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IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

APPEAL NO. 06/2012
SCZ/8/168/2011

(Civil Jurisdiction)

BETWEEN:

CHAMBESHI COPPER SMELTER LIMITED — **APPELLANT**

AND

BERNADETTE CHAPEWA (Administratrix of the estate of the late Frederick Mubanga Chapewa) — **RESPONDENT**

CORAM: Mwanamwamba, Ag/DCJ, Muyovwe, Lisimba J.J.S.
On 4th June, 2013 and 4th July 2014.

For the Appellant: Mr. W. M. Forrest–Messrs. Forrest Price & Company.

For the Respondent: Mr. N. Simwanza–Messrs. Kitwe Chambers.

JUDGMENT

Mwanamwambwa J, delivered the Judgment of the Court.

***CASES REFERRED TO*:**

(1) **CETINA TRANSPORT LIMITED V COMMISSIONER OF LANDS SCZ APPEAL NO. 79 OF 1999.**
(2) **NKHATA AND FOUR OTHERS V THE ATTORNEY-GENERAL OF ZAMBIA (1966) Z.R. 124.**
(3) **FIBROSA SPOLKA AKCYJNA V FAIRBAIRN LAWSON COMBE BARBOUR LTD, (1942) 2 ALL ER 122 AT 129, (1943) AC 32 AT 48.**

(4) **ROVER INTERNATIONAL LTD V CANNON FILM SALES LTD. (NO 3) (1989) 3 ALL ER 423, [1989] 1 WLR 912.**

LEGISLATION REFERRED TO:

(1) **THE LAW REFORM (FRUSTRATED CONTRACTS) ACT CHAPTER 73 OF THE LAWS OF ZAMBIA**

WORKS REFERRED TO:

1) **PARAGRAPHS 5-011 AND 29-034 OF CHITTY ON CONTRACTS, VOL. 1, 27TH EDITION AT PAGES 300 AND 421.**

This is an appeal against the judgment of the High Court in Kitwe dismissing the appellant's case. The appellant, who was the plaintiff in the Court below, commenced an action by writ of summons claiming a sum of $21, 600.00 from the respondent, as money had and received for alleged failure of consideration. The appellant entered into a contract with the respondent (Deceased), for the appellant to be allowed to build a pipeline through Farm No. 4208, Kalulushi. The appellant then paid the respondent a sum of $21,600.00 as easement fee. The farm was in the name of the respondent's company, called Lualuo Farms Limited, which had a 14 year lease. This lease had expired and an application for renewal for a 99 year lease was made. It was pending, but not granted.

The respondent had also applied for an extension of the farm. A recommendation by Kalulushi District Council was made to the

Commissioner of Lands. The respondent even paid survey fees of K1.8 million but the survey and approval of the extension were not yet made. However, the farm was renumbered 6512 in view of the pending extension and consolidation. The appellant built the pipe and a sub-station but claimed that it was on the adjacent land. It also claimed that the farm was repossessed by the Commissioner of Lands. It is against this background that the appellant sued the respondent for a refund of the $21,600.00. The learned trial judge dismissed the case and the appellant now appeals.

The appellant filed a memorandum of appeal containing the following five grounds of appeal contending that:

1. **The learned trial judge misdirected herself in page J7 line 18 et seq finding that the defendant Frederick Mubanga Chapewa deceased and his wife were the owners and not Lualuo Farm Limited notwithstanding that DW4 gave evidence to the contrary.**
2. **The pipeline the subject of the proposed wayleave was not on Farm No. 4208 as confirmed by PW1 but on an adjacent farm. He gave evidence that at the material time Farm 4208 was in the name of GRZ. The learned trial judge misdirected herself thereon.**

3. **The learned trial judge misdirected herself in page J4 of the judgment. Both DW1 and DW2 claimed in page J4 of the judgment that the farm 4208 was allocated to a company Lualuo Farm Limited and not the defendant. There is no proof of having informed the defendant thereof before contract. In paragraph 3 of J4 of the judgment the defendant F. M. Chapewa said he personally applied for the land. DW4 confirmed that no extension of farm 4208 was granted by the Commissioner of Lands.**
4. **The learned trial judge misdirected herself in accepting the evidence of DW4 the acting Registrar of Lands and Deeds. His evidence was hearsay and not from the registry file. He confirmed that approval for farm 6512 was not given notwithstanding that the learned trial judge found that the extended farm 6512 was vested in Lualuo Farms Limited. Page J7 of the judgement lines 23 to 24 refer.**
5. **DW4 also confirmed that farm 4208 has been subdivided by Chingola Municipal Council and no longer in the occupation of the defendant. PW1 stated that due to the fact that the defendant was not the owner of farm 4208 (the only farm in issue) the plaintiff suffered loss.**

The parties filed written heads of arguments based on the five grounds of appeal. At the hearing of this appeal, both counsel relied on their respective heads of arguments. Considering the nature of this appeal, we will deal with all of the five grounds at one go.

