Selected Judgment No. 26 of 2017
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IN THE SUPREME COURT OF ZAMBIA **Appeal No.146/2014**
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

MIRRIAM MBOLELA **APPELLANT**

AND

ADAM BOTA **RESPONDENT**

Coram: **Mwanamwambwa DCJ, Kajimanga and Kabuka JJS**
On the 6th of June 2017 and 15th of June 2017

FOR THE APPELLANT: Mr. T. Chabu, Messrs Terrence Chabu & Co.

FOR THE RESPONDENT: Mr. K. Bota, Messrs William Nyirenda & Co.

J U D G M E N T

Kajimanga JS delivered the judgment of the Court.

Cases referred to:

1. **Borniface Kafula & 8 Others v Billings Choonga Mudenda Appeal No. 202 of 2003**

2. Philips v Copping [1935] 1 KB1
3. Workers Compensation Fund Control Board v Kangombe and Company Appeal No.113/2001
4. Development Bank of Zambia & Livingstone Saw Mills Limited v Jet Cheer Development (Z) Limited SCZ Judgment No.33 of 2000
5. Hina Furnishing Lusaka Limited v Mwaiseni Properties (1983) ZR 40 (HC)
6. Mobil Oil (Zambia) Limited v Loto Petroleum Distributors Limited (1977) ZR 336 (HC)
7. Lindiwe Kate Chinyanta v Doreen Chiwele & Another (2007) ZR 246
8. Gideon Mundanda v Timothy Mulwani and the Agricultural Finance Company Limited and S. S. S. Mwiinga (1987) ZR 29 (SC)
9. Reeves Malambo v Patco Agro Industries Limited (2007) ZR 177
10. Wesley Mulungushi v Catherine Bwale Mizi Chomba (2004) ZR 96
11. Zambia National Building Society v Ernest Mukwamataba Nayunda (1993) ZR 33
12. Development Bank of Zambia v Mangolo Farms Limited (1995) ZR 65 (SC)
13. Kitwe City Council v William Ng'uni (2005) ZR 57
14. Surrey County Council & Another v Bredero Homes Ltd [1993] 3 All ER 705
15. The Attorney General v D. G. Mpundu (1984) ZR 6
16. Philip Mhango v Dorothy Ngulube and Others (1983) ZR 61 (SC)
17. Guinde and Others v Msiska (1963) R & N 465
18. Nora Mwaanga Kayoba and Valizani Banda v Eunice Kumwenda Ngulube and Andrew Ngulube (2003) ZR 132

Legislation referred to:

1. Intestate Succession Act Chapter 59 of the Laws of Zambia, section 19(2)
2. Statute of Frauds 1677, section 4

Works referred to:

1. Chitty on Contracts Vol. 1, 24th edition
2. R. E. Megarry and P. V. Baker, Snell's Principles of Equity (1954) 24th Edition

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This is an appeal against the judgment of the High Court which granted an order of specific performance and awarded damages for breach of contract against the appellant, and also dismissed the appellant's counterclaim.

The brief facts are that in January 2009, the appellant leased house No. 32 - 15th Street Nchanga South, Chingola to the respondent. The said house belonged to the appellant's late husband, Boyd Muleya. The appellant was appointed administrator of the estate of her late husband together with her late husband's sister, Eunice Muleya. On 18th November 2009, the appellant sent a text message to the respondent offering the house for sale to him at the price of K170,000,000.00 (now K170,000-00). The text message reads as follows:

> **"I feel I shud just sell the hse now. But b4 I cme 2 advertise over the weekend, I've given you the 1st priority as a sitting tenant. The offer is 170m."**

On 26th November 2009, the respondent wrote to the appellant accepting the offer to purchase the house. On 28th November 2009,

the appellant wrote a letter to the respondent in which she stated as follows:

> **"Due to the non-payment of rentals from September 17th to date, I have just decided to officially inform you that the house has been finally advertised for sale following the discussions we have had in the past.**
>
> **In connection with the same, you as a sitting tenant was offered to buy the property and this offer still stands. Because of the complaints you have been telling me of not having money of late, I have decided to forfeit the outstanding bill that you have accrued.**
>
> **Due to the advert I placed, the property is therefore subjected for viewing by any interested party without any hindrance from any party that is the landlord and the tenant.**
>
> **Sorry for the inconvenience this may cause."**

On 29th November 2009, the respondent replied to the appellant's letter and complained about her failure to maintain the house and her decision to advertise the house. The respondent insisted in that letter that he had accepted the offer.

