

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

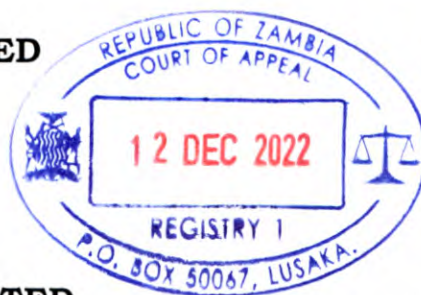
APPEAL NO./037/2021

BETWEEN:

HOUSE OF JASMINE LIMITED

APPELLANT

And



DUKON PAINTS (1998) LIMITED

RESPONDENT

CORAM: Chashi, Siavwapa and Banda-Bobo, JJA

On 15th November, 2022 and 12th December, 2022.

For the Appellant: Mr. K. Mwiche of Messrs Katongo and Co.

For the Respondent: N/A

JUDGMENT

Banda-Bobo, JA, delivered the Judgment of the Court.

Cases referred to:

1. Zambia Consolidated Copper Mines v. Matale (1993 – 1994) ZR 94
2. Kapembwa v. Maimbolwa and Another (1982) ZR 127
3. The Attorney General v. Achiume (1983) ZR 1
4. Zulu v. Avondale Housing Project Limited (1982) ZR 172,
5. Kunda v. Konkola Copper Mines Plc (App No. 48 of 2005)
6. Kankomba and Others v. Chilanga Cement Plc (2002) ZR 129
7. Zambia Breweries Plc v. Stanely K. Musa, SCZ Appeal No. 164 (2014)
8. Stamp Duty Commissioners v. African Farming Equipment Co. (1969) ZR32 (CA)
9. Jonny's Trading Company Limited v. Yewendwe Ossen Mengistu App. No. 163/2018 (2019)

10. Mwenya and Randee v. Kapinga (1998) SJ 12 (SC)

Other Works and Legislation to:

- Blacks Law Dictionary.
- Chitty on Contracts 27th Edition, paragraph 6 – 019
- The Misrepresentation Act, Cap. 69 of the Laws of Zambia
- The Statute of Fraud, 1677

1.0 Introduction

This is an appeal against the judgment of Justice Mapani-Kawimbe, J delivered in the High court at Kitwe on 18th December, 2020.

2.0 Background.

The brief background to this matter is that the parties herein executed a Memorandum of Understanding (MoU) on 5th October, 2011 for the sale by the Appellant to the Respondent, its business assets situated on Plot numbers 6879, 4653 and 3129, Kitwe at a cost of K2,700,000,000.00 (unrebased). Upon execution of the MoU, the Respondent paid a deposit of 10% of the sale price, vis; K270,000.00. The balance of K2,430,000,000.00 was to be paid within fourteen days from the date of payment of the deposit.

2.1 Unfortunately, things did not work out as envisaged, as the respondent failed to complete payment within the agreed time frame, which prompted the Appellant to issue a notice to

complete on 15th June, 2012. In response to the notice to complete, the respondent intimated that it failed to pay the balance because the Appellant misrepresented material facts which interfered with the sale. The Respondent in turn asked for a refund of the 10% deposit.

2.2 This prompted the Appellant to sue the respondent, by writ of summons claiming the following reliefs:

- 1. An order to rescind the Memorandum of Sale relating to Plots 6879,4653 and 3129;**
- 2. An order for the defendant to return the certificate of title no. L12440 to the plaintiff,**
- 3. Damages for breach of agreement,**
- 4. Interest on awards above,**
- 5. Further and other reliefs the court may deem fit and just in the circumstances,**
- 6. Legal costs.**

2.3 In the statement of claim, the Appellant averred that it had been agreed that the defendant would hold the Certificate of Title (CoT) number L12440 in trust. That contrary to the agreement, the Respondent failed to pay the balance, which prompted the appellant to send several reminders. When nothing was forth coming, it was decided to sue the

Respondent claiming the reliefs set out in paragraph 2.2 above.

2.4 The Respondent entered appearance and defence, in which it averred that the MoU was subject to a written contract of sale which the parties never executed. It also said that it held the certificate of title as purchaser in possession and not in trust, and finally that it had come to its attention that not all the Appellant's shareholders had consented to the sale. Further, that the Appellant had not disclosed that the property was encumbered as it came to its attention that a Mr. Reeves Malambo had placed a caveat on the said property because he was owed money. That it was for the above reasons that it failed to pay the balance of the purchase price.

