

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2009/HP/1299

BETWEEN:

**DOYLE B. KAPAMBWE
MACHONA KAPAMBWE
HENRY MACHINA
ROSE MADINA KAMUNGU**

**1ST PLAINTIFF
2ND PLAINTIFF
3RD PLAINTIFF
4TH PLAINTIFF**

AND

DAVID TEMBO

DEFENDANT

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

*For the Plaintiffs: Mr. K. Mwondela of Messrs Lloyd Jones and
Collins*

*For the Defendant: Dr. O. Banda of Messrs O.M.M Banda &
Company*

J U D G M E N T

Cases referred to:

- (i) *Gideon Mundanda v. Timothy Mulwani and the Agricultural
Finance Co. Ltd and SSS Mwiinga (1967) ZR 29 SC*
- (ii) *Evergreen Balducci and Margaret v. Ruth Nakazwe SCZ
Appeal No. 22/98*

- (iii) *Undi Phiri v. Bank of Zambia SCZ Judgment No. 21 of 2007 (2007) ZR 186*
- (iv) *Wesley Mulungushi v. Catherine Bwale Mizi Chomba (2004) ZR 96*

The genesis of this case is that on 20th October, 2009, the 4 Plaintiffs launched proceedings by way of writ of summons and statement of claim for the following reliefs:

- (i) *Damages for breach of agreement dated 8th August, 2006 for the sale of stand number 30274, Lusaka (“the property”);*
- (ii) *Specific performance of the aforesaid agreement;*
- (iii) *An injunction restraining the defendant from doing the following or any of them that is to say, dissipating, assigning (in any way whatsoever) or otherwise disposing of the property until a further order;*
- (iv) *Any other relief;*
- (v) *Interest;*
- (vi) *Costs.*

The defendant filed in memorandum of appearance and defence disputing the plaintiff’s claim and praying for the dismissal of the plaintiffs’ action.

On 20th October, 2009, the plaintiff obtained an interim order of injunction in respect of the “property”. Hearing commenced on 13th November, 2014. The plaintiff called 2 witnesses.

PW1 was Doyle Bowa Kapambwe (the first plaintiff). The summary of his evidence was that the witness was personally known to the defendant and he was married to a distant cousin.

In August, 2006, the defendant interested the plaintiff in a certain piece of land. The defendant had an offer from the Ministry of Lands. The defendant did not have money to pay for services charges and proposed that once the title deeds were secured, the defendant would sell the property. The 1st plaintiff then brought on board the 2nd plaintiff (who was his wife), 3rd plaintiff Henry Machina and Rose Madina Kamungu (the 4th Plaintiff) who was the 3rd defendant's wife.

An agreement document number 3 in the plaintiffs in the plaintiffs bundles of documents was referred to was subsequently signed by the parties. The salient features of the agreement dated 8th August were that:-

- (i) A sum of K30, 000, 000 down payment was to be made towards the service charges and other council fees (conditions contained in paragraph 3).
- (ii) A sum of K50,000,000 was to be paid to the defendant within 10 days after defendant (vendor) had acquired title deeds as per clause 4 of agreement.
- (iii) The balance of K30, 000, 000 to be paid within 30 days after payment of K50, 000,000 as per clause 5.
- (iv) The full purchase price was agreed at K110, 000,000 as appears at page 2 of the agreement.

It was his evidence that a total sum of K24, 557, 830 was paid to Lusaka City Council whilst the balance was paid to the defendant in cash in the sum of K5, 000,000. The defendant was from time to time being assisted with logistics to follow up uplifting of title deeds from the office of the Commissioner of Lands.

He used to inquire on the uplifting of title deeds and every time he would be told the same had not been uplifted.

On 7th April, 2009, plaintiff conducted a search at the Lands Registry as per document number 7 in his bundles which revealed that the title deeds had been issued as per the computer printout. When defendant was accosted with this information he denied knowledge.

Two months later, the 1st plaintiff visited the plot 30274 and discovered that the same had been subdivided and the defendant was selling the plots. He secured a sketch plan of the subdivision from a surveyor which is document appearing at page 4.

