

JEAN MWAMBA MPASHI v AVONDALE HOUSING PROJECT LIMITED (1988 - 1989) Z.R. 140 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND CHAILA, J.J.S.
7TH SEPTEMBER, AND 20TH OCTOBER, 1989
(S.C.Z. JUDGMENT NO. 7 OF 1989)

Flynote

Civil procedure - Summons for summary judgment - Defendant raising tribal issues - Grounds for granting leave to defend.

Land law - Land (Conversion of Titles) Act, 1975 - Presidential consent - Failure to obtain consent prior to contract of sale - Effect on performance of contract.

Headnote

The appellant entered into an agreement with the respondent to buy residential property subject to contract and state consent, and paid a deposit to the respondent company. Subsequently, a written contract was drawn up by the respondent's lawyers that was sent to the appellant and signed by her. The respondent then resiled from the agreement and never signed the contract. The appellant took out a specially endorsed writ claiming specific performance and issued a summons for summary judgment. The respondent filed an affidavit in opposition stating, *inter alia*, they had not obtained state consent under the Land (Conversion of Titles) Act. The trial judge held that whilst there was a breach of contract, specific performance could not be decreed where the parties had entered into a contract without obtaining state consent but that the appellant could sue for damages. He did not make a final order. The appellant appealed.

Held:

- (i) The Rules of the Supreme Court make it clear that if a defendant raises

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tribal issues those are grounds for refusing summary judgment and for granting leave to defend, whether conditional or unconditional.

- (ii) In a suitable case it is competent to decree specific performance of a contract the performance of which will necessarily entail application for state consent by the appropriate party. It is perfectly lawful to enter into a contract conditionally upon obtaining state consent since such contract cannot be performed, or is not intended for performance, in breach of the statute or otherwise than in accordance with the statute.

Mutwale v Professional Services Ltd. (1984) Z.R.72 explained.

Cases referred to:

- (1) Steadman v Steadman [1975] 1 A.C. 536
- (2) Mufalo v Nganga (1988-89) Z.R. 88
- (3) Mutwale v Professional Services Ltd (1984) Z.R. 72

Legislation referred to:

1. High Court Rules Cap. 50
2. Land (Conversion of Titles) Act, Cap. 289

Other Work referred to:

Rules of The Supreme Court of England

For the appellant: G. Chilupe, Chilupe and Co.

For the respondent: M. M. Mundashi, Legal Counsel Z.S.IC.

Judgment

NGULUBE,D.C.J.: delivered the judgment of the Court.

For convenience, we shall call the appellant the purchaser and the respondent the vendor, which is what they were in the transaction.

The brief history of this case is that the purchaser agreed to buy and the vendor to sell a residential property being sub-division 942/A378a Lusaka. Correspondence was exchanged to this effect and a deposit paid. The price was stated to be K125,000.00 and the deposit demanded was K25,000.00. The correspondence indicated that the agreement envisaged would be 'subject to contract and State consent.'

The vendor's lawyers were instructed to draw up the formal contract and they duly prepared a draft in the Law Association of Zambia standard form. This they sent to the purchaser's advocates with the invitation to the latter to treat it as an engrossment if approved, and to cause it to be executed by the purchaser. She signed the contract. The vendors repented of the transaction and did not forward any copy of the contract duly signed by them by way of exchange of contracts. The usual practice is to exchange duly signed contracts when one operates as an offer and the other an acceptance, thus bringing a formal binding contract into existence.

Apparently the vendors discovered that they would be selling the house at a price below the cost of construction. They suggested that a new price be agreed. The purchaser considered that she already had a binding contract and refused to consider this new development. She took out a specially endorsed writ claiming specific performance. Considering that the vendor had no defence, the purchaser issued a summons for summary judgment under Rules of the Supreme Court, Order 86, which was supported by an affidavit in which she outlined the facts of the matter. The vendors filed an affidavit in opposition in which they pointed out that they had not executed their part of the contract; they had discovered

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that the price was below cost and would only consider selling at a new price; that, in any event, they had not obtained State consent under the Land (Conversion of Titles) Act, Cap. 289, and that, what was more, someone else had placed a caveat over the property which matter was the subject of another action.

