

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

**APPEAL 172/2024
CAZ/08/151/2024**

BETWEEN:



WESLEY SIBANDA

1ST APPELLANT

FEEDINESS SAKALA SIBANDA

2ND APPELLANT

AND

POINT PRESENT INVESTMENT LIMITED

1ST RESPONDENT

SASHA CHIZYUKA

2ND RESPONDENT

CORAM: KONDOLO SC, MAJULA, MUZENGA, JJA

On 24th April, 2025 and 5th February, 2026

*For the Appellant : Mr. P. Chulu & Mr. C. Dioma of Messrs Patrick
Chulu Legal Practitioners*

*For the Respondent : Mr. J.R. Mutemi of Theotis Mutemi Legal
Practitioners*

J U D G M E N T

KONDOLO SC JA delivered the Judgment of the Court.

CASES REFERRED TO:

- 1. Rural Development Corporation Ltd v Bank of Credit and Commerce (2) Ltd (1987) Z.R. 35 (S.C.)**
- 2. G.F. Construction (1976) v Rudnap (Z) Ltd (1999) ZR 134,**
- 3. Queens Cash Finance Limited v Krestah Hanongo Muchindu Kanene CAZ/145/2022**

LEGISLATION REFERRED TO:

- 1. Rules of the Supreme Court of England 1999 Edition (White Book)**
- 2. Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia**
- 3. Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws OF Zambia**
- 4. The High Court Act Chapter 27 of the Laws of Zambia**
- 5. The High Court Rules Chapter 27 of the Laws of Zambia**

1. INTRODUCTION

1.0 This is an Appeal from the Ruling of Judge S.K. Newa delivered on 22nd March, 2024.

1.1 In the Court below the Appellants were the Defendants and the Respondents were the Plaintiffs. We shall refer to them by the nomenclature in this Court.

2. BACKGROUND

2.0 The Respondents commenced an action against the Appellants seeking the following reliefs;

1. **An Order for specific performance of the contract of sale dated 28th May, 2021 and Deed of Assignment dated 28th May, 2021 relating to Plot No 15371/1080 Kamwala South**
2. **In the alternative, damages for breach of contract**
3. **An Order for removal of caveat placed on Plot No. 15371/1080 Kamwala South**
4. **Any further reliefs the Court deems fit.**

2.1 According to the Respondents, the Appellants offered them **Plot No 15371/1080 Kamwala South** as security for a debt, a debt owed to the 2nd Respondent by the 2nd Appellants brother, Aaron Zulu (Mr. Zulu). The debt was to be paid back by 28th May, 2021.

2.2 The parties executed a contract of sale in the sum of ZMW555,282.00 and the 1st Appellant surrendered to the Respondents the properties land record card together with a duly executed assignment, assigning the property to the

Respondents. It was agreed that in the event of default by the Mr. Zulu the Respondents would assume ownership of property.

2.3 Mr. Zulu defaulted and the Respondents proceeded to enforce the contract of sale and assignments executed by the Appellants. However, the execution failed because the Appellants had placed a caveat against the property, which they refused to lift, causing the Respondent to file process in the lower Court.

2.4 The Appellants filed a defence contending that they had no intention of selling the said property to the Respondents. They explained that Mr. Zulu was the day to day manager of a company called Avan Durvy Zambia Limited of which the 2nd Respondent and a Mr Chipili Salati were shareholders and directors of the said company.

2.5 It was averred that Mr. Zulu incurred losses in one of the investments he had pursued and the Respondents together with Mr Chipili coerced the Appellants into signing the contract of sale for the property on the understanding that the Respondents would accord Mr. Zulu time to make good of his losses.

2.6 It was contended that the property was never on offer for sale as the contracts were signed by duress and therefore not duly executed and therefore invalid at law. That the Respondents had no cause of action which could amount to any breach of contract.

3. PRELIMINARY ISSUE

3.0 The Appellants went on the offensive and filed an application *in limine* seeking to dispose of the case on a point of law pursuant to **Order 14 Rule 1 and 2 of the Supreme Court Rules, White Book, 1999 Edition (RSC)**, on the following questions;

- I. *Whether or not the contract of sale allegedly signed by the 1st Defendant and the 1st Plaintiff is invalid for lack of consideration.*
- II. *Whether or not the contract of sale and deed of assignment allegedly signed by the 1st Defendant and the 1st Plaintiff are invalid for failure of registration as required by the law*
- III. *Whether or not the contract of sale and deed of assignment allegedly signed by the 1st Defendant and the 1st Plaintiff are irregular and invalid for not being in the correct statutory form.*

IV. Whether or not the mode of commencement in this matter is correct for removing a caveat placed on plot No. 15371/1080 Kamwala South Lusaka.

