

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA**

**APPEAL NO. 98/2014
SCZ/8/272/2012**

(Civil Jurisdiction)

BETWEEN:

JACKSON KABVIMBA LUNGU

APPELLANT

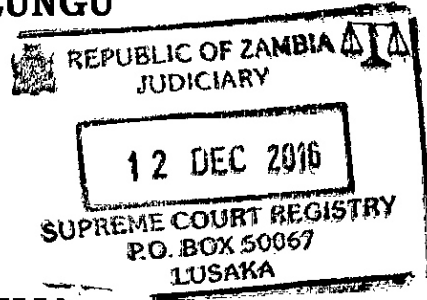
AND

MARIA PHIRI

1ST RESPONDENT

DAVISON KWENDAKWEMA

2ND RESPONDENT



**Coram: Mwanamwambwa DCJ, Hamaundu and Kajimanga, JJS
On the 8th December, 2016 and 12th December, 2016**

- ✓ For the Appellants : Messrs Mvunga & Associates (Not Present)
 For the 1st Respondent : Mr D. Tambalukani, Messrs Derrick
 Mulenga & Co
 For the 2nd Respondent : Messrs Lumangwe Chambers (Not
 Present. Notice of non-appearance)

JUDGMENT

Hamaundu, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Nora Mwansa Kayoba & Vulizani Banda v Eunice Kumwenda Ngulube & Andrew Ngulube [2003] ZR 132,**
2. **Zambia Consolidated Copper Mines Limited v Eddie Katalayi and Max Chilongo [2001] ZR 28**

3. **Crown Cork Zambia Limited v Pamela Jackson (Married Woman)** [1988/89] ZR 62
4. **Attorney General v Achiume** [1983] ZR 1
5. **Nkhata & Ors v Attorney-General** [1966] ZR 124.
6. **Augustine Kapembwa v Danny Maimbolwa and Attorney General** [1981] ZR 127;
7. **Wilson Masauso Zulu v Avondale Housing Project Limited** [1982] ZR 172.
8. **Kenmuir v Hattingh** [1974] ZR 162

Legislation referred to:

Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia, Section 34

Works referred to:

1. **A S Sutton and Shannon on contracts, 17th edition, page 9**
2. **Halsbury's laws of England, third edition, Vol.15, para 338**

This is an appeal against a judgment of the High Court which dismissed the appellant's action for specific performance of a purported sale of subdivisions 18 and 19 of Farm No. 748 "NJO" Ndola.

The background to this appeal is as follows: In December, 2001, the 1st respondent bought a house on the above plot from her employers, Gamma Pharmaceuticals Limited, who assigned it to her on the 13th December, 2001. On the 16th May, 2002, the 1st respondent sold and assigned the property to the 2nd respondent, as a result of which a certificate of title dated the 16th May, 2002 in respect of the house was issued to him. The appellant, then, commenced this action against the two respondents.

In the court below, the appellant's version of the dispute was briefly, thus; he applied to buy the disputed property from Gamma Pharmaceuticals Limited, through the 1st respondent. To that end, he paid a deposit of K10million (old currency) towards the purchase price of US\$24,500. Subsequently, he paid another sum of K23million (old currency). Thereafter, he started renovating the property while awaiting completion of the sale; spending in the process, a sum slightly in excess of K34million (old currency). To his amazement, the 1st respondent sold the house to the 2nd respondent, instead.

The 1st respondent's version was thus: Indeed, the appellant sought to buy the house through her. The offer was given in her name and had certain conditions attached; some of which were that a deposit of 10% was to be paid initially and the balance was to be paid within thirty days, failing which the deposit would be forfeited. The appellant duly paid the sum of K10million as deposit. The appellant, however, did not pay the balance within thirty days as required. This compelled her to borrow a sum of K30million (old currency) from a friend, Jane Changwe, which she paid to her employers in order to buy some time. The appellant promised to pay

back the K30million to Jane Changwe. Thereafter, the appellant sold his house in Lusaka and paid K23million (old currency) towards the purchase price. There was still a balance on the purchase price which the appellant failed to pay, prompting her to renegotiate the purchase price down to US\$18,000 and applying the money for her accrued leave days. The appellant failed to pay the money owed to Jane Changwe, whereupon the two of them decided to sell the house so that Jane Changwe would be paid the money owed to her and the appellant would be refunded his money. It was the appellant who even found the 2nd respondent as a buyer, whereupon the house was sold to the 2nd respondent. Jane Changwe was paid K30million owed to her and the appellant was refunded his money.

Jane Changwe supported the 1st respondent's version and added that no repairs were carried out to the property as the appellant took back the material he had bought for the repairs.

The 2nd respondent's version was thus: At first, he was approached by the appellant concerning the sale of the house. The appellant demanded K120million (old currency) as the purchase price. The 2nd respondent felt that the price was very high and,

therefore, he declined to buy the house. Later, he was approached by the 1st respondent and Jane Changwe who said that the property was being sold for K80million. He asked them as to how they came to be involved in the sale of the house. When they explained the circumstances of the sale, he demanded the appellant's presence. The appellant and the two women duly came again and a sale was agreed at K80million. He paid the money to the lawyers and title deeds were issued to him.

