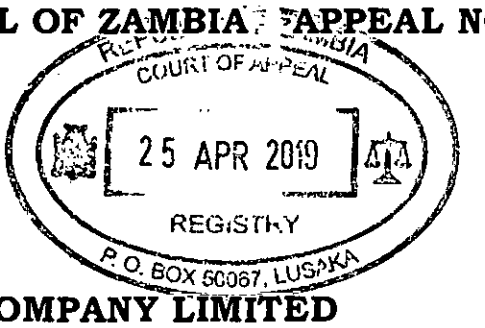
IN THE COURT OF APPEAL OF ZAMBIA: APPEAL NO. 163 OF 2018

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

JONNY'S TRADING COMPANY LIMITED **APPELLANT**

AND

YEWENDWEOSSEN MENGISTU **RESPONDENT**

CORAM: ***Chashi, Lengalenga and Siavwapa, JJA***

ON: ***27th March and 25th April 2019***

For the Appellant: *L. Mwamba Messrs Simeza Sangwa and Associates*

For the Respondents: *K. Sakazhila (Ms), Messrs Tembo Ngulube and Associates*

J U D G M E N T

CHASHI, JA delivered the Judgment of the Court.

1. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR, 172**
2. **Steadman v Steadman (1974) 2 All ER, 977**
3. **Zambia Building and Civil Engineering and Contractors Limited v Janina Georgopoullos (1972) ZR, 295 - Reprint**
4. **Jean Mwamba Mpashi v Avondale Housing Project Limited (1988/1989) ZR, 140**

Legislation referred to:

1. **The Statute of Frauds, 1677**

Other works referred to:

1. **Megarry's Manual of the Law of Real Property by David J. Hayton (1982) sixth edition, Stevens and Sons, London**
2. **Black's Law Dictionary, Brian A. Garner, eighth edition, Thomson West, Minnesota, 2004**
3. **Land Law in Zambia: Cases and Materials Fredrick S. Mudenda Unza Press, Lusaka, 2007**

The Appellant, who was the plaintiff in the court below, commenced an action against the Respondent by way of a writ of summons claiming the following reliefs:

(1) An Order declaring that the Appellant was entitled to occupy the Unit he completed constructing at the Respondents property known as Lot No. 15263/M, Lusaka (the Unit) for ten (10) years, free from rentals as per verbal agreement between the Appellant and the Respondent.

(2) Alternatively, that the Respondent be ordered to pay the Appellant the sum of US$500,000.00 as compensation for loss of expectation of income, had the Appellant occupied the Unit in issue for the agreed ten (10) years.

The Appellant's case is that, it entered into a verbal agreement with the Respondent sometime in 2017, where it was agreed that the Appellant

would build the Unit on the Respondent's land and run the business of bar and nightclub. That on completion the Appellant would occupy the Unit for ten (10) years free of rentals.

The Appellant as a consequence commenced and completed construction sometime in 2018.

Two weeks before the opening of the business, the Respondent demanded that the Appellant should pay rent, otherwise, the business should close down.

On 7th June 2018, before settling a defence, the Respondent raised the following issue for determination by the court below:

> *"Whether or not the action should be struck out in view of Section 4 of the Statute of Frauds, 1677 which requires that any contract for transfer or disposition of land or any interest in land be in writing in order to be enforceable."*

According to the Respondent, there was no agreement in writing, note or memorandum signed by the parties therefore the purported agreement offends **The Statue of Frauds, 1677** (The Statute) and the action should be dismissed for irregularity.

In response, the Appellant conceded that there was no written agreement but went on to exhibit the e-mails which were exchanged between the parties in the month of April 2018 when the dispute arose as evidence in support of the verbal agreement.

The Appellant in addition asserted part performance as an exception to the general rule espoused under The Statute being an equitable exception.

In determining the issue, the learned Judge in the court below found that there was no such agreement as required under Section 4 of the Statute. After perusal of the e-mails, she opined that there was no conclusive evidence of the terms of the purported agreement as there was no meeting of the minds of the parties. That there was therefore no conclusive agreement, in terms of the material aspects of the agreement such as consideration and it was not even clear whether there was offer and acceptance of any of the terms of the purported verbal agreement.