The plaintiff then informed the 3rd and 4th defendants who thereupon engaged the services of lawyers who lodged a caveat on the property. The defendant did not surrender the title deeds to enable them pay the K50, 000, 000 as per agreement.

A Mr. Phiri claimed that the defendant had sold him 1 hectare of plot 30274. He finally prayed for order of specific performance of the agreement and also for damages for breach of contract.

Cross examined by the defence counsel Dr. Banda – the witness testified that the agreement was signed on 8th August, 2006 between the parties (litigants). That PW1, PW2 and PW4 signed as witnesses. That contract was signed by PW3 as buyer though the same refers to four people PW1 to PW4.

He denied that in March, 2009 he had been informed that the title deeds were ready. He became aware of title deeds on 7th April, 2009. In terms of clause 4, the sum of K50, 000, 000 should have been paid by 20th April, 2009.

He denied breaching the contract because the defendant consistently denied having obtained title deeds. The plaintiffs had not paid the K30, 000,000 by monthend of May, 2009 (by 22nd May, 2009). A payment of K50, 000, 000 was paid into court on 28th October, 2009.

He denied receiving a letter dated 23rd May, 2009 from defendant which is at page 9 to 10 of the defendant's bundles. The defendant after I had secured print out became elusive. The plaintiffs did not comply with any other clauses.

Re-examined by Mr. Mwondela learned Counsel for the Plaintiffs, the witness testified that all the plaintiffs were a party to the agreement, the other party was the defendant. The drafting was made by all the plaintiffs and the defendant.

The payment of K50, 000, 000 could have triggered the last payment of K30, 000 but defendant did not surrender title. His wife

and himself had a joint account and they would have paid if title had been surrendered.

PW2 was Henry Machinda the 3rd plaintiff. He testified the 1st plaintiff was his brother in law. He first came to know the defendant in August 2006. They met at PW1's house where defendant made proposals in respect of a plot which had been offered to him and he feared losing it if service charges were not paid.

All the plaintiffs were present at that meeting. It was agreed that the plaintiffs purchase the plot at a sum of K110, 000, 000 for Plot 30274. A sum of K30 million would immediately be disbursed. K24, 557, 830 would be paid directly to council and balance be paid in cash to defendant.

A sum of K50 million was to be paid within 10 days from the defendant obtaining title deeds. And balance of K30 million to be paid within 30 days after paying the 2nd installment of K50 million. the buyers were the 4 plaintiffs.

Initially there was communication on telephone. In addition to the K30 million defendant was being given some money to run around in following up issue of title deeds and a phone was purchased for him to ease communication.

He became aware of subdivision of the property on diagram shown to him by PW1 dated 16th May, 2007. He learnt that the property had been subdivided and that a Bishop was selling plots. Upon

investigations, it was discovered that the reputed Bishop was actually the defendant.

On 25th August, 2009 a computer printout from Lands revealed a preliminary registration of caveat had been made in favor of one Luke Phiri over same property in extent of 0.999 from the 2.4686 hectares.

We decided to seek legal advise and engaged counsel.

He never received letter dated 23rd May, 2009 from defendant. He first saw copy of that letter from his Advocates. Defendant was elusive so they paid money L50 million into court.

He concluded by asking for specific performance, damages for inconvenience and interest on the award of damages.

Cross examined by Dr. Banda – insofar as is relevant to this case, witness testified that he met defendant in April, 2009. The contract was signed on 8th August, 2006. He typed the contract. Witness for vendor signed on 27th September, 2006. Certificate of title in defendant's bundle of documents shows that certificate of title was issued on 8th December, 2008. They were supposed to pay K50 million within 10 days from date of obtaining title deeds. Defendant was elusive.

It was for defendant to deliver title deeds. When defendant realised the plaintiffs were aware of issue of title deeds, he became hostile. He denied receiving letter of 13th May, 2009 from defendant. He only was recently shown the letter by his Advocates.

The balance of K30 million was to be triggered by payment of K50, 000, 000 after defendant had surrendered title deeds. Cross examined further, witness testified that at page 2 of contract, the plaintiffs were at liberty to put up minor developments. This was not done.

