LUSAKA CITY COUNCIL AND CHRISTOPHER MULALA

Supreme court.
Sakala, Chirwa and Chibesakunda JJS.
27TH November 2001 and 28TH December, 2001.
(SCZ Judgment No. 1 of 2002.)

Held:

(i) After the offer was made the terms and conditions applicable, were those in the offer which did not prohibit subletting;

(ii) When an offer to purchase the house was made, the relation between the council and the appellant was no longer that of landlord and tenant, but vendor and purchaser.

Legislation referred to:

Rent Act, Cap. 206 s. 13 (1) *(g).*
M. M. Imenda of Veritas Chambers for the appellant.
M. Munasangu, Director of Legal Services, Lusaka City Council for the 1st respondent.
N. Chanda of Okware and Associates for the 2nd respondent.

Judgment

SAKALA, J.S. delivered the Judgment of the Court.

This is an appeal against a judgment of the High Court dismissing the appellant's application for an order that the decision by the Lusaka City Council revoking the appellant's tenancy of house No. 2623, Palm drive Road, Chelston, Lusaka and the re- allocating of the same house to the 2nd respondent thereby repudiating the sale agreement of the same house to the appellant is unfair, null and void.

The relevant facts not in dispute are that, sometime in 1991, the appellant The relevant facts not in dispute are that, sometime in 1991, the appellant occupied the house in issue as an employee of the now defunct Zambia Airways Corporation Limited. Subsequent to the liquidation of Zambia Airways Corporation Limited, the appellant successfully applied to the Lusaka City Council to be allocated the same house in his own name. The house was accordingly allocated to him. He was given a tenant's card number F6 for the same house. On 8th July 1996, the Lusaka City Council offered the appellant the same house to purchase at a consideration of K2, 760,000 payable within 18 months while at the same time continuing to pay rent. Upon receipt of the offer, the appellant paid the requisite 10 percent deposit on the purchase price in the sum of K276, 000. In an effort to supplement his earnings, and to enable him complete the payment of the balance of the purchase price, the appellant sublet the house to the second respondent but without prior permission of the Council. However, on 25th April, 1997, he received a letter from the Council's Director of Housing and Social Services notifying him that the Council would cancel the tenancy agreement and rescind the sale agreement unless he completed payment of the balance of the purchase price within 30 days of the date of the letter. The appellant through his lawyer, appealed to the council to reverse its decision to rescind the sale agreement. He also requested the council for authority to sublet the house to enable him enhance his income and to complete the purchase of the house. While awaiting a response to his appeal, he received a letter from the

Director of Housing and Social Services notifying him that he had forfeited the tenancy of the house and that the sale agreement had been rescinded. In the same letter, he was notified that he will be refunded his deposit and that the house had now been allocated to the second respondent, his subtenant.

The appellant applied to the High Court by way of an originating summons for an order of revocation of the council's decision. The application was supported by an affidavit in which the appellant pleaded that the tenancy to the house be restored and that there be specific performance of the sale agreement. There was also an affidavit in position by the Director of Housing and Social Services of the council. The Affidavit in opposition confirmed the facts not in dispute, but contended that the house remained the property of the council until the purchase price was completed and the conditions of the tenancy continued in the meantime.

The learned trial judge considered the facts not in dispute and the appellant's affidavit in support of the application and the Council's affidavit in opposition. The court also considered Section 13 (1) (g) of the Rent Act Cap 206 of the Laws of Zambia. After setting out that section in full, the court noted that in terms of that section, council has a discretion and was at liberty to repossess a house and re-allocate it once the conditions of the tenancy are breached. The court was satisfied that on the facts of the case, the appellant had breached the conditions of his tenancy by subletting the house without prior permission. The court held that the appellant's application was misconceived and an abuse of court process and dismissed it with costs. The court further held that the 2nd respondent was a bona fide tenant of house No. 2525 Palm Drive, Chelston.