The learned Judge was of the view that it would be difficult to enforce whatever verbal agreement the parties might have entered into without further written evidence of any agreed terms of the contract, if any.

The all cause of action was on that basis dismissed.

The Appellant has now appealed to this Court advancing the following three grounds of appeal.

(1) That the lower court erred in law and fact when it applied The Statute of Frauds to a matter relating to a simple contract.

(2) The lower court erred in law and fact when it failed to consider the plea of part performance raised by the Appellant.

(3) The lower court erred in law and fact when it held that the Appellant had not satisfied that there was an agreement in compliance with section 4 of the Statute of Frauds, 1677.

At the hearing of the Appeal, both Counsel relied on their respective heads of argument which they augmented with brief oral submissions.

In respect to the first ground of appeal, Mr. Mwamba, Counsel for the Appellant submitted that, the agreement between the Appellant and the Respondent did not fall within the ambit of Section 4 of The Statute as it neither involved the sale of land nor disposition of any interest in land.

According to Counsel, the agreement was a simple contract concerning occupation of the Unit built by the Appellant with its own money on the Respondents land, rent free for ten years. That the Respondent's land was not transferred to the Appellant as ownership remained with the Respondent. Counsel further submitted that there was no deed, lease of

mortgage executed by the parties and therefore there was no disposition of any interest in land.

The second and third grounds of appeal were argued in the alternative.

Counsel drew our attention to the case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[1] where the Supreme Court emphasized on the duty of the trial court to adjudicate upon every aspect of the suit between the parties, so that every matter in controversy is determined in finality.

It was Counsel's submission that the court below abdicated its duty when it completely ignored the Appellant's plea of part performance.

On the plea of part performance, Counsel drew our attention to the learned authors of **Megarry's Manual of the Law of Real Property**[1] at page 141, where they had this to say:

> *"...The fundamental idea behind this doctrine, which was firmly established by a decision of the House of Lords in 1701 is that if the plaintiff has done acts in performance of his part of the contract, it would be fraudulent of the defendant to plead the statute as a defence, and consequently equity will enforce the contract despite the absence of any sufficient memorandum.*

Equity took the view that it could not allow the Statute to be made an instrument of fraud."

Reliance was also placed on the case of **Steadman v Steadman**[2] where Lord Simon Glaisdale had this to say:

"The Second competing legal principle was evoked when almost from the moment of passing the Statute of Frauds, it was appreciated that it was being used for a variant of unconsionable dealings, which the Statute itself was designed to remedy. A party to an oral contract for the disposition of an interest in land could despite performance of the reciprocal terms by the other party, by virtue of the Statute disclaim liability for his own performance on the ground that the contract had not been in writing. Common law was helpless. But equity with its purpose of vindicating good faith and with its remedies of injunction and specific performance, could deal with the situation. The Statute of Frauds did not make such contracts void but merely unenforceable; and if the statute was to be relied on as a defence; it had to be specifically pleaded.

Where therefore a party to a contract, unenforceable under the Statute of Frauds stood by while the other party acted to his

detriment in performance of his own contractual obligations, the first party would be precluded by the Court of Chancery from claiming exoneration, on the ground that the contracts was unenforceable of his reciprocal obligation; and the court would be if required decree specific performance of the contract.

Equity would not, as it was put, allow the Statute of Frauds to be used as an engine of Fraud."

According to Counsel, it is not in dispute that the Appellant, built the Unit on the Respondents land. The Respondent stood by and watched without raising any objection.

Counsel argued that, that was a sufficient act of part performance which brings in the doctrine of part performance. That therefore, the Respondent is precluded from raising the Statute as a bar to the enforcement of the agreement.

It was Counsel's submission that since there was part performance, there was no need for the Appellant to satisfy the court that the agreement had complied with the requirement of Section 4 of The Statute.

In turn, Ms Sakazhila, Counsel for the Respondent, in addressing the first ground of appeal submitted that the Appellant in the court below claimed that the alleged verbal contract gave it an interest in the Unit,

which was on the Respondent's land and the claim directly brought in the operation of The Statute.

