MWENYA AND RANDEE v KAPINGA (1998) S.J. 12 (S.C.)

SUPREME COURT
BWEUPE, D.C.J., SAKALA AND MUZYAMBA, JJ.S.
(S.C.Z. JUDGMENT NO. 4 OF 1998)

Flynote

Contract Law - Specific performance - Statute of Frauds
Contract Law - Time - When it is of the essence

Headnote
The 1st appellant agreed to sell her house to the respondent for the sum of K12,000,000. Meanwhile she asked the respondent to pay up K800,000 to enable her redeem the mortgage under which the house was. The respondent paid the said amount and the 1st appellant redeemed the mortgage accordingly. But when the respondent wanted to pay the rest of the purchase price, the 1st appellant refused to accept the money saying the 1st appellant had taken too long to find it. She then signed a second contract of sale with the 2nd appellant and the respondent sued. The High Court found in favour of respondent and ordered specific performance of the contract. The appellants appealed to the Supreme Court.

Held:
(i) For a note or memorandum to satisfy Section 4 of the Statute of Frauds, the agreement itself need not be in writing. A note of 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 the consideration

(ii) It may be said that time is essential firstly, if the parties expressly stipulate in the contract that it shall be so; Secondly, if in a case where one party has been guilty of undue delay, he is notified by the other that unless performance is completed within a reasonable time the contract will be regarded as at end; and lastly, if the nature of the surrounding circumstances or of the subject makes it imperative that the agreed date should be precisely observed.

For the appellants: Miss Sharpe of Messrs Mopani Chambers
assisted by Mr Wood of Wood and Company.
For the Respondent: Mr Musaba of Mungomba and Associates.

Judgment
BWEUPE, D.C.J.: delivered the judgment of the court.

This is an appeal by the appellant against the judgement of the High Court granting the respondents specific performance of a contract for the sale of Plot No. 4109 Sunningdale, Lusaka to the respondent by the 1st appellant.

The 1st appellant, Miss Jane Mwenya by a letter dated 25th August, 1992, offered to sell to the

respondent plot No. 4109 for the sale price of K12,000,000. As a precondition to the sale the 1st appellant requested the respondent to pay K800,000 to assist her in redeeming the mortgage under which the house was at the time. The 1st appellant received K800,000 and redeemed the mortgage. When the respondent sent the balance of the purchase price, the 1st appellant refused to accept the money because the respondent allegedly had taken too long to find the money.

The respondent has lived in that house for six (6) years as a tenant since 7th January,1987, and had paid the K12,000,000 into court ready to be collected by the appellant.

On 22nd September, 1993, a third party was added to the proceedings, Mr Jason Randee, now a second appellant, a person to whom the 1st appellant has allegedly sold the house. The 2nd appellant is claiming that there is a valid contract of sale between him and the 1st appellant in that in October, 1992, the 1st appellant sold the house to him for K13,000,000. He paid K9,000,000 as deposit and remained with K4,000,000 unpaid.

The court was asked to resolve the following issues:

(a) Whether the contract of sale made by the 1st appellant and the respondent was ever brought to an end by rescision or other method.
(b) Whether the contract of sale made by the 1st appellant and 2nd appellant (intervenor) was valid;
(c) Whether Intervenor was an innocent bona fide purchaser for value without notice and whether he acquired good title to the house;
(d) Which one of the two men, respondent and Intervenor, should be recognised as a legal purchaser of the house.

In its judgment the court said:

> "The court has not been shown a copy or the original of the contract signed by the plaintiff and defendant. The court does not know what the terms and conditions of the agreement were. As a result of this
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> omission, the court shall infer that the agreement was unconditional and that time of completion of the sale was not of the essence...."