V. Whether or not a transaction creating land as security for a debt can operate as a sale of the same land

VI. Whether or not the Pleadings are irregular for failure to seal the Statement of Claim in this matter.

3.1 Appellants' Arguments

3.2 In summary the Appellants argument was that the contract of sale was invalid for lack of consideration, it was contended that a valid contract requires consideration, therefore the absence of consideration in the purported contract between the 1st Defendant and the 1st Plaintiff, rendered the contract invalid. While acknowledging that forbearance to sue may constitute consideration in contract law, they argue this principle is inapplicable here as the debt was allegedly owed by a third party, Mr Aaron Zulu. The Appellants asserted that forbearance to sue a third party does not constitute valid consideration between the contracting parties, as it would violate the doctrine of privity of contract, which requires that contractual

obligations exist between the parties directly bound by the agreement.

- 3.3 The Appellants also argued that the Contract of Sale and the Deed of Assignment are invalid for non-registration as provided under **Section 4(1) of the Lands and Deeds Registry Act Chapter 185** which states that documents purporting to convey or transfer interest in land must be registered and **Section 6** which renders any such document null and void if not registered within the prescribed time.
- 3.4 It is further submitted that the purported Contract of Sale and Deed of Assignment conform to the Statutory Form under the **Housing (Statutory and Improvement Areas) Act, Chapter 194 (Housing Act)** of which **Section 22** stipulates that all transfers of land to be in the prescribed form; that is, in accordance with **Regulation 7(1)** which prescribes that such transfers must be in accordance with Form 3 of the First Schedule, include a reference to the plot number, and describe the land. That the Respondents did not comply with the requirements.

3.5 They further contended that the transaction in question was intended as security for a debt and not a sale. They cited **Regulation 12 and 13 of the Housing Act** to stress that a security for debt can never be used to transfer or sale a mortgaged property. That the purported sale was contrary to law and invalid.

3.6 The Appellants submitted that the Respondents bid to remove the caveat through a writ of summons was incorrect. Recourse was had to the case of **Rural Development Corporation Ltd v Bank of Credit and Commerce** ⁽¹⁾, where the Supreme Court held that in the absence of a procedure under **Section 81 of the Lands and Deeds Registry Act**, an originating summons is the appropriate mode of commencing proceedings for the removal of a caveat.

3.7 Respondents' Arguments

3.8 The Respondents opined that the question on consideration was a triable issue which can only be resolved by a full trial and therefore not suitable for determination under **Order 14A RSC**.

- 3.9 An alternative argument was offered to the effect that forbearance to sue constitutes valid consideration and reliance was placed on the learned authors of **Chitty on Contracts, Vol. 1, 29th Ed. at p. 242**, which they cited as stating that a promise not to enforce a valid claim is good consideration, especially when a creditor agrees to withhold enforcement in return for a debtors promise.
- 3.10 On the question of registration of documents, it was submitted that **Section 4(1) of the Lands and Deeds Registry Act** does not apply to contracts of sale *per se*, as the law only requires registration of documents that convey, grant, or transfer land. They cited the Supreme Court decision in **G.F. Construction (1976) v Rudnap (Z) Ltd** ⁽²⁾, which held that a contract of sale does not transfer land; transfer requires a separate deed of assignment and registration. They further argue that even if the Assignment was not registered, **Section 6** of the same Act allows for extension of time for registration upon application, making the issue curable.

4. DECISION OF THE HIGH COURT

- 4.1 The Court agreed with the Respondents' arguments on the effect of not registering a contract of sale and also agreed that **Section 6** of the Act allowed for extension of time within which to register required documents.
- 4.2 The trial Court further noted that the contract and deed under determination were executed after the Housing Act had been repealed. The learned trial Judge took the view that the applicability of **Regulation 7 of the Housing (Statutory and Improvement Areas) Act, Chapter 194** raised post-repeal questions and conflicting interpretations of transitional provisions, the issue could not be determined at the preliminary stage.
- 4.3 The lower Court expressed a similar view concerning the question, "*whether a transaction creating land as security for a debt can operate as a sale of the said land*" as transactions involving land given as security require careful scrutiny to ascertain the parties' true intentions, requiring a full trial.

4.4 The lower Court held that a trial was necessary to test the factual matrix. The application in *limine* was therefore dismissed.

