

IN THE COURT OF APPEAL

APPEAL NO. 72/2017

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

MAGGIE MULELA

APPELLANT

AND

ALICK KAIRA

1ST RESPONDENT

UMK CONSTRUCTION ENGINEERING

2ND RESPONDENT

CORAM: CHISANGA JP, CHISHIMBA, KONDOLO SC JJA

On 23rd January, 2018 and 19th November, 2019

For the Appellant

*:Mr. M. Chitundu of Messrs Chitundu & Barnaby
Advocates*

For the 1st Respondent :No Appearance

For the 2nd Respondent :No Appearance

J U D G M E N T

KONDOLO SC, JA delivered the Judgment of the Court

CASES REFERRED TO:

- 1. Lombe Chibesakunda v Rajan Lehraj Mahtani (1998) S.J. 39 (S.C.)**
- 2. Limpic v Mawere and Others Appeal No. 121/2006 (S.C.)**
- 3. Chimbo and others v The People (1982) ZR 20 (S.C.)**
- 4. Ronex Properties Limited v John Laing Construction Limited (4)
[1983] 1 QB 398**

5. **Kasepa v Mulenga (Appeal No. 235/2013) [2016] ZMSC 196 (24 August 2016)**
6. **Gideon Mundanda v Timothy Mulwani & The Agricultural Finance Co. Ltd and S.S.S. Mwiinga (1987) Z.R. 29 (S.C.)**
7. **Audrey Wafwa Gondwe v Supa Baking Company Limited (In Liquidation) and V.U. Akubit - SCZ/9/2001**
8. **Bain and Others v Fothergill and Others [1874- 1880] All E.R. Reprint 83**
9. **Ray v Druce [1985] 2 All E.R. 482**

LEGISLATION REFERRED TO:

1. **Halsbury's Laws of England**
2. **Odgers On Civil Court Actions 24th Edition, Sweet & Maxwell, 1996 J24 paragraphs 11.13 - 11.12 at page 242-243**

The Appellant has appealed against the Judgment of the High Court in which she was denied specific performance of a contract of sale of land and in lieu awarded a refund of the purchase price which she claimed was insufficient and she urged this Court to award the purchase price at market value.

The facts giving rise to this appeal stem from a contract to sale land between the 1st Respondent's late father, Brown Kaira and the Appellant. The agreed purchase price was K2,500.00 (rebased) and an agreement was executed to that effect. The Appellant then paid K1,500.00 as a deposit, on 28th December, 1994, leaving a balance of K1,000.00 to be paid at the end of January, 1995.

In the lower Court, the Appellant alleged that she had paid the balance but was unable to produce a receipt as proof of payment. The deceased did, however, write a letter confirming that he had sold half of LOT No. 3042/M to

the Appellant. Unrelated to the transaction, the deceased's wife borrowed K3,700.00 from a bank and used the Title Deed as security. The Appellant redeemed the mortgage and the deceased gave her the Title Deeds to hold on to. The Title Deeds were for a 14-year lease and when the deceased died, the Administrator changed title to his name and converted the lease from 14 to 99 years. He did, however, concede that when effecting the change, he did not disclose the Appellant's interest to the Commissioner of Lands. Unfortunately, the agreement to sale entered into by the Appellant and the Deceased did not describe which half of the land was sold to her.

Mr. Kaira, the 1st Respondent, stated that the Appellant was silent from 2003 until 2012, which was the year he changed the title into his name as Administrator. He later sold 2.5 hectares of the Land to the 2nd Respondent. The 2nd Respondent maintained that even though it had been sued, it was a bona fide purchaser for value and did no wrong.

The Appellant, disgruntled by the prevailing facts, commenced an action against both Respondents seeking, *inter alia*, the following reliefs; a declaration that the contract of sale for the land was and is still binding; an order for specific performance; in the alternative an order for reimbursement of the value of the land at current market value and an order compelling the 1st Respondent to effect the sale agreement entered into with the deceased.

The learned trial Judge after analyzing the facts before him, found that despite being in possession of the Title Deeds for 14 years, and doing nothing to

complete the sale to the 1st Defendant, the Appellant did not engage in any fraud because he was the Administrator of the estate. The Court further found that the claim for specific performance was, in any event, statute barred, because the Appellant had taken no steps to seek a 99 year lease even after those title deeds expired and only to resurface 21 years later claiming ownership of the land. The lower Court discussed the law on limitation of actions regarding claims to land and found that the claim for specific performance was statute barred and dismissed it.

