

**IN THE COURT OF APPEAL
HOLDEN AT KABWE**
(Civil Jurisdiction)

APPEAL NO. 179/2019

BETWEEN:

**THE TRUSTEES OF THE SEVENTH DAY
ADVENTIST ASSOCIATION IN ZAMBIA**
(A Corporate established under the lands
(Perpetual Succession) Act, Chapter 186
of the Laws of Zambia)

APPELLANT

AND

BLUE FINANCIAL SERVICES

RESPONDENT

CORAM: KONDOLO SC, CHISHIMBA & MULONGOTI, JJA

On 25th September, 2020 and 9th August, 2021

*For the Appellant : Mr. J Matalilwa of Messrs James & Doris Legal
Practitioners*

For the Respondent : Absent

J U D G E M E N T

KONDOLO SC, JA delivered the Judgment of the Court

Cases Referred To:

- 1. Mwila v BP Zambia Plc (2013) ZMHC 17**
- 2. Ndongo v Moses Mulyango & Roostico Banda SCZ/4/2011**

Legislation Referred To:**1. The Limitation Act 1939, United Kingdom**

When this appeal was heard we sat as a panel of 3 judges but our sister Mulongoti, JA as she then was has ascended to the Constitutional Court, this is the majority decision of the Court.

The undisputed background to this appeal is that the Appellant sold a piece of land to the Respondent who paid for it in full. The contract of sale was executed on 15th May, 2009 and a Deed of Assignment was executed in favour of the Appellant on or about 28th July, 2009.

The Appellant failed to complete the conveyance and it subsequently came to the Respondents attention that the Appellant had not advised them that the land they had sold to the Respondent had been re-entered by the Lusaka City Council and there was an active matter in court between third parties with regard to ownership of the said land.

Upon realising that the Appellant was unable to complete the conveyance, the Respondent sued for a refund of the purchase price of ZMK200,000 (rebased) paid to the Appellant for the land and for

damages amounting to ZMW35,000 (rebased) being the sum of money expended in trying to complete the sale.

The Appellant filed a defence raising various defences but of relevance to this appeal was the defence that the Respondent's claim was statute barred. The Appellant argued before the trial judge that not every contract in respect of land fell under the 12-year time bar provided in **section 4 of the United Kingdom Limitation Act 1939** (the Act). It was submitted that in this particular case, the Appellants claim was for breach of a contract of sale executed between the parties for the sale of land and that it was not in the form of a deed under seal but was a simple contract under the hands of the parties. It was submitted that the subject contract of sale therefore fell under **section 2 of the Limitation Act** which covers simple contracts and the said section provides that an action must be commenced within 6 years of when the cause of action arose.

The trial judge Mweemba, J agreed with counsel for the Appellant that a simple contract, even for the sale of land was subject to the limitation period prescribed in section 2 of the Act. He however observed that pursuant to the contract of sale and payment of the purchase price of ZMK200,000, the parties proceeded to file a deed of assignment for the conveyance of the said land. The judge dismissed the Appellants

defence that the Respondent's claim was time barred when he held as follows;

"The Deed of Assignment which is under seal means that under the provisions of the Limitation Act, 1939 of the United Kingdom the period of limitation for the contract of sale of land in casu is twelve years.

As the contract of sale of land herein is dated 15th May, 2009 but with a deed of assignment under seal dated 28th July, 2009 the 12 years limitation period will expire on or about 27th July, 2021. The Plaintiffs action herein commenced on the 16th November, 2017 is therefore within time and is not statute barred."

Dissatisfied with the ruling the Appellant filed one ground of appeal as follows;

- 1. The learned trial judge erred both in law and fact when he found and held that the limitation period applicable to a contract of sale of land where an assignment has been executed is 12 years as provided for under section 4 of the Limitation Act of 1939 ("the Act") and not section 2 of the said Act.**

In the heads of argument filed by the Appellant **section 2 of the Act** was cited to the effect that actions founded on simple contract or tort must not be brought after the expiration of six years. The argument was further supported by the case of **Mwila v BP Zambia Plc** ⁽¹⁾ in which the following was held;

“the court will not come to the aid of a litigant who has sat on his rights for such a long time. The Limitation Act 1939 (which applies to Zambia) in section 2 Part 1 provides for a limitation period of six years for all cases in tort and contract. The period runs from the point where the injury or problem was created.”

The gravamen of the Appellant’s argument is that the contract of sale and the deed of assignment are two separate documents and according to the Appellant the trial judge misdirected himself by holding that simply because the parties executed an assignment which was a document under seal, the contract of sale executed by the parties transformed itself into a contract under seal and was thus subject to the provisions of **section 4 of the Act**.

The Appellant also cited the case of **Ndongo v Moses Mulyango & Roostico Banda** ⁽²⁾ in which, according to the Appellant, the Supreme Court distinguished a contract of sale from an assignment. In the cited case the court stated that a contract of sale of land *per se* does not transfer ownership of property to the buyer, something more is

required. It was on that basis submitted that one cannot safely take an assignment to be part of a contract of sale as the two documents are executed separately.

It was further submitted that the Respondent was not enforcing any one of the covenants contained in the assignment when it sued the Appellant but was enforcing its rights under the contract. That the claim for a refund of the purchase price clearly showed that it was the rights under the contract for which enforcement was sought.

The Appellant summed up by submitting that immediately the trial court made a finding that the contract was a simple contract subject to **section 2 of the Act**, it should have proceeded to dismiss the action for being statute barred.

At the hearing, counsel for the Appellant indicated that he would rely entirely on the Appellant's heads of argument. The Respondent was not present at the hearing nor have we seen their heads of argument. We shall therefore consider only the arguments presented by the Appellant, bearing in mind that it is trite that even where an action is undefended the Plaintiff must still prove its case.

The sum total of the Appellant's argument is that the Respondents claim is limited to the contract of sale and that the assignment executed between the parties is irrelevant with regard to the issue

before court. The posture assumed by the Appellant indicates that the Appellant is quite accepting that the assignment is a document under seal and thus subject to the 12-year limitation period provided under **section 4 of the Act**. The argument with regard to the matter being statute barred is targeted at the contract of sale.

We have considered the case of **Ndongo v Moses Mulyango & Roostico Banda (supra)** and the holding that a contract of sale and an assignment are separate documents. However, nothing in the cited authority suggests that the two documents are not a series within the same transaction and cannot be read together as back-to-back agreements.

In any event, we have viewed the assignment (*page 78 of record of appeal*) and note that it clearly states that the Appellant would sell the subject property to the Respondent at the sum of ZMK200,000; that the Appellant had already received the money; and, the Appellant undertook to assign the property to the Respondent.

The Plaintiff's statement of claim (*page 34, record of appeal*) refers to both the contract of sale and the assignment as well as the fact that the Respondent had failed to enforce the assignment to transfer ownership of the land to itself on account of the fact that the Appellant had withheld material information that the land had been repossessed by the Lusaka City Council and offered to a third party.

The action commenced by the Respondent was against the Appellant's failure to assign title as undertaken in the assignment executed between the parties on 28th July, 2009. Being a document under seal, the limitation period for the assignment is 12 years as provided under **section 4 of the Act**.

In the circumstances, we find that nothing prevented the lower court from finding that in terms of the assignment, the Respondent's claim was not statute barred. We therefore uphold the judge's finding. This appeal is consequently dismissed with costs to the Respondent.



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



.....
F. M. CHISHIMBA
COURT OF APPEAL JUDGE

.....

J. Z. MULONGOTI
COURT OF APPEAL JUDGE