IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

SCZ Judgment No. 11 of 2004
APPEAL NO. 166 OF 2002

(Civil Jurisdiction)

BETWEEN:

WESLEY MULUNGUSHI APPELLANT

AND

CATHERINE BWALE MIZI CHOMBA RESPONDENT

CORAM: **LEWANIKA, D. C. J., MAMBILIMA AND SILOMBA, J. J. S.**
On the 24th of April, 2003 and 30th April, 2004

For the Appellant: Mr. Banda, Simeza Sangwa and Associates.
For the Respondent: Mr. C. M Sampa, C. M. Sampa and Associates.

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JUDGMENT

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SILOMBA, J. S., delivered the judgment of the court.

Cases referred to:

1. **Vincent Mijoni Vs. Zambia Publishing Company Ltd,** Appeal No. 10 of 1986
2. **Jane Mwenya and Jason Randee Vs. Paul Kaping'a**, SCZ Judgment No. 4 of 1998
3. **Tito and Others Vs. Waddel and Others No. 2 (1977)** Ch. D. 106

Statute referred to:
Statute of Frauds, 1677, Section 4.

This is an appeal against the refusal by the learned trial judge, sitting at Lusaka, to order specific performance of an agreement of sale of Stand No. 4717, Tukuluho road, Lusaka. The agreement, which was partly performed by the appellant, was entered into

between the respondent, as vendor and the appellant, as the purchaser. When we heard the appeal on the 24th April, 2003 we allowed the appeal and promised to assign our reasons for our decision, which we now do.

The evidence before the lower court, which unfortunately was not summarised and evaluated by the learned trial judge in his judgment, was that sometime in 1999 the appellant learnt that a house on Stand No. 4717, Tukuluho road in Lusaka, was being sold by the respondent. The appellant learnt of the sale through an estate agent. After viewing the house the appellant expressed his interest in the house and what followed later was a letter of offer pegging the value of the house at K120,000,000, which the appellant accepted. Subsequently, the appellant proposed to pay the amount in two instalments of K70,000, 000 and K50,000,000, which proposal the respondent accepted.

As the two parties got along, it transpired to the appellant that the respondent had not yet secured title to the stand. Notwithstanding the foregoing, the appellant did, on the 28th August, 1999, release a banker's cheque in the sum of K20,000,000 in the name of the respondent, which Charles Chomba, the son of the respondent, collected. The receipt of the amount was duly acknowledged. A draft contract was then prepared and sent to the appellant but because of certain queries raised by the appellant in respect of the said draft contract it was never signed.

Later, the appellant raised the balance of K100,000,000 and Charles Chomba was asked to come and collect the money. On the 28th October, 1999 the appellant was surprised to receive a letter withdrawing the sale of the stand to him. When he met Charles Chomba he requested him that they both see the respondent to find out why she

had withdrawn from the contract. Upon seeing her, she said she had changed her mind and was demanding the sum of K300,000,000 for the same property.

When the appellant was cross-examined by counsel for the respondent, he told the lower court that the letter of offer did not specify the mode of payment of the purchase price; that they discussed and agreed that the asking price be settled in two instalments of K70,000,000 and K50,000,000 but that since the respondent did not have title to the stand the appellant decided to pay K20,000,000 as down payment. According to the record of appeal, this was the evidence of the appellant.

On the 26th March, 2002, when the appellant testified and closed his case, the respondent's counsel applied for an adjournment and the case was accordingly adjourned to the 9th July, 2002. It would appear from the record that the respondent never testified in the court below, which meant that the learned trial judge only had the evidence of the appellant to consider. On the basis of the evidence adduced by the appellant, the learned trial judge found that the property in dispute was indeed offered to the appellant, which was followed by the payment of K20,000,000, being the deposit amount.

The learned trial judge also found that the property in issue had no title, no State consent to assign and indeed no formal contract of sale to bind the two parties. Based on these findings, the learned judge correctly observed that where real property is the subject of sale there is need to strictly observe the legal requirements involved in such a conveyance. He then listed the legal requirements as a contract of sale, availability of the property in question with a title deed, and the State consent to assign. In his opinion none of these were complied with.

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Going by the Latin maxim, *Nemo dat quod non habet*, which literally translates to mean that "no one can give that which he has not," the learned trial judge found that the respondent did not have title to the property in question to offer to the appellant. He declined to grant the order of specific performance because, in his view, the appellant had a sound claim in damages. There are three grounds of appeal and because they are similar we have decided to dispose of them in one single transaction. These are: -

1. That the learned trial judge misdirected himself in law when he held that the claim for specific performance should fail because the sale of property calls for strict observance of legal requirements, such as, contract of sale, availability of the property in question with title deed and State consent to assign, which are formal requirements and none of which was complied with.
2. That the learned trial judge erred in law when he held that specific performance does not arise herein on the basis of the legal maxim, *nemo dat quod non habet,* that is, no one can give that which he does not have despite having acknowledged part performance of the agreement of sale by the appellant.
3. That the learned trial judge erred in law by holding that the claim would sound in damages, which matter was not pleaded by the appellant or at all.

