**IN THE SUPREME COURT OF ZAMBIA Appeal No 128/2009**

**HOLDEN AT NDOLA**

**(Civil Jurisdiction)**

**B E T W E E N:**

**ANDREW WINTER CHILANZI APPELLANT**

**AND**

**MOSES CHISHA 1ST RESPONDENT**

**ZCCM INVESTMENT HOLDINGS PLC 2ND RESPONDENT**

**Coram: Chirwa, Chibomba and Phiri, JJS.**

 **On 7th December, 2010 and on 27th September, 2012.**

For the Appellant: Mr. F. Chalenga of Freddie and Company.

For the 1st Respondent: In Person.

For the 2nd Respondent: Ms. S. Namwiinga, In House Counsel, ZCCM.

**J U D G M E N T**

**Chibomba, JS, delivered the Judgment of the Court**.

**Cases and Other Materials referred to:-**

1.Timothy Hamaundu Muka Mudenda vs. Tobacco Board of Zambia SCZAppeal No. 49 of 1998

2. Beatrice Muimui vs. Sylvia Chunda Appeal No. 50 of 2000

3. Cheshire, Fifoot and Furmston’s Law of Contract, 11th edition

Butterworths, 568

4. ZCCM Limited vs. Richard Kangwa and Others, Appeal No. 169/99

The appellant appeals against the Judgment of the High Court at Kitwe in which the learned Judge held inter alia, that the appellant was not entitled to be offered to purchase house No. 8, Boma Street, Nkana West, Kitwe.

The facts leading to this appeal are that the appellant was an employee of 2nd respondent until he was retired in 2000. The appellant began to live at house No. 8, Boma Street, Nkana East in 1993. House No. 8 was, however, a condemned house.

Following the decision to sell Parastatal houses to sitting tenants, the appellant was offered to purchase house No. 43, Kariba Street, Nkana East, Kitwe, in which he was not a sitting tenant. Despite paying the purchase price, the appellant could not, however, take possession of that house as the same was occupied by an employee of Mpelembe Drilling who had obtained an injunction against the 2nd respondent from evicting him. Subsequently, the Court decided in favour of the Mpelembe Drilling employee who was offered and purchased house No. 43, Kariba Street. The appellant then applied to purchase the house that he was living in, namely, house No. 8, Boma Street. The 2nd respondent, however, could not offer the appellant this house because by the time the appellant applied to buy that house, the 2nd respondent had already sold it to the 1st respondent who was also an employee of the 2nd respondent. The 1st respondent had applied to buy the house after it was advertised for sale by the 2nd respondent. The 1st respondent paid the purchase price in full. However, at the time of offer and sell of the house to the 1st respondent, the appellant was still in occupation of the house.

Following the refusal by the 2nd respondent to sell the house to him, the appellant commenced an action in which he sought the following reliefs from the 1st and 2nd respondents:-

**“(i) A declaration that he is a sitting tenant and legally entitled to purchase House No. 8 Boma Street, Nkana West, Kitwe.**

**(ii) A declaration that House No. 8 Boma Street, Nkana West be valued and the Plaintiff be paid and refunded part of the purchase price of K9,160,000 on House No. 43 Kariba Street, Nkana East, Kitwe by the 2nd Defendant.**

**(iii) An order of interlocutory injunction to restrain the 2nd Defendant from evicting the Plaintiff.**

**(iv) Costs.”**

The Court below received evidence from the parties. Upon considering this evidence, the Court below came to the conclusion that the appellant was not entitled to be offered and to purchase house No. 8, Boma Street, as the same had already been sold to the 1st respondent by the 2nd respondent. The court below also held that the contract between the appellant and the 2nd respondent for the appellant to purchase house No. 43, Kariba Street, had been frustrated by the court order which allowed the Mpelembe employee to purchase that house.