5. APPEAL

5.1 Dissatisfied with the Ruling by the Judge, the Appellant raises the following grounds of Appeal:

1. *The lower Court misdirected itself in law and fact when it held that it would not be prudent to determine the matter at the preliminary stage on the basis that there was no consideration.*
2. *The Lower Court erred in holding that the question of registration of the Contract of Sale and Deed of Assignment could not dispose of the matter and that time could be extended to register the documents.*
3. *The lower Court erred by failing to determine whether Regulation 7 of the Housing (Statutory and Improvement Areas) Regulations survived the repeal of its enabling Act.*
4. *The lower Court erred in holding that the intentions of the parties could not be determined on affidavit evidence at a preliminary stage.*

5.2 Appellants' and Respondents' Arguments

5.3 Both parties filed detailed arguments which we have noted. However, for reasons that will become clear, we see no need to reproduce them.

6. HEARING

6.1 At the hearing both parties relied on the record of appeal and their filed arguments which they supported *viva voce*. For the same reason given in paragraph 5.3 above, we shall not regurgitate the submissions.

7. ANALYSIS AND DECISION

7.1 We have considered the Record of Appeal and arguments filed by both parties in support of and opposing the Appeal.

7.2 This case revolves around a question that has captured the pulse of society and the interest of the Courts i.e. *when a contract of sale is executed with regard to a debt or other transaction, is such a contract valid; and, where default occurs, can the contract of sale and accompanying documents be legally used to convey title from the borrower to the lender?*

7.3 The facts *in casu* disclose such a situation. In our view the question can only be resolved by determining the exact nature of the agreement and intentions of the parties. These will be peculiar to each case and will require the kind of evidence which can only be elicited at a trial.

7.4 Our rationale is best illustrated by the observations and findings we made in our recent decision of **Queens Cash Finance Limited v Krestah Hanongo Muchindu Kanene** ⁽³⁾ where at paragraphs 9.19 to 9.21 (pages J22 –J23), we stated as follow;

9.19 *Notwithstanding its previous decisions in cases such as **Kalusha Bwalya v Chadore Properties & Another [SCZ/8/296]** ⁽¹¹⁾, the Supreme Court has noted with concern the growing tendency of money lenders to disguise their transactions with borrowers as conveyances and usually apply unconscionable interest rates which inevitably cripple the borrower's ability to repay the loans and often leading to them to defaulting on the loans and losing their properties.*

9.20 *In the case of **Gillian Kasempa Mutinta v NewFuture Financial Company Limited and***

Another [APPEAL NO.13/2023; SCZ/08/23/2023) [2025] ZMSC] ⁽¹²⁾ *the Appellant borrowed money from the Respondent but what was executed by the parties was a contract of sale for the property she had put up as collateral. When she failed to pay back the loan, title was transferred to the 2nd Respondent without the Appellants consent.*

9.21 *The High Court decided that the transfer was invalid and ordered cancellation of the certificate of title issued to the 2nd Respondent and reverted it to the Appellant. The Court of Appeal however, overruled the High Court on the basis that the sale agreement was valid as it was freely and voluntarily entered into by the parties.*


9.22 *The Supreme Court overturned the Court of Appeal for a number of reasons but relevant to this case is where it observed that the transaction between the Appellant and the Respondents at all times had the hallmarks of a loan agreement which was wrongly executed as a contract of sale. The Supreme Court stated as follows at paragraph 61-page J 31 of the Judgment;*


“We take the view that, contrary to what the Court of Appeal held, the evidence on record in this matter does not lead to the conclusion that this was a contract with a buy back clause. When the contract is considered with all the other evidence, it all points to the conclusion that this was a loan

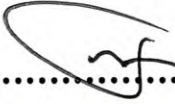
and not a sale. The contract itself vacillates between a loan and a sale but leans more towards a loan. The ordinary and natural meaning of the contract leads to the conclusion that it was meant to be a loan and not a sale. The evidence of the Appellant together with her witnesses and bank statement all show that this was a loan. The 1st Respondent's own witness described it as a loan."

7.5. It cannot be any clearer that this matter cannot be determined by the summary procedure provided in **Order 14A (1) RSC**.

7.6. This appeal is consequently dismissed with costs to the Respondent.


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M.M. KONDOLO SC
COURT OF APPEAL JUDGE


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B.M. MAJULA
COURT OF APPEAL JUDGE


.....
K. MUZENGA
COURT OF APPEAL JUDGE