On clause 4, he testified that he did not facilitate change of title to buyer. In respect of clause 5, it was his evidence that the plaintiffs did not pay legal fees because the defendant was not co-operative. Defendant never disclosed when he obtained title.

Re - examined by Mr. Mwondela - witness testified that contract was signed on 8th August, 2006. The witness for defendant was not present at time defendant signed contract.

Clause 2 allowed the plaintiffs to make minor developments if they wanted to. Defendant had allowed us.

The plaintiff rested his case.

The defendant called 2 witnesses. **DW1** was the Defendant himself. The essence of his evidence was that on a date he could not recall he informed PW1 about a plot (30274) Woodlands which he had been offered and he was looking for a buyer. A day later PW1 and PW2 visited the defendant expressing an interest to purchase the plot and disclosed that PW3 was also interested.

A meeting was subsequently convened where all the plaintiffs were present and the defendant and his wife. An agreement was reached on the terms that the purchase price would be K110 million.

The first installment of K30 million was immediately payable to cater for council service charges and other incidentals e.g surveyors fees. Upon uplifting title, the defendant was to surrender the title deeds to the plaintiffs after installment of K50 million would become payable within 10 days from the date thereof, payment of full purchase price.

The 3rd installment of K30 million would become payable after 30 days from date of payment of the 2nd installment. A contract was subsequently signed. The Zambia Revenue Authority property transfer tax at 3% purchase price would be paid from the K80 million.

It was also agreed that upon payment of the 1st installment, the plaintiffs could commence developing the plot by putting up minor structures. The 1st installment was paid and payments made to the council. He started now chasing for title deeds. Though PW1 had assured him that he had a cousin at Lands department who would facilitate uplifting of title deeds.

The plaintiffs had on 3 occasions given him some back up funds to pursue title deeds. He recalled that sometime in April, PW1, PW2 and PW4 visited him at his home and informed him that title deeds had been issued. The following day he went and collected the title deeds from Mulungushi house.

He declined to surrender title deeds since the K50 million had not been paid.

On 23rd May, 2009 he wrote to PW3 terminating the contract of August, 2006. He subsequently received a letter from the plaintiff's advocates. The matter could not be resolved hence these proceedings.

He subdivided the plots since he had terminated the contract. He took the writ of summons to his previous Advocates (a Mr. Kasonde who has since died). He finally referred to the contract in his bundles of documents at pages 7 – 8. He also made reference to certificate of title which appears at pages 1 – 6. He further made reference to page 10 being a copy of his letter to the 3rd plaintiff terminating the contract.

He paid back the plaintiffs money of K30 million into court on 14th April, 2015. He finally concluded by claiming damages for the wasted time, defamation of character and costs.

Cross examined by Mr. Mwondela, he testified that he had made inquiries and verified that the property valued much higher than the contractual purchase price. He contracted with Luke Phiri over a portion of the same piece of land. He offered to buy it at K290 million. He had subdivided property into 33 plots eight of which were commercial.

In 2006, he had no title deeds.

He was paid K30 million. A sum of K50 million was to be paid within 10 working days after getting title. It was only him who was supposed to collect the title deeds from the Commissioner of Lands.

He only learnt about issue of title deeds after 1st plaintiff had conducted a search in April, 2009. On these occasions he had been given back up by 1st plaintiff to follow title deeds. Other than letter of May, 2009, he never wrote any other letter to plaintiffs. The letter was given to his wife to deliver. He did not give plaintiffs notice to complete.

He never gave a photocopy of the title to the plaintiffs.

Shown paragraph 8 at page 9 of his pleadings he reconfirmed that the pleadings said

“The Plaintiffs were aware that the defendants had received certificate of title in the month of February, 2009”

By July 2009, he had entered into an agreement with Mr. Luke Phiri. The value of land had gone up and he subdivided the property. He was aware a total of K80 million has been paid. He also paid K30 million into court without interest on it. Other than the contract with Mr. Luke Phiri, he had not signed any contract with any other person.