In support of the three grounds of appeal the appellant filed heads of argument, which were supplemented by the oral submissions. There were no heads of argument filed by the respondent and on an application by the respondent's counsel, we allowed him to submit orally. In his oral submission, the counsel for the appellant covered all the three grounds of appeal in one submission. He submitted that the reasoning of the court

below showed that the learned trial judge refused to order specific performance firstly because the matter involved land and secondly because there was no observance of the legal requirements relating to the conveyance of land.

He argued that the appeal was based on equitable principles because the strict observance of the legal requirements would result in injustice to the appellant. He said that the order of specific performance, being an equitable and discretionary remedy, was the more appropriate remedy than the award of damages because of the uniqueness of the subject matter, land. His view was that damages, in as far as land was concerned, was never enough.

Counsel argued that instead of dismissing the case strictly on law the lower court should have asked itself if there was a contract for the sale of the land. Because of the oversight, the learned judge did not even consider the fact that there was part performance of the contract, let alone the documentation, which showed that there was a contract in writing, he said.

Counsel drew our attention to page 45 of the record of appeal, which is a letter of offer and which he said clearly showed the parties to the agreement, the identity of the property and the purchase price. He also drew our attention to page 26 of the record, which is a letter from the appellant's son acknowledging the sum of K20,000,000, being part payment of the purchase price. In his view the part payment was evidence that a contract of sale had been concluded.

After referring to our decision in the case of *Vincent Mijoni Vs. Zambia Publishing Company Limited,* (1) counsel said that the letters he had referred to also

constituted a contract of sale between the parties, accordingly, the learned judge should have ordered that the contract should be specifically performed. Counsel did not agree with the finding that the appellant had no title to land and no State consent to assign because these matters were not pleaded and besides the respondent did not testify to the effect that the property was not hers.

Counsel has submitted, in his heads of argument, that after the respondent was paid the deposit sum of K20,000,000 she went and paid the government for the house after which she was allowed to acquire title to the stand, which she now had. To confirm the story, counsel referred us to a letter at page 39 of the record in which another estate agent attempted to offer the house to another person at a higher price. We have taken note that the estate agent does confirm, in the said letter, the existence of the title deed to the stand.

Submitting for the respondent, counsel stated that the decision of the learned judge to refuse to grant the order of specific performance was correct because the respondent could not transfer the property to the appellant, which she did not own. He said that the evidence of lack of title was confirmed by the testimony of the appellant himself (see page 50, lines 1 and 2 of the record of appeal). He also referred us to the draft contract, which alluded to lack of title.

Counsel, however, conceded that lack of title could not be the reason for refusing to transfer the land. In his view, the respondent refused to transfer the land because the appellant delayed to pay the purchase price and not because she had found a buyer with more money. Based on the documentation on record, counsel conceded that there was an

agreement to sell and purchase the land and that the purchase price was agreed but that the mode of payment was not settled between the parties.

We have given our anxious consideration to the filed heads of arguments, the submissions and what is contained in the entire record of appeal. From the record of appeal it is clear that the respondent never testified in the court below. In the absence of her testimony, we expected the learned trial judge to, at least, make use of her defence but it appears this was not done. In refusing to grant the order of specific performance it is quite clear that the learned judge was greatly influenced by the Latin maxim, *Nemo dat quod non habet*, meaning that the respondent could not give or offer the property she did not have.

A cursory perusal of her defence shows that Stand No. 4717, Tukuluho road, Lusaka, was and still is hers. In paragraph 2 of her defence she avers as follows: -

> Paragraphs 3 and 4 of the plaintiff's claim is denied and will aver that the defendant had intended to sell but the plaintiff failed to raise the purchase price within the period of eight months, which period he was given. The defendant will further aver that the plaintiff even refused, ignored or neglected to sign the contract of sale as a way of buying time for himself to raise the said purchase price.

From the wording of the above defence, the issue of ownership of the Stand does not arise. She may not have secured title to the stand at the time she offered to sell it to the appellant but that did not diminish her entitlement to the property. We hasten to add that even though a title deed is conclusive evidence of ownership of land there are other factors that may be taken into account; these are factors that precede the issuance of title. In this case it would appear that the house belonged to the government and the

respondent, as a sitting tenant, had an accrued right to buy it, which she eventually did with money from the appellant.