The lower Court however held that the payment of K1,500.00 which the 1st Respondent was a witness to, was proved and he ordered that the said amount be refunded with interest thereon. The learned trial Judge also declared that the 2nd Respondent was indeed a bona fide purchaser and was the legal owner of the property purchased from the 1st Respondent.

The facts as stated above are not in dispute and the Appellant has come to terms with the finding of the lower Court with regard to specific performance. Her only issue with the Judgment was that monies ordered to be refunded were not accurate. The Court ordered that the 1st Respondent pays back the sum of K1,500.00 when it was supposed to be K2,500.00 which was the amount paid as full purchase price. The second ground of appeal was that the lower Court ignored the fact that K3,700.00 was paid for purposes of redeeming the mortgage and the same ought to be refunded.

The Appellant filed heads of argument and when the matter came up for hearing none of the Respondents were present and none of them had filed arguments in reply. We proceeded to hear the appeal in the absence of the Respondents and the Appellant relied solely on her heads of argument.

The Appellant submitted that it was not appealing the Courts finding that the claim for specific performance was statute barred but argued that the Court ought to have ordered that she be refunded the full purchase price of the subject property in the sum of K2,500.00 and not the partial payment of K1,500.00 ordered by the Court. It was argued that having found that there was no consideration given for the payment of the purchase price, the Court should have ordered repayment of all monies paid under the agreement in line with the holding in the case of **Lombe Chibesakunda v Rajan Lehraj Mahtani** ⁽¹⁾. It was opined that allowing the Appellant to hold onto the purchase price would amount to unjust enrichment, an act that has been condemned by the Courts in cases such as **Limpic v Mawere and Others** ⁽²⁾. Therefore, the lower Court ought to have upheld the Appellant's claim for a refund at the market value of the property as there was no breach of Contract on her part and for this reason her compensation must be to a degree high enough to enable her buy a similar piece of land.

Under Ground 2, Counsel submitted that she was given the original Title deeds to hold onto after she paid K3,700.00 towards redemption of the mortgage. Despite being aware of the transactions between the Appellant and the deceased, the 1st Respondent went ahead and sold the land to the 2nd Respondent without

refunding her the above-mentioned sum. This issue, albeit being brought to the attention of the lower Court, though not in the Writ of Summons but in her evidence, was not dealt with. This was wrong in principle and was contrary to the guidance of the Supreme Court in **Chimbo and Others v The People** ⁽³⁾ that a Court should adjudicate upon all matters before it. It was thus submitted that the trial Court's error could be rectified by this Court. Taking everything into account, the Appellant urged this Court to grant her a refund of K3,700.00.

We have considered the Record as a whole and appreciate the spirited arguments filed on behalf of the Appellant. The issues in contention boil down to a refund of the full purchase price at market value and a refund of K3,700.00 with the accompanying interest.

We note that the lower Court found that the matter in relation to the performance of the Contract of Sale was statute barred even though this was not raised in the pleadings or at trial. The learned authors of the **Halsbury's Laws of England**, state that the expiry of the limitation period must be expressly pleaded even if it appears on the face of the Statement of Claim that the limitation period has expired. They further state that statutory limitation periods can be brought before the Court either as a Defence or raised as a preliminary issue.

In the case of **Ronex Properties Limited v John Laing Construction Limited** ⁽⁴⁾ Stephen LJ explained the rationale as follows;

'There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. But in

those cases, it may be impossible to say that he has no reasonable cause of action. The right course is therefore for a defendant to apply to strike out the plaintiffs' claim as frivolous and vexatious and an abuse of the process of the court, on the ground that it is statute-barred. Then the plaintiff and the court know that the Statute of Limitations will be pleaded; the defendant can, if necessary, file evidence to that effect; the plaintiff can file evidence of an acknowledgment or concealed fraud or any matter which may show the court that his claim is not vexatious or an abuse of process.'

The point here is that unless or until a limitation defence is raised by a Defendant, it is not an issue in the action. This issue received attention by the Supreme Court in the case of **Kasepa v Mulenga** ⁽⁵⁾ where the following was said;

"According to the learned authors of Odgers On Civil Court Actions 24th Edition, Sweet & Maxwell, 1996 J24 paragraphs 11.13 - 11.12 at page 242-243, in order to enable a party, rely on a statutory defence such as those under the Limitation Act, such defence must be specifically pleaded. Generally, the reason for this requirement is that, in civil matters a claimant must give a fair notice of what case the opponent will meet at trial. Sufficient particulars must therefore be disclosed in advance and not at the trial itself with the result of denying the opponent an opportunity to respond and thus take them by surprise. The learned authors underscore this position under the heading on 'Special Defences' where it is stated as follows:

"A party must in any pleading subsequent to a statement of claim plead specifically any matter for example the expiry of a relevant period of limitation, fraud or any fact showing illegality - which he alleges makes any relevant claim or defence of the opposite party not maintainable; or (b) which if not specifically pleaded, might take the opposite party by surprise; "

It is therefore quite clear that the trial Court erred when it raised the Statute of limitations on its own motion. The Statute of limitations not having been raised implies that the statutory defence was waived and the trial judge should therefore have considered the claim for specific performance. It is trite law that specific performance is an equitable remedy and can only be awarded where the damages are inadequate. In **Mundanda v Mulwani and Others** the Supreme Court held that a Judge's discretion to award damages for breach of contract involving land is severely limited and said as follows;

"The law takes the view that damages cannot adequately 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....."

In a case of this nature it is proper for a plaintiff to claim specific performance and damages in the alternative, and it is the duty of the court to consider whether, on such pleading, specific performance should be granted before considering the possibility of

damages, which should only be awarded where, for some valid reason, specific performance would be an inappropriate remedy.”

In casu, an order of specific performance is inappropriate because the property has been sold to the 2nd Respondent who was found to be a bona fide purchaser for value without notice, a fact that the Appellant has not opposed. We shall address the alternative claim of damages later in this Judgement.

With regard to ground one, the document at page 154 of the Record of Appeal is a note confirming that the deceased sold the subject land to the Appellant and it makes no mention of any balance payable. The document was executed in 2003, 9 years after the initial Contract of Sale. The Appellant's evidence shows that she had paid the balance but was unable to show proof of receipt of the balance of K1,000.00. However, the document alluded to, is proof that the Deceased had no claim against her for the purchase price and as such we find that the Appellant did pay the entire purchase price. Ground 1 therefore succeeds.

In ground 2, the Appellant claimed a refund of the sum of K3, 700.00 which amount she used to redeem a mortgage on behalf of the Deceased's wife. The 1st Respondent at paragraph 7 of his defence (page 32 of the record of appeal) admitted that the money was paid but argued that it was an independent transaction. Even though not itemized as a claim, the issue was specifically pleaded in paragraphs 7 and 8 of the statement of claim. It was an issue for

determination and the trial Court erred by not dealing with it. The money obtained from the Appellant was for the purpose of securing the title deeds and therefore part of sale of land transaction which would only conclude upon completion or termination of the transaction and the Appellant is therefore awarded the sum of K3,700.00. Ground 2 succeeds.

We now turn to the alternative claim for damages. In the Appellants heads of argument under what was entitled “preface to the appeal”, realising that there was no hope of an order for specific performance in her favour, the Appellant urged the Court to award the refund of the purchase price at market value of the property to enable her purchase a similar piece of land.

We find it necessary to contrast the case at hand with the case of **Peter Militis v Wilson Kafuko Chiwala** in which the Supreme Court, in a dispute over the sale of a house declined to allow a valuation of the house for the purpose of compensation. The facts were that the Respondents employers offered to sell him a house as a sitting tenant at the cost of K70,000.00. He had no money to pay for the house so he entered into an oral agreement with his friend the Appellant, the terms of which were that the Appellant would advance the Respondent the sum of K70,000 to pay for the house and he would then re-sell to the Appellant for an additional K70,000. After receiving and paying for the house the Respondent reneged on the agreement and registered the house in his own name claiming that the Respondent had simply loaned him the sum of K70,000 to buy the house for himself.

The Appellant sued the Respondent seeking an order of specific performance. The High Court made a finding that there was an oral contract between the parties and entered Judgement for an order of specific performance in favour of the Appellant. The trial Judge further ordered, *inter alia*, that a valuation of the house be undertaken so as to arrive at the current value which was the amount to be paid to the Respondent in lieu of the K70,000 which was not paid. The Appellant promptly appealed the Judgement on various grounds but we shall confine ourselves to the ground of appeal against valuation of the house. The Appellant submitted that the trial Judge misdirected himself in law and fact in holding that the appellant should pay the respondent the current market value of the house in dispute when he found as a fact at trial that the appellant had paid K70,000 to the respondent in 1986 as part payment of the agreed purchase price of K140,000.

