

IN THE SUPREME COURT FOR ZAMBIA

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N :

EVERANDO BALDUCCI

1ST APPELLANT

MARGARET PHIRI

2ND APPELLANT

and

RUTH NAKAZWE

RESPONDENT

Coram: Sakala, A/DCJ, Chirwa, Lewanika, JJS

6th August and 2nd November, 1998

For the Appellant: Sachika Sitwala, Lighthouse Chambers

For the Respondent: Dr. J. Mulwila, Ituna Partners

J U D G M E N T

Lewanika, JS. delivered the judgment of the court.

This is an appeal against a decision of a Judge of the High Court dismissing the appellant's claims for a determination of the following matters in proceedings instituted by an Originating Summons:-

1. That the defendant as the registered holder of the property known as plot No. 6875 Bende Road, in the city and province of Lusaka holds such property in the capacity and a trustee for and on behalf of the plaintiff, the said Averando Balducci.
2. That the defendant do yield up vacant possession of the said property to the plaintiff who has since acquired capacity to hold the property directly and that the court do make an order for possession of the premises to transfer to the plaintiff and it accordingly be so decreed.
3. That it be declared in relation to the property known as plot No. 6873 Bende Road, Olympia Park that the defendant

deceived the plaintiff by fraudulently representing that she was able to and would hold the property from the vendor as trustee for the plaintiff and would surrender title to the plaintiff and his intended investment company as soon as the plaintiff ceased to serve in the diplomatic service and qualified to own land in Zambia.

The case for the appellant (who was the plaintiff in the court below) was that he was an Italian National serving as a diplomat in one of the United Nations agencies in Zambia. The respondent (who was the defendant in the court below) is a Zambian National and had an intimate relationship with the appellant with whom she lived. The appellant had decided that at the end of his tour of duty he would settle and invest in Zambia. Sometime in May, 1988 the appellant decided to buy the property in question from a Dr. Mwewa. The appellant sought the advice of his lawyer a Mr. Francis Kongwa who advised him that because of his alien and diplomatic status he could not own real estate in Zambia in the light of the provisions of the Land (Conversion) of Titles Act and it was agreed between himself and the lawyer that the property be conveyed to the respondent and that at some future date when the appellant had retired from the diplomatic service and formed a company with an investment licence the respondent would convey the property to the appellant's company. To this end the appellant wrote a letter to the respondent dated 15th May, 1988 setting out those conditions. The property was registered in the name of Margaret Phiri the mother of Dr. Mwewa and an assignment was drawn up by Mr. Kongwa who acted for both parties transferring title from Margaret Phiri to the Respondent. The learned trial Judge found as a fact that the agreed purchase price was paid by the appellant to Dr. Mwewa and also found as a fact that the respondent did not pay for the property.

On 11th February, 1993 the appellant wrote to the respondent advising her that he had retired from service in the United Nations and had incorporated a company which was in the process of obtaining an investment licence and that he had instructed a firm of Advocates to prepare the necessary documentation to transfer the property from the respondent to the company. By letter dated 11th November, 1994 the respondent's Advocates wrote to the appellant's Advocates denying the existence of any arrangement between the appellant and the respondent and asserting that the respondent had purchased the property in her own right. This led to the appellant instituting the present proceedings. Although the learned trial Judge found on the evidence before him that the arrangement existed and that the respondent did not pay for the property he declined to grant the appellant the orders that he sought on the ground that the arrangement was illegal and therefore void ab initio. Hence this appeal.