2.5 The respondent made a counter claim and stated that the Appellant facilitated the breach of the MoU, and it incurred an overdraft of K300,000.00 from its bank at 15% pa. Further that, it incurred fees of K80,000.00 paid to Mr. Mwanza, the agent. The Respondent was thus claiming for the return of the 10% deposit, interest at 15% p.a on the same, damages for misrepresentation and K80,000, Agency fees.

2.6 The Appellant denied the Respondents counter-claim.

3.0 **Decision of the Lower Court.**

The matter went to trial. In its decision, the lower court found that the relationship between the parties was governed by their MoU. That the key terms listed were that the property would be sold to the Respondent at K2,700,000,000.00 and that the Respondent paid a deposit of 10%, while the balance was due within 45 days thereof. That the contract of sale would only be concluded after the draft Memorandum of Sale was approved by the parties but that this did not materialize.

3.1 The learned judge went on to discuss principles of the law of contract, and stated that the essential requirements are that there must be an intention to create legal obligations and consideration. That when interpreting any written contract, courts cannot aid the interpretation by calling extrinsic evidence when the terms are unambiguously stated. The court adverted to an email from the advocates for the appellant which showed that prior to the execution of the MoU, the appellants owed K350,000,000.00 to a lender, which money had been partially paid and the lender had sued to recover the remainder. The court was of the view that it was not material who this money was owed to. That the fact

however, established the Respondent's assertion that the property was encumbered. That it was also clear that the loan to the 3rd party was advanced through an equitable mortgage which would only be registered when actual performance was required. That thus it mattered less that the records at the Ministry of Lands do not reflect such registration.

3.2 Regarding the assertion that not all shareholders had agreed to the sale, the learned Judge found that the Respondent's contention that some shareholders did not consent to the sale, was more probable than not, as PW1 did not lead any evidence on this averment. Further, that the disagreements amongst the shareholders was an internal fact that the Respondent could not have discovered prior to the execution of the MoU. That therefore, the Respondent was correct to attempt to rescind the sale, save the appellant moved faster than it did.

3.3 The court found, as a fact, that despite the Appellant undertaking to refund the 10% deposit, it had not done so at the time of trial. That in asserting that the refund was predicated upon the memorandum of sale, which it provided that the refund would only be made after the property was

sold to the next bidder, the Appellant overlooked the fact that it never signed the memorandum of sale, and by that omission, it could not rely on the document which is ineffective to its position.

3.4 Ultimately the learned judge found that the Appellant had misrepresented material facts in the sale transaction which facilitated the Respondent's failure in paying the full purchase price. That the respondent was entitled to a refund, but not the agency fees. That the Appellant failed to prove that the refund was dependent on the sale to the next bidder as it never signed the memorandum of sale. The Appellant's case failed.

4.0 **The Appeal**

Being dissatisfied with the decision of the lower court, the Appellant has now appealed to this court. The appeal is premised on four grounds couched thus:

1. **Ground One.**

The Honorable Trial Judge misdirected herself in law and in fact in asserting that the loan procured by the Appellant was likely advanced through an equitable mortgage and

would only be registered when actual performance was required, without any iota of evidence being laid.

2. **Ground Two**

The Honorable Trial Judge misdirected herself in law and fact in asserting that some shareholders never consented to the sale despite the Resolution of Board to Exercise Power of Sale executed by all three shareholders being exhibited.

3. **Ground Three**

The Honorable Trial Judge misdirected herself in law and fact in asserting that the plaintiff undertook to refund the deposit paid by the respondent and glossed over the provision in the Written Memorandum that such repayment would only be effected upon sale to the next bidder which were both signed by the Respondent and were thus bound by the terms therein.

4. **Ground Four.**

The Honorable Trial Judge misdirected herself in both law and fact in holding that the Appellant misrepresented material facts in the sale resulting in the defendant being

unable to complete the sale without any legal or factual basis.

5.0 **Hearing**

5.1 At the hearing, only the Appellant's counsel appeared. He informed the Court that counsel for the Respondent had intimated to him that he had no instructions to represent the Respondent and as such he had not filed any arguments in opposition to the appeal. Mr. Mwiche relied on the record of appeal, heads of argument and list of authorities filed on 1st March, 2021. The Appellant argued grounds 1, 2 and 4 together.

