NORA MWAANGA KAYOBA AND ALIZANI BANDA v EUNICE KUMWENDA NGULUBE AND ANDREW NGULUBE

Supreme Court
Sakala, CJ, Chibesakunda and Chitengi, JJS
17th July, 2003 and 13th January 2004
(SCZ Judgment No. 19 of 2003)

Flynote

Land Law – Notice of equitable interest – Constructive notice – Imputed to agents of parties Legal Practitioners – Duty of lawyer – Protection of the dignity and credibility of the legal profession.

Headnote

This is an appeal from the High Court decision in which the High Court granted specific performance of a contract between the second appellant and the respondents. On 26th August, 1996, the 1st and 2nd respondents entered into a contract to purchase a property known as Stand Number 203/9 Kaunda Square Stage 2, Lusaka, with the Second appellant. The second appellant was the sitting tenant in the property Lusaka City Council made an offer to him to purchase the property as a sitting tenant. The second appellant having failed to raise sufficient purchase price to pay Lusaka City Council, then entered into an agreement with the first and Second respondents for them to purchase the property in question. According to the agreement, the first and second respondents had to pay the second respondents a sum of K800,000.00. In addition, they had to pay Lusaka City Council K1,036,800.00 as purchase price of the property in question. The respondents by 21st October, 1996, had paid Lusaka City Council the sum of K1,036,800.00 as full purchase price. They had also paid K600,000 to the second appellant leaving a balance of K200,000.00. On 26th October, 1996, the Second appellant took out a caveat because of the agreement between him and the respondents. On 17th December, 1996 the purchase agreement between the respondents and the second appellant was reduced into a Law Association of Zambia Contract of sale. On the same day 17th December 1996, the second appellant entered into another contract of selling the same property to the first appellant. The purchase price was pegged at K4,000,000.00. On 18th December, 1996 another Law Association of Zambia Contract was drawn between the first appellant and the second appellant. On 4th February, 1997 the first appellant took possession of the property. Thus, the respondent filed an originating summons before the High Court seeking possession of the property in question mesne profits and costs. The High Court agreed with the respondents and ordered specific performance on the contract. The appellants aggrieved by that decision appealed.

Held:

1. In purchasing real properties parties are expected to approach such transaction with much more serious inquiries to establish whether or not the

property in question has encumbrances;

2. It is well established principle of law that any actual or contrastive notice is imputed to the agents of the parties;

3. A lawyer's core professional duty is to look after the interests of his client and guard his professional dignity and credibility jealously.

Cases referred to:

1. *Stanley Mwambazi v Morester Farms Limited* (1977) ZR 108
2. *Sam Amos Mumba Progressive Business Services Limited v Bank of Credit and Commerce Zambia Limited* SCZ No. 88 of 1996
3. *Mwenya and Another v Kapinga* SCZ No. 4 of 1998
4. *Kingsnorth Finance Company v Tizard* [1986] 2 ALL ER 54
5. *Tito v Waddel* No. 2 [1997] Ch. DP 106

Legislation referred to:

1. Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia s. 53
2. High Court Act, Chapter 27 of the Laws of Zambia Order 35 rule 3.

Work referred to:

Chitty on Contracts 26th Edition at P.285

M .V. Kaona of Nakonde Chambers for the appellants
T. S. Chilembo of T. S. Chilembo Chambers for the respondents

Judgment

CHIBESAKUNDA, JS, delivered the judgment of the court

This is an appeal from the High Court decision in which the High Court granted specific performance of a contract between the respondents and the 2nd appellant. In order to adequately deal with the issues raised, it is necessary for this court to state chronologically the sequence of events. On 26th August, 1996, the 1st and 2nd respondents entered into a contract to purchase this property known as Stand No. 203/9 Kaunda Square, Stage 2, Lusaka, with the 2nd appellant. The 2nd appellant was the sitting tenant in this property. Lusaka City Council made an offer to him to purchase this property as a sitting tenant. The 2nd appellant having failed to raise sufficient purchase price to pay Lusaka City Council, then entered into an agreement with the 1st and 2nd respondents for them to purchase the property in question. According to the agreement, the 1st and 2nd respondents had to pay the 2nd appellant a sum of K800,000.00. In addition, they had to pay Lusaka City Council K1,036,800.00 as purchase price of the property in question. The respondents by 21st October, 1996, had paid Lusaka City Council this sum of K1,036,800.00 as full purchase price. They had also paid K600,000.00 to the 2nd appellant leaving a balance of K200,000.00.