Counsel who appears for the appellant has advanced ten grounds of appeal and it is not our intention to refer to them in extensio. The gist of his argument was that there was no evidence on record on which the learned trial Judge could have found that the transaction between the appellant and the respondent was unlawful. He said that the evidence on record was that the appellant as a diplomat and non-Zambian could not have land registered in his name or in a company in which he had an interest and that this was on account of his contract of service with the United Nations. He submitted that there was no law that stopped him from having an interest in or owning land without registering it in his name or registering it in another person's name. And that his option to purchase the land and agreement to have it registered in his trusted friend's name for the time being was both legitimate and lawful and that moreover he had relied on his lawyer's advice. Further that having found that it was the plaintiff who purchased the property and that the claim by the respondent that she

was the one who purchased the property was false ^{the} ~~and~~ learned trial Judge ought to have employed the law in favour of the appellant. Counsel then referred us to a passage by LORD UPJOHN in the case of PETTIT VS. PETTIT, 1970 A.C. or 1969 2. A.E.R. P. 385 where he said that, "Whenever a man buys either real or personal property and has it conveyed or registered or otherwise put in the name of another, or of himself and another jointly, it is presumed that other holds the property on trust for the person who has paid the purchase money."

Counsel also referred us to other English authorities on the point and said that they were applicable in Zambia.

Alternatively, counsel submitted that as a matter of law and equity, the respondent cannot profit from what has been found by the trial court to be fraud by herself. He urged us to allow the appeal and order that the property be transferred to the appellant.

Counsel for the respondent in reply responded to the appellant's 10 grounds of appeal and likewise we do not intend to deal with his arguments in extensio. The gist of his argument was that the arrangement between the appellant and the respondent was tainted with illegality as it was intended to flout section 3 (c) of the Trusts Restriction Act, Cap. 63 of the laws which restricts the creation of trusts in Zambia. He said that the effect of this is that any such trust would be illegal and void ab initio. He referred us to section 5 (1) (c) and section 5 (2) of Cap. 63. He said further that the exceptions under the Act are listed under Section 4 and submitted that Section 4 (i) does not apply to the appellant as the appellant was not a beneficiary because at the time that the transaction took place the appellant did not have the legal capacity to own land because of section 13 of the Land (Conversion of Titles) Act. He urged us to dismiss the appeal or alternatively send the case back for retrial in the High Court.

We have considered the submissions by counsel and the evidence on record. The learned trial Judge found that the arrangement made between the appellant and the respondent was unlawful but he does not state in his judgement why or how the arrangement was unlawful. Presumably, he accepted the argument by counsel for the respondent that the arrangement fell foul of the provisions of Section 3 (c) of the Trusts Restriction Act. This section provides as follows:-

3. Save as hereinafter provided, after the commencement of this Act person shall not -
 - (a)
 - (b)
 - (c) Make any disposition whereunder property vests in possession at a future date.

However, the learned trial Judge did not consider the exceptions contained in Section 4 of the same Act and in particular Section 4 (i) which provides as follows:-

4. Nothing in this Act shall apply to -
 - (i) A trust terminable at the will of the beneficiary.

There can be no doubt from the evidence on record that the arrangement entered into between the appellant and the respondent was for the benefit of the appellant. This arrangement was to subsist till such time that the appellant had retired from the diplomatic service and formed a company which could own land in Zambia. We do not accept the argument advanced by counsel for the respondent that the respondent was not a "beneficiary" within the meaning of Section 4 (i) of the Act. We are satisfied therefore that the arrangement made by the appellant and the respondent was lawful. In passing we might add that even if we had found that the arrangement contravened Section 3 (c) of the Trusts Restriction Act, we would still not have upheld the learned trial Judge as the law cannot be used as an instrument of fraud.

For the reasons we have given, we are allowing the appeal and directing the Registrar of Lands and Deeds to register UMBRIA LTD. as the registered owner of plot 6875 Bende Road, Olympia Park, Lusaka in place of Ruth Nakazwe in terms of Section 34 (1) (c) of the Lands and Deeds Registry Act, Cap. 185 of the laws. The costs both here and in the court below are to be borne by the respondent.

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E.L. Sakala
ACTING DEPUTY CHIEF JUSTICE

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D.K. Chirwa
SUPREME COURT JUDGE

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D.M. Lewanika
SUPREME COURT JUDGE