

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)



2023/HP/484

BETWEEN:

CHIUZU LUNGU MUSAKANYA
(Suing as Administratrix of the estate of the
Late Everlyn Lwendawe)

PLAINTIFF

AND

CHANDA BWALYA

DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 27th DAY OF MAY,
2024**

For the Plaintiff : Ms E.M Kaphuka and Ms Natasha Kapuka, Messrs
Musyani Mwamba Legal Practitioners
For the Defendant : No appearance

J U D G M E N T

CASES REFERRED TO:

1. *Jones v Gardiner* 1902 1 CH 191
2. *Raineri v Miles* 1980 2 WLR 847
3. *Galaunia Farms v National Milling Company Limited* 2004 ZR 1
4. *Wesley Mulungushi v Catherine Bwale Mizi Chomba* 2004 ZR 96
5. *Communications Authority v Vodacom Zambia Limited* 2009 ZR 196
6. *David Howes and 8 others v Betty Butts Carbin (Sued in her capacity as Trustee of the estate of the Daisy Butts)* SCZ No 5 of 2012

LEGISLATION REFERRED TO:

1. *The Statute of Frauds, 1677*
2. *The High Court Act, Chapter 27 of the Laws of Zambia*

OTHER WORKS REFERRED TO:

1. *Phipson on Evidence, 17th Edition*

1. INTRODUCTION

- 1.1 In this matter, the Plaintiff, Chiuзу Lungu-Musakanya as Administratrix of the estate of the late Everely Lwendawe seeks the enforcement of a contract for the sale of land against the vendor of the property, Chanda Bwalya.
- 1.2 Therefore, on 23rd March, 2023, she took out a Writ of Summons which was accompanied by a statement of claim and the other requisite documents claiming:
 - i. An Order for specific performance compelling Chanda Bwalya to complete the conveyance of the property known as subdivision W15 of Farm number 1408, also known as House No 8, 14th Street, Nchanga South Chingola on the Copperbelt Province of the Republic of Zambia between himself and Chanda Bwalya;*
 - ii. Damages;*
 - iii. Any other relief that the Court may deem.*

2. STATEMENT OF CLAIM

- 2.1 In the statement of claim, Chiuзу Lungu-Musakanya stated that Chanda Bwalya, was at the material time the legal owner of the property known as Subdivision W15, of Farm 1408, also known as House No 8, 14th Street, Nchanga South Chingola on the Copperbelt Province of the Republic of Zambia. It was averred that on or about 23rd September, 2021, Chiuзу Lungu-Musakanya was appointed as Administratrix of the estate of late Everlyn Lwendawe, who died on 14th February, 2021.
- 2.2 The further averment was that prior to her demise, Everlyn Lwendawe had entered into a contract of sale with Chanda

Bwalya, for the purchase of the property known as Subdivision W15, of Farm 1408, also known as House No 8, 14th Street, Nchanga South Chingola. It was also stated that the contract of sale and original certificate of title for the property are in Chiuzu Lungu-Musakanya's possession.

2.3 Chiuzu Lungu-Musakanya contended that completing the conveyance had proved difficult as Chanda Bwalya could not be traced. Thus, on 7th July, 2022, Chiuzu Lungu-Musakanya's advocates wrote and delivered a letter, which was sent through express mail, to Chanda Bwalya's last known address, in Order for him to complete the transfer of the property.

2.4 It was also stated that a similar letter was delivered to his witness. However, neither of them, had responded to the letters. The contention was that as a result, Chiuzu Lungu-Musakanya had suffered loss and damage.

3. DEFENCE

3.1 No defence was filed to the claim. On record, is an affidavit of service dated 22nd May, 2023, which shows that Chanda Bwalya was served the originating process by substituted service, by way of advertisement in the Zambia Daily Mail newspaper on 12th April, 2023, after an Order of the Court was obtained on 3rd April, 2023, to serve by way of substituted service.

