

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL/028/2021

BETWEEN:

BWALYA CHISHIMBA KAMBWILI

APPELLANT

AND

GREATWALL FINANCIAL SERVICES LIMITED

RESPONDENT



CORAM: CHASHI, SIAVWAPA AND BANDA-BOBO, JJA

On 15th November, and 15th December, 2022

FOR THE APPELLANT: MR. K. MWICHE OF MESSRS KATONGO
& CO

FOR THE RESPONDENT: MR. L. CHANDA OF NCO ADVOCATES

J U D G M E N T

SIAVWAPA, JA delivered the Judgment of the Court.

Cases referred to:

1. *African Banking Corporation Limited v Plinth Technical Works Limited & Others – SCZ Selected Judgment No. 28 of 2015*

Legislation referred to:

1. *The High Court Rules Chapter 27 of the Laws of Zambia*
2. *The Money Lenders' Act Chapter 398 of the Laws of Zambia*

1.0 INTRODUCTION

1.1 This is an appeal against the Judgment of the High Court delivered by the Honorable Mrs. Justice M. Mapani-Kawimbe on 14th December, 2020.

1.2 By that Judgment, the learned Judge dismissed the Appellant's claim, *inter-alia*, for a declaration that a contract for the sale of land executed with the Respondent was a mortgage in disguise.

2.0 BACKGROUND

2.1 On 31st January 2018, the parties executed a contract for the sale of Subdivision G27 of Farm No. 1408(the property) belonging to the Appellant at a consideration of USD\$ 51,760.00.

2.2 The terms of the contract were that the Appellant had an option to buy back the property before 30th July, 2018 failure to which the Respondent would transfer the said

property to China Hua Shun Group Zambia Investments Company.

- 2.3 The buy-back option was subject to the vendor paying back the purchase price before the stated date.
- 2.4 Following the execution of the Contract and Conditions of Sale, the parties went on to execute a deed of assignment on the same date.
- 2.5 On 2nd February, 2018, the Appellant acknowledged receipt of the Kwacha equivalent of USD51, 760.00 from the Respondent. The amount of K200, 000.00 was transferred to the Appellant's account while K300, 002.00 was in cash.
- 2.6 On this same date, the Appellant, as the vendor, obtained consent to assign the property to China Hua Shun Group Zambia Investments Company Limited.
- 2.7 The Appellant defaulted and subsequently failed to buy-back the property from the Respondent within the time

stipulated. The Respondent then sought to enforce the contract of sale.

2.8 The Appellant however, resisted the Respondent's efforts to have the sale effected and decided to commence an action in the High Court.

3.0 THE ACTION BEFORE THE HIGH COURT

3.1 By an amended writ of summons accompanied by a statement of claim filed into Court on 4th November, 2019, the Appellant sought the following reliefs:

- 1. An order that the contract dated 31st January 2018 is illegal and unenforceable*
- 2. An order that the Appellant exercise his equitable rights under the mortgage transaction*
- 3. A declaratory order that the rate of interest applied by the Respondent is unconscionable and illegal as it offends the Money Lenders Act.*

3.2 In support of his case, the Appellant argued that contrary to what is apparent from the documents executed by the

parties, the contract was in fact a loan agreement and the subject property was used to secure the loan.

3.3 The Appellant also argued that of the USD\$51,760.00 or K500,000 equivalent, purported to be the purchase price, only K250,000.00 was given to him while the remainder was interest charged.

3.4 The Appellant argued that given the facts above, the true agreement between the parties amounted to an equitable mortgage. To that extent, the Appellant has argued that the contract is void and unenforceable as it takes away his right to redeem the property resulting in him suffering loss and damage.

3.5 In relation to the interest of K250,000.00 the Appellant argued that it was at the rate of 200% per annum or 16.666% per month, making it illegal and contrary to the Money Lenders Act.

3.6 The Appellant claims that he has since repaid the sum of K250, 000.00 leaving a balance of K250, 000.00 for which the Respondent now seeks to enforce the contract.