In arguing these grounds, counsel referred to what the Court below stated at page 30, lines 15 – 19 of the Record of Appeal; namely the email from Messrs Ellis and Company and the Court's assertion that that email showed that the Plaintiff owed a third-party money before the parties entered into the MoU. It was opined that the Court fell into error, when it held that in its opinion, it was immaterial who the money was owed to, as the fact established the defence's assertion that the property was encumbered. The Appellant took issue with the Court's assertion that it was therefore, likely that the loan

to the third party was advanced through an equitable mortgage, which would only be registered when actual performance was required and that thus, it mattered less that the records at the Ministry of Lands do not reflect such registration.

5.2 It was counsel's contention that the emails relied upon by the Court do not indicate the manner or form that any title deeds owned by the Appellant had been deposited with the third party, thereby creating an equitable mortgage. Counsel adverted to page 163 of the record of appeal and DW's evidence, and contended that despite DW stating that they discovered that the property was encumbered, he did not adduce evidence to indicate what the purported encumbrances were and on which property, among the three distinct Certificate of Title held by the Appellant. That there is no evidence showing the existence of any encumbrance, and no caveat had been placed on any of the three properties, otherwise the same would have been exhibited. That therefore, the holding by the Court below that it was most likely that the loan to the third party was likely advanced through an equitable mortgage is bereft of any evidence to

support the assertion that the subject property was encumbered.

5.3 In aid of the above, the case of **Zambia Consolidated Copper Mines v. Matale**¹, was cited for the holding that:-

“... a finding of fact becomes a question of law, when it is a finding which is not supported by evidence, or when it is one made on a view of the facts which cannot reasonably be entertained.”

Cited also was the case of **Kapembwa v. Maimbolwa and Another**², on when an appellate court can interfere with a finding of fact made by a trial court. The case of **The Attorney General v. Achiume**³ echoed the same principles. It was submitted that the court below had no factual basis on which it accepted the position that the property had been encumbered. It was argued that the onus was on the Respondents to prove their allegations in the counter-claim, by laying evidence before the Court of such encumbrance, as per the cases of **Zulu v. Avondale Housing Project Limited**⁴, **Kunda v. Konkola Copper Mines Plc**⁵ and **Kankomba and Others v. Chilanga Cement Plc**⁶.

5.4 It was submitted that he who alleges must prove, and the Respondent should have called evidence to prove its case.

The same arguments were proffered regarding the Court's assertion at page 31, of the Record of Appeal where it stated that:-

“the defendant's contention that some shareholders never consented the sale was more probable than not”, and

“the disagreement amongst the shareholders was an internal fact that the defendant could not have discovered prior to the execution of the MoU ...”

5.6 It was contended that the Court below misapprehended the facts. That the Court, at page 31 lines 7 – 9 of the record of appeal, indicated that the Plaintiff pleaded that all its shareholders consented to the sale, but then went on to say that **PW** did not lead any evidence on the averment. Counsel submitted that the averments in the pleadings as well as in the plaintiff's bundle of documents, showed that the Plaintiff had exhibited a Board Resolution executed by all the Plaintiff's shareholders agreeing to the sale of the property. That there is no evidence led, to support the Respondent's assertion that one of the directors had withheld her approval. That having thus asserted, it was incumbent upon the Respondent to adduce evidence. Therefore, there was no basis in holding that the Appellant misrepresented material

facts in the sale resulting in the defendant being unable to complete the sale.

5.7 As regards the issue of misrepresentation, it was argued that the appellant did not misrepresent anything, as the Respondent ought to have carried out due diligence on the property they intended to buy before executing the MoU. The word “misrepresentation” was defined as per Blacks Law Dictionary¹. Further reliance was placed on the works of Chitty on Contracts 27th Edition, paragraph 6 – 019², where it is stated that:-

“It is essential if misrepresentation is to have legal effect that it would have operated on the mind of the representee. However, once it is proved that a false statement was made, which is likely to induce that contract, it is fair inference of fact (though not inference of law) that he was influenced by the statement.”

