BERNARD LEIGH GADSDEN v VINCENT JOSEPH CHILA (1991) S.J. (H.C.)

HIGH COURT
MUZYAMBA W. M., J
19TH JULY, 1991.
1991/HP/8

Flynote
Contract of sale - When can a party notify the other that time is of the essence in the contract - Rescission of a contract

Headnote
The Plaintiff and defendant entered into a contract of sale of property. The parties agreed that the defendant was to remain in occupation of the property as license. The defendant however failed to make any payment under the contract and the plaintiff sent him three notices; the first making time of the essence of the contract, the second rescinding the contract and finally the plaintiff formally demanded for delivery of possession of the property. The Defendant did not yield the property and the plaintiff instituted proceedings under Order 13 of the High Court Rules.

Held:
(i) Where time is not of the essence and there is unnecessary delay by one of the parties in completing, the other has a right, by reasonable notice, to limit the time for completing the Contract and upon default to abandon or rescind the Contract
(ii) The said notice must be produced in Court and it is the duty of the party relying on such notice to tender it in evidence.
(iii) Time was therefore the essence of the Contract and the stated time for completion would start to run on the date of issuance of the State's Consent to Assign and /or when that fact is brought to the attention of the Defendant
(iv) The Contract was not properly rescinded and remained valid

For the Plaintiff: J. H. Jearey D.H. Kemp & Co.
For the Defendant: A. Kasonde, Kasonde & Co.

Judgment
MUZYAMBA W. M., J.:

This is an application by the Plaintiff, by way of Originating Summons under Order 113 of the Rules of the Supreme Court for possession of Stand No. 2, Matero, Lusaka, on the ground that the Defendant was in occupation without licence or consent, the Contract of Sale between the parties authorising such occupation having been rescinded by the Plaintiff on 22nd June, 1989.

The hearing of such an application would normally take place in Chambers, but in view of the issues raised by the affidavits the Court ordered the affidavits to stand as pleadings and adjourned the hearing from Chambers into Court under the provisions of Order XXX rule 8 of the High Court Rules Cap. 50.

The facts of the case are easy and they are that on 1st August, 1977 the Plaintiff was appointed Liquidator of Industrial Finance Company Limited. On 20th March, 1985, the Plaintiff, in that capacity and in the exercise of the power of sale under a Mortgage Deed between Industrial Finance Company and Kapiya & Sons, the owners of Stand No. 2, Matero, entered into a Contract of Sale, exhibit P1, of the Stand with the Defendant. The agreed purchase price was K35,000, K18,000 of which was to be paid on signing or exchange of the Contract as a deposit and the balance of K17,000 by 17 monthly instalments or by securing a second Mortgage over the Stand. The Defendant was to remain in occupation of the property as a licencee. The Defendant never made any payment. On 13th February, 1989, the Plaintiff, through his lawyers, gave the Defendant a notice making time of the essence of the

Contract. On 22nd June, 1989, by registered letter the Plaintiff, again through his lawyers, gave the Defendant a notice rescinding the Contract and on 31st March, 1990 formally demanded for delivery of possession of the property. The Defendant did not yield the property and hence these proceedings.

The Plaintiff said that he inspected the books of Industrial Finance Company and found no record of any Contract of Sale of the same property between Kapiya and Sons and the Defendant and that the Defendant never approached him for permission to make improvements to the property.

In cross-examination the Plaintiff said that he was not aware whether or not the Defendant had made any payments to Kapiya & Sons and that when he inspected the property in 1984 the only improvements he found were those on the plan, exhibit P2, which he drew and that if there were any other improvements made by the Defendant then they were done without his knowledge or consent.

The Plaintiff's witness, also his advocate, Mr. John Hugh Jearey gave evidence confirming the Plaintiff's evidence that acting on the Plaintiff's instructions, he gave the Defendant, through his former lawyers Merrs T.C. Chalanshi & Co, a notice on 13th February, 1989 making time of the essence of the Contract and by registered post to the Defendant a notice rescinding the Contract and subsequently a demand for delivery of possession of the property. He also denied ever receiving any monies from the Defendant.

In cross-examination he said he did not send the notice making time of the essence of the Contract direct to the Defendant because doing so would have amounted to breach of professional etiquette on his part and that the only reason why he sent the notice rescinding the Contract direct to the Defendant was because he learnt that Messrs T.C. Chalanshi & Co. had moved.