- 3.7 The Respondent settled its amended defence on 24th February 2020 and contended that the parties did not execute a mortgage agreement but a contract of sale which is valid, and the terms should be enforced as the Appellant has failed to buy-back the property.
- 3.8 The Respondent asserted that it advanced the Appellant the total sum of USD\$ 51,760.00 and that it was an express term of the contract that if the Appellant opted to buy-back the property, he would pay the kwacha equivalent of K500,000 even if the exchange rate went down.
- 3.9 As regards the interest charged, the Respondent refuted the allegation of 200% interest on the purchase price and contended that the Appellant is not entitled to any damages.
- 3.10 The Respondent went on to counterclaim as follows:
- 1. Damages for breach of contract*
 - 2. Leave to change ownership of the property*
 - 3. That Judgment be entered for the sum admitted*

4. A declaration that the contract is valid and enforceable

5. Alternatively, the refund of USD\$ 51,760.00

3.11 In his defence to the counterclaim dated 7th February 2020, the Appellant repeated the assertions in the statement of claim.

3.12 At trial, only the Appellant was present which led the learned trial Judge to proceed with the trial under Order 35 of the High Court Rules.

4.0 DECISION OF THE HIGH COURT

4.1 After considering the evidence before her, the learned trial Judge dispelled the Appellant's argument that the intention of the parties was to enter into a loan agreement.

4.2 The learned trial Judge stated that a party is bound by an agreement he/she enters into voluntarily and that the Court cannot therefore, resort to extrinsic evidence to aid the interpretation of written documents when the terms are unambiguously stated.

- 4.3 In relation to the Money Lenders' Act, the learned trial Judge found that it was inapplicable in the circumstances as the contract was for the sale of property and not a loan.
- 4.4 It is in the light of the above that the learned Judge came to the conclusion that the parties had entered into a contract for the sale of the property and that there was no evidence adduced by the Appellant to prove that the contract of sale was illegal.
- 4.5 The learned Judge dismissed the case in its entirety and made no order as to costs.

5.0 THE APPEAL

- 5.1 Dissatisfied with the judgment of the Court below, the Appellant filed his Notice and Memorandum of Appeal on 17th December 2020.
- 5.2 The Memorandum of Appeal contains six grounds as follows:

1. *The Honourable trial Court fell into error in finding that the Money Lenders Act Chapter 398 of the Laws of Zambia was inapplicable.*
2. *The Court misdirected itself in finding that there was a valid Law Association of Zambia contract of sale when in fact not*
3. *The Honourable trial Judge erred both in law and fact in determining that the Appellant intended to sell his property, when in fact not; and in so doing glossed over the Appellants assertion that it was a mortgage that was created as between the parties notwithstanding her finding that the Appellant failed to exercise his right of redemption by 30th July 2018.*
4. *The Honourable Judge fell into error in holding that by virtue of executing the Deed of Assignment the Appellant had transferred ownership of the property, notwithstanding the fact that the 'buy-back' date had elapsed.*

5. *The Honourable Trial Judge misdirected herself in finding that the contract was not illegal, excessive, harsh, and unconscionable*
6. *The Honourable Trial Judge fell in error in construing the receipt signed by the Appellant as indicating that a contract of sale had taken place whilst glossing over the fact that the same receipt referred to a repayment of the money advanced by 30th July 2018.*

6.0 ARGUMENTS IN SUPPORT

- 6.1 The Appellant argued all the six grounds of appeal together and largely repeated the arguments advanced in the Court below and added that the contract of sale fell short of the LAZ Conditions of sale.
- 6.2 The argument above is anchored on the fact that the Conditions of sale did not include a 14-day notice to be given to the Appellant upon default as stipulated by the LAZ Conditions of Sale. The second point is that the Conditions of Sale did not include a completion date, thereby making it impossible to determine the default date.

The final point is that there was no evidence that the Respondent paid property transfer tax.