On 2nd December 2009, the respondent took out an action in the High Court by way of writ of summons against the appellant

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claiming the following:

1. **An order of specific performance ... directing the Defendant to fulfil her obligations under a contract of sale;**
2. **An order declaring the Plaintiff as the bonafide purchaser of House No. 32 - 15th Street Nchanga South, Chingola;**
3. **An order restraining the Defendant from evicting the Plaintiff from the said house;**
4. **Damages for breach of contract;**
5. **Interest; and**
6. **Costs.**

On 29th January 2010, a defence and counterclaim was filed by the appellant. In her defence, it was alleged that she never offered to sell the subject property to the respondent and that she had no intention of doing so as it was a source of income for her children. In the counterclaim, the appellant sought an order for payment of rent arrears at a monthly sum of K2,000,000.00 (now K2,000.00) from September 2009 to date of payment, an order for possession of House No. 32, 15th Street Nchanga South, Chingola, mesne profits, interest and costs.

On 28th January 2010, the lower court granted the respondent an interim injunction restraining the appellant from evicting him

pending final determination of the matter. On 11th May 2010, the appellant filed an application for review of the court's decision. On 6th August 2010, an order for review was granted and the order of interim injunction was set aside. In its ruling, the court also ordered that the sum of K10,000,000.00 (now K10,000.00) paid into Court by the respondent should be paid out to the appellant as part payment of rent arrears. The appellant later executed two warrants of distress against the respondent for rent arrears.

On the appellant's application, on 2nd March 2011, the lower court granted an order of preservation of property and an order appointing the assistant registrar of the Kitwe High Court to take possession and management of the house, pending determination of the matter, and to collect rentals and pay the same to the appellant who required the money for the upkeep of her two minor children.

The respondent's evidence in the court below was that sometime in December 2009, the appellant and the respondent discussed the offer relating to the sale of the house and it was agreed between the parties that they would proceed with the sale in place of the tenancy

agreement. The respondent explained, however, that he was later informed by the appellant that the house had been sold to another person.

The respondent testified that there was a binding contract of sale between the appellant and himself which was breached. He explained that he suffered damage from the said breach of contract following his eviction from the house and the seizure of his goods pursuant to the warrants of distress for rent arrears issued by the appellant.

According to the respondent, no rent arrears were owed to the appellant at the time he accepted to purchase the property. He testified that in her letter dated 28th November 2009, the appellant had forfeited the outstanding rent that had accrued as of that date since the tenancy was superceded by the contract of sale. It was also the respondent's evidence that there was no presidential consent for the appellant to charge him such rent.

The appellant's evidence was that she leased the house to the

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respondent in January 2009 and that the respondent had been up to date with rentals until June 2009 when he began defaulting. She testified that when she wrote the letter dated 28th November 2009, she wanted to frustrate the respondent by offering to sell him the house knowing that he had no money to purchase it. She stated that her intention was not to sell the house to the respondent but to make him vacate it instead.

It was also the appellant's evidence that her co-administrator was not informed about the purported offer for the sale of the house and neither was the said co-administrator aware of the court proceedings.

After considering the evidence of the parties, the learned trial judge found that the respondent accepted the offer orally and in writing. She stated that the offer was unconditional and that the respondent was not given a chance to pay the purchase price after the offer was made. The learned trial judge also found that the offer was made without consulting the co-administrator and that there was no court order authorizing the sale of the house. She, however,

reasoned that it was impossible for the appellant to consult the co-administrator over the intended sale as the said co-administrator was nowhere to be seen.

The learned trial judge expressed the view that an administrator has the discretion to decide whether or not to sell the house but requires the authority of the court to sell it. She opined that section 19 (2) of the Intestate Succession Act Chapter 59 of the Laws of Zambia ("the Act") does not prohibit administrators from making offers for sale of houses or entering into contracts of sale of houses because they may apply for authorisation from the court at any time before the transaction is concluded. It was her view that the appellant was fully aware of the interest of the children in the house and had full authority to act on their behalf and, therefore, acted within her authority when she offered the house to the respondent.