The Supreme Court upheld the order for specific performance but overturned the order for valuation of the house stating as follows;

***“From the evidence on record it would appear to us that when the respondent secured the certificate of title dated 27th of July, 1990, he had already altered his position not to be bound by the oral contract to sell the property to the appellant. Had he done the transfer then, and as the learned trial judge rightly pointed out, the K70,000.00 would have been used to secure another high cost house to himself. In the circumstances, we hold the view that calling for a valuation to determine the present market value of the property*”**

would be a contradiction of the terms of the contract intended to punish the Appellant as if he was the one at fault. The order for valuation is reversed and the terms of the oral contract will apply.”
(underlining ours)

In the cited case, the house had not been paid for in full and the would-be beneficiary, the Respondent, was the cause of the delay and the main point was that the trial judge's order to value the house was going to harm the innocent party. For the sake of clarity, the Supreme Court did not hold that valuing a property for its present market value cannot be used as a basis for compensation.

The facts of the **Peter Militis** Case are in stark contrast and quite distinguishable from the facts of the case before us where the purchase price was paid in full and there was no echo of deceit in the transaction apart from the fact that Appellant chose to assert her rights after a long time.

The transaction for the sale of land in casu was not done under the Law Association of Zambia Contract of Sale Conditions and is thus a contract of sale of land at common law. There being a breach of contract, it follows that the Appellant is entitled to damages in addition to the refund of K2,500.00 and K3,500.00.

Even though the claim for damages was not contained in the Memorandum of Appeal, it was raised in the Court below where the Appellant claimed in the alternative that the 1st Defendant pays the money at the current

bank rate and or market value of that piece of land. The issue has also been raised in the Appellants Heads of Argument meaning that the Respondent was well aware that the Appellant considered the issue as a matter for determination. We thus exercise our power under **Order 10 Rule, 9 (3) and (4) Court of Appeal Rules** which states as follows;

10 (9) (3) The Appellant shall not therefore without leave of the Court put forward any grounds of objection other than those set out in the memorandum of appeal, but the Court in deciding the appeal shall not be confined to the grounds put forward by the appellant.

(4) The Court shall not allow an appeal on any ground not stated in the memorandum of appeal unless the Respondent, including any person who in relation to such ground should have been made a Respondent, has had sufficient opportunity of contesting the appeal on that ground.

As earlier indicated, we are inclined to award the Appellant damages for breach of contract and we so do. The damages in this instance are for loss of bargain and we refer to the case of **Audrey Wafwa Gondwe v Supa Baking Company Limited (In Liquidation) and V.U. Akubit** ⁽⁶⁾. In the cited case, the Defendant had been placed under liquidation and the liquidator offered to sell one of its houses to the Plaintiff. Unbeknown to the Plaintiff and the Defendant the house had been sold to a third party a year earlier by agents of the Zambia Privatization Agency. Before this occurred, the Plaintiff had requested a price

reduction which was declined by the liquidator who instead extended the time within which payment could be made and the Plaintiff accepted the offer a day before the offer expired. The Court found that when the liquidator offered the extension, he was already aware that the house had been sold to a third party.

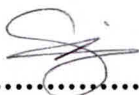
The Court held that the third party was an innocent purchaser who could not be deprived of the property. The liquidator found himself in a position where he had no house which he could sell and therefore unable to make a good title to the Plaintiff. The Court stated that *"this was a situation brought about through the fault of the vendor and amounted to some form of deceit or misrepresentation and a breach of the agreement"* and further held as follows;

"We are satisfied that the rule in Bain & Others v Fothergill and Others ⁽¹⁾ should not apply. This is an ancient rule much disliked by many which provided that where the non performance of the contract resulted from the vendor's inability to make a good title, the purchaser could not recover damages for loss of the bargain; but only damages limited to expenses incurred by the purchaser in investigating the title. The rule cannot apply where the vendor has voluntarily caused his own inability, as was the case here: see also and contrast Ray v Druce ⁽²⁾, where the rule applied because, among other reasons, the purchaser was already aware of the difficulty the vendor had created prior to the contract there will be judgment for the plaintiff appellant against the defendant respondent for damages for breach of contract on the footing of damages for loss of the bargain."

In casu, the 1st Respondent found himself in a position where he was unable to make a good title to the Appellant because he had sold the land to the 2nd Respondent who was a bona fide purchaser without notice. The Appellant is entitled to damages for loss of bargain which in this instance is the value for which the Appellant would sell the land today. The matter is referred to the Deputy Registrar for assessment of damages on the basis of the present market value of the land.

The awarded sums shall attract interest at the average short-term bank deposit rate from date of writ to date of Judgment and thereafter until date of payment, at the current bank lending rate as determined by Bank of Zambia.

The appeal succeeds and costs are awarded to the Appellant.



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F.M. CHISANGA
JUDGE-PRESIDENT

.....
F.M. CHISHIMBA

COURT OF APPEAL JUDGE



.....
M.M. KONDOLO SC
COURT OF APPEAL JUDGE