

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(CIVIL JURISDICTION)

APPEAL NO.191/2013
SCZ/8/194/2013

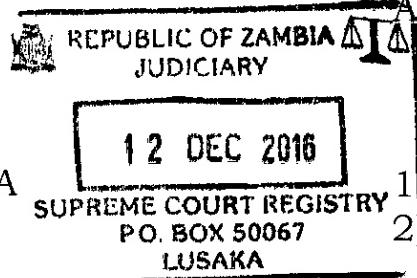
BETWEEN:

NASON KAPEMBWA

APPELLANT

AND

MICKNESS CHOMBA
JACKSON MTONGA



1ST RESPONDENT
2ND RESPONDENT

CORAM: Mambilima, CJ, and Kaoma and Musonda, JJS

On: 6th December, 2016 and 12th December, 2016

✓ For the Appellant: N/A
For the Respondents: N/A.

JUDGMENT

KAOMA, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Mobil Oil (Zambia) Limited v Loto Petroleum Distributors Limited (1977) Z.R. 336 (H.C.)**
2. **Bata Shoe Company Limited v Vin-Mas Limited (1994) S.J 35 (SC)**

Legislation referred to:

1. **Section 4 of the Statute of Frauds Act of 1677**

This is a matter which commenced in the Local Court and went on appeal to the Subordinate Court, to the High Court and finally is before this Court.

The background to the matter is that the appellant was approached by the 2nd respondent and Emmanuel Musalu concerning the sale of house number 1087 Luangwa Compound, Kitwe. The 2nd respondent informed the appellant that he was selling the said house on behalf of his mother (the 1st respondent).

During negotiations, at which the appellant, the 1st and 2nd respondents and Lillian Mtonga, a daughter of the 1st respondent were present, the purchase price for the house was fixed at K9,000.00 (rebased) by the 1st respondent. The appellant made a part payment of K3,000.00 and it was agreed that the balance of K6,000.00 would be paid when the documents relating to the house were availed to the appellant and change of ownership effected.

A Sale Agreement dated 4th May, 2007 was signed by Lillian Mtonga as seller indicating that she had sold house number 1087 Luangwa Compound, Kitwe to the appellant at the price of K9,000.00 and that the appellant had paid K3,000.00, remaining with a balance of K6,000.00. Emmanuel Musalu signed as the

buyer and Jason Chomba, who we understand is the 2nd respondent, signed as a witness. The appellant had authorised Emmanuel Musalu to act for him because he was sick at the time and was unable to walk.

Subsequently, the appellant reminded the 2nd respondent, on several occasions, about the documents for the house but the 2nd respondent claimed that the documents were at the village in Chipata. Lillian Mtonga went to Chipata to collect the documents but returned empty handed. She claimed that the documents were burnt in a house at the village. However, the 2nd respondent assured the appellant that the house now belonged to him.

In order to facilitate the acquisition of duplicate documents for the house from Kitwe City Council, the appellant paid an additional sum of K1,500.00 bringing the total payment to K4,500.00. But even then, the respondents failed to produce the documents for the house as agreed. Consequently, the balance of the purchase price remained outstanding. It was the appellant's position that he was ready to pay the balance on production of the documents for the house.

Although the 2nd respondent had allowed the appellant to begin renovating the house, he evicted the appellant's workers who were occupying the house. Thereafter, the 1st respondent sold the house to a third person at K19,000.00. She claimed that the appellant wanted a refund of his money but he refused to accept the K4,500.00 and demanded K18,000.00 because of renovations done to the house.

This behaviour by the 1st respondent prompted the appellant to take out an action in the Local Court against the 2nd respondent alleging that there were disputes over the house sold to him. The Local Court heard the parties and found in favour of the appellant and ordered him to pay the balance of K4,500.00 and further directed that the house be returned to him.

In arriving at this decision the Local Court considered two questions: first, whether the appellant purposely failed to pay the balance of the purchase price so as to justify the 2nd respondent and his family to sell the house to another person; and second, whether the 2nd respondent and his family asked the appellant to pay the balance of the purchase price after they acquired the

documents pertaining to the house which could have made it possible for change of ownership to be effected.

The Local Court answered both questions in the negative and held that it was unfortunate that after the procurement of documents pertaining to the house, the 2nd respondent and his family decided to sell the house to another customer without informing the appellant and without finding out whether or not the appellant was ready to pay the balance of K4,500.00. The Local Court was of the view that if the appellant had failed to pay the balance, then the 2nd respondent and his family could have decided to sell the house to any customer of their choice.