The learned trial judge also found that when the offer to sell the house was made and accepted, the relationship between the respondent and the appellant immediately changed from that of landlord and tenant to that of vendor and purchaser. That,

appealed on seven grounds. These are:-

1. **The learned High Court Judge erred in law and fact by holding that section 19 (2) of the Act does not prohibit administrators from making offers for sale of houses or entering into contracts of sale of houses which are part of the estates that they administer without Court authority.**
2. **The learned High Court Judge erred in law and fact when she held that there was a valid contract of sale between the respondent and appellant and by holding that there was an offer, acceptance and consideration notwithstanding the fact that the Court allowed the appellant to withdraw the sum of K10,000-00 paid into Court as part payment of rent arrears.**
3. **The learned High Court Judge erred in law and fact when she ordered specific performance of an alleged contract of sale.**
4. **The learned High Court Judge erred in law and fact when she treated all monies collected by the appellant as rent after 28th November 2009 as part payment of the purchase price.**
5. **The learned High Court Judge erred in law and fact when she held that the contract was breached and the respondent was entitled to damages for the breach.**
6. **The learned High Court Judge erred in law and fact when she ordered that the respondent was to take possession of the house pending completion of the conveyance.**
7. **The learned High Court Judge erred in law and fact when she dismissed the appellant's counterclaim.**

On 3rd September 2014, the appellant's advocates filed heads of argument in support of the appeal. At the hearing Mr. Chabu, the

learned counsel for the appellant informed us that he would rely on the appellant's written heads of argument and supplement ground two with brief oral submissions. For the respondent, Mr. Bota applied for leave to file the respondent's heads of argument and authorities out of time. We refused to grant the application on the ground that the delay was inordinate.

In support of ground one, counsel for the appellant referred us to the judgment of the trial court at page 21, lines 1 – 13 of the record of appeal where the trial court opined as follows:

> **"As regards lack of a Court order to sell the house, I am of the view that an administrator has the discretion to decide whether or not to sale [sell] the house but requires the authority of the Court to sale [sell] it. Section 19 (2) of the Act does not only relate to estates where there are minor interests but to all estates governed by the Act. However, this section does not prohibit administrators from making offers for sale of houses or entering into contracts of sale of houses which are part of the estates that they administer without Court authority because they may apply for authorization from the Court at any time before the transaction is concluded... In my view, lack of prior Court authority to sale [sell] cannot be a defence to an application for specific performance of a contract of sale of a piece of land or a house."**

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The learned counsel also referred us to the provisions of section 19 (2) of the Act and submitted that the said section prohibits the sale of property forming part of the estate of a deceased person without the authority of the court and any contract relating to the sale done without the said authority of the court is illegal and unenforceable for being contrary to the Act. To support his submission, counsel cited the case of **Borniface Kafula & 8 Others v Billings Choonga Mudenda**[1] where, despite the contract of sale having been executed and completed by the administrator and the purchaser, the court ordered a refund of the sum of K60,000,000.00 (now K60,000.00) as no authority had been obtained from the court prior to the sale. We were also referred to the case of **Philips v Copping**[2] where it was stated as follows:

> **"It is the duty of the court when asked to give judgment which is contrary to statute to take the point, although the litigants may not take it. Illegality once brought to the attention of the Court overrides all questions of pleadings, including any admission made therein."**

The learned counsel further submitted that the sale of a house takes place at the time the contract is signed or when the acceptance

of the offer is communicated and, therefore, authority from the court is needed before such actual sale takes place.

In support of ground two, counsel for the appellant submitted that there was neither a valid and enforceable contract of sale nor a note or memorandum to satisfy section 4 of the Statute of Frauds 1677. It was submitted in the alternative that if there was any contract between the respondent and the appellant then the same was unenforceable, for being contrary to section 19 (2) of the Act.

According to the learned counsel, the parties did not sign any contract of sale so as to prove the sale of the house in dispute. He also contended that the alleged text message and letter dated 28th November 2009 were insufficient to satisfy section 4 of the Statute of Frauds 1677, on the ground that they did not contain all the material terms of the contract namely; the nature of the consideration, adequate identification of the parties and subject matter.