5.8 Counsel also adverted to Section 2 of the Misrepresentation Act, Cap. 69 of the Laws of Zambia³ which state that:-

“Where a person has entered into a contract after a misrepresentation has been made to him, and

- (a) the misrepresentation has become a term of the contract, or**
- (b) the contract has been performed, or both,**

then, if otherwise, he could be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this act, notwithstanding the matter mentioned in paragraph (a) and (b)”

It was argued that no particulars of misrepresentation had been set forth in the pleadings by the Respondent. Further that they did not issue a Notice to Complete to the Appellant. That more importantly, they did not deem it appropriate to seek legal redress, until the Appellant took out court process. That on the other hand, the Appellant served the Respondent, with the Notice to Complete. We were urged to find merit in grounds 1, 2 and 4.

6.0 Ground three is on the issue of the undertaking by the Appellant to refund the deposit in the event that the sale between the parties did not materialize. In arguing this ground, our attention was drawn to page 72 of the record of appeal where the letter is found. Two aspects were brought out, namely:-

- (i) that the refund was conditional to the sale being concluded,
- (ii) that the said letter was unsigned.

6.1 That in the memorandum of sale, the sale to the next bidder was a condition precedent. Further, that the learned judge was wrong to adopt the position that since the memorandum of sale was not executed, it was inoperative. It was pointed out that the memorandum of sale had been executed by the Respondents. Our attention was drawn to the cases of **Zambia Breweries Plc v. Stanely K. Musa**⁷ and **Stamp Duty Commissioners v. African Farming Equipment Co.**⁸ for the proposition that for a written contract to be enforceable against any party, that party must have signed the contract, but that however, where only one party signs the contract, it will be enforceable on the party who has signed it, not withstanding that the other party may not have signed it, and that it is not necessary that an agreement should be signed by both or all the parties for it to be operative against a party who has signed it. The case of **Jonny's Trading Company Limited v. Yewendwe Ossen Mengistu**⁹ was also adverted to on the same issue. It was asserted that the Respondent executed the memorandum of sale as appears at page 71 of the Record of Appeal, which contained the refund clause.

6.2 It was submitted that if the memorandum of sale is not recognized, the counter-claim by the Respondent would have no legs to stand on. Counsel adverted to the case of **Jonny's Trading Company Limited**⁹ on Section 4 of the Statute of Fraud, 1677⁴. That this Section requires that any contract for the sale of land or interest therein must be in writing, because even though contracts can be entered into verbally, they are vague and it becomes difficult to prove. That on the other hand in written contracts, if such a contract led to litigation, the Court has a firm understanding of each party's responsibility in fulfilling the terms of the contract. It was argued that the Court fell into error in awarding a refund of the sum of K270,000.00

6.3 We were urged to uphold this ground and the whole appeal.

7.0 **Analysis and Decision**

7.1 We have carefully considered the record of appeal. Grounds 1, 2 and 4 all attack the finding of facts by the lower court. It is contended that the pronouncements that she made were all made in the absence of evidence. That the onus of laying evidence before court to prove its case fell on the Respondent who had asserted that it could not pay the remaining balance

because it discovered that the property was encumbered due to the none repayment of a loan to one Reeves Malambo, who placed a caveat on the property. That there had been misrepresentation, as it discovered that one of the majority shareholders had withheld her consent to sell the property.

7.2 It is trite that an appellate court will not reverse the findings of fact made by the trial judge unless 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, or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make (**Attorney General v. Achiume**³).

7.3 In casu, there is no evidence adduced by the Respondent that Mr. Reeves Malambo had placed a caveat on the property. It defies logic for the Court to have assumed, on the basis of an email from counsel, that indeed there was an unpaid loan and that, that was proof of the encumbrance. Further, there was no pleading by any of the parties to the effect that there had been an equitable mortgage, hence the non-registration of the same at the Ministry of Lands. At page 79 of the record of appeal is exhibited the Respondent's bundle of documents.

There is nothing in that bundle showing that the Respondent conducted a due diligence and discovered a caveat on the property. A printout from the Lands Registry would have sufficed. As regards the withholding of the consent by the majority shareholder to sell, again no evidence was adduced. The Appellant, on page 78 of the record of appeal, produced a duly executed Resolution of the Board to Exercise the Power of Sale. This document was not challenged. At page 163 of the record of appeal, the Respondent's witness testified that Susan Miller, the majority shareholder, had not sanctioned the sale, and demanded that it be reversed. However, it would have been counsel of prudence to bring the said shareholder to testify to that fact, considering what was at stake, but she was not brought before court.