4. EVIDENCE AT TRIAL

4.1 At trial, only Chiuzu Lungu-Musakanya testified. An affidavit of service was filed on 22nd February, 2024, which

showed that Chanda Bwalya was served the notice of hearing by way of advertisement in the Zambia Daily Mail newspaper on 20th February, 2024. Thus, I proceeded in line with **Order 35 Rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia**, which provides as follows:

“3. If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may, upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant.”

PW1-CHIUZU LUNGU-MUSAKANYA

- 4.2 In her testimony, as contained in the witness statement which she relied on, as her evidence at trial, Chiuзу Lungu-Musakanya stated that she was appointed as Administrator of the estate of the late Everlyn Lwendawe, who died on 14th February, 2021. In that regard, she referred to the death certificate, and the letters of Administration which were at page 1 of her bundle of documents, and pages 1-2 of her supplementary bundle of documents.
- 4.3 The further testimony that was given, was that the late Everlyn Lwendawe entered into a contract of sale with Chanda Bwalya for the sale of the property known as Subdivision W15 of Farm 1408, also known as House No 8,

14th Street, Nchanga South Chingola at an amount of K45, 000, 000.00 (unrebased), which contract of sale was at pages 2-5 of her bundle of documents.

- 4.4 It was stated that the purchase price was paid in full and thereafter, the original certificate of title was handed over to the late Everlyn Lwendawe, which was at pages 6-13 of Chiuzu Lungu-Musakanya's bundle of documents. The acknowledgment of payment was stated, as being at pages 3-4 of Chiuzu Lungu-Musakanya's supplementary bundle of documents.
- 4.5 Chiuzu Lungu-Musakanya also testified that efforts to trace Chanda Bwalya so that he could complete the transfer of the property, had been a challenge, as Chanda Bwalya could not be traced. Thus, as pleaded in the statement of claim, on 7th July, 2022, Chiuzu Lungu-Musakanya's advocates sent a letter to Chanda Bwalya via express mail, to his last known address, so that he could complete the sale.
- 4.6 Proof that the letter was sent, was stated as being at page 16 of Chiuzu Lungu-Musakanya's bundle of documents from ZAMTEL. It was also her testimony, that a similar letter was delivered to Chanda Bwalya's witness on the contract of sale, Andrew Changala, as evidenced at page 14 of Chiuzu Lungu-Musakanya's bundle of documents, with the proof of the letter having been sent, being at page 16, from ZAMTEL. However, neither Chanda Bwalya nor Andrew Changala had responded to the letters.

- 4.7 Chiuzu Lungu-Musakanya prayed for an Order for specific performance of the contract of sale.

5. DECISION OF THIS COURT

- 5.1 I have considered the evidence and the submissions.

FACTS NOT IN DISPUTE

- 5.2 It is common cause that Chiuzu Lungu-Musakanya is the Administratrix of the estate of the late Everlyn Lwendawe who died intestate on 14th February, 2021, by virtue of the letters of Administration which were issued to her. It is not in contention, that Chiuzu Lungu-Musakanya contends that the late Everlyn Lwendawe entered into a contract of sale with Chanda Bwalya for her, to purchase the property known as Subdivision W15 of Farm 1408, also known as House No 8, 14th Street, Nchanga South Chingola, at an amount of K45, 000, 000.00 (unrebased).
- 5.3 It is further not in dispute, that Chiuzu Lungu-Musakanya's assertion is that the late Everlyn Lwendawe paid the purchase price in full, and she was given the certificate of title for the property.

ISSUES IN DISPUTE

- 5.4 It is in contention whether Chiuzu Lungu-Musakanya, as Administratrix of the estate of the late Everlyn Lwendawe is entitled to the reliefs sought.

ANALYSIS

- 5.5 The testimony as given by Chiuzu Lungu-Musakanya, was that the late Everlyn Lwendawe and Chanda Bwalya entered into a contract of sale, for the late Everlyn Lwendawe to

purchase the property known as Subdivision W15 of Farm 1408, also known as House No 8, 14th Street, Nchanga South Chingola. Her evidence was that the purchase price for the property was K45, 000, 000.00 (unrebased), and that a contract of sale was executed.

