

HOLDEN AT LUSAKA.,

(Civil Jurisdiction)

AGIP ZAMBIA LIMITED

APPELLANT

AND

UNION BANK (ZAMBIA) LIMITED

RESPONDENT

Coram: Bweupe, DCJ, Sakala and Chaila JJS.

18th September and 19th November, 1997.

For the Appellant, Mrs. C.K. Kafunda of Kafunda and Company, Ndola, assisted by Mr. E. Lungu of Andrew Masiye and Company, Lusaka.

For the Respondent, Mr. S.C. Mwananshiku of Mun'gomba Associates, Lusaka.

J U D G M E N T

Sakala JS delivered the Judgment of the Court.

Cases referred to:

1. Hurbet Vs Frehem (1842) 133 ER 1338.
2. Leeman Vs Stocks (1951) 1 ALL ER 1043.
3. Caton Vs Caton (1867) LR2 HL 127.
4. Vincent Mijoni Vs Zambia Publishing Co. Ltd. Appeal No.10/1986
5. Mundanda Vs Mulwani & Others (1987) ZR 30.

This is an appeal against a Judgment of the High Court ordering specific performance of a contract of sale of Stand No. 4199 Ndola and directing that the respondent do reimburse the appellant, after a proper value is made, of any money spent on developing the land in question. The court also ordered that if the appellant were not prepared to part with the land they agreed to sale to the plaintiff, they must pay, in the alternative, damages suffered or incurred as a direct result of the cancellation of the contract.

For convenience, the appellant will be referred to as the defendant and the respondent as the plaintiff which they were in the court below.

The facts and history of this appeal can be stated very shortly. The learned trial judge either accepted or did not reject the following facts.

In or about 1984 the then Bank of Credit and Commerce (hereinafter referred to as BCCI (Zambia) Limited entered into negotiations

with the defendant for the sale of an

undeveloped portion of stand No. 4199, Ndola. Both parties engaged a firm of Messrs. Jaques and Partners to effect the sale transaction. By a letter dated 11th May 1984, addressed to the plaintiff, Messrs. Jaques and Partners forwarded a contract of sale and an assignment to the plaintiff for execution. The plaintiff executed the contract and the assignment and returned them to Messrs. Jaques and Partners enclosing therein a Banker's cheque in the agreed sum of K50,000 as consideration, payable to the defendant for the sale of the said premises. On 24th July 1984 Messrs. Jaques and Partners forwarded the signed contract of sale, the signed assignment and the banker's cheque to the defendant for them to sign their part of the contract and the assignment. Upon receipt of the said documents the defendant advised Messrs. Jaques and Partners that it was not the entire stand No. 4199 that was being sold to the plaintiff as indicated in the contract of sale and the assignment but that it was a subdivision of the said plot namely, No. 4199B that was intended for sale. Messrs. Jaques and Partners in turn informed the plaintiff of the new developments and also informed the plaintiff that the defendant was undertaking the subdivision of the property. When the subdivision was carried out, the No. 4199 was cancelled and the stand was subdivided by the council with the consent of the commissioner of lands. The site was re-numbered as stand No. 5505 and the undeveloped stand of stand No. 4199 was numbered as stand No. 5506. This was the portion that was to be sold to the plaintiff.

Between 1st July 1986 and 2nd May 1992, numerous correspondence relating to the completion of the sale of the subdivision exchanged hands between the council and Messrs. Jaques and Partners on one hand and between Messrs. Jaques and Partners and the defendant on the other hand in which the council advised Jaques and Partners of the completion of the subdivision and in which Messrs. Jaques and Partners requested the defendant to furnish the underlease between the council and the defendant so that it can be used in the finalisation of the transfer of the documents. But by letter dated 17th June 1992, the defendant purported

to unilaterally terminate the contract of sale and hitherto refused to deliver the said underlease to the council nor to the common advocate. The foregoing facts were accepted by the learned trial judge as being common cause.

The plaintiff's Managing Director testified that on 10th August 1991 the plaintiff bank purchased the entire share capital of BCCI and acquired all the liabilities and assets. The Managing Director explained that the delay in subdividing the plot was neither the fault of the plaintiff nor the fault of the defendant.

The second witness of the plaintiff confirmed the takeover of BCCI and the entering into a contract with the defendant. According to **this** witness the defendant indicated that they are not going to sale the land in issue because the subdivision had taken too long.

