

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2014/HPC/0412



BETWEEN:

MSANIDE PHIRI

PLAINTIFF

AND

BHB CONTRACTORS (Z) LIMITED

1ST DEFENDANT

STANSLOUS MUBANGA

2ND DEFENDANT

BRIAN CHILUMBA

3RD DEFENDANT

Delivered in Open Court before Hon. Mr. Justice Sunday B. Nkonde, SC this 28th day of October, 2016

For the Plaintiff : Mr. C. Hamweela of Messrs Nchito and Nchito
For the Defendants : Mrs. V. K Chitupila of Messrs A B & David

J U D G M E N T

CASES REFERRED TO:

- 1) *Milnes v Gery* (1807) 14. Ves. Jun.400
- 2) *Sudbrook Trading Estate Limited v Eggleton and Others* (1983) AC 444

The Plaintiff commenced this action on 6th October, 2014 by way of Writ of Summons and Statement of Claim claiming for:

- a) Damages for breach of contract;**
- b) Payment of the balance of K40, 000.00 for use of the (certificate of) Title relating to the Plaintiff's property for the period January to April 2014;**
- c) Payment of K25, 000.00 for each month from May, 2014 until the Certificate of Title relating to the property is returned to the Plaintiff;**
- d) An Order that the Certificate of Title relating to the property be returned to the Plaintiff forthwith;**
- e) An Order that the Defendants indemnify the Plaintiff stated there be any difficulty in the Certificate of Title relating to the Plaintiff's property being returned to the Plaintiff;**
- f) Interest;**
- g) Costs.**

The Defendants filed their Defence on 11th June, 2015.

On 15th July, 2016 the parties filed into Court amended Statement of Agreed Facts whose material portions were as follows:

- a) In or around December, 2013, the 1st Defendant was awarded a Contract by the Rural Electrification Programme for the supply, delivery, installation and Commissioning of the Grid Extension Liner and Transformers in certain areas under the 2013 Rural Electrification Programme REA/W/01 13 with K4, 012, 455.11.**

- b) An oral contract came into existence between the deceased and the Defendant's in or around December and January 2014.**
- c) One of the terms of the contract was that the Defendant would pay K100, 000.00 upfront for using the Title relating to the property known as Stand No 18000 Lusaka in the Lusaka Province of Zambia (the property).**
- d) The Defendants had only paid the Plaintiff K60, 000.00 to secure the release and use the Certificate of Title to the property.**
- e) The balance of K40, 000.00 was paid into Court by the Defendants on 21st December, 2015.**
- f) The Defendants only returned the Certificate of Title relating to the property to the Plaintiff on 19th August, 2015.**

In the Statement of Agreed Facts, the questions which this Court is being asked to determine are three, that is;

- 1) Was there an agreed period between the Defendants and the deceased for which the Defendants were to use the Certificate of Title relating to the property and return the same to the Plaintiff?**
- 2) In the event of 1) being found in the affirmative, was there an agreement between the deceased and the Defendants that the Defendants would be liable to pay compensation for the period that the Certificate of Title relating to the property was to be in the Defendant's custody beyond the agreed period?**
- 3) Was there an amount agreed for the compensation between the Defendant and the deceased?**

At trial, the Plaintiff's only witness was MSANIDE PHIRI (PW). He stated that he was the Plaintiff and personal representative of the estate of the late CYNTHIA KAOMA KAPAMPE. His evidence in chief was further that it was him as agent and his principal, CYNTHIA KAOMA KAPAMPE, now deceased, who the 2nd and 3rd Defendants approached to procure the use of the subject Certificate of Title relating to the property, of the deceased, as performance security for the Rural Electrification Programme Project (the Project) and both the deceased and PW agreed to this. PW further stated that the terms of the oral contract that came into existence between the Defendants and the deceased upon agreement were that:

- a) *The Defendants would use the Certificate of Title relating to the Property as performance security for 4 months, that is from January, 2014 to April, 2014;*
- b) *The Defendant would pay K100, 000.00 upfront for using the Title relating to the property for the 4 month aforesaid; and*
- c) *The Certificate of Title would be returned at the expiration of the 4 month period.*

PW further stated that the Certificate of Title was consequently handed to the 2nd and 3rd Defendants in late December, 2013 and a Third Party Mortgage was duly registered in favour of First National Bank Limited (the Bank) on 13th January, 2013.

PW went on to state that the Mortgage was only discharged on 19th January, 2016 despite the agreement with the 2nd and 3rd Defendants being that the period for using the Certificate of Title was from January to April, 2014.

Under cross examination, PW insisted that he was a party to the oral contract between the deceased and the Defendants because he (PW) was the person the Defendants were dealing with.

Asked on the duration agreed for use of the Certificate of Title, PW stated that it was for 4 months from January, 2014 being the duration of the Project but he also went on to concede that he had no evidence before Court as proof that the duration of the project was 4 months. PW, however, explained that nothing pertaining to the oral contract was reduced to writing because the Defendants were his colleagues.

On the K100, 000.00 upfront payment, PW stated that the Defendant defaulted in paying the same and this prompted PW to try to terminate the oral contract but at that time, the Certificate of Title had already been lodged at the Lands and Deeds Registry in furtherance of security for the bond availed to the Defendants by the Bank.

