

ALOUYSIUS YETA MUNDIA AND NATIONAL DRUG COMPANY LIMITED

SUPREME COURT
BWEUPE, D.C.J.

16TH MARCH, 1999
APPEAL NO. 106 OF 1998

Flynote

Law of Contract - Conveyance of property - breach of contract - specific performance.
Law of Contract - LAZ Conditions of Sale - whether proper procedure was adopted.

Headnote

The Appellant instituted proceedings in the High Court for specific performance of the Contract of Sale for the property known as Plot No. 61 Jasmondine, Lusaka. In 1996 the Respondent and the appellant entered into a Contract of Sale wherein the Respondent is the Vendor and the Appellant is the Purchaser. It is a standard agreement of sale drawn on the Law Association of Zambia Contract and Conditions of Sale. Both the Appellant and Respondent instructed Messrs Lukona Chambers. Consideration was K40 million. Under special conditions, the property was sold subject to the Purchaser paying 25% of the purchase price. The balance was to be paid within sixty (60) days of the date of the Contract. The Purchaser paid K10 million representing the 25% of the purchase price. The Contract was executed in June 1996. On these grounds the Judge refused to grant specific performance and in addition ordered the appellant to forfeit to the Vendor K10 million deposit which was 25% as stipulated in the Contract of Sale. On appeal the Appellant argued that the Respondent should have given him 14 days notice as stipulated by special condition 21 (a) of the Law Association of Zambia Contract and Conditions of Sale.

Held:

The Appellant should have been given at least 14 days notice in writing by the Respondent. No Notice to Complete was given and there was no finding that time was of the essence to the Contract. Appeal allowed.

For the Appellant J. Sangwa of Messrs Simeza, Sangwa and Associates.
For the Respondent P.S. Kamanga of Messrs P.S. Kamanga and Company.

Judgment

BWEUPE, D.C.J., delivered the judgment of the court.

This is an appeal against the decision of the High Court Judge refusing to grant the Appellant specific performance and ordering the Appellant to forfeit K10 million paid as a deposit for property known as Plot No. 61, Jasmondine, Lusaka. The brief facts of the case are that the Appellant instituted proceedings in the High Court for specific performance of the contract of sale for property known as Plot No. 61 Jasmondine, Lusaka. The Appellant was an employee of the Respondent. By virtue of his employment, he took occupation of the house in question. This is a dwelling house which the Appellant occupies to this day. The Respondent Company is now under the control and management of the Zambia Privatisation Agency (Z.P.A.) In 1996 the Respondent and the Appellant entered a contract of sale wherein the Respondent is the vendor and the Appellant is the purchaser. It is a standard agreement of sale drawn on the Law Association of Zambia contract and conditions of sale. Both the Appellant and the Respondent instructed Messrs Lukona Chambers. Consideration was K40 million. Under special conditions, the property was sold subject to the purchase paying 25% of the purchase price. The balance was to be paid within sixty (60) days of the date of contract. The purchaser paid K10 million representing the 25% of the purchase price. The exact date of the contract is not known, but the contract was executed in June 1996. On these grounds the Judge refused to grant specific performance and in addition ordered the Appellant to forfeit to the vendor K10 million deposit which was 25% as stipulated in the contract of sale.

The Appellant has argued that the Respondent should have given him notice as stipulated by Special Conditions 21 (a) which states that:-

If a purchaser shall fail to perform his part of contract, the vendor may give to the purchaser or his advocate at least 14 days notice in writing, specifying the default complained of and requiring the purchaser to make good the same before expiration of such notice.

- (b) if the purchaser does not comply with the terms of such notice, the deposit, if any, shall be forfeited to the vendor.

The Respondent has argued that there was no need to give notice as time was of the essence of the contract. He has referred the court to where the Judge said and we quote:-

"I would repeat, I cannot see any fault on the part of the Defendant company. The Defendant did not acquiescence, far from it. Contracts do exist in which on facts, a court may be called upon to determine whether time was of essence. The Plaintiff was under contractual obligation to pay within 60 days. He took months without action. To this day, he has no funds. He would like to borrow by mortgaging the property. The Plaintiff is before this court seeking an equitable relief by feigning and underplaying his own breaches and seeking to raise extremely dry legal arguments such as reliance on condition 21(a) of the L.A.Z. Conditions of Sale. This condition uses the term 'may'. A Defendant cannot be tied to a purchaser who cannot purchase. By his own conduct, the Plaintiff rescinded the contract."

In his Memorandum of Appeal the Appellant said:-

1. The learned trial Judge misdirected himself on a point of law by refusing the Appellant's application for specific performance on account of the decision of Mr. Justice WANKI under Cause No. 1997/HP/60.
2. The learned Judge erred both in law and fact in holding that the Appellant had no money to complete the transaction.
3. The learned Judge failed to determine whether or not time for the completion of the contract was or was not of essence in the light of the facts of the case.
4. The learned Judge misdirected himself on a point of law by rejecting the Appellant's reliance on condition No. 21 (a) of the Law Association of Zambia General Conditions of Sale but relied on Condition No. 22 in ordering that the Appellant forfeits the K10 million paid as deposit towards the purchase price.
5. The learned trial Judge misdirected himself on a point of law by refusing to grant an order for specific performance.

The Appellant argued this vehemently in his heads of argument.

We have scrutinized the record of appeal, the arguments submitted by both Counsel, cases cited and we are of the opinion that the learned trial Judge greatly misdirected himself as the arguments of the Appellant clearly show it is clear that under clause 21 (a) of the L.A.Z. Conditions of Sale the appellant should have been given at least fourteen days notice in writing by the Respondent. This was clearly a breach of the agreement by the Respondent. Forfeiture, in our view, should not have been done under Clause 22, but under Clause 21(b) if the Appellant did not comply with the terms of the notice. There was therefore a great misdirection on the part of the trial judge.

We have also considered whether time was of essence. Having considered what the judge said at page 15 of the record, time in our view, was not of the essence if this contract. We are satisfied that no notice to complete was given and there was no finding as already indicated above, that time was of the essence of the contract. Even though the caveat entered by the Appellant was removed, failure to give notice to complete and also there being no finding that time was of the essence, this appeal would be allowed and we order that costs should follow the event.