Re – examined by Dr. Banda – the witness testified that it was PW1 and PW2 who had gone to tell him that the certificate of title was ready.

DW2 was Beatrice Nandu Temboa niece to Mr. Doyle Kapambwe the plaintiff and wife to the defendant Mr. David Tembo. The essence of her evidence was that the 4 plaintiffs and the defendant after

negotiations reached upon an agreement to purchase property at K110 million (then). The mode of payment was to be:-

- (i) 1st installment K30 million (then) towards Lusaka City Council requirements;
- (ii) K50 million to be paid within 10 working days after acquisition of title deeds.

It was her evidence that sometime in April, 2009. The first and second plaintiffs visited the defendants home and advised the defendant that title deeds had been issued by the Commissioner of Lands and the later should collect them.

The following day, the defendant collected the title deeds. The first plaintiff requested that the title deeds be surrendered to him which request was rejected. Defendant insisted that he be first paid the K50, 000. A dispute arose and the Plaintiffs enlisted the help of lawyers Messrs Lloyd Jones and Collins.

Meanwhile, the defendant had written to the plaintiffs informing them that he had no business to do with them.

Cross examined by the plaintiffs counsel, the witness confirmed that the defendant had received the K30, 000. She recalled that in May, 2009, defendant drafted a letter with help of his children terminating the contract.

She later delivered the letter to the first and 2nd plaintiff's residence but did not find Mr. and Mrs. Kapambwe. She therefore left the letter dated 23rd May, 2009 with a certain young girl whose identity

she did not know, but assumed she was a daughter of Mr. and Mrs. Kapambwe though she had never met her before nor did she know her name. There was no acknowledgment of receipt.

She admitted that the initial K30 million had not been refunded to the plaintiffs. She admitted the plot was subdivided into many plots and 8 plots sold to a Mr. Luka Phiri for K290 million.

Learned Counsel for both parties made written submissions citing useful judicial precedents and reference to some very relevant works of some learned authors.

I will not recite or replicate the parties submissions but I assure the parties that I have taken into consideration the relevant points of law applicable to the facts in the case in casu. Judgment was scheduled for delivery on 29th August, 2016 at 09:00 hours but was not done due to applications by the parties Advocates applying for extension of time to submit. The essence of the plaintiffs submissions are that:

- (i) There is in existence a binding contract for the sale of the property (stand no. 80274, Lusaka herein after to be referred to as “property”).
- (ii) That the contract has been part performed by the plaintiffs.
- (iii) That the contract has been breached by the plaintiffs.
- (iv) That the remedies sought are available to the plaintiffs.

On the other hand, it has been submitted by the counsel for the defendant that whereas it is admitted that there is an existing

contract of sale between the litigants, it is their contention that the plaintiffs are in breach of the contract of sale and as such the defendants are not entitled to any relief they are seeking.

The starting point in resolving the dispute is the contract of sale dated 8th of august, 2006 which is hereby reproduced.

“The buyer shall

1. *Buy the land from the vendor;*
2. *Pay service charges for the same plot on behalf of the vendor and in the vendors name amounting to twenty four million five hundred and seven thousand eight hundred and thirty kwacha (K24, 557, 830) only and any other costs to be paid to the government or the surveyors including the Zambia Revenue Authority of the said land. All such payments shall be deducted from the total selling price.*
3. *Pay a sum of thirty million kwacha (K30, 000, 000) only as down payment to cater for service charges and other related costs as said in (1) and (2) above.*
4. *Pay a sum of fifty million (K50, 000, 000) only within ten working days once the vendor has acquired title deeds to the said plot.*
5. *Pay the remaining balance of thirty million kwacha (K30, 000,000) in thirty working days after the title has been issued.*

6. *Pay half the costs of any legal fees that may be required throughout the period of this agreement.*

The vendor shall

- (1) Sell the land to the buyer at one hundred and ten million kwacha (K110,000,000) only upon acquiring title deeds.*
- (2) Allow the buyer to start minor developments on the said land while waiting for title deeds.*
- (3) Surrender title deeds to the buyer to keep after the buyer has paid up to eighty million kwacha (K80,000,000) of the total amount.*
- (4) Facilitate change of title to the buyer to change ownership.*
- (5) Pay half the costs of any legal fees that may be required throughout the period of this agreement.*