The learned judge summarised the evidence. He said according to the evidence of the respondent , the contract was made on 25th August,1992, when the respondent responded to the advertisement for sale of the house made by the 1st appellant. On 26th August, 1992, the respondent paid K800,000 to the 1st appellant. The respondent then started to source for funds to buy the house. During September, 1992 the 1st appellant tried to get the purchase price from the respondent but she failed. On 12th October, 1992, the 1st appellant decided to sell the house to the 2nd appellant and signed a contract for sale with Mr Randee, the 2nd appellant. The court went on:

> "The following account clearly shows that Miss Mwenya was too much in a hurry and did not give the plaintiff sufficient time to look for the purchase price. She only gave him the month of September, 1992. I do not think that delay of 30 days to find K12 million can be said to be innordinate or unreasonable. A delay of four to six months would have been undoubtedly too long for any vendor to continue waiting for the purchase price. The one month or one and half months delay by the plaintiff to find K12 million could

not be said to be too long to justify a rescission of a contract. Since time of completion of the sale was not a term of the contract, the plaintiff was not guilty of breach of any term by the short delay in finding the purchase price.... I rule that the contract of sale between plaintiff was still subsisting when the 1st appellant purported to rescind it, and it still subsists now. The purported sale of the house to Mr Randee was a breach of contract on the part of the defendant."

The appellants abandoned grounds 1 and 7. They argued grounds 2-6. The learned advocates for the appellants, Miss Sharp contended in ground 2 that the learned trial judge erred in law by holding that a valid contract was in existence when there was no evidence produced before it to prove such contract. What was in existence was preliminary agreement which was not enforceable in the absence of a formal contract of sale. She argued that the correspondence between the 1st appellant and the respondent amounted to a preliminary negotiation which was included to culminate into a concluded contract but from which either party could retire before the formal contract concluded. she then referred the court at Halsbury's Law of England 3rd Edition Vol. 34 page 192.

In ground 3 Miss Sharp submitted that the court below erred in law by granting the remedy of specific performance to the respondent when there was a more appropriate remedy of damages since there was a bona fide purchaser for value without notice: refer Pacific Mother Auctions Private Limited v Motor Credit (Hire Finance) Limited (1965) 2 ALL E.R 105.

She argued ground 5 that in the alternative, if this court finds that the 1st appellant's letter of 25th August, 1992 amounted to a valid contract, then the

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Judge erred both in law and in fact by not finding that the contract was terminated by the respondent's own breach: See Encyclopedia of Forms and Precendents 4th Edition Vol 17 page 749, Sutton and Shannon on Contracts Butterworths 7th Edition page 325.

In ground 6, Miss Sharp submitted that the court below erred in law by applying the Sales of Goods Act 1893 to transaction involving sale of Land.

The respondent's advocate Mr Musaba of Mungomba and Associates responded to five grounds of the appellants grounds of appeal. He said the appellants' ground of appeal is misconceived in that there is sufficient evidence of a concluded contract between the 1st applicant and the respondent which contract neither left anything to future treaty nor specifically stated that the parties would treat the said contract merely as a preliminary agreement and/or subject to a further or formal contract to be drawn. Mr Musaba argued that the sufficient note or Memorandum as desired by the Statute of Frauds 1677 being the 1st appellant's letter of offer to the respondent dated 25th August, 1992, did not indicate that the sale transaction would subject to a formal contract to be drawn up nor is such an inference capable of being drawn from the said letter. In any case the preliminary negotiations were held by the parties prior to the letter of offer. He referred to page 25 of the record of appeal and Fry and Specific performance 8th Edition page 25 paragraphs 506 - 508.

He argued ground 3 that notwithstanding the fact that completion was to be within thirty days from the date of contract, the court did not fall into error in law when it held that the contract between the 1st appellant and the respondent was unconditional in respect of time of completion in that there was nothing in the said letter indicating that time was of the essence of the contract. He said the holding of the judge in this respect ought not to be misconstrued as having implied that the contract between the parties was unattended by conditions in its entirety, but that even though the parties agreed that completion would be within thirty days,

nevertheless they did not agree nor intend that time be of the essence of the contract. See Cheshire and Fifoot's Law of Contract 10th Edition 499 paragraphs 1 - 3 where the learned authors say:

> "By way of summary, it may be said that time is essential firstly if the parties expressly stipulate in the contract that it shall be so; secondly, if in a case where one party has been guilty of undue delay, he is notified by the other that unless performance is completed within a reasonable time the contract will be regarded as at end; and lastly if the nature of the surrounding circumstances or of the subject matter makes it imperative that the agreed date should be precisely observed."