The Defendant's case is a follows. Sometime in 1982 he offered to Kapiya & Sons to buy the Stand. The property was then valued by Government Valuers at K18,000 and after negotiations he agreed to buy it for K25,000. It was also agreed between them that on payment of 10% of the purchase price he would occupy the property. There then followed the preparation and signing of the Contract of Sale, after which he paid the required deposit and then moved in and started rebuilding and renovating the property. In March 1985 his lawyer, Mr.T. C. Chalanshi took him to the Plaintiff's office where he signed exhibit P1. Before that he told the Plaintiff that he had already paid 10% towards the purchase price, presumably to Kapiya & Sons, and that he had been granted a loan of K16,000 to complete the sale.

That in addition to the structures on exhibit P2, he had constructed a shop and built a concrete wall fence around the property and that the property was now worthy over K10 Million.

He denied ever receiving any notice from the Plaintiff making time of the essence of the Contract or the one rescinding the Contract. Nor the demand for delivery of possession of the premises.

In cross examination he admitted signing exhibit P1 and that he was aware that for title to pass to him he had to pay the purchase price to the Plaintiff.

He said that he had a project in Luapula Province and spent most of his time there and was therefore not in a position to either pressurize his lawyer for completion or check the progress of the sale.

That on signing exhibit P1. He told the Plaintiff that he was making some improvements on the property.

He said that the copy of the Contract he signed with Kapiya & Sons was with his former lawyers and that he had paid to Kapiya & Sons K3,000.

In re-examination he said he got a Mortgage advance of K16,000 from the Zambia National Building Society. That he saw the cheque. It was payable to Martin Banda & Co.

That concludes the evidence.

On the evidence before me, I find the following facts not in dispute and therefore proved-

(a) That on 1st August, 1977 the Plaintiff was appointed Liquidator of the Industrial Finance Company Limited.
(b) That Stand No. 2 Matero, Lusaka, was Mortgage by Kapiya & Sons to Industrial Finance Company Limited for a loan of K17,500 and that Kapiya & Sons failed to repay the loan.
(c) That in exercise of the power of sale in the Mortgage Deed the Plaintiff, in his capacity as Liquidator of Industrial Finance Company Limited did on 20th March, 1985 enter with the Defendant into a Contract of Sale, exhibit P1 for the sale to the Defendant of Stand 2, the terms of which speak for themselves.
(d) That the sale has not been completed. There are certain facts which are neither expressly denied nor admitted which the Court need comment on.

Both the Plaintiff and his witness said that they did not receive any portion of the purchase price from either the Defendant or his advocate and the Defendant did not say in his evidence that he paid any money to either of them. I will therefore accept the Plaintiff's evidence and find as a fact that the Defendant has not paid any part of the agreed purchase price of K35,000.

The Defendant said that before he entered into the contract with the Plaintiff he had entered into another Contract with Kapiya & Sons and that he had paid on that Contract over 10% of the purchase price i.e K3,000 and that another amount of K16,000, a Mortgage advance from the Building Society was remitted to Martin Banda & Co. The Defendant could not produce a copy of the Contract. Neither did he produce any receipts as proof of any payments. And according to the Plaintiff, he could not find any evidence of the existence of that Contract in the books of Industrial Finance Company. However, since there is no stipulation in exhibit P1 that any monies, if any, paid by the Defendant to Kapiya & Sons would be set off against the purchase price of K35,000, I find myself not called upon to resolve the issue whether or not any Contract existed between the Defendant and Kapiya & Sons and whether or not the Defendant paid any monies to Kapiya & Sons. Therefore, notwithstanding any relationship or transactions between him and Kapiya & Sons the Defendant had an obligation to pay to the Plaintiff the agreed purchase price of K35,000 and here I would like to express the view that even if the Defendant had called Mr. Kapiya as a Witness to confirm that he had received some monies from the Defendant I do not see how that would have altered the position.

Having said that the Court will now resolve the following issues which emerge from the evidence.

1. When would a party to a Contract be entitled to give notice to the other making time of the essence of the Contract.
2. Has a party who has given such a notice an obligation to produce it in Court.
3. Was or is there a stipulation in the Contract between the parties that time is of the essence of the Contract and if so when did or would the time start to run.
4. Is the Contract still valid or it has been properly rescinded.