7.4 It is clear that the Respondent's case was devoid of tangible facts to prove its case or to rebut the assertion by the Appellants.

7.5 In the case of **Kunda v. Konkola Copper mines Plc**⁵, the Supreme Court guided on who bears the burden of proof in a civil matter when it said:-

“He who alleges must prove that allegation. This principle is so elementary, the court has had on a number of occasions to remind litigants that it is their duty to prove their allegation, of course it is a principle of law that he who alleges must prove the allegations.”

We agree that the onus was on the Respondent to prove its allegations, in the counter-claim.

7.6 It is therefore, our view, based on the principles laid down in the case of **Kapembwa v. Maimbolwa**², that this is a matter in which this Court can interfere with the findings of fact by the lower court as the same are not supported by evidence and were made on a view of the facts which cannot reasonably be entertained. We find merit in grounds 1, 2 and 4.

7.7 In ground 3, the issue is whether, the court was on firm ground in disregarding the memorandum of sale on page 71 of the record of appeal. That is the document that contained the provision for a refund in the event that the Respondent failed to pay the balance. It stated that in such a scenario, the refund would only come after the property was sold to the

next bidder. At page J19, paragraph 44 line 14, the Judge said that:-

“... I further find and hold that the plaintiff failed to prove that the defendant’s refund depended on the sale to the next bidder as it never signed the memorandum of sale.”

7.8 Our view is that this was misdirection. The memorandum of sale appears at page 71 of the record of appeal. It shows that it was signed by the Chairman and Operations Officer in the Respondent’s office. As was held in the case of **Stamp Duty Commissioners**⁸ it is not necessary that an agreement should be signed by both or all the parties for it to be operative against a party who signed it. Further, Section 4 of the Statute of Fraud⁴ was applicable in this case, and all the requirements had been met. In the case of **Mwenya and Randee v. Kapinga**¹⁰, it was held that:-

“for a note or memorandum to satisfy Section 4 of the Statute of Fraud, the agreement itself need not be in writing. A note or memorandum of it is sufficient, provided it contains all the material terms of the contract, such as names, or adequate identification of the parties, the description of the subject matter and the nature of the consideration.”

7.9 In our view, the memorandum of sale was binding on the Respondent, having executed it, and it containing all the necessary information. One of the terms thereof was that if the Respondent failed to pay the balance, he would be refunded the money on sale of the property to the next bidder. The sale to the next bidder had not occurred; hence there was no basis on which to grant the refund. We find merit in Ground 3.

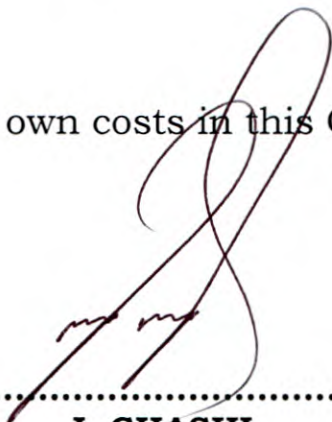
7.10 However, we note with concern that despite the appellant insisting that the refund was dependent on the property being sold to the next bidder as per the clause in the memorandum of sale, it appears not to have made any effort to advertise the property, so that it finds another buyer and refund the respondent. Our enquiry to counsel, during the hearing, elicited the response that no effort had been made to find another bidder for the property. We are of the view that the appellant abrogated the very clause it relied on to refuse to refund the Respondent the 10% deposit.

8.0 **Conclusion**

8.1 This appeal has merit and all the grounds succeed. We uphold the Judge's finding that the Respondent was entitled

to a refund of the deposit paid with interest in accordance with the judgment of the High Court dated 18th December, 2020. We order the Appellant to advertise the property for sale to the next bidder to facilitate the refund. The advertisement and the sale of the property must be done within six months from the date of this Order. In default, the Respondent will be at liberty to levy execution in the sum of K270,000.0 together with interest as awarded in the Court below.

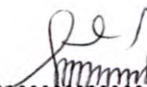
8.2 Each party to bear own costs in this Court.



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J. CHASHI
COURT OF APPEAL JUDGE



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M. J. SIAVWAPA
COURT OF APPEAL JUDGE



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A. M. BANDA-BOBO
COURT OF APPEAL JUDGE