

IN THE HIGH COURT FOR ZAMBIA
 AT THE PRINCIPAL REGISTRY
 HOLDEN AT LUSAKA
 (CIVIL JURISDICTION)

2020/HP/0813

BETWEEN:



WHYLE MUPETA CHISULO
 BUPE ZULU

1ST PLAINTIFF
 2ND PLAINTIFF

AND

AKAYOMBOKWA IMATAA

1ST DEFENDANT

TRYMORE MWENDA

2ND DEFENDANT

BEFORE HON. JUSTICE E. P. MWIKISA

FOR THE PLAINTIFF: MR. K. MWALE OF MESSRS K. MWALE & COMPANY
 FOR THE DEFENDANT: MS. T. CHATWA OF HIBAJENE MULUNDA
 ADVOCATES

JUDGMENT

Cases Referred To:

1. *Jane Mwenya and Jason Randee v. Paul Kapinga* (1998) ZR (SC)
2. *Turk v. Moxhay* (1848) 2 Ph 774
3. *Wesley Mulungushi v Catherine Bwale Mzi Chomba* (2004) ZR 96
4. *Gideon Mundanda v. Timothy Mulwani, The Agricultural Finance Company Limited & SSS Mwiinga* (1987) ZR 29
5. *Amisi Mwandezi v. Tammine Hamweemba and Another* (CAZ Appeal No. 184/2021)

1.0 INTRODUCTION

- 1.1 The matter was commenced by way of writ of summons, accompanied by a statement of claim both dated 20th August, 2020.
- 1.2 The Plaintiff's stated in their statement of claim that they entered into a contract of sale of land with the 1st defendant on dates unknown in 2017, wherein the plaintiffs agreed to purchase 1077 square meters of land known as Subdivision A37 of Subdivision 1 of Subdivision A of Farm 2882 (The property) at a purchase price of K180,000.00 from the 1st defendant.
- 1.3 That the certificate of title to the said land was in the name of the 2nd defendant. That the 1st defendant purchased the property from the 2nd defendant, however no conveyance was done to change the names on the certificate of title from the 2nd defendant to the 1st defendant.
- 1.4 The plaintiffs averred that it was agreed between the 1st and 2nd defendants that the property will be transferred directly to the plaintiffs who purchased the said property from the 1st defendant and the contract of sale was drawn as though

the contract was made between the plaintiffs and the 2nd defendant.

- 1.5 That the plaintiffs made a payment of K160,000.00 to the 1st defendant being down payment for the purchase price and the balance of K20,000.00 to be paid at the exchange of the certificate of title with the 1st defendant.
- 1.6 That on 2nd June, 2019, the 1st defendant pledged as security, property known as Subdivision No. 2 of Subdivision A of Lot No 32 in Palabana. That it was agreed between the plaintiffs and the 1st defendant that the certificate of title to the Palabana property will only be given back to the 1st defendant upon production of the certificate of title for the property under the contract of sale, failure to which the certificate of title to the Palabana property would be conveyed into the plaintiffs names.
- 1.7 That the period agreed for the delivery of the certificate of title under the contract has long since elapsed but the defendants have refused or neglected to issue the certificate of title in the names of the plaintiffs.

1.8 That the plaintiffs have made numerous requests and reminders for the defendants to deliver the certificate of title but the defendants have neglected to complete the same.

1.9 That as a result of the above, the plaintiffs have suffered loss and damage and claim for;

- (i) An order for specific performance for subdivision No. 2 of Subdivision A of Lot No. 32 of Palabana;**
- (ii) Damages in lieu of or in addition to specific performance;**
- (iii) Alternatively, a refund in the sum of K160,000.00 being monies paid towards the purchase price;**
- (iv) Interest;**
- (v) Costs; and**
- (vi) Any other relief the court may deem fit.**

2.0 DEFENCE

2.1 The contents of paragraph 1.7 above, as contained in the statement of claim, are admitted and the 1st defendant will aver that to date the remaining of ZMW 20,000.00 has not been paid to the 1st defendant.