On 26th October, 1996, the 2nd Appellant took out a caveat because of this agreement

between him and the Respondents. On the 17th of December, 1996, the purchase agreement between the Respondents and the 2nd Appellant was reduced into a Law Association of Zambia contract of sale. The 2nd appellant and the respondents signed this same Law Association of Zambia contract of sale. On the same day 17th December, 1996 the 2nd appellant entered into another contract of selling the same property to the 1st appellant. The purchase price this time was K4,000,000.00. On 18th December, 1996 another Law Association of Zambia contract of sale was drawn up between the 1st appellant and the 2nd appellant, using Messrs Pikiti and Company as advocates. Strangely enough, on the same day the same advocates Messrs, Pikiti took out another caveat on the same property. It is also common ground that these two transactions were being conducted by Messrs Pikiti and Company on behalf of the 1st and 2nd Appellants. Messrs Chilembo Chambers acted for the 1st and 2nd respondents.

On 4th February, 1997, the 1st appellant took possession of this property. There is some confusion as to whether or not the 1st and 2nd appellants lived together in this same property. However, the 1st appellant obtained a certificate of title after Zambia Revenue Authority issued a tax clearance certificate. In the course of December, 1996, the 2nd appellant tried to rescind the contract between himself and the two respondents by repaying back the sum of K1,600,100.00 to the respondents, through his advocates, Messrs, Pikiti and Company. Messrs, Pikiti and Company drew a cheque of K1,600,000.00 in favour of the respondents through their advocates, Messrs Chilembo Chambers. Messrs Chilembo Chambers on behalf of the 1st and 2nd respondent refused to accept this refund of the purchase price as according to them their client, the Respondents, had not instructed them to resile from the contract. Messrs Chilembo Chambers, in addition, argued that, applying the principle of NEMO DAT, the 2nd appellant could not have sold the property to the 1st appellant, as at the time when there was this purported agreement between them, the property in question had already been sold to their clients. So the respondents filed originating summons before the High Court seeking possession of the property in question, mesne profits and costs. The lower court agreed with the respondents and ordered specific performance on the contract. The appellants aggrieved by that decision have appealed to us.

Before us the appellants filed five grounds of appeal.

1. That the lower court misdirected itself in law and in fact by proceeding to trial and entering judgment against the 2nd appellant without proof of service on the 2nd appellant;

2. That the lower court erred in fact and in law by holding that the 1st appellant was aware of the first transaction because her counsel Mr. Pikiti of Messrs Pikiti and Company dealt with the 2nd appellant (the 1st defendant in the court below), when lodging a caveat to defraud the respondents after due payment by them was made to him;

3. That the court below misdirected itself by holding that this is an appropriate case relating to the sale of land where specific performance should apply when such relief was not prayed for;

4. That the court below misdirected itself in law and in fact by holding that the defendant would not suffer hardship after specific performance was ordered; and

5. That the court below erred in law and in fact by ordering possession of plot 203/9 Kaunda Square Stage II mesne profit and costs to the Respondent without a parallel order that the Appellants be awarded expenses for any improvements.

Before us, Mr. Kaona went into details on ground 1, as to the actual sequence of the events before the lower court. His main argument is that when the matter came up for trial on 12th May, 1998, the court below immediately proceeded to hear the evidence of the Respondent in the absence of the 1st and 2nd appellants. This, he argued, was done even at the hearing of 22nd February, 1999. According to Mr. Kaona, although the learned trial Judge addressed his mind to some authorities on this point, for instance, *Stanley Mwambazi v Morester Farms Limited (1),* nonetheless, he applied wrong principles in proceeding with the trial in the absence of the 2nd appellant. In his written heads of arguments, he went into details on the law relating to default judgment. Citing the case of *Sam Amos Mumba Progressive Business Services Limited v Bank of Credit and Commerce Zambia Limited (2)* and Order 35(3) of the High Court Rules (7), he argued that the court should have satisfied itself as to whether or not there was actual service of the process on the other side. As the learned trial Judge did not, Mr. Kaona urged us to order a re-trial of the matter, as this was a serious misdirection on the part of the learned trial judge.

On ground 2, his written arguments is that the lower court erred in fact and law by making the findings that the 1st appellant was aware of the notice because her counsel dealt with the 2nd appellant in lodging the caveat. He argued that according to the evidence of the 1st appellant, she had paid the vendor the purchase price and was planning to move into the house when she was first approached by people who were claiming that they had already paid for the same house. So she was not aware of the other transaction.

Mr. Kaona argued ground 3 and 4 together. He argued that the court also misdirected itself in holding that this was a proper case for the court to order specific performance when such relief was not prayed for. The respondents commenced this action by originating summons, seeking possession of the said property and mesne profits and costs. This, he pointed out, was not asking for specific performance. In addition, he argued that, since the 2nd appellant did not own the house in question, as he was just a mere tenant and as such had only an interest in the property, he could not effectively dispose of that house in question to the respondents. He cited Chitty on Contracts at page 285:-

"Contracts for the disposition of an interest in land within the meaning of the statute have been held to include the following: an agreement that if the Plaintiff, the tenant of a farm, would surrender her tenancy to her landlord and would prevail on her landlord to accept the defendant as his tenant in place of the plaintiff, the defendant would pay the plaintiff 100; as agreement by the defendant, the landlord of a house, to put certain furniture into the house in consideration that the plaintiff would become tenant thereof an agreement to grant a lease of furnished premises and an agreement by the plaintiff to let a house to the defendant and to sell him furniture and fixtures therein and to make alternative and improvements in the house, the defendant agreeing to take the house and to pay for the furniture, fixtures and alternatives."

