IN THE SUPREME COURT FOR ZAMBIA Appeal No.118 of 2002

HOLDEN AT KABWE

BETWEEN

GODSON MOONGA Appellant

And

CHRISTON VWALIKA Respondent

Coram: Lewanika, DCJ: Mambilima and Chitengi, JJS on the 5th day of November 2002 and 5th August 2003.

For the Appellant: Mr. E. M. Mukuka, of E. M. Mukuka and Company.

For the Respondent: Professor P. Mvunga, of Mvunga and Associates.

J U D G M E N T

Mambilima, JS delivered the judgment of the Court.

Authorities referred to:

(1) Jasuber R. Naik Motors Limited vs Agness Chama (1985) Z. R. 227

This is an appeal against the decision of the court below refusing to uphold the Appellant's claim for 775hectares of farm No. 1531 Kabwe and also declining to grant him compensation for the developments he put up on the said farm in equity, on the ground that he had not come to court with clean hands.

The Appellant had taken out a writ of summons in the court below seeking an order that the certificate of title issued to the 2nd respondent in respect of farm No. 1531 Kabwe be nullified. He also sought damages for interference in his enjoyment of the land. The Appellant contended that on 19th September 1995, he was offered a portion of farm 1531 by the 1st respondent at a price of K14,000,000.00. He made a down payment of K4,000,000.00 followed by another payment of K6,000,000.00 a month later. More payments were made later. The Appellant exhibited a contract of sale in which the hectarage of 775 was inserted in ink. The Appellant told the court below in cross-examination that he inserted this figure of 775 later on his own volition.

The Appellant's evidence was that after the contract for the purchase of 775 hectares, he started developing the land by putting up workers houses, sinking four boreholes, erecting a wire fence, making cattle paddocks, a milking parlour and residential houses. He kept 200 beef and 70 diary animals and also cleared 60 hectares

of land for ploughing. The remaining portion of the farm was first sold to Sayed Brothers and later to the 2nd respondent who became his neighbour. According to the Appellant, the 2nd respondent was brought to the farm by Mr. Joseph Moyo, an accountant with the 1st respondent. He showed them their respective boundaries and the 2nd respondent then cleared a portion of his land and erected a fence to separate their properties.

The Appellant further testified that he was constantly asking management of the 1st respondent for the certificate of title to his subdivision but all they did was to apologise that the original title deeds were missing and that there was a caveat on the property. He was assured that as soon as the encumbrances were removed his title deeds would be processed but in May 2001 the Appellant discovered that the 2nd respondent had the title to the whole property. This was at the Provincial Lands Office.

Mr. Moyo was called as a witness in the court below and he confirmed that the Appellant bought a portion of farm 1531 but that this was only 223 hectares in extent and not 775 hectares as alleged by the Appellant.

The 2nd respondent on his part contended that he bought the whole farm at a price of K50,000,000.00. In the transaction, he was

assisted by Mr. E. M. Mukuka, now counsel acting for the Appellant. He got his title deed on 28th November 2001.

After evaluating the evidence and documents before him, the learned trial judge found that the original offer of the farm to the Appellant did not show any hectarage apart from the price of K14,000,000.00. The contract of sale had a different price of K8,000,000.00. He concluded that there was no proper contract of sale. The learned trial judge was also of the view that the Appellant fraudulently tried to mislead the court on his claims that he bought 775 hectares when according to Mr. Moyo, the Appellant was only offered 223 hectares. The judge found that Mr. Moyo was at the center of the confusion because he offered the land to two people. He was of the view that apart from the legal lapses, the Appellant went about the whole transaction in an haphazard and dishonest manner while being assisted by Mr. Moyo who eventually let him down. He also found that the Appellant did not challenge the decision by the Commissioner of Lands to allow the assignment and the subsequent issue of the certificate of title to the 2nd respondent. The judge concluded that the certificate of title was valid to all intents and purposes.

The learned trial judge considered whether the appellant could be availed of any equitable remedy but in view of the conduct

of the appellant, which he found to have been dishonest, he came to the conclusion that the appellant had not come to court with clean hands. He dismissed the action and ordered that each party would bear its own costs.

Before us, the appellant has advance three grounds of appeal, namely: that the learned trial judge erred in law by interpreting the contract made between the 1st Respondent of the one part and the Appellant on the other part in favour of the respondent; that the learned trial judge erred in fact and law in attacking the evidence of PW2 and interpreting it in favour of the respondent which said evidence was not challenged by the respondent and; that the learned trial judges decision was against the volume and weight of both oral and documentary evidence which pointed to the purchase and occupation of the land in issue by the appellant.

In his written and oral arguments, Mr. Mukuka, in the main, argued the first two grounds of appeal. In support of the first ground of appeal he submitted that the sale/purchase agreement in respect of the portion of the farm, which the Appellant is claiming, was between the Appellant and Chambashi Estates Limited and not the Respondent. He referred us to a portion of the judgment on page 12 of the record of appeal in which the trial judge stated:

'In view of the above I agree with the submissions of Professor Mvunga that it is not clear what was the exact purchase price and for what hectarage. In fact PW2 only mentioned 223 hectares but PW2 played a vital role in the sales to both the plaintiff and the defendant....'

