

GIDEON MUNDANDA v TIMOTHY MULWANI AND THE AGRICULTURAL
FINANCE CO. LTD AND S.S.S. MWIINGA (1987) Z.R. 29 (S.C.)

SUPREME COURT
GARDNER, J.S., MUWO AND SAKALA, J.J.S.
6TH FEBRUARY, 1986 AND 4TH MAY, 1987.
(S.C.Z. JUDGMENT NO. 10 OF 1987)
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Flynote

Contract - Illegal contract capable of being performed legally - Enforcement of.

Contract - Sale of Land - Specific performance preferred to damages.

Land Law - Consent under Land (Conversion of Titles) Act - Necessity for - Effect of an order for specific performance.

Land Law - Illegal contract capable of being performed legally - Enforcement of: Land Law - Specific performance of contract for sale of land - Whether preferred to damages.

Headnote

The appellant appealed against a judgment of the High court awarding him damages. He asked for specific performance of the contract in lieu of the damages awarded.

The 1st respondent agreed in writing to sell part of his farm to the appellant, which was on mortgage to the second respondent for K20,000 regardless of whether that part of the farm was valued at a lesser amount by the Lands Department. The 1st respondent later offered the whole farm to the 3rd respondent and the K20,000 paid by the appellant was refunded to him by the 2nd respondent. The appellant argued that damages were not an adequate remedy because he had already moved on the land, and the 3rd respondent had acted fraudulently. The 1st respondent argued that the agreement to pay K20,000 even if that was more than the valuation fixed in the Presidential consent made the contract illegal and the contract could therefore not be enforced. The 1st respondent argued that he would face great hardship if specific performance was granted.

Held:

- (i) A judge's discretion in relation to specific performance of contracts for the sale of land is limited as damages cannot adequately compensate a party for breach of a contract for the sale of land.
- (ii) The application for permission to subdivide and presidential consent are not matters which are usually expected to be the subject of litigation, uncertain or otherwise, and the need to obtain such consent is not in itself a ground for refusing to grant an order of specific performance. Since the court will not make orders which it cannot enforce parties applying for the specific performance of contracts for the sale of land should come to court with evidence that if the order they seek is made in their favour, all necessary consents will be granted.
- (iii) The legal performance of a possibly illegal contract is enforceable.

Cases cited:

- (1) Kulamma v Manadan [1968] A.C. 1062
- (2) Naik and Anor v Chama S.C.Z. Judgment No. 28 of 1985
- (3) Aillion v Spiekermann and Others [1976] 1 Ch. 158

Legislation referred to:

Land (Conversion of Titles) Act, 1975 s.13(1)

For the appellant: H. Silweya, Messrs Silweya and Co.

For the 1st respondent: C. K. Banda, Messrs Lisulo and Co.

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For the 3rd Respondent: J. M. Mwanakatwe, M.M.W. and Co.

Judgment

GARDNER, J.S.: delivered the judgment of the court.

This is an appeal against a judgment of the High court awarding damages to the appellant for breach of contract of sale of land. The appellant asks for specific performance of the contract in lieu of the damages awarded.

The facts of this case are that the first respondent is the owner of Farm No. 82 'a' situate in Kalomo district which is on mortgage to the second respondent an Agricultural Finance Company. The first respondent was in difficulty with his mortgage repayments and arrangements were made with the second respondent for him to sell off part of the farm and use the purchase money in reduction of his mortgage indebtedness. Accordingly the first respondent saw the appellant and entered into an agreement with him to sell part of the farm amounting to four thousand acres at a price of K20,000.00. The letter of agreement indicated that the parties agreed that the purchase price would be K20,000.00 regardless of whether the part of the farm was valued at a lesser amount by the Lands Department. It was a term of agreement that the K20,000.00 should be paid direct to the second respondent and this sum was duly paid by the appellant. Some time later the appellant was summoned to a meeting at the offices of the second respondent and it transpired at that meeting that the whole of the farm had been offered to the third respondent. Following the meeting, the K20,000.00 paid by the appellant was refunded to him by the second respondent, but he brought proceedings to establish his claim to the land and paid the K20,000.00 into court.

The third respondent gave evidence that his contract for purchase of the farm was entered into prior to the date of the appellant's contract. The learned trial judge, having heard the evidence, found as a fact that the appellant's contract was first in time and that it was evidenced by a valid memorandum in writing sufficient to satisfy section 4 of the Statute of Frauds as amended by the Law Reform (Enforcement of Contracts) Act, 1954. Having found in favour of the appellant the learned trial judge then went on to find that the third respondent had already redeemed the first respondent's mortgage on the whole of the farm and, although his part in the whole affair was, he found, to say the least fraudulent and an abuse of his position as Chairman of the Lands Board, the first respondent would undoubtedly face great hardship in that the third respondent would bring further

proceedings against the first respondent if specific performance were granted. He ordered that the appellant be paid K7,500.00 damages apart from the K20,000.00 purchase price already refunded. The appellant appeals against that order for damages.