According to him as the 2nd appellant was not a registered purchaser of the land in question he could not effectively dispose off the house in question. Lastly, he argued that the court below erred by ordering vacant possession of plot 203/9 Kaunda Square Stage II to the respondents without making an order that the appellants be awarded expenses for any

improvements.

Mr. Chilembo in response supported the lower court's decision. He argued that as soon as consideration moved from the respondents to the 2nd appellant there was a valid contract and that this contract, was in accordance with the Statute of Fraud, as it was evidenced in writing. Therefore, by the time the 2nd appellant was purporting to resale the same property to the 1st appellant, the property had already been passed to the respondents. Consequently, the 2nd appellant could not rescind the contract at that stage as the contract had already been executed.

We have seriously considered the evidence on record and the arguments by both sides. Mr. Kaona canvassed the point that this was a default judgment as the 2nd appellant was not in court when evidence from the respondents was led and that he was not in court when the 1st Appellant gave evidence before the court. He has argued that although the court addressed its mind to this point in its judgment, this court should hold nonetheless, that the hearing of this matter in the absence of the 2nd appellant, was a gross misdirection. We hold that this is a strange proposition by the learned counsel as according to the record, the court began hearing the evidence on 12th May, 1998. The learned counsel for the appellants Mr. Pikiti of Messrs, Pikiti and Company who acted for the 2nd appellant in both transactions was in court throughout the hearing of this matter. He is the same counsel who on 12th May, 1998, when the court sat, sought an adjournment before the court. The court adjourned this matter to 15th August 1998. On that day, the court did not sit, but sat on the 20th of October, 1998. On 20th October, 1998, the court adjourned the matter as Mr. Chilembo, learned counsel for the respondents, did not appear before the court. Mr. Pikiti on the other hand appeared before the court. This matter was then adjourned to 9th December, 1998. On 9th December, 1998, Mr. Pikiti applied for an adjournment on the grounds that the 1st appellant was unwell. The court on that day adjourned and made the following order, "I will grant this last adjournment to the 22nd of February, 1999 at 10.00 hours."

We are putting all these details in our judgment to show that at all the sittings of the court, the two appellants were adequately represented by Messrs. Pikiti and Company and at no time did the learned counsel for the appellants apply to court to seek an adjournment from the court on the grounds that the 2nd Appellant was not in court. Even on the 9th of December 1998, the learned counsel for the two appellants applied for an adjournment on the grounds that the 1st appellant was unwell. The court adjourned to the 22nd February, 1999, on that ground. Therefore, when the court sat on 22nd February, 1999, and heard the evidence of the 1st appellant, it was with full knowledge and consent of the learned counsel for the appellants that the 2nd appellant had not been coming to court throughout the hearing. Counsel, according to the well-known ethics of the profession, has an obligation to look after the interest of his client. Therefore, if counsel advised his client not to come to court or was indifferent to his client not coming to court or as in this case he did not care to inform the court that the absence of his client was prejudicial to his interest, it is not then the fault of the court that the court proceeded in the absence of this 2nd appellant. The court was right and proper to have proceeded to hearing of the matter in the absence of the 2nd appellant, as this was done with full knowledge and consent of his counsel. This court cannot fault the learned trial Judge. In fact, as already indicated, the court did address its mind to this point and concluded rightly that at no time did Mr Pikiti apply to court for an adjournment on the ground that the 2nd Appellant was absent from court. We find no merit on that point.

On the second ground, it was argued that the court below erred in concluding that the 1st

appellant knew of the first transaction between the respondents and the 2nd appellant as she used the services of the same advocate who acted for the 2nd appellant. Firstly, in the cross examination of the 1st respondent, there is evidence that the 1st respondent went to try and plant few plants and found the 1st appellant in the property in question claiming to be a tenant. Secondly, there is also evidence that the 1st appellant was oddly advised by her advocate that she should pose as a tenant in the house in question. There is also evidence that Lusaka City Council summoned for the title deeds, which had been given to the 1st appellant when, the Council suspected that those title deeds had been obtained by way of fraud. All these facts support, in our view, the conclusion by the learned trial Judge that the 1st appellant knew about the first transaction between the 2nd appellant and the two respondents.