2.2 The 1st defendant disputes the contents of paragraph 1.6 above, in so far as same is averred that property known as Subdivision No. 2 of Subdivision A of Lot No. 32 in Palabana was pledged as security.

- 2.3 That the 1st defendant denies the contents of paragraph 8 of the statement of claim in so far as it is claimed that the said Palabana certificate of title will only be given back to the 1st defendant upon production of the certificate of title for the property under the contract of sale, failure to which the certificate of title to the Palabana property would be conveyed into the plaintiff's names.
- 2.4 That the 1st defendant will aver that the plaintiffs offered to assist with finding a buyer for the Palabana property which was not in any way linked to Subdivision A37 of Subdivision 1 of Subdivision A of Farm 2882.
- 2.5 That the 1st defendant will at trial further aver that the plaintiffs were aware of the fact that the title to Subdivision A37 of Subdivision 1 of Subdivision A of Farm 2882, was still in the names of the 2nd defendant and by agreement they entered into a contract with the 2nd defendant for the conveyance of the said property directly from the 2nd defendant to the plaintiffs.
- 2.6 That the 1st defendant denies the contents of paragraph 9 of the statement of claim and will aver that he is not privy to the

subsequent contract between the plaintiffs and the 2nd defendant wherein the plaintiffs agreed to have the property transferred to them by the 2nd defendant.

2.7 That the plaintiffs have not issued a notice to complete to the 1st defendant in any event.

3.0 ANALYSIS AND DECISION

3.1 According to the statement of claim and the 1st defendant's defence, the 1st defendant does not deny having entered into a contract of sale of land namely Subdivision A37/1/2882 (the property) with the plaintiffs, wherein the plaintiffs paid K160,00.00 to the 1st defendant leaving an outstanding balance of K20,000.00 from the purchase price of K180,000.00.

3.2 The plaintiffs did not carryout a due diligence to establish whether the land they were purchasing was in the name of the 1st defendant or not.

3.3 The contract of sale is void as it was not entered into with the 1st defendant who is not the owner of the property, namely, Subdivision A37/1/2882 but instead was entered into with the

2nd defendant who is the purported owner of the property. The 1st defendant states in his defence that he is not privy to the contract between the plaintiffs and 2nd defendant, yet he signed as witness to the same. The 1st defendant also denied offering the Palabana property as security and that it is not in any way linked to the Subdivision A37/1/2882, yet there is a note or memorandum at page 18 of the plaintiff's bundle of documents to that effect.

3.4 At page 18 of the plaintiff's bundle of documents there is a hand written note agreeing to the terms of sale namely the pledge of the Palabana land as security for the title owed to the plaintiffs by the 1st defendant for A37/1/2882, Meanwood.

3.5 According to **Jane Mwenya and Jason Randee v. Paul Kapinga (1998) ZR (SC)¹**, the note suffices as evidence of sale of the said land between the plaintiffs and the 1st defendant. The plaintiffs have also exhibited a contract of sale between them and the 2nd defendant wherein the 1st defendant signed as a witness instead of vendor. It is not clear whether the 2nd defendant was acting

as an agent for the 1st defendant who signed as a witness in the said contract of sale.

- 3.6 The doctrine of privity of contract prevents strangers or a third party to a contract benefiting therefrom or vice versa, prevents contracting parties enforcing obligations against a stranger to the contract.

“It has long been an axiom of the common law that a contract between A and B cannot impose a liability upon C”. (see Cheshire and Fifoot’s Law of Contract, M.P furmston 10th edition, Butterworths 1981, at page 414)”.

- 3.7 In casu, the issue is whether the contract of sale entered into between the plaintiffs and the 1st defendant dated 24th day of January, 2017, can be enforced against the defendants as the 1st defendant neglected and failed to process the certificate of title relating to the Subdivision A37/1/2828, Meanwood, which was purchased by the plaintiffs wherein the 1st defendant purchased the said property from the 2nd defendant. The witness to the said contract is the 1st defendant himself, whose names appear under the witness clause as “Imataa M. Akayobotwa” and there is proof of payment of K160,000.00 from

Mr Mupeta Whyte Chisulo, the 1st plaintiff herein, to the 1st defendant at page 17 of the plaintiff's bundle of documents. No title deed for the property in Meanwood namely A37/1/2882 was produced by both parties.