The appellant alludes, in his evidence to the lower court, that at the time he wanted to pay the first deposit amount of K70,000,000, the respondent had not yet acquired title to the stand. He instead paid K20,000,000. In our view, this piece of evidence does not doubt the respondent's ownership of the stand. The view we take is that the appellant was simply exercising caution, like any other person would do if faced with a similar situation. It would have been risky for him to just dish out the funds without insisting on the availability of title. We would end here by saying that the enquiry about title was a normal business enquiry, intended to place the appellant on the safer side; it did not go as far as to suggest that the respondent was not the owner of the stand.

Our concern is: where did the learned judge get the evidence that the respondent did not own the property in the absence of her own testimony? Since we have not come across any evidence by the respondent that she did not own the property, we can safely say that the learned judge seriously misdirected himself by taking into consideration evidence that was not before him. As was rightly conceded by the respondent's counsel, the lack of title could not be a bar to the conclusion of a legally binding contract.

Another factor that influenced the learned judge into refusing to grant the order as prayed for, was the lack of State consent to assign. Again the lack of State consent to assign was never an issue before the learned judge as it was never pleaded and there was no evidence to that effect from the respondent. Assuming it was pleaded and there was evidence adduced by the respondent, our view is that it would not have been an

impediment to the sale of the house at all. We say so because after the repeal of the Lands (Conversion of Titles) Act, 1975, under which the President, through the Commissioner of Lands, had to fix the purchase price on which parties were obliged to contract, the requirement of a State consent today is not of primary importance.

The position today, under Section 5 (1) of the Lands Act, Chapter 184 of the laws, which is the successor Act to the Lands (Conversion of Titles) Act, is that no person can sell, transfer or assign any land without the consent of the President. The subsection makes it mandatory for the person wishing to sell, transfer or assign land to apply and obtain State consent before the sell, transfer or assignment.

What this means is that the obtaining of State consent must be done in the course of dealing but before the sell, transfer or assignment is lodged for registration in the Lands and Deeds Registry to give effect to the change of ownership. This procedure, as we see it, enables the Commissioner of Lands to ascertain whether the ground rent has been paid up to date by the vendor (as the owner of the land) as per the stipulation in the lease agreement with the State.

Further, the procedure also enables the Commissioner of Lands to ensure that the person who is buying that piece of land qualifies under the Lands Act, Chapter 184 of the Laws, either as an investor or as a Zambian. Where there is compliance with the law, as well as, the covenants of the lease we do not see why the Commissioner of Lands cannot exercise his discretion in favour of granting State consent to the applicant.

Since the obtaining of State consent is a function of the owner / seller of land the burden is on him or her to ensure that the law is complied with before the sale, transfer or

assignment is lodged for registration in the Lands and Deeds Registry. In the present appeal, there is no evidence from the respondent indicating that she had encountered problems in securing State consent and so we do not think that the learned judge was justified in making the absence of State consent as an issue.

Before we deal with the issue whether or not there was a binding contract between the parties to sell and buy Stand No. 4717, Tukuluho road, Lusaka, which we think was the real issue before the learned trial judge, we would like to dispose of the assertion by the respondent's counsel that the offer was withdrawn because the appellant delayed in paying the purchase price. In fact the defence talks of a delay of eight months.

We note from the record of appeal that the offer to sell the stand to the appellant was made on the 10th of June, 1999. On the 28th August, 1999, about two and half months or so later, the appellant paid the deposit sum of K20,000,000, which was duly acknowledged by the respondent's son. The view we hold is that on payment of the deposit sum the appellant accepted the offer and the contract became binding upon the parties.

The record, nonetheless, shows that the contract was rescinded on the 28th October, 1999, which was four months and eighteen days from the date of offer. The record confirms also that before the contract was purportedly rescinded the appellant had secured the balance sum of K100,000,000 and was about to deliver it to the respondent. From our tabulation, it is not true that the appellant delayed in paying the purchase price by more than eight months.

It would appear to us that the pleading in her defence and the subsequent submission by counsel was indeed an afterthought as the period and mode of payment were not expressly incorporated into the contract. As we observed in the case of *Mwenya and Randee Vs. Paul Kaping'a* (2) time can be of essence if, firstly, it is stipulated in the contract that it shall be so; and secondly, if in 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 an end.

Coming back to the present appeal we have not come across evidence that the appellant was warned well in advance before the contract of sale was abruptly terminated. In the light of the evidence contained in the record of appeal, we feel very strongly that what prompted the respondent to rescind the contract with the appellant was the attractive offer of more than K300,000,000 from another bidder as confirmed by a letter of offer at page 39 of the record.