Arguing grounds one, two and three, Mr. Forrest on behalf of the appellant submitted that the emphasis in these grounds was that when the contract was being entered into, the owner of the property which was subject of the contract for the right of way, was the respondent and not Lualuo Farms Limited. Counsel stated that even the respondent's defence at page 28 of the record of appeal makes no mention of the company at all. He pointed out that the appellant's submission at page 63 of the record of appeal confirms that the respondent was holding an expired 14 year lease. He referred us to the case of **Cetina Transport Limited v Commissioner of Lands**[1].

On ground four, Mr. Forrest submitted that the evidence of DW4- the Acting Registrar of Lands and Deeds, was hearsay and not from the lands and deeds registry file. Counsel added that the details were set out in paragraph 3 (d) at page 64 of the record of appeal. On

this point, he referred us to the **Law Reform (Frustrated Contracts) Act** Chapter 73 of the Laws of Zambia.

On ground five, Counsel's contention was that the money which was paid by the appellant under the contract amounted to unjust enrichment on the part of the respondent and was, therefore, a debt due to the appellant for failure of consideration. Mr. Forrest relied on **paragraphs 5-011 and 29-034 of Chitty on Contracts, 27th Edition, Volume 1 at pages 301 and 1421** respectively.

In response to all the five grounds of appeal, Mr. Simwanza submitted that the unchallenged evidence of DW2, together with the document produced, clearly showed that the property belonged to the respondent and was never repossessed by the Commissioner of Lands. He submitted that the testimony of DW2, was that the respondent had applied for an extension of farm 4208 which was approved by Kalulushi Municipal Council. That the council made a recommendation to the Commissioner of Lands and survey fees were paid. Counsel referred to the documents at pages 48 to 51 of the record of appeal.

Mr. Simwanza further submitted that DW2's testimony was that the appellants were told the property was in the name of Lualuo

Farms Limited and were informed of the reason why there was no title deed. Further, that DW2 and the respondent were directors of Lualuo Farms Limited and the appellant was fully aware of the capacity under which the respondent was transacting.

Counsel argued that the appellant could not allege failure of consideration because the terms of the contract had been fully performed, since the appellant had pumped water and continues to do so under the right of way it was granted. That the appellant also built an electricity substation on the respondent's land. He argued that the case of **Cetina Transport Limited v Commissioner of Lands**[1] was distinguishable from the case at hand. According to counsel, that case dealt with an issue where there was no recommendation from the Council. In the case at hand, the council had recommended to the Commissioner of Lands, a sketch plan was drawn and survey fees were paid. He stated that the property was officially renumbered.

Mr. Simwanza argued that the appellant's allegation that the property was repossessed had no basis because no such evidence was led. He added that DW4's testimony was that the respondent's property was not repossessed by the Commissioner of Lands. That

therefore there had been no mistake as the subject matter was in existence at the time of the contract. The respondent having disclosed his position in Lualuo Farms Limited, had authority to deal with the land and to grant the appellant a right of way. He submitted that the appeal should therefore fail.

We have scrutinized the record of proceedings before the learned trial Judge, as well as, the judgment. We have also analyzed the written heads of arguments by Counsel for both parties. We will start by addressing the issue relating to ownership of the property in dispute and the issue of whether the respondent had the right to enter into a contract granting an easement to the appellant.

Our perusal of the evidence on record reveals that the respondent (who is now deceased) and his wife were directors of Lualuo Farms Limited, a company which was incorporated on 23rd July 1981. Lualuo Farms Limited was granted a 14 year lease on Farm 4208 by the Ministry of Lands on 19th September, 1981. It paid lease charges on 17th September, 1981. Since then, the respondent and his wife have been in control and possession of that land. In 1990, Lualuo Farms Limited applied to Kalulushi Municipal Council, for an

extension of the plot. The Council approved the application on 9th July 1990. Then Farm 4208 was renumbered 6512.

