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IN THE SUPREME COURT OF ZAMBIA

HOLDEN AT NDOLA

(Civil Jurisdiction)

SCZ/Judgment No. 27 of 1988

Appeal No. 8/66/86.

BETWEEN :

CROWN CORK COMPANY (ZAMBIA) LIMITED

Appellant

and

PAMELA HELEN JACKSON (Married Woman)

Respondent

CORAM: Gardner, Ag.D.C.J., Bweupe and Chaila, Ag.JJ.S.,

8th December, 1987

G. Kunda, George Kunda & Company, for the appellant

D.C. Mutale, Messrs Ellis & Company, for the respondent

J U D G M E N T

Gardner, Ag.D.C.J., delivered the judgment of the court.

Cases referred to:

(1) WOODS AND OTHERS -V- MACKENZIE HILL LIMITED (1975) 2 All E.R. 170

This is an appeal from a judgment of the High Court dismissing a claim for possession of real property.

In this judgment we will refer to the appellant as the plaintiff and to the respondent as the defendant as they were in the court below.

The facts giving rise to the action between the parties were that the parties agree in writing for the sale to the defendant of property known as sub-division No. 73 of sub-division "AZ" of farm No. 748 "NJO" Ndola, at a price of K17,000-00. The completion date was to have been the 1st of March, 1980, and, pending completion, the defendant was allowed under the terms of the contract to enter into possession. The defendant paid a deposit of K5,000-00 and there was evidence that prior to the commencement of the action she paid a further K8,000-00 leaving a balance due of K4,000-00 plus interest payable in terms of the contract. There was evidence that the defendant failed to complete the purchase on the 1st of March, 1980, and a notice to complete dated the 16th of March, 1982 was sent by ordinary

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post to the defendant at the address appearing on the advocate's file. The defendant alleged that she did not receive this notice and only learned about it when she went to the plaintiff's advocates to enquire as to outstanding balance of the purchase price.

In his judgment the learned trial judge found that clause 25 of the Conditions of Sale provided that any notice should be served in the manner provided by section 67 of the Conveyancing and Law of Property Act, 1881 and that that section provided inter alia for postal service by registered letter. The learned judge found that there was evidence of postal service but not by registered letter and that in consequence there had been no proper service of notice.

The learned trial judge considered the case of Hoods and others -v- Mackenzie Hill Limited (1) and in particular the comment of Megarry J., at p. 172:-

"... I do not for one moment think that the inclusion of express provisions for completion notices, as now contained in both the Law Society's conditions and the National Conditions of Sale, has the effect of excluding the contractual obligation to complete on the date fixed for completion, or within a reasonable time thereafter. In my judgment, such provisions add to the remedies available against a defaulting party without driving out the existing remedies, or altering the existing structure..."

Having accepted this statement of the law the learned trial judge went on to say that he did not accept that there was any claim before him other than a claim under clause 21 of the contract of sale which provided for the service of a notice to complete and right to rescission in default of completion in accordance with such notice. The learned trial judge therefore held that, apart from the claim specifically relating to the service of a notice to complete, there was no other claim before him and consequently the plaintiff's claim was dismissed.

On appeal to this court Mr. Kunda, on behalf of the plaintiff, argued that the learned trial judge was wrong to have held that there was no other claim for legal or equitable remedies by the plaintiff.

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He pointed out ~~that~~ the statement of claim specifically asked for possession interest on the unpaid purchase money and an order for resale. He further argued that the case of Woods and Mackenzie Hill Limited (1) specifically provided that the inclusion in the contract of a ~~right~~ to serve a notice to complete did not exclude the plaintiff's legal and equitable rights arising out of the defendant's failure to complete the purchase within a reasonable time. It was argued that in this particular case the defendant was hopelessly out of time and the plaintiff was therefore entitled to rescind the contract and repossess the property.