The court below found the following facts as undisputed; that the 1st respondent applied to buy the property on behalf of the appellant; that the offer was made to the 1st respondent; and, that there were conditions for payment of a deposit and completion of the purchase price within 40 days.

With regard to the disputed facts, the court found the combined evidence of the 1st respondent, the 2nd respondent and Jane Changwe to be very cogent. Consequently, it believed their version of the dispute over that of the appellant. In view of that it, further found as a fact as follows; that the appellant paid the sum of K23million long after the deadline to pay the purchase price had expired; that the delay had forced the 1st respondent to borrow

K30million from Jane Changwe to pay for the house; that the appellant made no further payment; that the 1st respondent used her terminal benefits to pay the balance; that the appellant was refunded all the money he paid; and, that the appellant carried out no renovations worth the claim he was making for re-imbusement.

In the end, the court below held that, in the circumstances of this case, it was the 1st respondent who bought the house and that, consequently, she was its owner. With those findings and the holding, the court dismissed the appellant's claim.

The appellant filed four grounds of appeal. The first ground is that the court below erred in law and fact when it held that the appellant was not the owner of the disputed house.

The second ground is that the court below erred in law and fact when it held that the appellant was part of the decision to sell the property when he had rescinded his decision before title could pass.

The third ground is that the court below erred in law and fact when it held that the appellant was not entitled to a refund of the

money paid towards the purchase price when evidence showed that he never directly received any refund.

The fourth ground is that the court below erred in law and fact when it held that the appellant was not entitled to a refund of the money spent on renovations inspite of the fact that he had proved the claim in his evidence.

The appellant's arguments were those contained in the heads of argument filed by his advocates. In the first ground of appeal, the appellant's argument revolved around the law of agency. It was argued that, in this case, the facts had established that the 1st respondent was an agent of the appellant in the purchase of the house from Gamma Pharmaceuticals; that this was confirmed by the 1st respondent's testimony that she was buying the house on behalf of the appellant. It was argued that, in the circumstances, the appellant should have been declared the rightful purchaser of the house.

In the second ground, it was submitted that the appellant had ably testified that he had rescinded his decision to sell the house even before title had passed to the 2nd respondent. We were referred

to the case of **Nora Mwansa Kayoba & Vulizani Banda v Eunice Kumwenda Ngulube & Andrew Ngulube⁽¹⁾**, and also the case of **Zambia Consolidated Copper Mines Limited v Eddie Katalayi and Max Chilongo⁽²⁾** to buttress the appellant's argument that the 2nd respondent had notice of the appellant's interest in the property and therefore could not be treated as a buyer for value without notice.

In the third ground, it was submitted that there was no evidence in the court below to prove that the money purported to have been refunded to him was received and accepted by him. It was argued that in the absence of such crucial evidence, the appellant was entitled to a refund of the K33million that he paid towards the purchase price.

In the fourth ground, it was submitted that the appellant had presented before the court below a bill of quantities and receipts for the payments he had made towards renovating the house. That the 2nd respondent even admitted in evidence that he had seen some paints and cupboards at the house. The appellant argued that, in those circumstances, he was entitled to a refund for the expenses on renovations.

With those arguments, we were urged to allow the appeal.

In response to the appellant's first ground of appeal, Mr Tambalukani, learned counsel for the 1st respondent, argued that the court below did not err when it held that the appellant was not the owner of the disputed house. According to counsel, this is because the appellant failed to satisfy the requisite consideration, which was payment of the purchase price in full. It was argued that, by that failure, the appellant failed to fulfill a condition of sale and that this amounted to breach of contract on his part. We were referred to the works, **A S Sutton and Shannon on Contracts, 17th edition**, as to the meaning of a condition in contract. We were also referred to the case of **Crown Cork Zambia Limited v Pamela Jackson (Married Woman)**⁽³⁾ to support counsel's submission that the appellant repudiated the contract.

In response to the second ground, counsel rallied behind the court below in its holding that the appellant was part of the decision to sell the house. To support that position, counsel pointed out that the appellant had written a letter to the advocates, Messrs Makungu & Co, giving instructions as to how the money realized from the sale should be utilized. It was argued that, by that letter,

the appellant was estopped from denying that he consented to the sale of the house. We were referred to **Halsbury's Laws of England, third edition**, and **Sutton and Shannon On Contract** for the meaning and effect of the doctrine of estoppel.

In response to the third ground, counsel submitted that, infact, the court below did not hold that the appellant should not be refunded his part payment; but that he had, infact, been already refunded. In support of the lower court's finding, counsel pointed to the evidence before the court below which showed that the cheques for the refund were issued directly in the name of the appellant. It was counsel's further argument that it was immaterial whether or not the appellant took the cheques to his former advocates.