Also, in purchasing of real properties, parties are expected to approach such transactions with much more serious inquiries to establish whether or not the property in question has no encumbrances. Buying real property is not as casual as buying household goods or other personal property. There was a caveat lodged by Messrs Pikiti and Company on behalf of the respondents at the time the 1st appellant was buying the property from the 2nd appellant. Surely, with serious investigations that caveat should have been found on record. This court cannot accept that a legal document like a caveat was not on the proper records. Another important point worth consideration is that since the 2nd appellant employed the services of Messrs Pikiti and Company as his advocates in the first transaction and the 1st appellant also used them in the second transaction between herself and the 1st appellant, Messrs Pikiti and Company were agents of both the 1st and 2nd appellants as vendor and purchaser respectively. It is well settled principle of law that any actual or constructive notice, which Pikiti and Company as agents received in the course of the two transactions, is imputed to both the 1st and 2nd appellants – *Kingsnorth Finance Company v Tizard (4).* Therefore, the 1st appellant is imputed to have had actual or constructive notice of the first transaction between the 2nd appellant and the two respondents. We, therefore, cannot fault the learned trial judge when he concluded that the 1st appellant knew or ought to have known of the existence of the sale agreement between the two respondents and the 2nd appellant.

On the argument that the 2nd appellant could not have legally sold the house in question as he was not the owner of the house, the passage cited at J5 by the learned authors of Chitty on Contract, is sufficient authority that the transaction between the 2nd appellant and the respondents comes within the definition of disposing of an interest in land. This view is fortressed in the case of *Mwenya and Another v Kapinga (3),* which is on all fours with this case before us. The Supreme Court in that case adopted this principle with approval. The facts briefly in the *Mwenya* case are that the 1st appellant, Jane Mwenya, offered to sell to the respondent, Mr. Paul Kapinga, plot number 4109, Sunningdale, for K12, 000,000.00. As a pre condition to this sale, the 1st appellant requested the respondent to pay K800,000.00 to assist her in redeeming the mortgage of the house. On 26th August 1992, the 1st appellant received this money and redeemed the mortgage. After two months, the respondent sent the purchase price to the 1st appellant, but the 1st appellant resiled from the contract because according to her the respondent took too long in completing payment. The 1st appellant by that time on 12th October, 1992, had already sold the same house to a 3rd party now for K13, 000,000.00. This court held inter alia that:-

" 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."

In applying this principle, we cannot fault the learned trial judge when he concluded that this was a proper contract entered between the 2nd appellant and the respondents. We further hold that the 1st appellant was not a bona fide purchaser for value without notice.

Coming to the third and fourth argument, we take note that the respondents came to court by way of summons seeking for possession of the property in question. The court rightly ordered that the matter be heard in open court and that viva voce evidence be adduced. The court also ordered that there be summary trial with the parties relying on the summons and the affidavit accompanying the summons as pleadings. In the summons, the prayer was for possession. Our view is that this is the same as asking for specific performance. We, therefore, hold that the prayer as couched in the summons amounted to a prayer for specific performance. In the same case of *Mwenya and Another v Kapinga, (3)* this court considered when the remedy of specific performance can be granted. The court referred to the case of *Tito v Waddel (5),* where this principle of law was enunciated:-

"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."

We have addressed our minds to the facts of this case in particular the professional conduct by the learned advocates of the 1st and 2nd appellants.

We are perturbed by these advocates unethical conduct in that they acted for the 2nd Appellant in the transaction between the 1st appellant and the two Respondents and even lodged a caveat on behalf of the respondents on the same day they were acting for the 1st appellant, when she was purporting to purchase the same property of the 2nd appellant. This is an impeachable conduct by the advocates, which should be visited by the Law Association of Zambia (LAZ), as it tends to put the noble profession in bad light. This conduct by these advocates most unfortunately has tended to show its ugly face quite often. A lawyer's core professional duty is to look after the interests of his client and guard his professional dignity and credibility jealously. In this case, Messrs. Pikiti and Company acted in both transactions and as such, the 1st appellant is legally presumed to have known of the first transaction and as such she was not a bona fide purchaser for value.
Therefore, the learned trial judge was on firm ground to have dismissed her claim and to have decreed the remedy of specific performance in favour of the respondents. We, therefore, cannot fault the learned trial judge when he ordered the specific performance. Because of the circumstances of this case, we, on the other hand, condemn the conduct of the advocates for the two appellants.

Coming to the last ground of appeal, it has been argued that the court should have made an order on costs incurred by the appellants in improving the property. We have looked at the pleadings and hold that these were not pleaded. It is trite law that parties are bound by the pleadings. Therefore in view of this omission, parties cannot now come to this court claiming for such. Because of all the reasons given in our judgment we find no merit in the appeal. We dismiss the appeal. We order costs of this appeal to be borne by the advocates for the two appellants.

Appeal dismissed