The record further shows that Lualuo Farms Limited had also applied for a 99 year lease. The application for renewal was made prior to 1992, before the expiration of the 14 year lease. The Acting Survey General's letter to Lualuo Farms Limited, at page 52 of the record Appeal dated 24th August, 1992, indicates that the company had actually applied for a 99 year lease. The Acting Surveyor General in that letter requested the company to have the land surveyed by a qualified surveyor and enclosed two copies of the approved site plan. Lualuo Farms Limited engaged the Government Survey Department for Ndola Region and paid a sum of K1, 810,000.00, as survey fee on Farm 6512, Kalulushi. It was issued with a Republic of Zambia General Receipt No 173574 on 15th September, 2004, as proof of payment. The record at page 55 also shows a computer printout on the property from the Ministry of Lands, dated 5th June, 2008, which has a handwritten query which reads: *"Richard-property appears cancelled for subdivision please confirm."* Another computer printout bearing the same date at page 56 of the record has a handwritten response which reads: *"offered to Lualuo Farms Ltd,*

Box 20494 Kitwe, farm situate in Kalulushi." There is no further evidence on record showing who wrote on the two documents.

After evaluating the evidence before her, the trial judge found that there was only one property in issue, which was renumbered and only Lualuo Farms Limited was ever allocated that farm by the Commissioner of Lands. That the parties entered into the contract at the time when the property had been renumbered 6512 since the application for an extension by Lualuo Farms Limited was being processed.

The trial judge stated that although Lualuo Farms Limited was not issued with a certificate of title for the farm, the evidence of DW4 was that it was regarded as the owner of the farm, since it complied with all the legal requirements. The 14 year lease had not yet been renewed by the Ministry of Lands from 1995 when it expired. The application for a 99 year lease was still being processed by the Ministry of Lands, because it received survey fees from Lualuo Farms Limited and gave the respondent approved site plans for the renumbered plot 6512. She found that the farm had not been repossessed by the Commissioner of Lands. She also found that the respondent and his wife being directors of Lualuo Farms Limited, had

the right to be in possession of that land and to enter into a contract involving the property.

The record also shows that a contract between the parties, allowing the appellant to construct a pipeline through Farm 4208, was entered into on 18th August, 2007. The easement was for an initial period of five years, at the initial charge of US$21, 600.00 for each year paid in advance to the owner. The trial judge found that although Lualuo Farms Limited was a separate legal entity from the respondent and was not mentioned in the contract between the parties, the evidence of DW1 and DW2, showed that the appellant was informed through PW1, that the farm was registered in the name of the company and that they had applied for the renewal of the lease. She held that the fact that the contract was not made in the name of Lualuo Farms Limited, did not inhibit either party from performing its part of the contract. The trial judge found that the respondent was paid a sum of US$21, 600.00 and on the other hand the appellant have since passed a pipeline and have put up a substation. That, therefore, there was no failure of consideration.

We have noted that all the five grounds of appeal advanced by the appellant are on findings of fact made by the learned trial judge.

We have in a plethora of cases outlined the circumstances when an appellant court can reverse findings of fact made by a trial judge. In the case of **Nkhata and Four Others v The Attorney-General of Zambia**[2], the Court of Appeal held that:

"A trial judge sitting alone without a jury can only be reversed on facts when it is positively demonstrated to the appellant court that:

(a) by reason of some non-direction or misdirection or otherwise the Judge erred in accepting the evidence which he did accept; or

(b) in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or

(c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or

(d) in so far as the judge has relied on manner and demeanor, there are other circumstances which indicate that the evidence of the witnesses which he accepted it is not credible, as for

instance, where those witnesses have on some collateral matter deliberately given an untrue answer."

We have analyzed the evidence on record and we have found that none of the above conditions is present in this case. The appellant's main argument that the trial judge wrongly found that the respondent and his wife were the owners of the land and not Lualuo Farms Limited, is a complete misapprehension of the judgment by the court below. To the contrary, her finding of fact on that point, was that the farm belonged to Lualuo Farms Limited, which was granted a 14 year lease by the Ministry of Lands, on 19th September, 1981. The trial judge further held that the respondent and his wife, as directors of Lualuo Farms Limited, had the right to be in possession of the land as well as to enter into the contract as at August, 2007.

We have noted that the appellant failed to produce any document proving that at the material time Farm 4208 was repossessed and that its pipeline was not on Farm No. 4208, but on the adjacent land. The trial judge rightly observed that there was only one farm in issue, which was renumbered and only Lualuo Farms Limited, was ever allocated that farm by the Commissioner of Lands. We find the appellant's assertion that Farm 4208 was repossessed,

speculative. In addition, the trial judge dismissed the appellant's argument that farm 4208 has been subdivided by the Council and was no longer occupied by the respondent. She found that the Council did that after the contract between the parties was entered into and was without the involvement of the Commissioner of Lands. She also noted that if the Commissioner of Lands was involved, there would have been documents from the Ministry of Lands to prove the repossession. We totally agree with the court below on the observations it made.