Mr Musaba argued that nothing at page 25 indicates that time was of the essence. He said contract can only be repudiated if a notice is given, the stipulated period. He refers the court to appeal No. 4 of 1992 Dennis Lyuwa v Cold Storage of Zambia (unreported) and concluded that in the absence of completion Statement by the Vendor to the purchaser time was not of the essence of the contract.

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In ground 4 Mr Musaba submitted that the learned judge was in order to have decreed the remedy of specific performance in favour of the respondent instead of damages and that the second appellant was not a bona fide purchaser for value without notice. He argued that an order for damages would not have been sufficient to redress the respondents plight and therefore the judge properly exercised his discretion in pronouncing an Order for specific performance in the respondent's favour as being the more appropriate remedy. He referred the court to the case Hutton v Walting (1947) 2 AII E R 641 at 641 where Jenkins, J., said:

> "The normal common law remedy for breach of a contract, namely damages is not in all cases an adequate remedy."

He also referred to the case of Tito v Waddel (No. 2) (1977) Ch. D.P. 106 at p. 322 where it was stated:

> "The question is not simply whether damages are an "adequate" remedy but whether specific performance as it were will do more perfect and complete justice than award of damages.
> This is particularly so in all cases dealing with a unique subject matter such as land."

Mr Musaba argued that the decree upon being pronounced was practically enforceable and has in fact since been complied with as in fact, the respondent prior to and during the proceedings, was a tenant of the 1st appellant, and already in possession of the property the subject of the present appeal. A certificate of title has since been issued in the respondent's name and his family continues to live on the property.

Mr Musaba further argued that the 2nd appellant was not a bona fide purchaser for value without notice as he had:

(a) Actual notice of a purportedly and/or allegedly failed agreement of sale of the same property between the 1st appellant and the respondent. He referred to Halsbury's laws Vol. 16 4th Edition para. 1322 on p. 887 where the learned author states:

> "Notice may be actual or constructive and where the said notice is imputed on the

subsequent purchaser, then the plea of purchaser for value without notice is defeated."

He further argued in the alternative that:

(b) The 2nd appellant had constructive notice of the fact that the respondent was in possession as tenant of the property he too desired to purchase. He argued that notice that the land is in possession of tenant puts the purchaser on inquiry as to the terms of the holding and he has constructive notice of the tenants' rights including a possible agreement for sale to him.

He referred the court to Hunt v Luck (1902) 1 Ch. D.P p 428 where it was:

"held in that case that the occupation of land by a tenant affects a purchaser of land with constructive

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notice of all that tenants rights including an agremment for sale to him by the vendor."

"A tenant's occupation is notice of all the tenant's rights. It means that if a purchaser has notice that the vendor is not in possession of the property, he must make inquiries of the person in possession and find out from him what his rights are and, if he does not choose to do that, then whatever title he acquires as purchaser will be subject to the title or rights of the tenant in possession."

He said the 2nd appellant had constructive notice in that when he was taken to view the house by the 1st appellant, they found people living in the house. Hence no title was acquired by 2nd appellant and if he acquired one it was subject to the rights of the respondent.

Mr Musaba responded in ground 5 that the judge did not fall into error in fact or in law by not finding that the said contract was terminated by the respondent's own breach in that acts or omissions were done or the part of the respondent as to amount to a breach of the contract of sale. To the contrary the 1st appellant failed and/or neglected to perform part of the contract as agreed on by the parties, in the contract being the 1st appellant's letter of 25th August, 1992, thus:

(a) the respondent paying to the first appellant as part of the purchase price an initial amount of K800,000.00
(b) that the 1st appellant using the said sum to redeem mortgage she had on the property under sale;
(c) after redemption, the 1st appellant than transferring title of the property to the respondent

However, the 1st appellant failed and/or neglected to transfer title of the property to the respondent before she could receive the balance of the purchase price and as contracted between the parties. He referred the court to the case of Killner v France (1946) 2 all E.R. p. 83 where Stable, J., said:

"completion" in the contract had its usual meaning i.e. the complete conveyance of the estate and final settlement of the business."

He argued that in the instant case, the 1st appellant was firstly supposed to transfer title of the property to the respondent: the complete conveyance of the estate, before the respondent could pay her the balance of the purchase price: the final settlement of the business.

