

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

SCZ APPEAL No.30 of 1993

B E T W E E N :

CHARLES MUMBA KAPOBA

APPELLANT

and

ROBINSON WHITE MOOMBA

RESPONDENT

Coram: Sakala, Chaila and Muzyamba, J.J.J.S.

21st September and 4th November, 1993

For the Appellant : E.B.M. Mwansa of EBM Chambers

For the Respondent : A.M. Wood of D.H. Kemp and Co.

Muzyamba, J.S. delivered the judgment of the court.

This is an appeal against a Judgment of the High Court deciding that the Contract of Sale dated 11th May, 1987 was valid and binding on both parties and for ordering specific performance of the said contract.

In our judgment we will refer to the appellant as defendant and respondent as plaintiff which is what they were in the court below.

The facts of this case are that the defendant is the registered owner of a farm known as the Remaining Extent of Sub-division 'A' of Farm Number 680 "Marydale" Lusaka comprising of 462.9244 hectares. It would appear that after acquiring the farm the defendant mortgaged it to Agricultural Finance Company (hereafter referred to as AFC) for an undisclosed amount. As at 30th September, 1986 the defendant's debt to A.F.C. stood at K111,953-49. On 6th January, 1981 A.F.C. wrote to the defendant, document 40 in the record of appeal, that its Board of Directors

had decided that the farm should be sold to reduce his debt and that he should vacate the farm. It would appear that A.F.C. did not implement the Board's decision because on 5th June, 1986 the defendant, though he denied this in the court below, wrote a letter to A.F.C., document 41 in the record of appeal, saying that he wanted to sub-divide the farm and sell to the plaintiff 694 acres for K60,000-00 in order to reduce the debt. On 8th August, 1986 A.F.C. responded by saying that it could not authorise a sub-division and advised the defendant to sell the whole farm to the plaintiff or any other interested person. This is contained in document 42 in the record of appeal. Then, according to the plaintiff, the defendant, on 14th August, 1986 offered to sell the whole farm to him and with that offer he applied to Zambia Agricultural Development Bank for financial assistance to buy the farm. There is evidence on record from PW.3, Mr. Michello that the plaintiff's application was approved by the bank but could not be disbursed because the bank was merging with Lima Bank, the successor of A.F.C. It is common ground that subsequent to the offer the plaintiff, with the defendant's permission or licence moved onto the farm in November, 1986. Later both parties engaged Hamanyanga and Co. to assist them in the transfer of the farm. Then, according to the plaintiff, Hamanyanga and Company prepared a Contract of Sale at page 126 of the record of appeal and on 15th December 1986 he and the defendant signed the contract in the presence of some witnesses. The defendant, while conceding that Hamanyanga and Company were his long standing lawyers denied signing the contract saying he did not know how to write and sign as he was blind. The defendant called Mr. Hamanyanga of Hamanyanga and Company as his witness. The later contradicted the defendant and said that the defendant signed the contract in his presence. Subsequent to the signing of the contract a state consent was applied for and obtained for K150,000-00 and when it expired it was renewed, document

52 and 53 in the record of appeal. Although the defendant denied obtaining the consent Mr. Hamanyanga testified that both parties jointly pursued the application for and obtained the consent. Completion of the transaction did not take place as specified in the conditions of sale because as, explained earlier on, the Zambia Agricultural Development Bank did not release the funds to the plaintiff due to impending merger with Lima Bank and the plaintiff had to look elsewhere for financial assistance. He went to his Bank, Zambia National Commercial Bank Limited who approved his application for a loan of K130,000-00. As a result, a fresh contract of sale was drawn which, according to the plaintiff, was executed by both parties on 11th May 1987. The defendant denied signing the second contract and alleged that it was a forged document. Later Zambia National Commercial Bank disbursed the loan and paid K113,658-97 to Lima Bank, the successor of A.F.C. and the latter surrendered the Title Deeds for the farm to Zambia National Commercial Bank as security. The balance out of K130,000 was, according to the plaintiff, paid to the defendant and acknowledged by the defendant on document 49 of the record of appeal dated 29th June 1987. The defendant denied signing this document and said that his signature was forged and that the only payment he received from the plaintiff was an amount of K7,000 for cattle the plaintiff got on credit. These are the facts.

Mr. Mwansa has advanced three grounds of appeal namely:

1. That the lower court misdirected itself to have held that there was a valid and binding contract of sale between the defendant and the plaintiff.
2. That the lower court misdirected itself to have held that the defendant's plea of fraud and forgery could not stand.
3. That the lower court misdirected itself to have made an order for specific performance of the contract of sale.