The action came up before a High Court Judge, though it is not clear from the record whether this was by way of appeal or simply on a reference to him under High Court Rules, Order 30 rule 9 from the learned Deputy Registrar. The learned trial judge heard the arguments and submissions and passed the judgment which is the subject of this appeal. The upshot of such judgment was that he found there was a breach of contract by the vendor; that the contract was entered into in breach of a statutory prohibition contained in Section 18 of Cap. 289; that specific performance could not be decreed where the parties had entered into a contract without first obtaining State consent; and that the purchaser could sue for damages. The learned trial judge did not attempt to bring the litigation to any sort of conclusion nor to indicate the future course of such litigation.

We heard arguments and submissions which ranged far and wide. On behalf of the purchaser, Mr. Chilupe submitted that, as the learned trial judge held that there had been a valid contract, he ought to have decreed specific performance or, at the very least he ought to have made an award of damages. It was Mr Chilupe's argument that there was, on the facts, a sufficient memorandum to satisfy the Statute of Frauds, coupled with part performance in the form of the deposit paid. He relied on *Steadman v Steadman* (1) where views were expressed to the effect that, contrary to the old attitude of the courts based on possible equivocation, there is no general rule that payment of money cannot constitute an act of part performance for a parole contract. There was also an argument, which is valid, to the effect that contracts for the sale of land entered into subject to the obtaining of State consent are not illegal nor null and void, as was held by the learned trial judge. Mr *Mundashi's* response to these arguments was that, as the agreement was subject to contract and State consent, no binding contract came into effect when the vendor withheld execution and exchange of contracts.

For the reasons which we will shortly give, we comment only on some of the arguments put forward in this appeal. We must dispel immediately the misconception that Section 13 of Cap. 289 operates to prohibit absolutely the entering into contracts by purchasers and vendors. As we said in *Mufalo v Nganga* (2):

"There is nothing to prevent parties entering into contracts for the sale of land conditionally upon the obtaining of Presidential consent under Section 13 (1) of the Land (Conversion of Titles) Act."

It is, therefore, not correct to strike down such contracts out of hand nor to consider that specific performance must be refused simply for want of Presidential consent at a time when the party obliged to apply for consent has not even done so yet. In a suitable case, it is competent to decree specific performance of a contract the performance of which will necessarily entail application for State consent by the appropriate party. Refusal

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of consent, or appropriate consent, whether the transaction is litigated or not, would of course, raise entirely different problems, as for instance frustration of the contract. The learned trial judge understood our decision in *Mutwale v Professional Services* (3) as suggesting that all contracts entered into without prior State consent must be regarded as null and void. Our decision in that case related to a contract which was performed without State consent and it was the entering into such

contracts - which the parties then perform or purport to perform - which we said offended the Statute. We repeat: it is perfectly lawful to enter into a contract conditionally upon obtaining State consent since such contract cannot be performed, or is not intended for performance, in breach of the statute or otherwise than in accordance with the statute.

With regard to the arguments concerning the validity of the contract and the award of some remedy or other, we wish to point out only that it would appear to have been an error, to attempt by arguments alone, to come to a final decision of the case given the stage reached in the action. In our considered view, an application under Rules of the Supreme Court, Order 85 must attract considerations and an approach very similar to that obtaining under High Court Rules, Order 13. Indeed, Rules of the Supreme Court, Order 86 makes it clear that if a defendant raises triable issues, those are grounds for refusing summary judgment and for granting leave to defend, whether conditional or unconditional. This is what should have happened in this case and a visit to this Court at this point in time obviated. No doubt the parties have by now a fair idea of the hurdles before them and they may wish to take them into account when they return to the High Court, which is where we propose to remit the case.

In sum, the appeal is allowed and the determination below, to the extent that it may be necessary formally so to do, is varied to the extent that we find that there were some grounds advanced by the vendors to resist summary judgment and to entitle them to unconditional leave to defend. We direct that the parties do proceed to take out an order for directions below and thereafter the action will run its informal course until trial when full evidence can be given and arguments heard including on the questions of the existence or validity of the contract, damages, and so on. The costs hereof will abide the outcome in the Court below.

Appeal allowed.