- 5.6 It was further Chiuзу Lungu-Musakanya's testimony, that the late Evelyn Lwendawe paid the purchase price in full and she was given the certificate of title for the property. However, efforts to trace Chanda Bwalya so that he could complete the transfer of the property had proved futile, as he had not responded to a letter that was sent to him via express mail on 7th July, 2022, and neither had his witness on the contract, Andrew Changala, responded to a similar letter.
- 5.7 In the submissions, Chiuзу Lungu-Musakanya stated that even though no defence was filed in this matter, it is trite that in civil matters, the burden of proving a case is on a plaintiff. In that regard, reliance was placed on ***Phipson on Evidence 17th Edition*** in paragraph 6-06 at page 151, as stating that:

“So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by the parties, the party who has the burden has not discharged it, the decision must be against him. It is an ancient rule, founded on consideration of good

sense and should not be departed from without strong reasons.”

- 5.8 Further reliance was placed on the case of **Galaunia Farms v National Milling Company Limited** ⁽³⁾ where the Court held that:

“The principles laid out in the Nkhata case, followed in subsequent decisions of this court still stand as good law and do not require restating. In the case of Mohammed restated with approval in Zulu’s case we said:-

“An unqualified proposition that a Plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so the mere failure of the opponent’s defence does not entitle him to Judgment. I would not accept a proposition that even if a Plaintiff’s case has collapsed of its inanity or some reason or other, Judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need a defence.”

We reaffirm that position. The burden to prove any allegation is always on the one who alleges.”

DECISION

**CLAIM FOR SPECIFIC PERFORMANCE OF THE
CONTRACT OF SALE**

5.9 In respect of the claim for specific performance, the case of ***Communications Authority v Vodacom Zambia Limited*** ⁽⁵⁾ was relied on, as having held that:

“The remedy of specific performance is an equitable remedy which is available in certain cases to the aggrieved party to a contract. It is founded upon the fact that the normal common law remedy for breach of a contract - damages - is not in all cases an adequate remedy.”

5.10 The evidence as given by Chiuзу Lungu-Musakanya, was that a contract of sale was executed by the late Everlyn Lwendawe and Chanda Bwalya for the sale of the property, which contract was at pages 2-5 of Chiuзу Lungu-Musakanya’s bundle of documents. That contract of sale confirms that there was an agreement for Everlyn Lwendawe to buy the property known as Subdivision W15 of Farm 1408, also known as House No 8, 14th Street, Nchanga South Chingola, at an amount of K45, 000, 000.00 (unrebased).

5.11 In respect of acknowledgment of payment of the purchase price, at page 3 of Chiuзу Lungu-Musakanya’s supplementary bundle of documents, is an agreement dated 4th December, 2003, on which Chanda Bwalya acknowledged receipt of the payment of K30, 000, 000.00 (unrebased) leaving a balance of K15, 000, 000.00 (unrebased), which

would be paid in Two (2) instalments, being the month end of December, 2003, and the month end of January, 2004.

5.12 Then at page 4, is an acknowledgment of payment, on which Chanda Bwalya on 3rd January, 2004, acknowledged being paid K5, 000, 000.00 (unrebased) leaving a balance of K10, 000, 000.00 (unrebased), which was to be paid by the month end of January, 2004.

5.13 What the documents do establish, is that the contract for the sale of the property, was evidenced in writing. This was in line with **Section 4 of the Statute of Frauds 1677**, which provides that:

“No Action shall be brought upon any contract for the sale or other disposition of land or interest in land unless the agreement upon which such action shall be brought or some Memorandum or Note thereof shall be in writing and signed by the parties to be charged therewith or some other person thereunto by him lawfully authorized.”

5.14 This position was reaffirmed in the case of **David Howes and 8 others v Betty Butts Carbin (Sued in her capacity as Trustee of the estate of the Daisy Butts)** ⁽⁶⁾, where the Supreme Court held that:

“It is well settled that the memorandum required by the Statute of Frauds need not be in any particular form and may be constituted by two or more documents which are clearly connected by reasonable inference.