The 1st and 2nd Defendants' witness was STANSLOUS MUBANGA (DW). In his evidence in Chief, he stated that upon being awarded the contract RES/W/01/13, the 1st Defendant was requested to provide a Performance Guarantee from a financial institution and, thus, the Defendants approached the Bank to provide the guarantee. However, the bank needed security or collateral for the intended guarantee and that is how the Defendants approached the deceased with whom they agreed that the Certificate of Title relating to the property would be used as security or collateral as required by the Bank for the duration of the Project.

DW further stated that it was also a term of the oral contract that the Certificate of Title would only be returned to the deceased upon completion of the Project, once the same had been returned from the Bank with which it had to be deposited.

In relation to the K100, 000.00 payment, DW stated that this amount was to be paid to the deceased for use of the property as security for the duration of the Project. Out of this amount, K60, 000.00 was paid upfront to secure the release and use of the Certificate of Title while the K40, 000.00 balance was agreed to be paid upon completion of the Project. DW further stated that the Project was only completed on or about 30th July, 2016 and the Certificate of Title was eventually returned to the Plaintiff on 19th August, 2016.

Under cross-examination, DW stated that the duration of the Project was 26 weeks. DW, however, conceded that August, 2015 when the Certificate of Title was returned was far longer a period than the 26 weeks duration of the Project he had alluded to.

At the close of the case, both Learned Counsel for the respective parties filed written submissions which I am very grateful for and I have duly taken into account in determining this matter.

Am also mindful that since the facts were agreed upon by the parties, and a Statement of Agreed Facts accordingly filed, it was the desire of the parties that this Court strictly adheres to determining the questions put to it and not to venture into formulating its own questions.

Coming to the three questions before me, I will deal with them in the same sequence they were put forward.

The first question is whether there was an **“agreed period between the Defendant and the deceased for which the Defendants were to use the Certificate of Title relating to the property and return the same to the deceased.”**

The evidence on record, both from PW and DW, was that the Certificate of Title was to be used for the duration of the Project. However, the witnesses were at variance on the specifics as to the duration and when the Certificate of Title was agreed to be returned. To PW, the specific duration was agreed to be 4 months from January 2014; meaning, April 2014 and to be returned after April, 2014 which according to PW, was when the Project was scheduled to end. To DW, the duration agreed upon for use of the Certificate of Title was from mid December, 2013 up to completion of the 26 weeks which was the duration of the Project, and to be returned once the Certificate of Title had been returned to the Defendants by the Bank with whom it was deposited.

My simplified understanding of the evidence on record on the aspect is;

a) On the duration for use of the Certificate of Title,

- (i) Plaintiff's version - 4 months; that is, from January, 2014 to 30th April, 2014, and

- (ii) Defendant's version - 6 ½ months; that is, from mid December, 2013 to 30th June, 2014.

b) On when the Certificate of Title was to be returned,

- (i) Plaintiff's version - after 30th April, 2014, and
- (ii) Defendant's version - after 30th June, 2014 once the Certificate of Title had been returned to the Defendants by the Bank.

At trial, I had the opportunity to observe the demeanor of both PW and DW and even then, I am unable to tell who between PW and DW could have been lying.

Quite clearly, therefore, from what I have stated above, and in the light of the different versions from the witnesses as alluded to, I find as a fact that there was no "**Consensus Ad Idem**" or "**meeting of the minds**" by the parties as to the duration for use of the Certificate of Title by the Defendants for the Project at the time of entering into the said "oral contract" in December, 2013.

Therefore, to the first question, which is whether there was "**an agreed period between the Defendants and the deceased for which the Defendants where to use the Certificate of Title relating to the property and return the same to the Plaintiff**", the same is answered in the negative.

It also follows that since the second question was premised on the first question being found in the affirmative, and now that it has instead been found in the negative, the second question falls away.

With regard to the third question, which is whether there was **“an amount agreed for the compensation between the Defendants and the deceased”**, this question, which I consider to be a stand-alone question to the first and second question is manifestly vague. It is compensation for what? In my view, the Court is left to speculate as to what the compensation referred to by the parties in the third question was intended for. Consequently, I find myself unable to judiciously determine the third question as formulated by the parties.

But assuming I am wrong, and the compensation referred to in the third question is that stated in the second question; that is **“compensation for the period that the Certificate of Title relating to the property was to be in the Defendant’s custody beyond the agreed period.”** Still, because of the answer I have given to the second question, the third question equally falls or would equally fall away.

Before I end, as a general observation in this case which stems from an “oral contract”, I find it compelling to quote the words of Sir William Grant, MR in the old English case of **Milnes v Gery**¹ at page **409** cited in the case of **Sudbrook Trading Estate Limited v Eggleton and Others**² when he said:

“If you go into a Court of law for damages, you must be able to state some valid legal contract, which the other part wrongfully refuses to perform”

In conclusion, in view of the answers I have given to the three questions put forward for determination, am not satisfied that the Plaintiff has proved its case on a balance of probabilities for relief (a); that is, damages for breach of contract and/or relief (c); that is, payment of K25, 000.00 for each month from May, 2014 until the Certificate of Title relating to the property is returned while reliefs (b), (d) and (e) have, after the commencement of the action, since become moot.

Consequently, the Plaintiff's action against the Defendants lacks merit and is accordingly dismissed with costs to the Defendants, the same to be taxed in default of agreement.

Dated at Lusaka this 28th day of October, 2016.



Hon. Mr. Justice Sunday B. Nkonde, SC
HIGH COURT JUDGE