It was further submitted, in the alternative, that the letter dated 28th November, 2009 and the evidence on record clearly showed that

the appellant later resiled from her intention to sell the house to the respondent. That this was evident from the said letter which stated that the property was advertised and any other interested persons were entitled to view it without any hindrance from the landlord and tenant. We were referred to the case of **Workers Compensation Fund Control Board v Kangombe and Company**[3] where we stated as follows:

> **"In this case, the Defendant even later resiled from its intention to sell the house in question saying it would keep it as its housing stock to accommodate its employees and we know of no law, constitutional or the general law, which forces an unwilling person to sell his property. The motive of a property owner not to sell is irrelevant."**

The learned counsel contended that since the respondent did not pay the alleged purchase price to the appellant or into court, then the appellant was entitled to rescind the alleged offer, if any. We were referred to the learned authors of **Chitty on Contracts Vol. 1, 24th Edition,** who state at page 693, paragraph 1471 as follows:

> ***"Discharge from liability by breach*. A contract may be discharged by breach, that is to say, one party to it may be discharged from further liability to perform it by reason of the other party's default."**

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It was accordingly submitted that the contract, if any, was discharged by the respondent's failure to pay the full purchase price either to the appellant or into court and the appellant had a right to rescind the offer, if any, which she duly exercised.

In support ground three, counsel for the appellant submitted that the respondent was not entitled to an order for specific performance on the ground that the respondent did not come to equity with clean hands as he did not pay the full purchase price to the appellant or into court for him to be entitled to specific performance. Counsel placed reliance on the case of **Development Bank of Zambia & Livingstone Saw Mills Limited v Jet Cheer Development (Z) Limited**[4] where we held that:

> **"Specific performance is an equitable relief and the maxim that applies in a case of this nature is "He who comes to equity must come with clean hands."**

The case of **Hina Furnishing Lusaka Limited v Mwaiseni Properties**[5] was also cited on the same principle.

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We were further referred to the learned authors, R. E. Megarry and P. V. Baker in their book, **Snell's Principles of Equity (1954) 24th Edition**, where they state at page 25 as follows:

> **"He who comes into equity must come with clean hands...The Plaintiff not only must be prepared now to do what is right and fair, but also must show that his past record in the transaction is clean."**

It was submitted that the respondent's past record in the alleged transaction was not clean as he was in breach of the contract, if any, as he did not pay the full purchase price either to the appellant or into court. The learned counsel further submitted that the respondent was not entitled to an order for specific performance as it was impossible to specifically perform the contract because the appellant was not the owner of the property and that there are children who have an interest in the same and there was no authority from the court to sell the house. We were referred to the learned authors of **Chitty on Contracts Vol. 1, 24th Edition**, who state at page 786, paragraph 1655 as follows:

> **"Impossibility. Specific performance will not be ordered against a person who has agreed to sell land which he does not own and**

cannot compel the owner to convey to him, because the court does not compel a person to do what is impossible."

The learned counsel also referred us to the case of **Mobil Oil (Zambia) Limited v Loto Petroleum Distributors**[6] where the High Court held as follows:

"A court will not grant a decree for specific performance of a contract if the party seeking the decree can obtain a sufficient remedy by a judgment for damages, and such a decree will not be made when it would be impracticable to secure compliance with it."

According to the learned counsel, although the appellant had a life interest in the house, she could not pass any title to the respondent. To support this argument, we were referred to the Latin maxim **"nemo dat quod non habet"**, which means that no one can give that which he has not. We were also referred to the case of **Lindiwe Kate Chinyanta v Doreen Chiwele & Another**[7], where it was held that:

"The duty of the administrator is not to inherit the estate, but to collect the deceased's assets, distribute them to the beneficiaries and render an account."

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The learned counsel further submitted that specific performance ought not to have been awarded to the respondent as it would cause hardship to the appellant because the deceased's children depended on the rentals from the house for their education. We were referred to the case of **Gideon Mundanda v Timothy Mulwani and the Agricultural Finance Company Limited and S. S. S. Mwiinga**[8] where we stated as follows:

> **"As to hardship we would quote from Snell's Principles of Equity 27th Edition at page 598, the relevant paragraph of which reads: 'To constitute a defence, however, the hardship must have existed at the date of the contract; specific performance will not be refused merely because, owing to events which have happened since the contract was made, the completion of the contract will cause hardship'..."**

In support of ground four, counsel for the appellant submitted that the treatment of monies paid out of court as part payment of the purchase price amounted to a review of the order which allowed the sum of K10,000,000.00 (now K10,000.00) to be paid as rent arrears. We were referred to the case of **Reeves Malambo v Patco Agro Industries Limited**[9] where it was held that:

> **"However, by proceeding to address himself to the Court's power to**

open a foreclosure absolute and the Valuation Report exhibited by the defendant, the trial court fell into error because he went into issues of review. The trial judge should have restricted himself to the application for interpretation before him; which he did; but gratuitously went further by reviewing his judgment by dealing with new matters which were not before him in the substantive judgment...There was no application before the trial judge for review. The attempt to review the judgment was misconceived.