On behalf of the defendant, the Marketing Manager testified that in 1984 the plaintiff was advised that they were to buy only a portion of the land in question. According to the Marketing Manager BCCI folded up. They did not know the Union Bank. They did not enter into any contract with the Union Bank.

The learned trial judge considered the facts not in dispute and also examined the evidence on record. He found that since the parties were acting through one lawyer the defendant ought to have known that the Union Bank had taken over the activities of BCCI. He dismissed the argument that the Union Bank was a stranger to the negotiations and that on the documentary and oral evidence on record a legally binding contract existed between the defendant and the plaintiff. On section 4 of the Statute of Frauds, 1677, the court held that although the contract of sale and the agreement were not signed by the defendant, the documents together with the letters exchanged between the parties through their common advocate formed an enforceable contract of sale. The court found that time was not of essence and that in any event the delay in subdividing the land was caused by the council which was not a party to the contract.

The court concluded that the plaintiff performed their part of the contract by executing the contract of sale and the agreement and sending the said document to the defendant through the common advocate as well as by forwarding the purchase price in the sum of K50,000.00

On behalf of the defendant Mrs. kafunda who filed two grounds of appeal argued only one ground before us namely, that the learned trial judge misdirected himself in both law and fact when he held that there was a valid contract between the plaintiff and the defendant.

The gist of the submissions on the ground argued before us was that the contract of sale and the assignment both signed by the plaintiff only did not contain a correct description of the subject matter. Counsel contended that the real issue was whether the contract of sale and the assignment signed by the plaintiff only constituted sufficient memorandum to bring them within the requirements of the Statute of Frauds. It was counsel's submission that on the facts and on the evidence on record there was no valid contract between the plaintiff and the defendant, contending that the two documents signed by the plaintiff but not signed by the defendant did not constitute a sufficient memorandum within section 4 of the Statutes of Frauds. It was further counsel's contention that the consideration in the sum of K50,000, although received by the common advocate, was not received by the defendant. Mrs. Kafunda who referred to some very useful decided cases informed the court at the end of her submissions on ground one that she did not intend to argue the second ground of appeal where the trial court ordered the defendant to pay the plaintiff damages for rent expenses incurred in the rented building as an alternative. Among the authorities cited by Mrs. kafunda in support of the submissions on ground one are:

Hurbet Vs Frehem(1) and Leeman Vs Stocks (2).

Responding to the submissions on ground one, Mr. Mwananshiku, who also filed written heads of argument submitted in his oral arguments that the documents prepared by Messrs. Jaques and Partners with the vendors names were enough to constitute a signature within the meaning of Section 4 of the Statute of Frauds. For this submission counsel referred the court to the Leeman case also cited by Mrs. Kafunda. Mr. Mwananshiku argued that the documents having been prepared on the express instructions of the defendant, the name written was sufficient signature even if the documents were not signed by the defendant. For this submission counsel cited the case of Caton V Caton (3).

Counsel further contended that from all the documents exhibited and from the conduct of the defendant, requesting for the subdivision, a valid contract can be inferred between the parties.

We have very anxiously considered the documentary and oral evidence on record and the submissions by both learned counsel. We have also examined the judgment of the learned trial judge. This case in our view underlines the risks associated with the engagement of common advocates in conveyancing matters. We have here a situation where Jaques and Partners acted for both parties until when a dispute arose.

The issue for determination as we see it however is whether the documents prepared by the common advocates constituted a sufficient memorandum within the meaning of section 4 of the statute of Frauds. In the case of Vincent Mijoni Vs Zambia Publishing Company Limite (4) (unreported).

This court said:

"It seems to us that it is now settled law that for a note or memorandum to satisfy section 4 of the Statute of Frauds, the agreement itself need not be in writing. A note or memorandum of it is sufficient provided that it contains all the material terms of the contract such as names or adequate identification of the parties, the description of the subject matter and the nature of consideration

(see Cheshire and Fitfoot's Law of Contract 9th Edition at page 186 under the heading, The contents of the note or memorandum). It has also been said that letters may themselves constitute the contract and the written evidence of it. It follows that whether there is a binding contract or not it must depend on the construction of the letters."

The exchange of documents and correspondence between the parties as prepared by the common advocates is not in dispute. These documents and correspondence disclose the existence of the offer and acceptance, named the parties, identified the property and showed the price which was paid by the plaintiff through the common advocates.