The decision of the Local Court displeased the 2nd respondent who then appealed to the Subordinate Court. In his grounds of appeal he alleged, among other things, that the lower court erred by ordering him to give the house back to the appellant when the owner of the house was the 1st respondent; and that the court erred by ordering him to give back the house because PW2 (sic) was the one who sold the house and he was just an agent.

The Subordinate Court heard the matter de novo. Prior to that, on 9th February, 2010 the 1st respondent was joined to the

proceedings as 2nd defendant on application by the appellant as the one who sold him the house. The Subordinate Court also found in favour of the appellant on the basis that the 2nd respondent was an agent of the 1st respondent; that as agent he had lawfully sold the house to the appellant; and that he had no authority to sell the house to another person as the appellant had an equitable interest in the house once he had paid a deposit. The Subordinate Court found that the delay was caused by the 2nd respondent who had no right to sell what did not belong to him.

The respondents were not satisfied with the decision of the Subordinate Court, and therefore, appealed to the High Court on three grounds. The first ground alleged that the learned magistrate erred in fact and law when she held that the 2nd respondent acted for the 1st respondent when he did not have any express and actual authority to do so. The second ground alleged that the learned magistrate erred in law and in fact when she adjudicated upon the matter without the consent of the parties. The third ground was that the Subordinate Court erred both in law and fact when it held that house number 1087 belonged to the appellant when there was no contract of sale between the appellant and the 1st respondent.

The High Court considered the appeal and held that: from the evidence on record it had not been established that the 1st respondent authorised the 2nd respondent to act on her behalf for the sale of the house; that the lower court had jurisdiction to hear the matter; and that from the evidence there was no contract of sale or memorandum between the appellant and the 1st respondent as required by section 4 of the Statute of Frauds Act 1677 on sale of land or interest in land and that as such, there was no valid sale of the house to the appellant. The 2nd respondent was directed to refund the appellant the part payment of K4,500.00 with interest.

Dissatisfied with the decision of the High Court, the appellant has appealed to this Court on two grounds as follows:

- 1) **The learned High court Judge erred in law and fact when he held that from the evidence on record, it had not been established whether the 1st respondent authorised the 2nd respondent to act as agent for the sale of land, when the record was showing that there was a principal-agent relationship between them.**
- 2) **The learned High court Judge erred in law and fact when he held that there was no documentation for the purported sale, thereby invoking section 4 of the Statute of Frauds Act when in fact there was a contract of sale on record being proof of the documentation for the sale.**

In support of the appeal, counsel for the appellant filed written heads of argument but was not present at the hearing of the appeal as he had earlier on filed a notice of non-attendance. On the other

hand, the respondents did not file heads of argument or attend the hearing despite proof of service of the notice of hearing on their advocates, Nyirongo & Co.

On ground one, counsel for the appellant contended that there was viva voce evidence which was tendered before the Local Court to the effect that the 1st respondent did in fact authorise the 2nd respondent to look for a buyer of the house and sell it. Counsel argued that it was further established under cross-examination of the 2nd respondent that the other person who was also authorised to sell the house was the daughter to the 1st respondent and the 1st respondent in her testimony before the Local Court agreed that she appointed the 2nd respondent to look for a buyer.

It was also argued that in his evidence before the Subordinate Court the 2nd respondent reiterated that his mother, the 1st respondent asked him to look for a buyer for the house. It was counsel's contention that from the viva voce evidence on record, it is clear that the 1st respondent did authorise the 2nd respondent to act on her behalf in the transaction for the sale of the house.

In respect of ground two, counsel for the appellant submitted that there was ample evidence, both viva voce and the contract of

sale, to prove that there was a contract of sale for the house in question which contract of sale was signed on behalf of the 1st respondent by her daughter Lillian Mtonga and witnessed by the 2nd respondent and it was signed on behalf of the appellant by Emmanuel Musalu.

Counsel contended that as argued in ground one, the 1st respondent had given authority to her daughter and the 2nd respondent, her son, to act on her behalf in this transaction; that there was a contract of sale which was executed relating to the house in question; and that the learned High Court Judge erred when he invoked section 4 of the Statute of Frauds, 1677.