Mr Silweya on behalf of the appellant argued that damages were not an adequate remedy; that the learned trial judge, having found that the third respondent was guilty of fraud, should not have made an order to his advantage and that the appellant would himself suffer hardship because by agreement with the first respondent, he had already moved on to the Land.

Mr Mwanakatwe on behalf of the third respondent argued that specific performance is a discretionary remedy and that the learned trial judge had properly exercised his discretion. He further argued that the court should take into account, as it did, the hardship which an order for specific performance would inflict on the third respondent.

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In his written heads of argument, Mr Mwanakatwe raised the question of the Land (Conversion of Titles) Act, section 13(1) which provides there shall be no disposition of land without prior Presidential consent. Mr Mwanakatwe did not argue this point verbally, but, despite Mr Silweya's argument that the point had not been raised at the trial, Mr Banda on behalf of the first respondent argued the point before us and contended that the agreement to pay K20,000.00 even if that was more than the valuation fixed in the Presidential consent made the contract illegal and therefore it cannot be enforced.

On this latter point Mr Silweya in reply maintained that only an actual sale in breach of section 13 of the Lands (Conversion of Titles) Act is forbidden, and a contract for sale is valid to the extent that the parties must be presumed to have a legal intent. He cited the case of *Kulamma v Manadan* (1). That was a case concerning a contract for the sale of land in Fiji where there was a local requirement under section 12 of the Native Land Trust Ordinance for the consent of a board of trustees for the alienation of and dealing with land. It was held in that case that there was nothing in the agreement which led to the conclusion that the consent of the board would not be obtained at the time of the sale and the parties should be presumed to contemplate a legal rather than an illegal course of proceedings.

We will deal first with the question of the learned trial judge's discretion to make an order for specific performance. In this respect we are quite satisfied that the majority of the authorities cited to us related to specific performance of contracts other than contracts for the sale of land. The law concerning specific performance of contracts relating to or the sale of land is quite clearly set out in paragraph 1764 of Chitty on Contracts 25th Edition, which reads in part:

"Land.

The law takes the view that damages cannot adequately compensate a party for breach of a contract for the sale of an interest in a particular piece of land or of a particular house (however ordinary). . ."

This authority is supported in countless other instances and in this case it is quite clear that the

learned trial judge did not have his attention drawn to the fact that his discretion in relation to specific performance of contracts for the sale of land was decidedly limited. As to hardship we would quote from Snells Principles of Equity 27th edition at page 598, the relevant paragraph of which reads:

"To constitute a defence, however, the hardship must have existed at the date of the contract; specific performance will not be refused merely because, owing to events which have happened since the contract was made, the completion of the contract will cause hardship"

In this case there would be no hardship arising to the first defendant at all had it not been for his conduct since entering into the contract with the appellant. In the circumstances of this case we do not consider that the hardship to any of the respondents should be taken into account when considering whether or not the appellant should have specific performance.

Having regard to the view that we take of this case it is not necessary for us to consider whether the learned trial judge's finding of fraud on the part of the third

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respondent was a correct finding, or whether it should have any effect on the decision whether or not to grant specific performance; nor do we consider that there is any merit in the argument put forward that, because the appellant claimed damages in the alternative to his specific performance, he should be satisfied with the award of damages. In a case of this nature it is proper for a plaintiff to claim specific performance and damages in the alternative, and it is the duty of the court to consider whether, on such pleading, specific performance should be granted before considering the possibility of damages, which should only be awarded where, for some valid reason, specific performance would be an inappropriate remedy.