: J4 :

In support of grounds 1 and 2 Mr. Mwansa submitted that it was common cause that the first contract of sale had expired and could therefore not be revived. That the second contract of sale was prepared by the plaintiff himself and not Hamanyanga and Company and that the defendant's signature on it was forged and therefore that the entire document was a forgery. That the learned trial judge was therefore wrong in deciding that it was a valid binding contract. He further submitted that the plaintiff volunteered to clear the defendant's loan with A.F.C. In other words, he was a "Father Christmas" who could not be heard now to say that the defendant should convey the farm to him.

In response, Mr. Wood submitted that neither fraud nor forgery was proved by the defendant against the plaintiff. That the evidence of the defendant on this allegation took the pattern of bare denials that he did not sign any of the documents on record. That the defendant did not adduce any evidence to prove that the plaintiff had forged his signature on these documents. He further submitted that in conveyancing a contract of sale does not automatically lapse by mere non-performance of either party. That to have no effect such a contract has to be rescinded after due notice of completion is given to the defaulting party, which was not done in this case. That the learned trial judge was therefore right in dismissing the allegations of fraud and forgery and in deciding that the second contract was valid and binding on both parties and that it had revived the first contract. That in these circumstances, it could not be said that the plaintiff volunteered to settle the defendant's debt with A.F.C. or indeed that he was Father Christmas. He therefore urged the court to dismiss the appeal.

We have carefully considered the submissions on both sides. In his judgment at pages 19 - 20 and 21 -22 the learned trial judge dealt with these matters adequately. He said:

J5/...

"The evidence adduced by both parties and their witnesses shows that the Defendant accepted this payment inspite of his insistence that he knew nothing about the payment and did not authorise it. His flat denial is not substantiated by any evidence at all. The Defendant's evidence in this respect further shows its uncreditworthiness to say the least. The Defendant's attempt to use his loss of sight as a pretext for not knowing many aspects of the second contract of sale cannot be sustained because he has contradicted himself materially to show that he was lying in that there is ample evidence that after all he knew and signed the first contract. There is no truth that he did not sign the second contract of sale. Be that as it may be the first contract in as far as the evidence goes was not rescinded by the Defendant, the parties continued to make efforts to complete it. They went together to get consent, to the banks to search for money until the Plaintiff succeeded. The Plaintiff paying off of the Defendant's debt with the Agricultural Finance Company Limited/Lima Bank which debt if unpaid would have led obviously to the repossession and sale of the farm by the Lima Bank revived the first contract because it had after all been not killed any one of the parties.....

I must hasten to say that whilst the plea of fraud and forgery were entered on record the evidence that was adduced in court was not clear and sufficient to support the plea. As I have already pointed out and found that the defendant in fact can sign and did sign the contract of sale, this was clearly confirmed by the learned advocate he once engaged in the transaction in dispute.

It is my humble view that the defendant was attempting to escape from his obligations emanating from the contract of sale he committed himself to but this was too late in the day - the event had already been done. In the same vein the defendant attempted to say that there was no Consent and that otherwise it had expired."

We entirely agree with the above learned trial Judge's reasoning, because the defendant having completely denied the fact that he offered to sell the farm to the plaintiff and that he signed the first contract of sale and also that he obtained the state's consent to assign when infact he made the offer, signed the contract and obtained the consent, the court was perfectly entitled to treat him as an unreliable witness and to accept the plaintiff's evidence that he, the defendant in fact signed the second contract. We would add that the learned judge was also perfectly entitled to accept part of Mr. Hamanyanga's evidence and to reject the other i.e. to accept his evidence that the defendant signed the first contract in his presence and to reject his evidence that he did not prepare the second contract because as rightly submitted by Mr. Wood a contract of sale of land or an interest in land does not automatically lapse or cease to have effect by default on the part of one party. To lapse or have no effect it must be properly rescinded after due notice of completion is given to the defaulting party. This was not done in this case. It is quite obvious therefore that Mr. Hamanyanga denied having prepared the contract in order to protect himself. Mr. Mwansa's arguments must therefore fail.

Having upheld the learned trial judge's reasoning that there was no fraud and forgery and that the second contract was valid and binding it would, in our view therefore, be an academic exercise to comment on Mr. Mwansa's last submission that there was no memorandum to satisfy the Statute of Frauds in this transaction. It is also our view that this is a proper case for the granting of an order of specific performance.

We would therefore, for the foregoing reasons, uphold the lower court decision and dismiss the appeal with costs to be taxed in default of agreement.

In passing off, we note that the learned trial judge ordered that the plaintiff, on his own undertaking, do keep the defendant on the farm. We cannot find such an undertaking on the evidence on record. In our view this order is not only unconscionable but likely to stir serious trouble between the parties. However, since there is no cross appeal, we leave it at that.

.....
E.L. SAKALA
SUPREME COURT JUDGE

.....
M.S. CHAILA
SUPREME COURT JUDGE

.....
W.M. MUZYAMBA
SUPREME COURT JUDGE