IN THE SUPREME COURT OF ZAMBIA SCZ APPEAL NO.26 OF 1992

HOLDEN AT LUSAKA

B E T W E E N:

ELPIDIUS MPOROKOSO Appellant

and

GODFREY GABRIEL SIKAZWE Respondent

Coram: Ngulube C.J., Gardner and Chirwa JJs at Lusaka on 2nd June, 1994 and 28th December, 1994

For the Appellant : Mr. R.N. Mandona of Permanent Chambers

For the Respondent: Mr. K.M. Simbao of Mulungushi Chambers

J U D G M E N T

Chirwa J.S. delivered the judgment of the Court.

In this judgment we will refer the appellant Elpidius Mporokoso as the plaintiff and the respondent Godfrey Gabriel Sikazwe as the defendant for that is what they were in the court below.

The undisputed major issues in the case are that the plaintiff in 1985 was the registered owner of property known as Remaining Extent of S/D 56 of S/D E of farm No. 609, Lusaka and in July that year he agreed to sell that property to the defendant at K90,000.00. The contract of sale was signed by both parties. Among the conditions of sale were that completion of the sale would be within 21 days from receipt of the State's Consent to assign; the defendant to pay 10% of the purchase price of which he paid; that at the time of the signing of the contract of sale the defendant was in occupation of the property as a tenant paying a monthly rent of K750.00. Upon obtaining State's Consent to Assign dated 31st January 1986 the plaintiff's advocates wrote the defendants' advocates advising them of the receipt of the State's Consent to Assign and requested them to act on it.

2/...The letter

The letter is dated 19th February, 1986. It is also not in dispute that there was no response from the defendant's advocates to the letter. By letter dated 30th June, 1986 the defendant's advocates wrote the plaintiff's advocates requesting them to complete the sale, as the consent was to expire on 31st August 1986, within the next few days. On 2nd July 1986 the plaintiff personally wrote the defendant cancelling the deal and fixing the monthly rentals at K2,600 from 1st July 1986. On 10th February 1988 the plaintiff obtained State Consent to sublease the property at a monthly rent of K2,000 with effect from 1st July 1986. On the facts the learned trial judge found that there was a valid contract of sale between the parties and that time was of essence. Having found time to be of essence he went further to hold that the time given within which to complete the contract was unreasonable. The trial judge held so bearing in mind the General Conditions of Sale particularily to Condition 21 where the period within which to complete the sale was given as 14 days after the service of the notice or within a reasonable time and also from the conduct of the plaintiff for which he gave notice for the first time and that time elapsed he did not exercise his right to repudiate the contract but instead gave the defendant more time. The learned trial judge took the time to start re-running from the 26th June 1986 when the plaintiff's advocates wrote the defendant's advocates and he held that the cancellation of the sale by the plaintiff personally on 2nd July 1986 as unreasonable time.

In arguing this appeal on the issue of reasonableness Mr. Mandona, for the plaintiff, whilst agreeing with the learned trial judge that time was of essence in the contract submitted that the learned trial judge erred in accepting the plaintiffs interpretation of "within reasonable time" to mean 4 days. He submitted that the plaintiff was not qualified to give such an opinion.

3/...He further

He further argued that after been given notice the defendant did nothing to complete the sale and it would be inequitable at this stage to order specific performance. He also submitted that the letter dated 2nd July 1986 did not constitute rescission of the contract but merely said that the plaintiff would inform his advocates to rescind the contract.

In reply Mr. Simbao for the defendant supported the learned trial judge that the notice given was unreasonable saying that after obtaining State Consent and the same having brought to the attention of the defendant, the plaintiff should have rescinded the contract after 21 days or given 14 days to the defendant to complete. He said this was not done, the contract is therefore subsisting. Further that after the High Court proceedings the defendant tendered to the plaintiff K2m as purchase price to take into account inflation realising that the original purchase price of K90,000 was not enough and the K2m has been accepted by the plaintiff. Further the defendant redeemed the plaintiffs' mortgage with the Building Society in consequence of which the defendant obtained title deeds to the property after registering the High Court judgment with the Lands and Deeds Registry under the provisions of Section 14 of the High Court Act, Cap. 50.

We have considered the submissions made by Counsel and also the evidence on record. As properly conceeded by Counsel for the plaintiff that time was of essence in this contract the learned trial judge cannot be faulted in his finding on this point. Having accepted that time was of essence in this matter, one would also question what notice to complete was issued to the defendant. From the arguments of Mr. Nandona it is clear that none was given and one would therefore say that the contract is still standing.

4/...Mr. Nandona's argument

Mr. Mandona's argument on this only goes to the consideration or purchase price as he submitted that it would be inequitable that the price of K90,000 of 1985 should apply now in enforcing the contract. This was not the argument in the court below, the argument of the plaintiff in the court below was that the defendant had failed to honour his part of the contract although they conceded then that by letter dated 18th September 1986 the defendant said that he was ready and willing to complete the contract. If the letter by the plaintiff of 2nd July, 1986 was not a rescission of the contract there is no other evidence that the defendant was given any other notice. It is therefore clear that by September, 1986 the defendant was willing to complete but the plaintiff did not facilitate this. The learned trial judge cannot therefore be faulted for having dismissed the plaintiffs prayer for rescission of the contract and ordered specific performance. This appeal is therefore dismissed. As there was after the High Court proceedings a tender of K2m which was accepted by the plaintiff, we hold the view that that was adequate purchase price taking into account inflation. Costs to the defendant to be taxed in default of agreement.

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M.S. Ngulube
CHIEF JUSTICE

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B.T. Gardner
SUPREME COURT JUDGE

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D.K. Chirwa
SUPREME COURT JUDGE