As regard ground 6, Mr Musaba submitted that though it was conceded that the sale of Goods Act 1893 does not apply to contracts involving disposition of an interest in land nevertheless reference and/or reliance on the said legislation by the judge is not sufficient as to warrant this court allowing this appeal for the following reasons:

(a) that the provisions of Sections 10 and 22 of the Sale of Goods Act 1893 on stipulations as to time and a bonafide purchaser for value without notice are not at variance with the general law of contract;

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(b) that an award of damages to the respondents would not have been adequate to redress his plight as he had acquired a very special and/or very unique interest in the property having lived in it for at least eight (8) years as at the date of judgment and thus the decree of Specific Performance has the more appropriate remedy. He then urged the court to dismiss the appeal with costs.

We have anxiously considered the oral evidence on record and the submissions by both learned counsel. We have also examined the judgment of the learned trial judge, the documents and authorities cited. The issue for determination, as we see it, however, is whether the letter written by the 1st appellant to the respondent on 25th August,1992, constitute an offer.

The letter reads as follows:

"Mr. P. Kapinga
LUSAKA
Dear Sir,
re: SALE OF PLOT NO. 4109 - SUNNINGDALE
As per our discussion, I now offer you this Plot at K12 Million. The first payment of K800,000.00 has to be paid immediately. On completion of this transaction, I will transfer the title deeds and you will pay me the balance, and this will be within 30 days from the date hereof.

Kindly let me know if this offer is accepted.

Yours faithfully,

Signed
JANE MWENYA"

The above letter was written on 25th August, 1992 and on 26th August, 1992, the respondent accepted the offer and paid K800,000 deposit as demanded in the letter of offer and which deposit the 1st appellant used to redeem the mortgage on the property.

Miss Sharp on behalf of the appellant argued that the learned trial judge was in error when he held that a valid contract was in existence when there was no evidence produced before it to

prove such contract. She said what was in existence was a preliminary agreement which was not enforceable in the absence of a formal contract of sale. She further argued that the correspondence between the 1st appellant and the respondent amounted to a preliminary negotiation which was intended to culminate into a concluded contract of sale.

In the case of Vincent Mijoni v Zambia Publishing Company Limited Appeal No. 10/1986 (unreported) this court had this to say:

> "It seems to us that it is now settled that for a note or memorandum to satisfy Section 4 of the Statute of Frauds, the agreement itself need not be in writing.

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> A note of 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 the consideration (See Cheshire and Fitfoot's Law of Contract 9th Edition at p.186 under the heading:
>
> The contents of the note or memorandum). It has also been said that latters 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 letter dated 25th August, 1992, by the 1st appellant addressed to the respondent is not in dispute. It has identified the parties, the subject matter of the agreement and the consideration of K12 million. The offer was made by Miss Jane Mwenya to Mr P Kapinga as per their discussions to purchase Plot 4109, Sunningdale, Lusaka at K12 million. The first payment of K800,000.00 had to be paid immediately. The name of the vendor and the name of the purchaser, the subject matter plot 4109 and the consideration of K12 million were all featured in that letter of 25th August, 1992. The accepatance of the offer was clearly made by payment of K800,000.00 deposit which the vendor used to clear the mortgage. There was therefore nothing left to be included in the future.

In the case of Mundada v Mulwani and Others (1987) Z.R. we said:

> "We will deal first with the question of the learned 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 the contracts for the sale. The law concerning specific performance of contracts relating to the sale of land is quite clearly set out in paragraph 1764 of contracts 25th Edition which reads in part:-
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> <u>Land</u>
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> The law takes the view that damages cannot adquately 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 cases and 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 for the sale of land was decidedly limited."

In this case the preliminary negotiations were had by the parties as indicated by the letter. We

agree with the learned author in Fry on Specific Performance 6th Edition at page 244 paragraph 506 - 508 that when the contract is not expressly stated to be subject to formal contract it becomes a question of construction, whether the parties intended that the term agreed on should merely be put into term or whether they should be subject to a new agreement the terms of which are not expressed in details.