At the hearing of the appeal, we invited counsel for the respondent to address us first. Mr. Munansangu, the Director of Legal Services, on behalf of the first respondent, argued the appeal without heads of argument. In his short arguments, he pointed out that there was no dispute that the appellant was offered the house by the first respondent to buy. He contended, however, that according to the terms and conditions of the offer, the appellant was to continue to pay the normal rent to the Council until the date of completion. According Munansangu, his interpretation of the term relating to payment of rent was that the tenancy agreement continued and that even after the payment of the 10 percentage deposit, the ownership of the house in question still remained that of the council. Counsel submitted that, in these circumstances, the conditions of tenancy prohibiting sub-letting without prior permission still applied.

After counsel for the first respondent concluded his arguments, we invited counsel for the second respondent to address us in turn. Mr Chanda, on behalf of the second respondent, filed heads of argument. We do not propose to go into these heads of arguments in great detail for reasons which will be apparent later in this judgment. The gist of Mr Chanda's arguments and submissions is that there being no dispute that the appellant sublet the house in issue without authority or permission from the council, he was clearly in breach governing council houses and also in breach of the Rent Act. Counsel submitted that all the facts on record to which the appellant himself conceded are against him and there the trial judge cannot be faulted and the first respondent had the discretion, the liberty and the right to repossess and re-allocate the house to whoever it deemed fit. Mr Chanda agreed with the interpretation of Mr Munansangu on the terms relating to continued payment of rent in the offer to the appellant to purchase the house.

On behalf of the appellant, Mr Imenda filed written heads of arguments based on five grounds of appeal. The grounds are that the trial judge erred in law and fact by holding that the second respondent was a bona fide tenant of the house in issue, that the appellant's application against the first respondent was misconceived and abuse of court; that the action by the first respondent was done without malice; that the first respondent's action of allocating the said house to the second respondent was done in good faith; and that the trial judge misdirected himself by not

legitimizing the offer to the appellant to purchase the house in issue. On account of the view we take of this appeal, we do not propose to review the detailed written heads of argument on behalf of the appellant but we have taken them into account in our judgment.

We have examined the judgment of the trial court. We have also examined the tenancy conditions governing council houses as well as the Rent Act.

Both the council tenancy conditions and the Rent Act prohibit subletting without prior permission or with consent. The fact that the appellant sublet the house in issue without prior permission or consent was not in dispute. In addition, the fact that the house was offered to the appellant to purchase was not in dispute. It is common cause that the offer was based on certain terms and conditions. One of these terms and condition states:-

(v) You shall continue to pay normal rent to council until the date of completion."

The questions for determination in this appeal as we understand them are these:

(i) What conditions governed the house after the offer to purchase was made to the appellant on 8th July, 1996? and;

(ii) What was the relationship between the appellant and the first respondent after the offer was made to the appellant?

The spirited submissions on behalf of both respondents are that the only reasonable interpretation to be placed on the terms and conditions relating to continued payment of rent in the offer is that the tenancy conditions continued to apply. We have examined the offer documents. We cannot agree with the submissions on behalf of both respondents. If the first respondent wanted the tenancy conditions to the offer to purchase the house to apply, the offer could have said so. It did not. We are satisfied that after the offer was made, the terms and conditions applicable were those in the offer which did not prohibit subletting. The house in our view, was no longer governed by the council's tenancy conditions and the Rent Act, after the offer was made and accepted by payment of the 10 percentage deposit. This to us is the only reasonable and logical interpretation of the offer despite the inclusion of the payment of the rent in the terms and conditions.

Above all, when an offer to purchase the house was made, the relationship between the council and the appellant was no longer that of landlord and tenant, but vendor and purchaser. The two relationships are totally different and governed by different principles of law in the event of any breach of the terms. In our view, the respondent's case in the court below was agued from a wrong premise.

For avoidance of any doubt, we must stress that from the time the offer was made and accepted by the appellant by payment of 10 percentage deposit, the relation between the appellant and the first respondent was no longer that of landlord and tenant but that of vendor and purchaser. The tenancy agreement had been superceded by the agreement to sell. Thus, the contract of sale could only be rescinded if the appellant was in breach of the terms or conditions of the offer. On the facts of this case, the appellant is entitled to specific performance on terms and conditions contained in the offer dated 8th July 1996. The appeal is allowed with costs to be taxed in default of agreement.

Appeal allowed.