 Dissatisfied with the Judgment by the Court below, the appellant has appealed to this Court advancing one ground of appeal as follows:-

“**Having found as a fact that the appellant was an employee of ZCCM and occupied House No. 8 Boma Street, Nkana East Kitwe, the learned trial Judge misdirected herself in law and in fact by holding that the appellant had no legal right to purchase the said house having retired and obtained his terminal benefits by the time the 1st respondent bought the house.”**

In support of the sole ground of appeal, the learned Counsel for the appellant, Mr. Chalenga, relied on the arguments advanced in the appellant’s Heads of Argument filed into Court. The major argument is that the appellant should have been offered the house in question as he was the sitting tenant and in occupation of the house and was still in employment of the 2nd respondent. Further, that the learned Judge in the Court below ought not to have been influenced by this Court’s holding in **Timothy Hamaundu Muuka Mudenda vs. Tobacco Board of Zambia1** in which we held that:-

“**Although there may have been political pronouncements, the legal position has always been that a licensee is not a sitting tenant at Law and had no legal right to purchase the house he is living in except where there has been a form of offer and acceptance of the offer to purchase that house.”**

It was pointed out that applying this principle to the case in casu was a misdirection by the Court below and by holding that the appellant had already retired and had been paid his terminal benefits by the time the 1st respondent bought the house from the 2nd respondent. Further, that by also holding that the appellant was initially a sitting tenant who became a licensee after his retirement was a misdirection and so is the holding that the appellant’s contract to purchase house No. 43, Kariba Road, had been frustrated by the Court action taken by an employee of Mpelembe Drilling who was in occupation of that house.

It was argued that these findings are contrary to the evidence on record which showed that the appellant was in employment from 1976 up to 2000 while the 1st respondent was offered the house in question on 19th July 1999 and that the contract of sale was executed on 22nd December, 1999 and that at this time, the appellant was still in employment. Therefore, that to hold that the appellant was a licensee was a misdirection as he was the sitting tenant who was still in employment.

It was contended that the finding that the appellant had no legal right to purchase the house in question as the house had not been offered to him was contradictory to what the learned Judge observed at page J11 where she stated that:-

**“Under the circumstances it is unreasonable for the Defendant to suggest that he did not apply to purchase the house he occupied because he did not want it. The house he lives in was not offered to him and was not earmarked for sale until sometime after he had purportedly bought House No. 43 Kariba**.”

It was pointed out that in the case of **Beatrice Muimui vs. Sylvia Chunda2**,the Court held that:-

 “**In the present case, the 1st Defendant who was an employee of ZCCM was better placed even though he was not a Sitting Tenant rather than the Plaintiff who was no longer an employee of ZCCM or a Sitting Tenant.”,**

It was argued that the appellant was in a better place than the 1st respondent to buy the house in question. Further, that in the above case, this Court acknowledged the well established legal principle that **any bonafide purchaser of property buys that property with existing encumbrances**. It was submitted that the 1st respondent, therefore, bought the house in question with the appellant as an encumbrance since at the time of such purchase, the appellant was the sitting tenant who was still an employee of the 2nd respondent.

With respect to the learned trial Judge’s finding that the appellant’s contract to purchase house No. 43, Kariba Street, had been frustrated by the Court Order in the other case, it was argued that the learned Judge ought to have gone further to deal with the effect of a frustrated contract. Our attention was drawn to what the learned authors of **Law of Contract**³, stated inpropounding the legal consequence of the doctrine of frustrated contract. They stated that “**The rule established at common law is that the occurrence of the frustrating event brings the contract to an end forthwith, without more and automatically.”**

Therefore, that had the learned Judge considered the legal effect of a frustrated contract, he could have found that the appellant was an encumbrance with legal rights to purchase the house in question.