Counsel drew our attention to the learned authors of **Black's Law Dictionary**[2] at page 505 where they defined disposition as follows:

> *"The act of transferring something to another's care or possession, esp. by deed or will; the relinquishing of property."*

According to Counsel it is evident from the said definition that the Appellant in the court below was in effect claiming that a disposition in an interest in land had occurred between the parties as the Unit had been transferred to the Appellant's care and possession.

It was Counsel's submission that the court below was on firm ground when it applied The Statute to the verbal agreement which could not be referred to as a simple contract as the agreement the Appellant is trying to enforce is a lease agreement.

Counsel referred us to the learned authors of **Land Law in Zambia: Cases and Materials** at page 91 where a lease is defined as follows:

> *"A lease is an interest or estate in land of a defined duration ... A lease, apart from being a proprietary interest in land, is also a contract in that it is an agreement between a landlord and*

tenant. As a contract, a lease is subject to the principles of contract law. A lease is more than a contract between two parties in that as an interest in land it is capable of binding a third party... A lease will be valid if two requirements have been satisfied. The essential qualities a lease gives are that it gives a person the right of exclusive possession of property for a defined or certain duration."

Counsel argued that the verbal agreement the Appellant is trying to enforce is for exclusive possession of the Unit for a period of ten (10) years, and therefore falls within the essential qualities of a lease agreement. The Appellant cannot therefore allege that the contract is a simple one, thus The Statute should come into play.

In response to the second and third grounds of appeal, Counsel took the view that the court below did not err when it did not consider the plea of part performance.

According to Counsel, the fact that the Appellant was in occupation of the Unit did not amount to part performance of the alleged verbal agreement between the parties, as the allegation did not prove that the Unit was offered to it at no rental for a period of ten years.

Counsel submitted that, the purpose of the doctrine of part performance was to allow a party to prove the existence of a contract which could not be proved directly with documentary evidence.

Counsel further submitted that the court below did not err when it held that there was no agreement between the parties in compliance with Section 4 of The Statute, which is clear with regard to the circumstances under which an action can be brought upon the contract for the disposition of an interest in land.

The case of **Zambia Building and Civil Engineering Limited and Contractors Limited v Janina Georgopoullos**[3] was relied upon.

Counsel further submitted that, the Appellant did not produce any note or memorandum in writing as required by The Statute to prove the existence of the alleged verbal agreement. That, the communication between the parties at pages 25 to 28 of the record of appeal does not amount to a note or memorandum as the parties were not in agreement over the terms.

We have considered the parties respective arguments and the Ruling being impugned. We shall in our determination deal with the first ground, then the third and conclude with the second ground of appeal.

The first ground of appeal, attacks the application of The Statute by the court to what Counsel for the Appellant alleges was a simple contract. The issue we are being called upon to determine is whether the Statute was applicable given the pleadings on record.

Section 4 of The Statute entails that no action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person thereunto by him lawfully authorised.

The Statute requires certain types of contracts aforestated to be in writing. The reason behind that, is that, despite the fact that the law of contracts recognise agreements made verbally, such contracts are often vague and often impossible to prove what the original terms were. If one party breaches an oral contract, it often becomes an issue of who said what, forcing the court to determine which party is more believable.

By contrast, written contracts provide a tangible record of the specifics of the agreement. In the event such an agreement leads to litigation, the court has a firm understanding of each party's responsibility in fulfilling the terms of the contract.

The Statute extends to leasing real estate as well. Any lease that will not end within one (1) year from its commencement must be in writing. In other words, leases of more than one year must comply with The Statute.

This is so, because a lease is a contract between landlord and tenant which creates an estate in land.

We note from the pleadings on record that the issue in contention between the parties relates to an interest in land as it brought about the leasing of the Unit for over ten (10) years, the only term in dispute being the rent payable. The Unit, was constructed on the Respondent's land and therefore falls under the ambit of The Statute. This therefore cannot be said to be a simple contract as is being alleged by the Appellant.

In the view we have taken, the first ground of appeal has no merit and is accordingly dismissed.