As to the question of the possible illegality of the contract we respectfully agree with the principle set out in *Kulamma v Manadan* (1) that parties to a contract should be presumed to contemplate a legal rather than an illegal course of proceedings. However we would not say that the facts in *Kulamma v Manadan* (1) are on all fours with the case at present before us. In that case there was an agreement for a future alienation of land and no suggestion that the parties would ignore any conditions laid down by the authority granting consent. The question was only whether it could be presumed that the parties would seek consent if it became necessary. In the present case there was a definite agreement by the parties that, if the valuation of the property was less than K20,000.00 in the consent granted under section 13(1) of the Act, the parties intended to continue with the transaction at the higher price in clear breach of the condition attached to the consent. It must be made quite clear that the courts will never in any circumstances condone the flouting of the law; but we must approach this matter by considering whether it was possible for the parties to comply with their contract legally, in which event we must encourage such compliance. It is clear that were consent to be granted for the sale of the land at a valuation of K20,000.00, no breach of the law would be incurred at all, and it follows therefore that the contract made between the parties might be capable of legal fulfilment. In the case of *Naik and Another v Chama*, (2), this court held that where there had been an actual letting of premises without the obtaining of consent under section

13(1) of the Lands (Conversion of Titles) Act, it was the duty of a landlord to obtain consent, and a tenant who was not in default himself did not lose the protection of the Rent Act as a result of the landlord's failure to obtain consent. We pointed out that the purpose of the Acts was for the protection of tenants whose interests were the primary consideration. In this respect we referred to the case of *Ailion v Spiekerman and Others* (3), in which a vendor agreed to assign the lease of a flat which he occupied as a protected tenant and the purchasers agreed to pay him 3,750.00 pounds for certain furniture. The furniture, to the knowledge of the parties, was of much less value than the agreed price and therefore the vendor was requiring a premium contrary to Sections 86 and 89 of the Rent Act 1898. The purchasers went into possession but failed to pay the purchase price on the day fixed. The vendor claimed rescission of the contract and possession of the premises and the purchasers counter-claimed for specific performance on payment of a reasonable price for the furniture. It was held in favour of the purchasers that the demanding of a premium did not render the whole contract illegal. In that case the court refused the vendor an order for possession and granted the purchasers specific performance but without payment of the illegal premium represented by the excess purchase price over and above the true value of the furniture.

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It is appropriate to note that in that case the purchasers were not entirely innocent in that they were aware that the price of the furniture was excessive and their offer to pay that price was in breach of the law; but the attitude taken by the court in that case was that the purchasers were to be protected from being persuaded into such an illegal contract, and, when they had been so persuaded, the courts would enforce the intention of the legislature. In the same way in the *Naik* case we held that the Rent Acts were for the protection of tenants and a landlord's default in obtaining Presidential consent would not deprive a tenant of their protection.

In this case there is no doubt that the legislature intended to protect purchasers, and by entering into the contract in the way he did, the appellant was doing so for the benefit of the first respondent. Both because the contract was capable of being performed legally and because the appellant was the party whom the law intended to protect, we are quite satisfied that the legal performance of the contract is enforceable against the first respondent.

Mr Mwanakatwe argued that specific performance will not be ordered where such performance would be subject to the obtaining of consent from a third party. We also appreciate that in this case permission to sub-divide would have to be obtained, and, as in all cases of alienation of land, Presidential consent under Section 13 of the Lands (Conversion of Titles) Act must be obtained. However, the case of *Wroth v Tyler* (1973)

1 All E.R. 897, cited by Mr Mwanakatwe, related to a case where a vendor's wife wished to remain in possession of the matrimonial home which the vendor had contracted to sell with vacant possession. The court in that case specifically held that it was a vendor's duty to obtain necessary consents to a sale, but he would not usually be required to embark on difficult or uncertain litigation in order to secure such consent.

We are satisfied that application for permission to sub-divide and Presidential consent are not matters which are usually expected to be the subject of litigation, uncertain or otherwise, and the need to obtain such consent is not in itself a ground for refusing to grant an order for specific

performance. In this particular case we indicated to the parties that, before we would consider the possibility of making such an order, we required to know whether permission to subdivide and Presidential consent would be granted in the event of our making an order for specific performance.

We did so on the principle that the court will not make orders which it cannot enforce, and in future similar cases parties applying for the remedy of specific performance of contracts for the sale of land would be well advised to come to court with evidence that, if the order they seek is made in their favour, all necessary consents will be granted.

In this case we have been informed that both permission to sub-divide and Presidential consent for the sale at a purchase price of K20,000.00 will be granted.

For the reasons that we have given we do not consider that this is a case where any of the grounds put forward by the respondents could justify the court's refusal to exercise its discretion to grant an order for specific performance of the contract.

The appeal is allowed and the order for damages made by the High Court is set aside. In its place we substitute an order for specific performance of the contract for

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the sale by the first respondent to the appellant at a purchase price of K20,000.00 of four thousand acres of farm No. 82 'a', Kalomo, the delineation to be as agreed between the parties at the commencement of the transaction.

The appellant's costs of this appeal will be paid by the first respondent. The third respondent will pay his own costs.

Appeal allowed