The gist of the submission by Mrs. Kafunda was that no binding contract existed on the ground that the contract of sale prepared by the common advocate was never signed by the defendant though signed by the plaintiff and that the assignment was equally not signed by the defendant though signed by the plaintiff. Mr. Mwanashiku's contention on the other hand was that these documents were prepared at the express instructions and authority of the defendant.

The case of Leeman Vs Stocks(2) cited by both learned counsel is very instructive and illustrative on the issue of signature and sufficient memorandum. The facts of the case are these:

"The defendant instructed an auctioneer to offer his house for sale. Before the sale, the auctioneer partially filled in a printed form of agreement of sale by inserting the defendant's name as vendor and the date fixed for completion. The plaintiff was the highest bidder, and after the sale the auctioneer inserted in the form the plaintiff's name as purchaser, the price and a description of the premises. The plaintiff signed the form. The defendant then refused to carry out the contract, and the plaintiff sued for specific performance. The defendant pleaded failure to satisfy section 40(1) of the Law of Property Act 1925, and in particular that he had never signed any document."

Roxburg, J (Chancery Division) distinguishing the case of Hurbet cited by Mrs. Kafunda held as follows:

"(i) in procuring through his agent (the auctioneer), the purchaser's signature to the document so as to bind the purchaser, the vendor was, by his agent, recognising his name which was written at the beginning of the document as the affixing of his mark to the document, and, as the purchaser signed the document on the understanding that it contained the terms of his contract with the vendor, whose name appeared in the document, and as it was the intention both of the purchaser and of the vendor's agent that this should be the final written record of the contract which had already been made between the parties, the document was a sufficient memorandum to satisfy the law of Property Act, 1925, S. 40(1) and, accordingly, the purchaser was entitled to specific performance of the contract, it being immaterial that the document was a formal one, as it had been used with informality by the auctioneer.

(ii) although the document itself contemplated by its terms that it should be signed by both parties, evidence was admissible to show that neither the purchaser nor the auctioneer, acting on behalf of the vendor, intended any other signature to be added to the document and that it was the intention of the parties that the document should be the final written record of the contract.

(iii) the name of the vendor was inserted in the document by the vendor's agent in anticipation of the result of the auction sale, and, when the purchaser signed the document, the vendor's name was in it in relation to the contract which had then come into existence as a binding contract between the vendor and the purchaser, and, therefore, it was immaterial that the vendor's name was inserted in the document before the auctioneer knew who would be the purchaser. It was also immaterial that the vendor's christian names were not written out in full before his surname in the document."

This case although an English decision is, in our view, very persuasive indeed and is on all fours with the facts in the present case. We take note that the major reason for the defendant in the present case in refusing to perform the contract was the delay to subdivide the plot caused by the council. As stated in the evidence neither party could be faulted for the delay. We accept that the documents were drafted on the express instructions of the vendor.

We are satisfied that upon a proper construction of the correspondence and the documents emanating from the parties' mutual advocates, a sufficient note or memorandum to satisfy the statute existed, buttressed by the contract of sale and assignment prepared by the common advocates, signed by the plaintiff/purchasers though not signed by the defendant/vendor. We are therefore satisfied that a binding contract existed between the parties and we accordingly order that there be specific performance. On this ground, this appeal cannot succeed.

Although the second ground of appeal was not argued we take note that it relates to the issue of damages awarded in the alternative. We are mindful that specific performance is a discretionary remedy. In the case of Mundanda Vs Mumwani and others this court said:

"We will deal first with the question of the learned trial judge's discretion to make an order for specific performance. In this respect we are quite satisfied that the majority of the authorities cited to us related to specific performance of contracts other than contracts for the sale of land. The law concerning specific performance of contracts relating to the sale of the land is quite clearly set out in paragraph 1764 of Chitty on Contracts 25th Edition, which reads in part:

LAND.

The law takes the view that damages cannot adequately compensate a party for breach of contract for the sale of an interest in a particular piece of land or of a particular house (however ordinary)....

This authority is supported in countless other instances and in this case it is quite clear that the learned trial judge did not have his attention drawn to the fact that his discretion in relation to specific performance of contracts for the sale of land was decidedly limited."

Damages in the present case cannot in our view adequately compensate the plaintiff. We therefore order that the plaintiff is entitled to specific performance of the contract of sale. The appeal is therefore dismissed with costs to be taxed in default of agreement.

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B.K. BWEUPE,
DEPUTY CHIEF JUSTICE.

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

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