According to Mr. Mukuka, this reasoning by the trial judge is in conflict with the doctrine of privity of contract in that because of the flaws in the contract between Chambashi Estates Limited and the Appellant, then the land together with all the improvements should benefit the Respondent. He argued further that the Respondent found the Appellant on the farm and he ought to have ascertained the terms on which he was in occupation. He stated that one of the implications of finding others on the land is that the new purchase is subject to equities.

On the second ground of appeal, Mr. Mukuka submitted that the learned trial judge found that the confusion in this case was caused by PW2. The witness did not impress him as a credible one and he treated his evidence with caution. He submitted that the evidence of PW2 should not therefore have been relied upon and interpreted in favour of the Respondent.

On the discrepancies in the price and hectarage of the portion sold to the Appellant, Mr. Mukuka submitted that this was not one of the issues the court was asked to decide upon. Despite the discrepancies, the contract between the Appellant and Chambashi Estates still remained valid. On the issue of State Consent to assign, Mr. Mukuka referred us to the case of Jasuber R.Naik Motors Limited vs Agness Chama (1) in which we held that the prohibition against letting premises without Presidential consent applies primarily to the landlord. He submitted that in this case, the Appellant was not the landlord and he should not therefore suffer any illegal consequences arising from lack of consent.

In reply to Mr. Mukuka's submissions Professor Mvunga submitted on the first ground of appeal that nowhere in the judgment did the court say that the Respondent in this appeal was privy to the contract between the Appellant and Chambashi Estates Limited. He argued that any flaws in the contract of sale, which has a bearing on the respondent's interests has unavoidably to be taken into account.

On the second ground of appeal, Professor Mvunga referred to the disparities on hectarage between the evidence of PW2 and the contract. The hectarage of 775 was inserted in ink. He also referred us to the discrepancy in price. While the contract had a

figure of K8,000,000.00 the receipts produced amounted to K18,760,00.00 and some other documents show that the Appellant paid K14,000,000.00. According to Professor Mvunga, no other conclusion could be arrived at on the basis of this evidence and the finding that PW2 was unreliable cannot be attacked just because it has a favourable bearing on the Respondent's case.

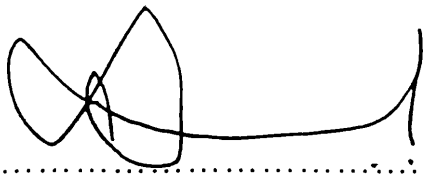
On the third ground of appeal, it was Professor Mvunga's submission that the Appellant by himself and through his witness failed to prove that he purchased 775 hectares. The contract of sale, which is prima facie evidence, showed that the appellant fidgeted with the hectarage. Whatever evidence there may be on the purchase and occupation of the land, the appellant's title is unsecured at law for want of registration and the failure to obtain state consent.

We have considered the judgment of the court below and the submissions by counsel. From the evidence on record, it is clear to us that both the Appellant and the Respondent came on to farm 1531 as a result of sale agreements they entered into with Chambashi Estates Limited, the 2nd defendant in the court below. The first to come onto the property was the Appellant. The evidence in the court below conclusively established that the contract of sale between the appellant and Chambashi Estates did

not show the hectarage of the property to be sold. The appellant conceded that the figure of 775 hectares, appearing in ink in the contract, was inserted by him much later. The record of appeal also shows that there were discrepancies on the price for the property. The appellant appeared to have paid more than what is stipulated in the contract. The price and hectarage are fundamental terms in a contract for the sale of land. If there is no agreement on these two terms, it cannot be said that there is a valid contract for the sale of land. The learned trial judge cannot therefore be faulted for having found that there was no proper contract of sale. The absence of a valid contract goes to the root of the whole transaction. Arguments on the lack of registration and failure to obtain State Consent therefore become irrelevant. For this reason, we consider it unnecessary to consider the rest of the grounds of appeal.

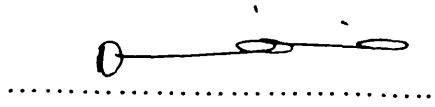
There was evidence before the court, which established that the Appellant moved onto this property as an intending buyer in 1995 before the Respondent came on the scene. To this effect, he was not a trespasser. It has not been disputed that as an intending purchaser, he put up some developments, and these no doubt enhanced the value of the property. Notwithstanding his questionable conduct, equity also frowns on unjust enrichment. On the judgment of the court below, the Respondent would be getting much more than he paid for. In our view, it was a misdirection on

the part of the learned trial judge not to have taken these developments into account when upholding the respondent's title to the land. We therefore order that the improvements which the appellant made on the land be valued and that the appellant be compensated accordingly for the value of the said improvements. To this extent, the appeal succeeds. In the circumstances of this case, we order that each party should bear its own costs.



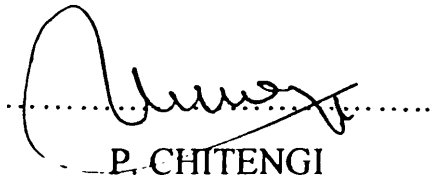
D. M. Lewanika

DEPUTY CHIEF JUSTICE



I.C.M. Mambilima

JUDGE SUPREME COURT



P. CHITENGI

JUDGE SUPREME COURT