Counsel for the appellant also referred us to the ruling dated 6th August 2010 at page 94 of the record of appeal, where the trial court stated as follows:

"For the foregoing reasons, I set aside the interlocutory injunction and order that the K10m paid into Court by the Plaintiff be immediately paid out to the Defendant as part payment of the outstanding rentals."

He then referred us to the judgment of the trial court at page 22 of the record of appeal where it was held as follows:

"For the foregoing reasons, I hereby order specific performance of the contract of sale and the treatment of all monies collected by the defendant as rent after 28th November 2009 as part payment of the purchase price."

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It was contended that there was no application for review of the order allowing payment of K10,000.00 out of court as rent arrears and that the attempt to review the said order in the judgement was improper and misconceived.

In support of ground five, it was submitted that the award of specific performance and damages for breach of contract relating to the sale of land are alternative and not concurrent remedies. The learned counsel for the appellant referred us again, to the **Gideon Mundanda** case (supra) where we stated as follows:

> **"Having regard to the view that we take of this case it is not necessary for us to consider whether the learned trial judge's finding of fraud on the part of the third respondent was a correct finding, or whether it should have any effect on the decision whether or not to grant specific performance; nor do we consider that there is any merit in the argument put forward that, because the appellant claimed damages in the alternative to his specific performance, he should be satisfied with the award of damages. 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."

He also referred us to the case of **Wesley Mulungushi v Catherine Bwale Mizi Chomba**[10] where we held as follows:

"As was pointed out in the case of Tito and Others v Waddel and Others No.2 [1977] Ch. D. 106 at page 322, the court will decree specific performance only if it will do more perfect and complete justice than the award of damages. It is for the foregoing reasons that we allowed the appeal, reversed the order of the learned trial judge and in lieu thereof granted the order of specific performance as per the claim of the appellant in the court below."

It was, therefore, contended that the award of both specific performance and damages for breach of contract relating to the sale of land being alternative and concurrent remedies, would unjustly enrich the respondent. The case of **Zambia National Building Society v Ernest Mukwamataba Nayunda**[11] was cited in support of this argument. In that case, we held that:

"The essence of damages has always been that the injured party should be put as far as monetary compensation can go, in about the same position he would have been had he not been injured. He should not be in a prejudiced position nor be unjustly enriched."

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We were further referred to the cases of **Development Bank of Zambia v Mangolo Farms Limited**[12], **Kitwe City Council v William Ng'uni**[13] on the same principle.

The learned counsel further referred us to the judgment of the trial court at page 23, lines 1- 3 of the record of appeal, where it is stated as follows:

> **"I am satisfied that the contract was breached and the plaintiff is entitled to damages for the breach. I therefore award damages to the plaintiff to be assessed by the Deputy Director of Court Operations."**

It was submitted that since the respondent was awarded specific performance of the contract, he was not entitled to damages for breach of the said contract and, therefore, the learned trial judge erred when she awarded both reliefs.

It was also contended that the respondent was not entitled to damages for breach of contract as there was no proof of loss of the house as he was given possession of the house. The learned counsel relied on the cases of **Surrey County Council & Another v Bredero Homes Ltd**[14] and **The Attorney General v D. G. Mpundu**[15] in

support of this contention.

We were further referred to the case of **Philip Mhango v Dorothy Ngulube and Others**[16] where we stated as follows:

> **"It is, of course, for any party claiming a special loss to prove that loss and to do so with evidence which makes it possible for the Court to determine the value of that loss with a fair amount of certainty. As a general rule, therefore, any shortcomings in the proof of a special loss should react against the claimant."**

It was the appellant's contention that the respondent had not lost anything owing to the fact that he was awarded specific performance which ought not to have been awarded to him. According to the appellant's counsel, the respondent was in the same financial position when specific performance was awarded to him and, therefore, no damages were payable.