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In Lloyd v Nowell (1985) 2 Ch. D.P. 744, a writing purporting to be an agreement for a lease but expressed to be "made subject to the preparations and approval of a formal contract" was held not to be a concluded contract and the vendor could not waive such a stipulation. In the matter before us the parties intended that the terms agreed on should merely be put into form.

In relation to delay Cheshire and Fifoot's Law of Contract 10th Edition on page 499 pages 1, 2 and 3 thereof puts the matter thus:

> "By way of summary, it may be said that time is essential firstly, if the parties expressly stipulate in the contract that it shall be so; Secondly, if in a case where one party has been guilty of undue delay, he is notified by the other that unless performance is completed within a reasonable time the contract will be regarded as at end; and lastly, if the nature of the surrounding circumstances or of the subject makes it imperative that the agreed date should be precisely observed."

We are satisfied, therefore, that upon a proper construction of the 1st appellant's letter dated 25th August, 1992, as at page 25 of the record a sufficient note or memorandum existed of which time was not of the essence. That there was no unreasonable delay and that no completion statement was issued. We would also hold as did the trial judge that there was no basis for rescission.

We now turn to ground four. It was submitted that the trial judge erred in law by granting the remedy of specific performance to the respondent when there was a more appropriate remedy of damages since there was a bonafide purchaser for value without notice. The respondent's counsel argued that the learned trial judge was in order to have decreed the remedy of specific performance in favour of the respondent instead of damages and that a 2nd Appellant was not a bonafide purchaser for value without notice. He said damages would not have been sufficient to redress the Respondent's plight. He referred to the case of Tito Waddel (No. 2 1997) Ch. D.P. 106 at p. 322 where it reads:

> "The question is not simply whether damages are an 'adequate remedy but whether specific performance as it were will do more perfect and complete justice than award of damages. This is particularly so in all cases dealing with a unique subject matter such as land."

The learned lawyer for the respondent further argued that the 2nd appellant was not a bonafide purchaser for value without notice as he had:

(a) actual notice of a purportedly and/or allegedly failed agreement of sale of the same property between the 1st appellant and the respondent. He then referred us to Halsbury's Laws of England para 1322 on page 887 Vol. 16 4th Edition where the learned author said:

> "Notice may be actual or constructive and where he said notice is imputed on the subsequent purchaser then the plea of purchaser without notice is defeated."

(b) in the alternative the 2nd appellant had constructive notice of the fact that the respondent was in possession as tenant of the property he too desired to purchase.

The learned counsel argued that Notice that the land is in possession of a tenant puts the purchaser on inquiry as to the terms of the holding and he has constructive notice of the tenant's rights including a possible agreement for sale to him. He referred us to the case of Hunt v Luck (1902) 1 Ch. D P 428 where it was held:

> "in that case that the occupation of land by a tenant affects a purchaser of land with constructive notice of all that tenants' rights including an
> agreement for sale to him by the vendor.

It means that if a purchaser has notice that the vendor is not in possession of the property he must make inquiries of the person in possession of the tenant who is in possession - and find out from him what his rights are and, if he does not choose to do that then whatever title he acquires as purchaser will be subject to the title or rights of the tenant in possession."

We have considered this ground of appeal. It is clear from the record and the judgment of the trial court that when the 2nd appellant visited the property he found the respondent in possession of the property. He had therefore constructive notice and when he purchased the property his purchase was subject to the respondent's title or rights of the respondent.

We would hold as did the learned trial judge, that the 2nd appellant was not a bonafide purchaser for value without notice. We adopt the opinion of the learned author of Halsbury's and the enunciation in Tito v Waddel (No. 2); Hunt v Luck; and other authorities herein before adequately referred to. This ground would also fail.

We have held in ground 3 that a letter at page 25 of the record constituted a valid contract and that there was no basis for rescission. We find it superflous to repeat ourselves except to say by way of emphasis that the purported rescission was null and void.

All in all and for reasons we have given, we would dismiss this appeal. We confirm the trial judge's decision ordering the specific performance of the contract for the sale of Plot 4109, Sunningdale, Lusaka to the respondent by the first appellant. Costs to the respondent and to be taxed if not mutually agreed.

Appeal dismissed
