

IN THE SUPREME COURT FOR ZAMBIA APPEAL NO. 122 OF 2001

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

B E T W E E N:

ELSHEIKH ELSAEED

1ST APPELLANT

AND

MISR ENTERPRISES LIMITED

2ND APPELLANT

AND

MWANGALA BEATRICE KAMUWANGA

RESPONDENT

CORAM: NGULUBE, CJ., D.K. CHIRWA AND CHIBESAKUNDA JJS.

On 22 January and 17th July, 2002

For the Appellant - In Person

For the Respondent - Mr. C.L. Mundia, of Mundia & Co.

J U D G M E N T

Ngulube, CJ., delivered the judgment of the Court.

In the action, the respondent was the plaintiff and the appellants the defendants. The first defendant and the plaintiff entered into a contract under which the plaintiff would buy and the defendant would sell forty acres of land for the sum of K8,800,000. They signed a standard Law Association of Zambia contract. The plaintiff paid the agreed purchase price by

instalments. There were accusations and counter accusations as to why the sale did not proceed, with the defendant claiming that it was the plaintiff who kept on changing her mind and changing the plots to be bought out of the many into which part of the defendant's large farm had been subdivided. What is certain is that the plaintiff launched proceedings claiming specific performance, or in the alternative refund of the price plus interest, together with damages for breach of contract. Thereafter, the action became truly untidy with numerous applications, numerous orders and numerous rulings before a variety of deputy registrars and at least two judges who were also called upon to make quite a few orders, rulings and judgments. A summary judgment was entered for refund of the money paid and interest. This was confirmed and reconfirmed a number of times in orders and rulings quite needlessly repeated at the instance of the plaintiff. Again there was judgment separately entered and repeated several times for damages which incredibly enough included a claim for alleged lost income in respect of crops which might have been grown or farmed. Such claim was too remote and should not have been entertained. It was not a direct consequence of the alleged breach of the contract for the sale of land. We immediately disallow such claim and expunge it from the record.

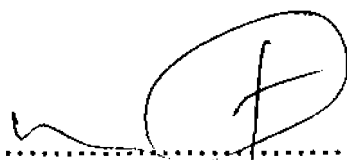
The various efforts at enforcement of the monetary judgments have cluttered the record which, we repeat, looks truly untidy. For instance, as Mr. Mundia very properly conceded, there was no justification or occasion for the plaintiff to issue a writ of possession for the whole of the defendants' one thousand acre farm and to seek to grab the entire large farm without making any meaningful effort to enforce the judgments for the payment of money by the more usual writ of fieri facias. We can very well understand the defendant's complaints in this appeal at the way the plaintiff used court process to confuse issues and literally to hound the defendant. The complaints were well taken. Of course, we have not forgotten Mr. Mundia's response that, for better or for worse, the plaintiff had obtained various court orders to support her various court sanctioned manoeuvres.

Rather than add to the confusion by dissecting the case in extensio, we propose to straighten the position between the parties. Anything inconsistent with what we say next is to be taken as disallowed and reversed. We can confirm that the plaintiff was entitled to claim the refund of the money paid plus interest as an alternative to specific performance. She is taken to have opted for the refund of her money and there can therefore be no question of at the same time getting some land out of the defendant, as she attempted to

do. We repeat: The claims were in the alternative; it is either she gets specific performance for the sale of forty acres; or she gets a refund of her money plus interest, not both. Quite apart from the refund, we will also confirm the judgment awarding damages for breach of contract. In this regard, we accept the submissions by Mr. Mundia that the failure of the original contract was on account of subdivision and survey problems on the side of the vendor rather than on the purchaser's side as the defendant contended. The record before us supports this finding. However, the proper measure of such damages is that they should be on the footing of loss of the bargain; anything else is too remote. Such damages will be assessed by the Deputy Registrar, as was ordered by one of the judges (see, for instance, page 8 of the record of appeal).

In sum, the plaintiff will have refund of K8,800,000 plus K220,000 as awarded below, together with interest which was allowed and the costs below. The plaintiff will also have damages on the footing of loss of bargain, to be assessed by the Deputy Registrar. Everything else and anything inconsistent is set aside. In particular, the processes of attachment of the farm and writs of possession are all disallowed and set aside.

The appeal has succeeded to the extent indicated and the appellant in person will have his costs limited to disbursements and out of pocket expenses, to be taxed if not agreed.



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M.M.S.W. NGULUBE
CHIEF JUSTICE



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D.K. CHIRWA
SUPREME COURT JUDGE



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L.P. CHIBESAKUNDA
SUPREME COURT JUDGE