The Court will decide those issues in that same order. When is a party to a Contract entitled to give the other notice making time of the essence of the Contract. Paragraph 7(a) of the Plaintiff's affidavit filed in support of the application on 4th January, 1991 reads:

"7. The Defendant having defaulted in completing the purchase of the said property I am advised by my advocates D. H. Kemp & Co and verily believe that

> (a) They gave notice to the Defendant's then advocates Messrs T. C. Chalanshi & Co. On 13th February, 1989 making time of the essence of the Contract."

Mr. Jearey gave evidence saying that he gave the notice to Messrs. T. C. Chalanshi & Co. on 13th February, 1989. The notice was not produced in Court. Nor was it exhibited to the affidavit of the Plaintiff. In the case of CHARLES RICKARD LD -v- OPPENHAIM 1950 1KB 616 the facts of which I do not intend to recite, it was held:

> "Where, as a condition of its performance, time is of the essence of a Contract for the sale of goods and, on the lapse of the stipulated time, the buyer continues to press for delivery, thus waiving his right to cancel the Contract, he has a right to give notice fixing a reasonable time for delivery, thus making time again of the essence of the

Contract, which, if not fulfilled by the new time stipulated, he will then have the right to cancel. The reasonableness of the time fixed by the notice must be judged as at the date when it is given."

There emerge from the decision in my view, three major principles of law namely:

(a) That where time is of the essence of a Contract the Contract may be rescinded by either party at the end of the stipulated period.

(b) That where time is of the essence of a Contract and at the end of the stipulated period one of the parties demands performance of the Contract thereby waiving the initial time stipulated, he is entitled, if there is continued delay, to give the other notice demanding that he performs his part at a particular moment of time and if he fails to do so the Contract may be cancelled.

(c) The notice given must be reasonable and the time given for performance must be judged as at the date when it is given.

To the above principles I would add another, that is that where time is not of the essence and there is unnecessary delay by one of the parties in completing, the other has a right, by reasonable notice, to limit the time for completing the Contract and upon default to abandon or rescind the Contract.

This leads me to the next issue, should the notice be produced in Court. The Court has a duty to decide whether or not the notice given is reasonable under the circumstances and for it to do so the notice, unless of course there is evidence stating the duration of that notice and is undisputed, must be produced in Court and it is the duty of the party relying on such notice to tender it in evidence.

Was or is time of the essence of the Contract in this case and if so when did or would it start to run. Condition 4 of the Special Conditions of the Contract, exhibit P1 reads:

"4. The date fixed for completion is on or before 28 days after the State's Consent to assign has been issued."

It is quite clear from this condition that the parties intended that completion of the sale should take place within 28 days of the issuance of the State's Consent to assign. Time was therefore the essence of the Contract.

When would the 28 days begin to run. Again, it is quite clear from the above condition that the stated time for completion would start to run on the happening of an event and that is on the date of issuance of the State's Consent to Assign and /or when that fact is brought to the attention of the Defendant.

This brings me to the related and most important question and that is has the State's Consent been issued and that fact brought to the Defendant's attention. There is no evidence either from the Plaintiff himself or his witness that the State's Consent to assign has been issued. Neither was the Consent, if any, produced in evidence or exhibited to the affidavit in support of the application. The only time there was ever a reference to the consent was when the Defendant attempted to give hearsay evidence that he was told by his advocate that the consent had expired and this evidence was shut out by Mr. Jearey.

The notice which was given on 13th February, 1989 to the Defendant's then advocates, T.C. Chalanshi & Co. was not produced in Court and it is not clear from the evidence whether that notice or communication was made pursuant to Condition 4 of the Special Conditions of the Contract and since it was not produced in Court for the Court to see its nature the Court will not assume that that notice was informing the Defendant that the State's Consent to assign had been issued and that completion should take place within 28 days. That would be too much to assume. The Court is therefore unable to make a finding that the State's Consent to Assign has been issued in this matter and that being the case I hold that the time for completion has not started to run and there can be no completion without the consent.

The Court therefore finds for the Defendant and holds that the Contract has not be rescinded. It is still valid.

Had the application been brought on the ground of failure to pay the agreed deposit of

K18,000 the outcome may have been different.

For the foregoing reasons the application must be and is refused with costs to be taxed in default of agreement.

Application refused

_____