In support of ground six, it was submitted that the respondent was not entitled to possession of the house pending completion of the conveyance on the ground that the said relief was not pleaded and the alleged contract was not completed for the respondent to be entitled to possession. The learned counsel referred us to the case of

Guinde and Others v Msiska[17] where it was held that:

> **"As a general rule a party cannot rely on a matter which has not been pleaded."**

We were also referred to the case of **Nora Mwaanga Kayoba and Valizani Banda v Eunice Kumwenda Ngulube and Andrew Ngulube**[18] where we stated that:

> **"Coming to the last ground of appeal, it has been argued that the Court should have made an order on costs incurred by the appellants in improving the property. We have looked at the pleadings and hold that these were not pleaded. It is trite law that parties are bound by the pleadings. Therefore, in view of this omission, parties cannot now come to this Court claiming for such."**

The learned counsel contended that the writ of summons and statement of claim appearing at pages 24 – 26 of the record of appeal show that the respondent never pleaded vacant possession of the house. According to the learned counsel, the respondent could only have been entitled to possession upon paying the full purchase price which he had not paid into court or to the appellant up to the date of the judgment. That this is evident from clauses 3 (c) (i) and 12 of the Law Association of Zambia General Conditions of Sale 1997 which

reads as follows:

> **"Completion**
>
> **3 (c) (i) On actual completion of the purchase the purchaser shall be entitled to possession or receipt of the rents and profits of the property as from that date and shall be liable for all outgoings as from that date...**
>
> **Vacant possession**
>
> **12. Except as otherwise stated in the particulars or the special conditions vacant possession of the property will be given upon completion."**

In support of ground seven, it was submitted that there was no valid and enforceable contract of sale and, therefore, the appellant's counterclaim ought to have been sustained.

We have considered the record of appeal, the appellant's written heads of argument and the oral submissions of counsel.

The thrust of ground one is that the learned trial judge fell into error by deciding that section 19(2) of the Act does not prohibit administrators of estates of deceased persons from making offers to sell houses forming part of the estates they are administering without the authority of the court. In advancing this ground, Mr. Chabu

submitted that section 19(2) prohibits the sale of property forming part of the estate of a deceased person without the authority of the court. That any contract relating to the sale of such property done without court authority is illegal and unforceable. Counsel also contended that the sale of a house takes place when a contract is signed and acceptance of the offer is communicated. That therefore, authority from the court is needed before the sale takes place.

We have considered the arguments of counsel relating to this ground. In determining this ground, the starting point should be to examine the provisions of section 19(2) of the Act. This section states that:

> **"Where an administrator considers that a sale of any of the property forming part of the estate of a deceased person is necessary or desirable in order to carry out his duties, the administrator may, with the authority of the court, sell the property in such manner as appears to him likely to secure receipt of the best price available for the property."** (Emphasis added)

We note from the judgment of the learned trial judge at page 21, lines 1 – 13 of the record of appeal that after correctly observing that

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an administrator requires the authority of the court to sell a house forming part of the deceased's estate in accordance with section 19(2) of the Act, she went on to state as follows:

> **"... However, this section does not prohibit administrators from making offers for sale of houses or entering into contracts of sale of houses which are part of the estates that they administer without court authority because they may apply for authorisation from the court at any time before the transaction is concluded... In my view lack of prior court authority to sale [sell] cannot be a defence to an application for specific performance of a contract of sale of a piece of land or a house."**

There can be no doubt that the learned trial judge misdirected herself. The import of section 19(2) of the Act is very clear. It proscribes the sale of property (including real property) forming part of the estate of a deceased person without prior authority of the court. In the mind of the legislature, this statutory provision was intended to prevent administrators of estates of deceased persons from abusing their fiduciary responsibilities by selling property forming part of such estates, without due regard to the interest of the beneficiaries. No doubt, the court can only grant such authority when it is satisfied that the sale would be in the interest of the beneficiaries. In our view, prior authority of the court is a *sine qua*

non of a valid sale of such property. Contrary to the opinion of the learned trial judge, nowhere in section 19(2) of the Act does it allow an administrator of the estate to obtain court authority before a sale transaction is concluded.