For a note or memorandum to satisfy Section 4 of the Statute of Frauds 1677, the agreement itself need not be in writing. A note or memorandum of it is sufficient, provided that it contains all the material terms of the contract, such as names, or adequate identification of the subject matter and the nature of the consideration.

5.15 The evidence on record, shows that part of the purchase price may have been paid, leaving a balance of K10, 000, 000.00 (unrebased) which was to be paid by the month end of January, 2004. I say so, as there is no acknowledgment of receipt of that sum, contrary to Chiuzu Lungu-Musakanya's contention that the purchase price was paid in full.

5.16 She claims for specific performance of the contract of sale. Reliance in that regard, was placed on the case of ***Wesley Mulungushi v Catherine Bwale Mizi Chomba*** ⁽⁴⁾ where the Supreme Court held that:

“The court will decree specific performance only if it will do more perfect and complete justice than the award of damages.”

5.17 Indeed, that is the position of the law. In this matter, while Chiuzu Lungu-Musakanya has shown that the late Everlyn Lwendawe was given the certificate of title for the property Subdivision W15 of Farm 1408, otherwise known as house number 8 14th Street, Nchanga South Chingola, she has not shown that the entire purchase price was paid in full.

- 5.18 Therefore, in Order for the contract to be completed, I direct that the balance of the purchase price, being K10, 000, 000.00 (unrebased) or ZMW10, 000.00, shall be paid into Court by 28th June, 2024, so that in the event that Chanda Bwalya were to come forward and claim the said amount, it would be paid to him.
- 5.19 Upon the money being paid into Court, Chiuзу Lungu-Musakanya shall advertise the Judgment of the Court, and call upon Chanda Bwalya to execute all the documents that are necessary, in Order to complete the sale. If after the lapse of Thirty (3) days after the advertisement is placed in a daily newspaper that enjoys wide circulation in the country, and Chanda Bwalya would not have come forward to execute the documents, and upon proof of the advertisement having been filed into Court, the Registrar of the High Court shall execute all the necessary documents to enable the property to be transferred into Chiuзу Lungu-Musakanya's name.
- 5.20 This will be in line with **Section 14 of the High Court Act, Chapter 27 of the Laws of Zambia**, which provides that:
- “14. Where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the Court may, on such terms and conditions, if any, as may be just, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall***

be endorsed by such person as the Court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it.”

CLAIM FOR DAMAGES FOR BREACH OF CONTRACT

- 5.21 In the submissions, reliance was placed on the case of **Raineri v Miles** (2) stating that the Court in that matter, held that failure to complete a contract for the sale of land on the due date, is treated as breach of contract, giving rise to a claim for damages. Further, that in the case of **Jones v Gardiner** (1), the innocent party was allowed to recover damages as a result of delayed completion.
- 5.22 In this matter, while Chiuзу Lungu-Musakanya established that there had been failure to complete the contract of sale on time, she did not lead any evidence to show what damage had been suffered as a result. Further, she did not demonstrate that the entire purchase price was paid in full, and therefore delay to complete the sale was attributable to Chanda Bwalya. Thus, on that account, she is entitled to damages for breach of contract.
- 5.23 Condition number 8 on the special conditions of sale at page 4 of Chiuзу Lungu-Musakanya’s bundle of documents, shows that possession of the property was to be given on exchange of the contracts, while under condition 4, the date

fixed for completion of the contract, was on obtaining State's consent to assign the property. No evidence was adduced to show that in fact, State's consent to assign was obtained.

5.24 The claim for damages for breach of contract therefore fails, and it is dismissed.

6. CONCLUSION

6.1 Chiuzu Lungu-Musakanya shall be entitled to specific performance of the contract of sale upon payment of the balance of the purchase price of ZMW10, 000.00 into Court by 28th June, 2024. I make no Order as to costs. Leave to appeal is granted.

DATED AT LUSAKA THE 27th DAY OF MAY, 2024

S. Kaunda
**S. KAUNDA NEWA
HIGH COURT JUDGE**