It was pointed out that this Court, in upholding the rule of “**Untold Fairness**”, pierced the corporate veil in the case of **Zambia Consolidated Copper Mines Limited vs. Richard Kangwa and Others3** so as to give chance to the employees of Ndola Lime, a subsidiary of ZCCM, to purchase the houses they occupied as sitting tenants. In that case, we held that:-

“**For our part, we agree with Mrs. Mbaluku that these and other aspects which were pointed out and which it is unnecessary to tabulate in extensio constitute ample ground for a tribunal of substantial justice to reach the conclusion it did, ZCCM were clearly not overly scrupulous in observing any legalistic lines of demarcation in the name of separate corporate identities and the Court was not in error to hold the view that there would be “untold unfairness” to the aggrieved workers some of whom had formally been ZCCM direct employees themselves and who had ended up at the subsidiary company by accident of circumstances or by act of ZCCM in transferring them.”**

We were accordingly urged to in the current case, consider other circumstances or criterion such as the fact that the appellant had been in occupation of house in question for 16 years and that he had also worked for the 2nd respondent for 26 years, he had also renovated the house to improve its safety for his family.

It was submitted that in view of the circumstances outlined above, to uproot the appellant’s emotional attachment to the house if he was denied an opportunity to own it would cause him to suffer untold unfairness compared to the 1st respondent who joined the 2nd respondent on 1st March, 1999 and was offered to purchase the house three months later on 19th July, 1999. We, were, accordingly, urged to uphold the appeal and to quash the decision of the Court below and to order that the appellant is entitled to purchase the house in question.

On the other hand, in opposing this appeal, the 1st respondent relied on the Judgment of the Court below. He did not make any submissions.

On the other hand, the learned Counsel for the 2nd respondent, Mrs Simwinga, relied on the 2nd respondent’s Heads of Argument.

In response to the sole ground of appeal, it was argued in the 2nd respondent’s Heads of Argument that the house in question was a condemned house which was advertised for sale by the 2nd respondent in 1999. And that the 1st respondent was offered to purchase this house on 19th July, 1999 and the purchase price was deducted from his terminal benefits on 31st March, 2000. That the appellant only applied to purchase the house in 2005 but that however, by this time, the house had already been sold to the 1st respondent.

It was contended that no evidence was adduced to support the claim that the appellant was a tenant of the 2nd respondent. That in the case of **Timothy Hamaundu Muuka Mudenda vs. Tobacco Board of Zambia1**, this Court observed that **although there may have been political pronouncements, the legal position has always been that a licensee is not a sitting tenant at law and has no legal right to purchase the house he is living in except where there has been a firm offer and acceptance of the offer to purchase that house.**

It was submitted that the appellant was a licensee from 1993 until the house was sold to the 1st respondent and that although the evidence on record shows that house in question was earmarked for sale in 1999 and that at this time, the appellant was still an employee of the 2nd respondent, the Court below did not find that the appellant had a legal right to apply to purchase the house as he was prevented from doing so because the house was a dilapidated and condemned house. Hence, he was recommended and was allocated an alternative house to buy. That the trial Judge found as a fact that the house was not offered to the appellant and that it was not earmarked for sale until sometime after he had purportedly purchased house No. 43, Kariba Street.

It was argued that by so finding, the Judge did not state that the appellant qualified to purchase the house and as such, she was on firm ground when she applied the case of **Beatrice Muimui2** to the fact of this case as the evidence shows that the appellant only applied to purchase the house on 4th May, 2005 and that by this time, the appellant was no longer an employee of the 2nd respondent and the house had already been sold to the 1st respondent.

In response to the contention that the appellant would suffer “untold unfairness” compared to the 1st respondent, it was submitted that although the 1st respondent joined the 2nd respondent on 1st March, 1999, he was an employee of the 2nd respondent who had also received a letter of offer to purchase house in question. Therefore, that he had a legal right to buy the house on the basis of the principle in **Timothy Hamaundu Muuka Mudenda vs. Tobacco Board of Zambia1**.

It was pointed out that the fact that the appellant did not occupy the house No. 43, Kariba Street was no fault of the 2nd respondent. Therefore, that the learned trial Judge was on firm ground when she found that the contract between the appellant and the 2nd respondent had been frustrated as the vendor was prevented by a Court Order from transferring title in that house. Hence, the Court below ordered the 2nd respondent to refund the purchase price of K9,160,000.00 with interest to the appellant.