7.0 ARGUMENTS IN OPPOSITION

7.1 The Respondent is of the view that the learned Judge in the Court below was on firm ground in holding that the parties entered into a contract of sale and not a loan agreement as argued by the Appellant. This position is anchored on the clear and unambiguous terms of the contract and the deed of assignment and the consent to assign granted by the Respondent to the Appellant upon application.

7.2 The Respondent has further argued that because the parties reduced the terms of the agreement into a written document, extrinsic evidence cannot be used to vary, contradict, add to or subtract anything from the written document.

7.3 Finally, the Respondent argued the doctrine of freedom of contract to the effect that men and women of full age and competent understanding are at liberty to enter into

contracts voluntarily which contracts shall be enforced by Courts of law.

- 7.4 In support of his arguments, the Respondent relied on the cases of Holmes Limited v Buildwell Construction Company Limited, (1973) ZR 97, Kalusha Bwalya v Chadore Properties and Ian Chamunora Nyangwe Haruperi, SCZ Appeal No. 222/2013 and Tijem Enterprises Limited v Children International Zambia Limited 2010/HPC/0121.

8.0 OUR ANALYSIS AND DECISION

- 8.1 After carefully considering the arguments for and against the appeal, and the judgment of the Court below, we find that there is only one question that we need to answer to resolve the dispute, namely; did the parties herein, enter into a contract of sale or a loan agreement?
- 8.2 The mainstay of the Appellant's argument is that the parties' true intentions upon executing the contract in issue were to create a borrower/lender relationship with the property in issue being used as security for the loan.

- 8.3 We must begin by stating that it has been a long standing principle of law that the party that alleges a fact bears the burden to prove it. It follows therefore, that the Appellant ought to have laid proof before the trial Court that the letter of the contract was at variance with the true intentions of the parties.
- 8.4 The learned trial Judge, after considering the evidence produced by the Appellant, found that the parties had entered into a cash advance agreement. The Appellant has relied on this finding to argue that the contract of sale was in fact an equitable mortgage.
- 8.5 However, at page J11 of the Judgement, the learned trial Judge held that the parties had in fact entered into a contract for the sale of land which did not include any of the terms alleged by the Appellant.
- 8.6 This position was in stark contradiction of the finding earlier made by the learned Judge. We however, find the second position taken by the learned Judge to be the

correct one as the earlier position is not supported by evidence and therefore, perverse.

8.7 On the other hand, we find that the holding by the learned Judge that the parties entered into a contract of sale of land, is supported by the evidence before her. Our view is supported by the contract and conditions of sale appearing at page 87 to 92 of the record, whose terms indicate that it was a contract for the sale of land with an option to the Appellant to repurchase before 31st January 2018.

8.8 In our held view, we are fortified by the position taken by the Supreme Court in the case of African Banking Corporation Limited v Plinth Technical Works Limited & Others Selected Judgment No 28 of 2015 which is stated as follows;

“The function of the Court is to ascertain what the parties meant by the words which they have used; to declare the meaning of what is written in the instrument, not of what was intended to have been

written; and to give effect to the intention as expressed.”

- 8.9 We therefore, agree with the learned trial Judge’s view that the discussions between the parties before the contract was executed were not useful in proving the parties’ true intentions in their written contract.
- 8.10 We find no reason to fault the learned trial Judge’s findings as there is no proof of discussions contradicting the terms of the written agreement prior to the execution of the contract.
- 8.11 The intentions of the parties in any written contract can only be construed from the document itself or a collection of documents forming part of the contract if any. In this case, it is very clear from our reading of the contract that the parties’ intention was for the Appellant to sell and the Respondent to purchase Sub-Division G27, of Farm No. 1408 Chingola for a consideration of USD51, 760.00.
- 8.12 The only unique feature of this contract of sale is that it contains a buy-back provision which gave the Appellant an

opportunity to regain ownership and possession of the property if he refunded the purchase price before the 30th July 2018. The buy-back provision in the contract does not, in our view, imply that the parties entered into a loan agreement secured by a mortgage. We instead take the view that the Respondent availed a window to the Appellant to have back the property if he so desired upon a refund of the purchase price.