Responding to the fourth ground, counsel submitted that, before the court below, the appellant failed to dispute the evidence of Jane Changwe to the effect that, from the time she moved into the house up to the time it was sold, she did not see any renovations that had been carried out. It was argued that, because of that evidence, the court below found as a fact that no renovations were carried out to justify the claim. Counsel argued that a finding of fact can only be reversed by this court if it was perverse. We were

referred to the cases of **Attorney General v Achiume⁽⁴⁾** and **Nkhata & Ors v Attorney-General⁽⁵⁾** for that proposition. Counsel submitted that, in this case, the finding of fact was not perverse.

We were, accordingly, urged to dismiss this appeal.

The 2nd respondents arguments also were those contained in the heads of argument filed by his advocates. To begin with, the 2nd appellant argued that this whole appeal is intended to attack the lower court's findings of fact. As a starting point we were referred to two cases;

- (i) **Augustine Kapembwa v Danny Maimbolwa and Attorney General⁽⁶⁾**
and,
- (ii) ~~**Wilson Masauso Zulu v Avondale Housing Project Limited⁽⁷⁾**~~

Both cases lay down the principle that an appellate court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts. On the strength of that principle, it was argued that there is no basis upon which the appellant can claim to be the owner of the house because the court below had found that the appellant was refunded the sum of K33,000 which he had paid towards the house

as part payment. It was argued that, in the circumstances, the appellant never bought the house.

In response to the second ground of appeal, the 2nd respondent set out a portion of the passage where the court below found that the appellant was party to the sale of the house to the 2nd respondent and argued that there was nothing perverse about this finding of fact.

Again in response to the third ground of appeal, the 2nd respondent set out passages of the judgment of the court below where the evidence of the parties on the issue of the refund of the deposit was recited by the court and the finding of fact that the appellant was refunded his deposit was made. It was argued that having analysed the evidence and made the finding of fact, the court below was on firm ground in holding that the appellant was not entitled to a refund of his deposit.

Responding to the fourth ground of appeal, it was submitted that the court accepted the evidence of Jane Changwe and found as a fact that the appellant did not carry out any renovations to the house. Consequently, it was argued that the court below was on

firm ground when it held that the appellant did not carry out any renovation to justify his claim for a refund of K34,505,750.00.

We were, therefore, urged to dismiss this appeal.

We have heard the arguments from both sides. We wish to start by noting that the 2nd respondent holds title deeds to the house in dispute. **Section 34** of the **Lands and Deeds Registry Act, Chapter 185** of the **Laws of Zambia** does not permit an action for possession to lie against the holder of a certificate of title in respect of property unless, among other exceptions which do not apply to this case, the title has been obtained by fraud. The question is, did the 2nd respondent obtain his title by fraud?

We agree, entirely, with the submission by the 2nd respondent that this matter was decided in the court below, entirely, on facts. At the trial the appellant, on one side, had his own version of the story while the 1st respondent, Jane Changwe and the 2nd respondent, on the other side, had their own version of the story. The trial court weighed the two opposing sides of the story and decided that the respondents' side was very cogent indeed as compared to the appellant's. Consequently, the court accepted the

respondents' version of the story in its entirety. It should be borne in mind that the respondents' version traversed facts such as; that the appellant paid K33 million towards the purchase of the house but failed to pay the balance; that due to the appellants failure, the 1st respondent borrowed K30million from Jane Changwe which the appellant promised to pay back; that the 1st respondent also renegotiated the purchase price and applied her leave days benefits in order to complete the purchase; that the appellant failed to pay back the K30million whereupon the appellant and Jane Changwe agreed to sell the house so that Jane Changwe could be paid her money and the appellant would be refunded his part payment; that, pursuant to that agreement the house was sold to the 2nd respondent; that Jane Changwe was paid her money while the appellant received his refund; and, that, although the appellant had bought a few materials meant for the renovation of the house, he never renovated it but, instead, took away the materials.

The above, as we have said were, therefore, found as facts by the court below. As can be seen, all the grounds of appeal are on one or other of the above facts. There is no doubt in our minds that

the court below resolved the disputed facts by resorting to the credibility of the parties before it. In **Kenmuir v Hattingh**⁽⁸⁾, we held:

“Where questions of credibility are involved an appellate court which has not had the advantage of seeing and hearing the witness will not interfere with the findings of fact made by the trial Judge unless it is clearly shown that he has fallen in error.”

In this case, the appellant has not demonstrated in what way the court below may have fallen in error when it accepted the respondents' version over that of the appellant. Indeed, having read the proceedings in the court below, the combined version of the respondents is the one that has a clearer explanation of what happened between the two sides. Therefore, it does not come to us as a surprise that the court below was swayed by their version. We, therefore, hold that the court below was on firm ground when it made the findings of fact that the appellant now appeals against. In the light of those findings of fact, it cannot be said that the 2nd respondent obtained his certificate of title by fraud. Consequently, we cannot fault the court below for dismissing the appellant's claim. As a result, all the four grounds of appeal must fail.

This appeal stands dismissed, with costs to the respondents to be taxed in default of agreement.


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M. S. Mwanamwambwa
DEPUTY CHIEF JUSTICE


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E. M. Hamaundu
SUPREM COURT JUDGE


.....
C. Kajimanga
SUPREM COURT JUDGE