A contract of sale relating to land is consummated when the vendor's offer is accepted by an intending purchaser. What follows thereafter is the payment of the purchase price (consideration) by the purchaser. The genesis of a sale transaction is the offer. In our opinion, therefore, the proper interpretation of section 19(2) of the Act is that court authority must be sought before an offer is made to an intending purchaser by an administrator of the estate. The evidence in the court below shows that no court authority was obtained by the appellant to sell the property to the respondent. In the absence of such authority, we agree with counsel for the appellant that the purported sale would be illegal and unenforceable. If we may add, such a transaction would be null and void *ab initio*. It is for this reason that in the **Boniface Kafula** case, we ordered a refund of the purchase price under circumstances akin to this case

written heads of argument, Mr. Chabu submitted that there was no valid and enforceable contract of sale to satisfy section 4 of the Statute of Frauds 1677. That the contract, if any, was discharged by the respondent's failure to pay the full purchase price. Counsel argued in the alternative, that the purported contract was unenforceable for violating section 19(2) of the Act.

In augmenting ground two at the hearing, Mr. Chabu submitted that the SMS at page 115 of the record of appeal does not by itself amount to a sufficient note or memorandum as it does not identify the parties to the alleged offer and the alleged offeree. That even the letter at page 119 on which the learned trial judge relied heavily in its judgment does not disclose a sufficient note or memorandum as it does not show the subject or the purchase price, save for a mere expression of intention to sell without a definite offer. Counsel submitted that evidence at pages 351 – 353 of the record of appeal clearly shows that the appellant had resiled from the intention to sell the house and further, that there was no consideration furnished for

the alleged contract to be binding. We were according urged to uphold ground two.

In response at the hearing, Mr. Bota first brought to our attention the partial order of stay of execution of the judgment pending appeal at page 273 of the record of appeal. He then submitted, in sum, that there was a valid contract of sale represented in several correspondence.

We shall start with the appellant's alternative argument, that the purported contract was unenforceable because it did not comply with section 19(2) of the Act. We earlier stated under ground one that the purported sale of the house to the respondent was null and void and, therefore, unenforceable for being in conflict with section 19(2) of the Act.

Even assuming that the purported sale had not been affected by section 19(2) of the Act, it would still have been invalidated for another reason. The undisputed fact is that the appellant was jointly appointed administrator of her deceased husband's estate together

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with Eunice Muleya, the deceased's young sister. Section 20 of the Act covers circumstances involving more than one administrator. It states that:

> **"Where there are several administrators, their powers may, in the absence of any decision to the contrary contained in the letters of administration, be exercised by the majority of them."**

According to section 20 of the Act, the decision to sell the property should have been made by the two co-administrators as one co-administrator cannot constitute the majority. Similarly, the offer to the respondent should also have been made jointly by the two co-administrators. In this case, the offer was made by the appellant alone. In terms of section 20 of the Act, therefore, that offer was invalid.

At page 20, lines 24 – 26 of the record of appeal, the learned trial judge stated in her judgment as follows:

> **"I further find that it was impossible for the defendant to consult the co-administrator over the intended sale as she was nowhere to be seen."**

P.946

This finding was contrary to the appellant's own evidence in the court below appearing at page 349, lines 2 – 10 of the record of appeal as follows:

> **"The deceased's elder sister Eunice Muleya was appointed as joint administrator with me... Currently, I don't know where she is as she is a trader who moves up and down. She is married with children and is of fixed abode in Choma."**

Quite obviously, the finding of the learned trial judge was contrary to the appellant's evidence that her co-administrator was of fixed abode in Choma.

In view of what we have stated above, in relation to the alternative argument, it is otiose to address the appellant's first part of the argument under this ground. We find merit in ground two as well. We allow it.

As counsel for the appellant did not supplement other grounds with oral submissions at the hearing, counsel for the respondent could also consequently not make any oral submissions in opposition to those grounds since his application to file the respondent's heads

of argument out of time was refused.

The appellant's grievance under ground three is that it was wrong for the learned trial judge to order specific performance of an alleged contract of sale. The argument on which this ground is anchored is that specific performance is an equitable remedy which requires a person seeking it to come with clean hands. That the respondent did not come to equity with clean hands because he did not pay the purchase price to the appellant or into court.

Having held under ground one that there was no valid contract of sale capable of enforcement at law, it follows that the award of specific performance can also not survive that illegality. In other words, the illegality would not have been cured by the full payment of the purchase price by the respondent. Ground three is also successful.

Ground four attacks the decision by the learned trial judge to treat all moneys collected by the appellant as rent after 28th November, 2009, as part payment of the purchase price. The

appellant's argument being that, the treatment of moneys paid out of court as part payment of the purchase price was tantamount to reviewing the order which allowed the sum of K10,00.00 (rebased) to be paid as rent arrears when there was no application for review before the learned trial judge.