We, were accordingly, urged to dismiss this appeal on ground that the appellant had no legal right to purchase the house in question.

We have seriously considered the sole ground of appeal together with the arguments advanced in the respective Heads of Argument and the authorities cited therein. We have also considered the Judgment by the learned Judge in the Court below. It is our considered view that this appeal raises the question whether in the circumstances of this case, the appellant had any legal right to be offered to purchase house No. 8, Boma Street, Nkana West, Kitwe.

To ably determine this question, the facts of this case must not only be borne in mind but must also be put in their proper perspective. These are that the appellant was in occupation of the house in question. The 2nd respondent did not offer to sell this house to the appellant as it was a condemned house. The 2nd respondent instead offered him another house (the second house). The appellant accepted the offer of that second house and he paid the purchase price. He, however, could not take occupation of the second house because the house was occupied by an employee of the 2nd respondent’s subsidiary, Mpelembe Drilling. That employee had obtained an injunction from the Court in a different Court case. Subsequently, the Court in that case ruled in favour of that employee to be sold that house. The appellant then applied to purchase the house in question in which he was in occupation. However, by this time, the 2nd respondent had already advertised and sold that house to the 1st respondent who was also its employee just like the appellant. The 1st respondent had also already paid the purchase price.

What emerges from these facts as outlined above is that the appellant was never offered the house in question by the 2nd respondent even though he was in occupation of the same. This was because the house was not earmarked for sale as it was a dilapidated and condemned house. The appellant had also accepted the offer to buy a different house from the one that he was in occupation. In fact, the appellant even went so far as to pay the full purchase price for the second house. The only reason the appellant could not occupy this house was the Court order and injunction which were in favour of the Mpelembe Drilling employee who was in occupation of that second house.

Given these set of facts, our firm view that the learned trial Judge cannot be faulted for coming to the conclusion that the appellant was not entitled to be offered to purchase house No. 8, Boma Street, Nkana West, Kitwe, on ground that the house had already been offered and sold to the 1st respondent by the time he applied to purchase it. Neither can the learned trial Judge be faulted for coming to the conclusion that the contract to purchase the second house had been frustrated by the Court Order which ordered the 2nd respondent, as Vendor, to sell that house to the Mpelembe Drilling employee. That contract could not be performed by the parties as the second house which was the subject matter of the contract between the appellant and the 2nd respondent was no longer available to the vendor to sell to the appellant.

Therefore, the contention that the 1st respondent bought the house in question with the appellant as an encumbrance does not arise because the appellant was well satisfied to be offered to purchase a different house from the one that he was in occupation. This is evidenced by the appellant’s acceptance of the offer and the payment in full of the purchase price. In this vein, we are satisfied that had the contract to purchase the second house not been frustrated by the Court Order, the appellant could not have raised any issues over his being the sitting tenant, being the person in occupation of the house and the claim that he had a better right to be offered to purchase that house than the 1st respondent. Hence, his claim of “**untold unfairness**” does not arise as he took the risk of accepting the offer to purchase a different house from the one he was in occupation of. We, therefore, find no merit in the sole ground of appeal.

We, however, confirm the Order by the learned trial Judge that the 2nd respondent do refund the sum of K9,160,000 to the appellant with interest at the average short term deposit rate of 12% per annum from the date of the Writ to the date of Judgment, thereafter, at the current bank lending rate of 24% per annum until full settlement, as the contract for him to purchase the second house was frustrated by the Court Order in the other case.

The sum total is that this appeal has no merit. The same is dismissed.

In the circumstances of this case, we order that each party bears own costs.

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D. K. CHIRWA

**SUPREME COURT JUDGE**

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H. CHIBOMBA G. S. PHIRI

**SUPREME COURT JUDGE** **SUPREME COURT JUDGE**