8.13 In the alternative, the Appellant has argued that the contract did not comply with the LAZ Conditions of sale 2018 for failing to provide for a fourteen (14) day default notice.

8.14 The first point to note is that the LAZ Conditions of Sale of 2018 were published in December of 2018 whereas the contract of sale between the parties was executed in January 2018. It follows therefore, that the LAZ conditions of sale applicable to the contract between the parties are those of 1997.

- 8.15 But even assuming that the 2018 LAZ Conditions of Sale were applicable to the contract, the issue is whether the Appellant was in breach of any of the terms of the contract to attract the application of condition of sale number 21(a) which provides for the fourteen-day notice period.
- 8.16 The facts on the record do not speak to any breach on the part of the Appellant. This is because the purchaser, the Respondent in this case, paid the full purchase value of \$51,760.00 which payment the Appellant acknowledged as evidenced by the receipt dated 2nd February, 2018, just two days after the signing of the contract. The receipt appears at page 99 of the Record of Appeal.
- 8.17 The buy-out clause was an option available to the Appellant and his choice not to exercise the option is not tantamount to a default and as such, we do not find the argument in that respect valid. In any case, if the Appellant was in default, it is the Respondent who would have been entitled to commence an action against the Appellant. It is however, the Appellant who commenced the action against

the Respondent. The Respondent has no power to or interest in compelling the Appellant to invoke the buy-back option in the contract.

8.18 In the circumstances, the Appellant has no claim against the Respondent as it proceeded against the property in accordance with the terms of the contract.

8.19 As regards the argument that the Respondent cannot transfer the property to another company, we note that the contract at page 39, line 13 of the Record of appeal contains the following provision;

“If the vendor shall fail to pay back the money before the agreed date (30th day of July, 2018), the property herein, including the land, houses and the appurtenant shall be fully transferred to the CHINA HUA SHUN GROUP ZAMBIA INVESTMENTS COMPANY LIMITED.....”

8.20 The above cited provision in the contract allowed the Respondent to have the property transferred accordingly. Besides that, the Appellant, having obtained consent to

assign to the said third party company, appearing at page 93 of the record of appeal, cannot now be heard to argue that this was contrary to the agreement between the parties.

8.21 Finally, the Appellant's argument that property transfer tax may not have been paid is irrelevant in so far as it is speculative.

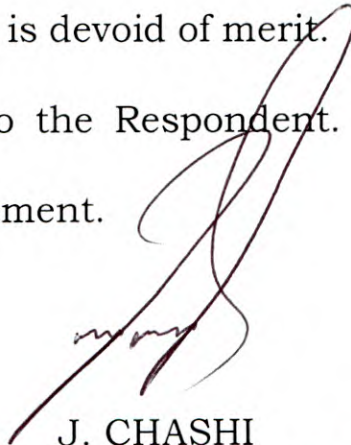
8.22 The argument relating to the date for completion is irrelevant because the contract provided that the parties would complete upon (execution of the documents to transfer the property) if the purchase price was not paid back immediately after 30th July 2018.

9.0 CONCLUSION

9.1 The Appellant appears to have been in a desperate financial need and went into an agreement by which he hoped to outsmart the Respondent. This is evident from the fact that despite the clear, plain and unambiguous language in which the contract is couched, the Appellant attempted to persuade the Court below into believing that

it was actually a mortgage contract when in fact it was a contract of sale.

9.2 When the Appellant failed to get a favourable judgment from the Court below, he came to us hoping to get some joy out of it. From our analysis of the appeal, it is clear that the appeal is devoid of merit. We accordingly dismiss it with costs to the Respondent. Same to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



M. J. SIAVWAPA
COURT OF APPEAL JUDGE



A. M. BANDA-BOBO
COURT OF APPEAL JUDGE