The third ground of appeal attacks the holding by the court below that the Appellant had not satisfied the court that there was an agreement in compliance with Section 4 of The Statute.

We have noted from the onset that in the affidavit in opposition to the preliminary issue appearing at page 22 of the record, the Appellant concedes that the agreement between the parties was verbal.

There was therefore no written agreement. The Appellant however went on to exhibit e-mails which were exchanged when the dispute arose as evidence in support of the verbal agreement. After the learned Judge looked at the same, she opined that there was no conclusive evidence of the terms of the purported agreement as there was no meeting of the minds of the parties. The learned Judge was of the view that there was no conclusive agreement in terms of the material aspect of the agreement such as consideration.

It should be noted that, even when an agreement is put in writing, there are certain elements that must be contained in the writing in order for the contract to be considered valid and binding.

The agreement must be in written form; it must identify the subject of the contract in an easily understood manner; it must spell out the essential terms of the agreement, such as consideration and it must include at a minimum the signature of the party that is being charged.

The issue we are being called upon to determine is whether the e-mails qualified to be a memorandum or note as envisaged under The Statute. The document in issue need not be contemporaneous with the agreement. It may be contained in a pleading in an action or in a series

of documents. However, it must as earlier alluded to, contain the essential elements, such as the parties, the property and consideration.

In our view, although the e-mails were not contemporaneous, they would have qualified as a memorandum or note if the parties had agreed and /or had certainty on all the essential elements of the agreement.

Whilst there was certainty on the parties and the property; it was lacking on consideration.

In the view that we have taken, we find no basis for faulting the learned Judge in holding that the Appellant had not satisfied the court that there was an agreement in compliance with The Statute.

This ground of appeal fails for lack of merit.

We now turn to the second ground of appeal. We note which is conceded by the Respondent, that the learned Judge did not consider the doctrine of part performance, as asserted in the Appellants affidavit evidence and arguments. On the strength of the **Wilson Masauso Zulu**[1] case, we agree with the Appellant that it is the duty of the trial court to adjudicate upon every aspect of the suit between the parties, so that every matter in controversy is determined in finality.

The doctrine of part performance is an exception to Section 4 of The Statute, in that, a court will enforce a contract if one side has partially performed. In the event the validity of an oral agreement is at question, the fact that one party has already performed its responsibilities under the agreement may serve to confirm that a contract did exist.

The doctrine of part performance was addressed in the **Steadman**[2] case. The House of Lords noted that there was nothing about the doctrine in the Statute.

That it is an invention of the Court of Chancery in England after the passing of The Statute, keeping in mind the equitable nature of the remedy, so that the defence under Section 4 of The Statute was not abused. The **Steadman**[2] case also made it clear that the Statute did not make and does not make oral contracts void; it only makes them unenforceable.

It also made it clear that proof of part performance is an issue of evidence. That a thing is proved in civil litigation by showing that it is more probably true than not.

In the even that part performance is proved to the satisfaction of the court, Section 4 of The Statute will be excepted and will accordingly not apply.

Given the aforestated, the learned Judge erred in dismissing the entire cause by not addressing the doctrine of part performance as the issue was one of evidence which needed to be interrogated at the trial.

The Supreme Court case of **Jean Mwamba Mpashi v Avondale Housing Project Limited**[4] made it aptly clear that the Rules of the Supreme Court makes it clear that if triable issues are raised, it is a ground for refusing summary Judgment.

We also note that as endorsed on the writ of summons apart from the Appellant claiming specific performance, there was in the alternative a claim for damages which also needed to be interrogated at the trial instead of dismissing the entire cause.

In the view that we have taken, the second ground of appeal succeeds.

We accordingly remit the matter to the High Court to be allocated to another Judge. We direct that the Respondent does settle its defence and thereafter the parties do proceed to take out an Order of directions and then the action should run its informal course until trial when full evidence can be given and arguments heard on all the issues before the

court for determination.

The costs hereof will abide the outcome in the court below.

J. CHASHI
COURT OF APPEAL JUDGE

F. M. LENGALENGA
COURT OF APPEAL JUDGE

M. J. SIAVWAPA
COURT OF APPEAL JUDGE