4.0 I therefore find that the 1st defendant had notice or knowledge of the existence of the contract between the plaintiffs and the 1st defendant states in paragraph 10 of his defence that the plaintiffs were aware of the fact that the title deed for the said property was in the names of the 2nd defendant but still went ahead and entered into a contract of sale with the 2nd defendant who had not completed the conveyancing transaction with the 1st defendant. The 1st defendant in his defence in paragraph 11 avers that he is not privy to the subsequent contract between the plaintiff's and the 2nd defendant wherein the plaintiffs agreed to have the property transferred to them by the 2nd defendant. The doctrine of privity of contract will not therefore apply in this case in respect of the 1st defendant who had knowledge of the contract in issue as he was a signatory thereof as a witness. The description of the property is A37/1/2882,

Meanwood, being the property that the plaintiffs purportedly purchased from the 2nd defendant, who is the owner of the said property even though no title deed was attached to confirm this position and I will therefore order specific performance of that contract against the 2nd defendant who is the owner of the said property at the purchase price of K140,000.00 stipulated in the said contract of sale between the plaintiffs and the 2nd defendant as contained at pages 11 to 12 of plaintiff's bundle of documents.

- 4.1 There is however another contract on record between the plaintiffs and 1st defendant, dated 2nd June, 2019, in which it was agreed that the 1st defendant will give a farm title to the plaintiffs on 3rd June, 2019, which will act as security for a title owing to the plaintiffs and the title will be given back to the 1st defendant upon giving the plaintiffs the farm situated in Palabana, (5 acres). That upon selling of the said farm the title will be handed back to the 1st defendant to facilitate the processing of the title. That the farm title is to act as surety for the plot bought in Ibex Meanwood in February, 2017.

Where the matter in dispute is land, specific performance would do more perfect justice as held in the case of **Wesley Mulungushi v Catherine Bwale Mzi Chomba (2004) ZR 96³**.

Gideon Mundanda v. Timothy Mulwani, The Agricultural Finance Company Limited & SSS Mwiinga (1987) ZR 29⁴,

held that:

“A judges discretion in relation to specific performance of contracts for the sale of land is limited as damages cannot adequately compensate a party for breach of a contract for the sale of land”.

4.2 An award of damages will not suffice in the case in casu since it pertains to land. Section 4 of the statute of Frauds 1677, provides that the court only looks at salient features to be present to uphold the existence of a contract of sale, namely that, it must identify the subject matter, it must spell out the essential terms of the agreement such as consideration and the agreement must include at the minimum, the signature of the party that is being charged. I find that the contract or agreement at page 18 of the plaintiffs' bundle of documents contains all the elements stated above.

4.3 In casu, the note at page 18 of the plaintiff's bundle of documents, contains all material terms and the particulars of the property to be sold. I am of the considered view that the contract of sale for the Palabana property, as pledged by the 1st defendant as surety for the title deed in Meanwood property, as stated at page 18 of plaintiff's bundle of documents, satisfies section 4 of the Statute of Fraud and is valid for all intents and purposes.

4.4 I accordingly order specific performance for both contracts of sale pertaining to Subdivision A37 of Subdivision 1 of Subdivision A of Farm 2882 and the Palabana property belonging to the 1st defendant, which was pledged as surety, to the plaintiffs, for the change of title deeds into their names. (See **Amisi Mwandezi v. Tammine Hamweemba and Another (CAZ Appeal No. 184/2021**⁵).

4.5 In the alternative, I will award the plaintiffs a refund of the purchase price paid to the 1st defendant in the sum of K160,000.00 plus interest at the Bank of Zambia short term

deposit rate from date of writ to judgment and thereafter at the Commercial lending rate until full payment.

4.6 I award costs to the plaintiffs to be taxed in default of agreement.

Leave to appeal is granted.

Dated at Lusaka this.....18th day of.....March,.....2025



.....
ELITA P. MWIKISA
HIGH COURT JUDGE