We wish, in the final stage of our judgment, to deal with the question we earlier posed for ourselves as to whether there was a binding contract of sale, in which the respondent offered to sell and the appellant accepted or agreed to buy Stand No. 4717, Tukuluho road, Lusaka. Again, going by the record we find that there is the an undisputed evidence that the respondent, through her estate agents, made an offer for the sale of the property to the appellant for K120,000,000.

As we have already pointed out, the offer of the stand to the appellant was accepted through the part payment of the sum of K20,000,000, the receipt of which the respondent duly acknowledged. In this regard, we are indebted to counsel for the

respondent for conceding the fact that there was an agreement to sell and that what was not agreed upon was the mode and duration of payment of the agreed purchase price of K120,000,000.

We reiterate our agreement with the observation of the learned trial judge that where real property is the subject of a sale there is need for strict observance of the legal requirements attending to the conveyance. One of the legal requirements the learned judge mentioned was the need for the sale to be evidenced by a contract of sale. The others, such as, availability of title deed and State consent have already been covered.

On the need for a contract of sale, the learned judge does not say whether the contract should be oral or in writing. However, from the provision of Section 4 of the Statute of Frauds, 1677, a contract affecting the transfer or sale of land ought to be evidenced in writing and must be signed. From the explanatory notes to Section 4, it is the position of the law under the said Act that before a seller of land can be held liable on the contract there must be an agreement contained in a note or memorandum; that the memorandum or note must be signed by the person to be charged and that a written proposal accepted orally is sufficient.

This old law, which every legal practitioner in this country has come across, is applicable to this country by statutory enactment. From the explanatory notes the law does not prescribe the statutory form the note or memorandum must take. It is, however, important to note that the note or memorandum need not be contemporaneous with the contract. It is, however, important for the note or memorandum to contain the names of the parties to the contract and all the essential terms of the contract.

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In the case of *Jane Mwenya and Jason Randee Vs. Paul Kaping'a* (2), in which we upheld our earlier decision in the case of *Vincent Mijoni Vs. Zambia Publishing Company Limited* (1), we stated that a letter may constitute a valid contract and whether there is a binding contract or not it must depend on the construction of the letter. We held further: -

> that for a note or memorandum to satisfy Section 4 of the Statute of Frauds, 1677, 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 the consideration.

The facts in the above case of *Mwenya and Randee* would appear to be on all fours with the present case. In that case, the 1st appellant agreed to sell her house to the respondent through a letter of offer for the sum of K12,000,000. The respondent was asked to pay up K800,000 immediately, which he did, to enable the 1st appellant to redeem the mortgage attaching to the house, the subject of sale.

The mortgage was redeemed upon payment, but when the respondent wanted to pay the balance purchase price the 1st appellant refused to accept the money, saying the respondent had taken too long to pay. She (1st appellant) then signed a second contract with the second appellant and the respondent sued for an order of specific performance and succeeded both in the High Court and in this court on appeal.

Coming to the appeal before us, we note that the note, in form of a letter of offer, sufficiently gives particulars of the house and its location. The note is addressed to

Waltkins Gray International / Zambia, for the attention of the appellant, as managing partner. It is written by Malcolm Realtors and Services, the real estate agents of the respondent to whom the note is copied. The purchase price, stipulated therein, is K120, 000,000.

Based on our reasoning, in the case of *Mwenya and Randee,* we think that the evidence contained in the record of appeal firmly establishes the fact that the appellant and the respondent, by their conduct or deed, intended to be bound by a contract of sale in which the respondent offered and the appellant accepted to buy the house at Stand No. 4717, Tukuluho road, Lusaka, for K120,000,000. There is ample evidence of part payment, the receipt of which the respondent duly acknowledged.

We do not, therefore, agree with the learned trial judge, that the claim is sound in damages when there was a contract supported by part payment and when damages were not pleaded as an alternative remedy. The matter in dispute is land, a very valuable commodity whose loss may not adequately be atoned in damages. As was pointed out in the case of *Tito and Others Vs. Waddel and Others No. 2* (3) at page 322, the court will decree specific performance only if it will do more perfect and complete justice than the award of damages.

It is for the foregoing reasons that we allowed the appeal, reversed the order of the learned trial judge and in lieu thereof granted the order of specific performance as per the claim of the appellant in the court below. Owing to the circumstances the respondent

finds herself in, we shall not order her to pay costs to the appellant both in this court and in the court below. It follows that each party will bear his or her costs.

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D. M. Lewanika,
DEPUTY CHIEF JUSTICE.

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I.C.M. Mambilima,
SUPREME COURT JUDGE.

.....
S.S. Silomba,
SUPREME COURT JUDGE.