Mr. Mutale, on behalf of the defendant, argued that the statement of claim relied solely on the failure to comply with the notice to complete, that the learned trial judge had not found that the delay in completion was a breach of contract and, furthermore, that a notice should be properly served by a vendor who intends to rescind a contract for alleged breach. Mr. Mutale further pointed out that the plaintiff had accepted K13,000-00 towards the purchase price.

We note that, in the statement of claim, paragraph 8 contains an allegation that the defendant had not completed the said purchase in accordance with the notice to complete "or at all", and, in our view, it could well be argued that these latter words were an indication of a claim that the defendant had failed to complete within a reasonable time, regardless of the requirements of the notice to complete.

In considering the Woods -v- Mackenzie (1) case we note that the circumstances of that case and the comments of the learned trial judge therein arose out of a claim for specific performance, and, when Megarry J. said that the inclusion of express provisions for completion notices did not have the effect of excluding the contractual obligation to complete on the date fixed for completion and that such provisions added to the remedies against the defaulting party,

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the remedy to which the learned judge was referring was specific performance as claimed by the vendor. In the case at present before us the learned trial judge appeared to indicate that the plaintiff might have some other legal or equitable remedies but he did not set out what such remedies were. In fact he specifically found no such other remedies had been claimed.

Halsburys Law of England 3rd Edition Volume 34 at paragraph 543 reads as follows:-

"If the contract contains a condition entitling the vendor to rescind on the happening of certain events; the vendor may if these events arise rescind. In the absence of such a condition vendor can only rescind if the conduct of the purchaser is such as to amount to a repudiation of the contract and the parties can be restored to their former position."

Halsburys Laws of England 4th Edition Volume 9 at paragraph 548, which relates to repudiation of contracts, reads as follows:-

"A party seeking to rely on repudiation implied from conduct must show that the party in default has so conducted himself as to lead a reasonable man to believe that he will not perform or will be unable to perform at the stipulated time ..."

Applying these two principles to the present case it would appear that as the contract contained a special provision for the giving of a notice to complete, the plaintiff would have been entitled to rescind on the defendant's failure to comply with such notice. In view of the learned trial judge's finding in this case that the notice to complete was not properly served the plaintiff had no other right to rescind (in the absence of any other breach or situation referred to in the contract) unless the defendant repudiated the contract. There was no express repudiation in this case and, as time could not have been of the essence of the contract unless a notice to complete had been properly served, the plaintiff could only rely upon implied repudiation. As Megarry J., said in the Woods -v- Mackenzie Hill Limited (1) case, there is a contractual obligation

to complete within a reasonable time after the date fixed for completion and the condition providing for a completion notice avoids any uncertainty as to what is the reasonable time. By this we presume that the learned judge was referring to the reasonable time after which it could be presumed that there was an intention to repudiate; but the lapse of time in itself is not the sole indication of such intention. In our view the onus was on the plaintiff, as the party seeking to rely on implied repudiation, to show that the defendant had so conducted herself as to lead a reasonable man to believe that she would not perform or would be unable to perform the contract. Although the extract we have quoted from paragraph 548 of Halsbury refers to performance at the stipulated time, it is accepted that, in cases of purchases of land, delay in completion frequently occurs but does not automatically result in implied repudiation. In order to consider whether or not repudiation by the purchaser can be implied in this case the whole of the facts must be looked at. The most salient facts are that, out of a purchase price of K17,000, the purchaser has paid K13,000 and has continued to occupy the premises. In these circumstances, even when giving the plaintiff the benefit of the doubt that the pleadings indicated that there was a claim of implied repudiation by the defendant, no evidence was produced in support of it and, as we have said, the evidence that does exist is against that implication.

In our view there is no other ground upon which the plaintiffs could possibly have succeeded in their action and this appeal is accordingly dismissed with costs to the respondent/defendant.

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B. T. Gardner
ACTING DEPUTY CHIEF JUSTICE

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B. K. Bweupe
ACTING SUPREME COURT JUDGE

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N. S. Chaila
ACTING SUPREME COURT JUDGE