



Court. However Counsel for the Appellant did file heads of argument which we took into account in arriving at our decision.

In the proceedings in the court below the Respondent had instituted proceedings against the Appellant by way of writ of summons claiming the following reliefs:-

1. a declaration that he was entitled to rescind the contract of sale of house Number 5623 Chitoshi Close, Riverside Extension for failure on the part of the Appellant to pay the full amount K25,000,000.00) of the agreed purchase price of the said property on due dates, having paid only K6,250,000.00 to date;
2. an order for vacant possession of the said house on the ground of failure of consideration on the part of the Appellant;
3. payment of rent by the Appellant together with mesne profits from the date of vacant possession of the house by the Appellant and to account for rent so far collected from the sub tenant presently in unlawful occupation of the said house;
4. interest on amounts found due;
5. an order of interim injunction to restrain the Appellant from taking occupation of the said house.

The facts which are not in dispute are that on 28<sup>th</sup> June, 2000 the Appellant and the Respondent entered into a written agreement for the sale of the property in question by the Respondent to the Appellant at an agreed purchase price of K16,650,000.00. The agreement provided for payment of a deposit of K12,100,000.00 leaving a balance of K4,550,000.00. The deposit of K12,100,000.00 was not in fact paid. The Respondent received

various payments from the Appellant or his advocates amounting to K4,250,000.00 towards the purchase price. On 9<sup>th</sup> January, 2001 the Respondent's advocates wrote a letter to the Appellant rescinding the contract of sale and subsequently instituted these proceedings against the Appellant. The Appellant did not give evidence in the court below and the Respondent's evidence was uncontroverted. The learned trial Judge found on the evidence adduced before him that the Respondent was entitled to rescind the contract. The learned trial Judge made a further finding that as consent to assign was not obtained in terms of Section 5(1) of the Lands Act, the contract was unenforceable. It is against these findings that the Appellant has appealed.

Counsel for the Appellant has filed two grounds of appeal. The first one being:-

- 1. that the learned trial Judge in the court below erred in law when he held that the "contract" was unenforceable for lack of presidential consent.**

In arguing this ground counsel for the Appellant submitted that it was the responsibility of the Respondent, as vendor, to apply for, and obtain state consent to assign. That therefore the lack of state consent cannot be used as a finding against the Appellant. He admitted that in the case of MUTWALE VS PROFESSIONAL SERVICES LTD (1), we had held that lack of

obtaining prior presidential consent for a sublease rendered the whole of the contract unenforceable including the provision for payment of rent. He however pointed out that later decisions like REGINA MUFALO VS HELLA INONGE NGANA (2) have amplified and clarified the decision in the MUTWALE case particularly the case of JEAN MWAMBA MPASHI VS AVONDALE HOUSING PROJECT LIMITED (3) where we said:-

***"In a suitable case it is competent to decree specific performance of contract the performance of which will 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 then in accordance with the statute."***

Counsel said that the nature of the agreement signed by the parties was such that all the requirements of the law such as the application for state consent and other related issues were to follow later. He submitted that the lack of and/or absence of state consent did not therefore render the agreement null and void.

We agree with the Counsel for the Appellant that it was a misdirection on the part of the learned trial Judge to hold as he did, but that that is not the end of the matter. The question of state consent or the lack of it was not an issue in the proceedings before the learned trial Judge and we fail to understand why he felt it was necessary to make a finding on a non issue.

The issue before him was whether or not on the evidence before him, the Respondent was entitled to rescind the contract. On this issue he only had the uncontroverted evidence of the Respondent and he found that on the evidence before him, the Respondent was entitled to rescind the contract.

The second ground of appeal relates to this finding and we have considered the submissions of Counsel and the evidence on record and we can see no other finding that the learned trial Judge could have arrived at. It was for this reason that we dismissed the appeal.

D.M. Lewanika  
DEPUTY CHIEF JUSTICE

I.M.C. Mambilima  
SUPREME COURT JUDGE

S.S. Silomba  
SUPREME COURT JUDGE