The record shows that in her ruling of 6th August, 2010 at page 94 of the record of appeal, the learned trial judge in discharging the interlocutory injunction, also ordered that **"... the K10m paid into court by the plaintiff be immediately paid out to the defendant as part payment of the outstanding rentals."** The purpose for which that amount was initially paid into court is murky as there is a dearth of evidence about it on the record of appeal. If we are to assume that it was part payment of the purchase price, then such payment is also affected by our holding in ground one, that the purported sale was invalid. Correspondingly, there can be no part payment for an invalid sale, or a sale that otherwise never existed. The decision of the lower court can therefore be aptly assailed on this score.

P.949

As we have already observed above, the lower court's order of 6th August, 2010 was to the effect that the sum of K10,000.00 (rebased) paid to the appellant was part payment of rent arrears. From that order, it is certain that the lower court acknowledged that the appellant was owed arrears of rent by the respondent. In the circumstances, the court's decision to treat the same amount paid to the appellant as rent arrears as part payment of the purchase price in the absence of a prior application for review of the earlier order was undoubtedly misconceived and a misdirection. We accordingly find merit in ground four.

Ground five attacks the lower court's award of damages for breach of contract. The learned counsel for the appellant contended that specific performance and damages for breach of contract for the sale of land are alternative, and not concurrent remedies. That since the respondent was awarded specific performance of the contract, it would be unjust enrichment to also award him damages for breach of contract.

P.950

From the cases of **Gideon Mundanda** and **Wesley Mulungushi** cited by the learned counsel for the appellant, the law is settled that specific performance and damages for breach of contract relating to the sale of land are awarded in the alternative and not concurrently. However, in her judgment at pages 22 – 23 of the record of appeal, the learned trial judge held as follows:

> **"For the foregoing reasons I hereby order specific performance of the contract of sale... I am satisfied that the contract was breached and the plaintiff is entitled to damages for the breach."**

Given what we have stated above, the learned trial judge fell into error by awarding specific performance and damages for breach of contract concurrently. Ground five therefore succeeds.

Under ground six, the appellant's grievance relates to the order made by the learned trial judge that the respondent should take vacant possession of the house pending completion of the conveyance. Counsel for the appellant submitted that the respondent was not entitled to vacant possession of the house because he neither pleaded the said relief nor paid the full purchase

price.

We have examined the writ of summons and statement of claim at pages 24 – 26 of the record of appeal. We equally agree that vacant possession was not one of the reliefs sought by the respondent in the court below. Given the precedents set in the **Guinde** and **Nora Mwaanga Kayoba** cases, we also find that it was a misdirection by the learned trial judge to award the respondent vacant possession, a relief he did not plead.

Even assuming that vacant possession was pleaded, our conclusion would not have been any different. On the facts of this case, we posit that since the respondent did not pay the purchase price for the house, he could not have been entitled to vacant possession. Furthermore, we have held under ground one that there was no valid contract of sale, it having been in violation of section 19(2) of the Act. On this score also, the award of vacant possession would not have survived. For these reasons, we also find ground six to be meritorious.

P.952

Finally, ground seven is that, there having been no valid and enforceable contract of sale, the appellant's counterclaim should have been sustained. In her counterclaim at page 57 of the record of appeal, the appellant sought an order for payment of rent arrears from September, 2009 to date of payment at a monthly sum of K2,000,000.00 (K2,000.00), an order of possession of the house, an order for mesne profits; interest and legal costs. Given our decision in ground one, it follows that the appellant's counterclaim must be sustained.

All the grounds of appeal having succeeded, we allow this appeal and set aside the lower court's judgment. We order the respondent to vacate the house within thirty (30) days from the date of this judgment and to pay rent arrears from September 2009 to the date he will vacate the house, at a monthly rent of K2,000.00. We award interest on the rent arrears at a short-term bank deposit rate from the date of writ to the date of this judgment and thereafter, at the bank lending rate as determined by the Bank of Zambia from time to time until full payment. Given our order in respect of rent arrears,

we make no order for mesne profits. We award the appellant costs in the court below and here, to be taxed in default of agreement.

M. S. Mwanamwambwa
DEPUTY CHIEF JUSTICE

C. Kajimanga
SUPREME COURT JUDGE

J. K. Kabuka
SUPREME COURT JUDGE