We have considered the record of appeal, the judgment of the court below and the arguments submitted on behalf of the appellant. The question raised by ground one is whether or not the 1st respondent authorised the 2nd respondent to act as her agent in the sale of the house in issue. The second question raised by ground two is whether or not there was evidence in writing in respect of the contract of sale between the appellant and the 1st respondent relating to the house in issue.

In respect of the first question posed above, it is trite that the concept of agency is premised on the principle that 'he or she who acts through another does, the act himself or herself'. The person who instructs another to act for him or her is called the principal while the person instructed to act on behalf of another is an agent.

In this case, there was no dispute in the Local Court or the Subordinate Court that the 1st respondent authorised the 2nd respondent to find a buyer and to sell house number 1087 Lwangwa Compound in Kitwe. The evidence on record clearly shows that 2nd respondent was authorised to act as an agent of the 1st respondent. In their written arguments in the High Court, the 2nd respondent admitted that he was an agent of the 1st respondent. His only grievance was that he had not been properly heard by the court and that since there was full disclosure of the identity of the principal, she ought to have been the one to be sued.

And as submitted by counsel for the appellant, the 1st respondent had admitted in her evidence before the Local Court that she appointed the 2nd respondent to look for a buyer and that Emmanuel Musalu took her and the 2nd respondent to the appellant whom she charged K9,000.00 and she told the appellant to give the

2nd respondent and her daughter the money. There can be no doubt, therefore, that a principal-agent relationship existed between the 1st respondent, the 2nd respondent and Lillian Mtonga.

We agree with the appellant that the learned High Court Judge glossed over the evidence on record because had he carefully examined the evidence and the arguments, he would have found that the 2nd respondent was authorised to act as an agent of the 1st respondent. We find merit in the first ground of appeal.

With regard to the issue raised in ground two as to whether there was evidence in writing relating to sale of the house, it is trite that section 4 of the Statute of Frauds Act 1677 requires contracts relating to the sale of land to be evidenced in writing and that they should be signed by the party to be charged or by some other authorised person. Section 4 provides that:

“No Action shall be brought whereby to charge the Defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.”

In the present case, the evidence on record, which we have alluded to above, shows that there was a sale agreement relating to

house number 1087, Lwangwa Compound, Kitwe which was executed between the appellant and the 1st respondent by their duly authorised agents. Therefore, we have no doubt that the sale agreement relating to the house satisfied the requirements of section 4 of the Statute of Frauds.

The holding by the learned High Court Judge that there was no documentation for the sale of the house between the appellant and the 1st respondent was, in our view, erroneous. In the case of **Mobil Oil (Zambia) Limited v Loto Petroleum Distributors Limited**¹, a High Court decision, it was held that the court must investigate the circumstances to see whether the document came into being as a valid agreement, and, if the court on the evidence finds that it did, then the court is not prevented from so holding by any impediment of law.

In this case, it is clear to us that the learned High Court Judge failed to investigate the circumstances of this case in order to establish whether or not there was a contract of sale in respect of the house in question. Had he investigated the circumstances of this case, he would have come to the conclusion that there was a sale agreement between the 1st respondent and the appellant which

was not repudiated by any of the parties. Since the sale agreement was signed by authorised agents of the parties, the 1st respondent and the appellant were bound by the acts of their agents and they cannot avoid liability arising from a contract concluded by their agents. In the case of **Bata Shoe Company Limited v Vin-Mas Limited**², Bata Shoe Company attempted to avoid liability arising from a contract of sale concluded by its subordinate employee who was instructed to advertise its houses for sale on the ground that the subordinate officer had no authority to sell. The court held that the company's authorised agents bound the company to comply with the contract and as such liability could not be avoided.

We agree with the appellant's argument that the lower court erred when it held that there was no documentation for the sale of the house in issue thereby invoking section 4 of the Statute of Frauds. We find merit in ground two of the appeal.


In conclusion, we find merit in the appeal and we allow it with costs. In the circumstances, we confirm the judgment of the Subordinate Court nullifying the purported sale of the house by the 1st respondent to a third party on the basis that the house having

been offered and sold to the appellant was not available to be sold to a third party.


We further confirm the Subordinate Court order that the appellant pays the outstanding balance of the purchase price of K4, 500.00 to the 1st respondent (without any interest), and that the 1st respondent yields vacant possession of house number 1087, Lwangwa Compound, Kitwe to the appellant.



HON. I.C. MAMBILIMA
CHIEF JUSTICE



HON. R.M.C. KAOMA
SUPREME COURT JUDGE



HON. M. MUSONDA
SUPREME COURT JUDGE