Registrar of Lands and Deeds.

It has been drawn to our attention that there is a further caveat entered against this property in respect of an action which the respondent had brought against Messrs Dudhia and Company, who were the defendants in the court below and who were advocates acting for all parties. It would appear to us that the respondent could not possibly claim specific performance against Messrs Dudhia and Company because they were not the owners of the property. It is therefore possible that the Registrar, upon hearing the parties, may decide that the latest caveat should not remain on the property.

Costs of this appeal will follow the event.

B. T. GARDNER
SUPREME COURT JUDGE

E. L. SAKALA
SUPREME COURT JUDGE

M. S. CHAILA
SUPREME COURT JUDGE