On the other hand, there is overwhelming evidence showing that the respondent's application to renew the lease on behalf of Lualuo Farms Limited was still being processed by the Ministry of Lands. As shown above, the Ministry of Lands received survey fees from Lualuo Farms Limited and gave the respondent approved site plans for the renumbered farm 6512. Therefore, the trial judge was on firm ground when she accepted this evidence from DW4, the Acting Registrar of Lands and Deeds. We also agree with her that although DW4 referred to a temporary file containing photocopies of the documents obtained from the respondent and Kalulushi Municipal Council, the authenticity of those documents had not been

challenged. Further, that DW4 had also explained that it was the only evidence available to him at the time he was testifying. In the same vein, we cannot fault the learned trial judge for finding that this was the best evidence the court could receive from the Ministry of Lands in this case.

On the whole, the land in dispute can only be traced with Lualuo Farms Limited, in which the respondent and his wife were directors. Although the respondent entered into the contract in his name, the appellant at least received a benefit of what he bargained for, since he built the pipeline and substation on the land. As a result we do not see any merit in the appellant's claim that there was failure of consideration in this case.

In an appropriate case, the law allows a party to a contract, who has not enjoyed the benefit of any part of what he bargained for, to recover the payment he made to the other party for failure of consideration. **Paragraph 29-034 of Chitty on Contracts, Vol. 1, 27th Edition at Page 421** states as follows:

"Failure of consideration

General principles. Where money has been paid under a transaction that is or becomes ineffective the payer may recover the money provided that the consideration for the payment has totally

failed. Although the principle is not confined to contracts, most of the cases are concerned with ineffective contracts. In that context failure of consideration occurs where the payer has not enjoyed the benefit of any part of what he bargained for...."

Further, in the case of **Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd**(3), Viscount Simon LC stated as follows:

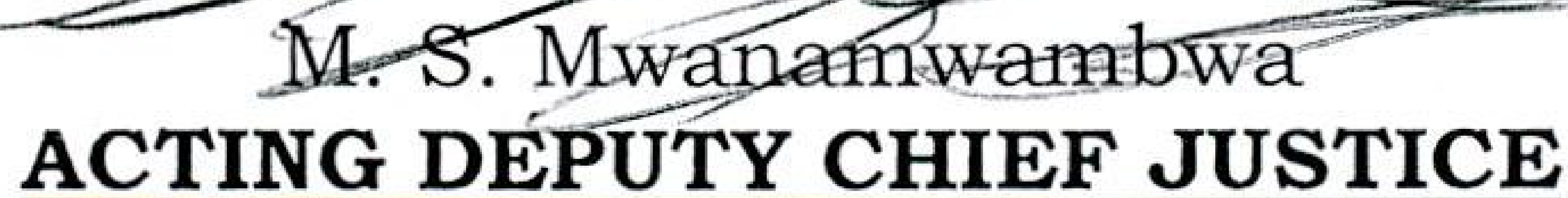
"... when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise."

In this regard, the proper test to be applied in considering whether there has been a total failure of consideration was laid down in the case of **Rover International Ltd v Cannon Film Sales Ltd (No 3)**(4), in which Kerr LJ held as follows:

"The question whether there has been a total failure of consideration is not answered by considering whether there was any consideration sufficient to support a contract or purported contract. The test is whether or not the party claiming total failure of consideration has in fact received any part of the benefit bargained for under the contract or purported contract."

In the case before us, there is unchallenged evidence that the appellant paid the respondent a sum of US$21, 600.00 and that it has since passed a pipeline and put up a substation on land belonging to the respondent's company, in pursuance of the agreement. In other words, the appellant in this case did in fact receive the full benefit of what he bargained for under the contract. The appellant got the very thing for which its money was paid. We, therefore, hold that there was no total failure of consideration.

In view of what we have stated above, all the five grounds of appeal fails. We hereby dismiss this appeal, with costs, to be taxed, in default of agreement.



M. S. Mwanamwambwa
ACTING DEPUTY CHIEF JUSTICE

E. C Muyovwe
SUPREME COURT JUDGE

M. Lisimba
AG/SUPREME COURT JUDGE