The vendor and the buyer shall agree again on any other issues that may not be included in this agreement concerning the same land”

1 CONTRACT

- (i) On the evidence available, I find that it is common cause between the parties and I find as a fact that there was a valid contract of the sale of the property entered into between the plaintiffs and the defendants on 8th August, 2016 at a consideration of K110, 000,000.00.*

- (ii) I also find as a fact that a sum of K30, 000, 000 was paid to the defendant towards the payment of the purchase price

ACQUISITION OF CERTIFICATE OF TITLE

The background evidence surrounding the contract is that the plaintiff had been offered a piece of land (the property) by the Commissioner of Lands. He had no means to comply with the lease formalities so that the Commissioner of Lands would process issue of title deeds after the defendant had met his obligations under the offer letter.

I therefore find as a fact that the plaintiffs financed the acquisition of the certificate of title to the defendant.

According to PW1, a search was conducted at the Lands and Deeds Registry on 7th April, 2009 which revealed that a certificate of title had been issued in favor of the defendant when the later was accosted he denied knowledge.

In his evidence in chief, he maintained that he was not aware that title deeds had been issued and he learnt about that from the 1st and 2nd plaintiffs. This evidence conflicts with his pleadings which state that the plaintiffs were not aware that title deeds had been issued and received by him.

I therefore accept the evidence of PW1 that the defendant had collected title deeds from the Registry of Lands and Deeds or the Commissioner of Lands and withheld that fact to himself without

revealing the same to the plaintiff so that the 2nd stage of payment of K50, 000, 000 would be triggered.

I also accept the evidence of PW1 that the defendant became uncooperative after acquiring the title deeds. I am fortified in this view by the subsequent conduct of the defendant who swiftly went into the subdivision of the property after acquiring title into 33 plots 8 of which commercial plots and sold some plots to one Luka Phiri at K290, 000, 000.

The defendant did not deduce title to the plaintiffs nor did he give them notice to complete or demand payment of K50 million as 2nd stage payment.

The defendant testified that by letter dated 23rd May, 2009, he terminated the contract of sale. This view was supported by DW2 the wife to the defendant who stated that the letter was delivered to PW1 and PW2 residence.

DW2 could not tell the name of the recipient, she had never met her before and the letter was not acknowledged. For these reasons I do not find the evidence of DW2 credible. I hold and find that the letter dated 23rd May, 2009 was never communicated to the plaintiffs. It was manufactured at a later date and was only disclosed in the defendants bundle of documents of 7th May, 2014.

There was therefore no demonstration on the part of the defendant that he had repudiated the contract.

I am fortified in this view by the failure of the defendant to have paid back the sum of K30 million which was the anchor upon which the contract was premised.

Even assuming it was to be held that the letter dated 23rd May, 2009 had actually been communicated or delivered to the plaintiffs; the said letter was not accompanied with any refund of the K30 million.

In my view, upon acquiring the defendant became greedy and tried to contract out of the contract.

(iii) Whether the contract has been part performed by the plaintiffs

I have already addressed this issue in one of the preceding paragraphs. The plaintiffs had partly performed the contract by paying the critical sum of K30 million without which payment the defendant could not have been given a certificate of title No. 81675 for the property dated 9th December, 2008.

It then remained to the defendant to give the plaintiff the necessary notice so that the process of completion and obtaining the necessary consent and payment of attending statutory impositions inclusive of property transfer tax could be attended to.

The defendant was thus in breach of the contract entered into by the parties.

(iv) Breach of Contract

I have just indicated in the immediate preceding paragraph that the defendant was in breach of the contract. The post conduct of the defendant after acquisition of certificate of title by the defendant clearly demonstrated that he did not in any way intend to complete or perform his part of the contract.

(v) Remedies available

It is trite law that a Judge's discretion in relation to specific performance of contracts of sale of land is limited as damages cannot adequately compensate a party for breach of contract for sale of land. This proposition and statement of law was enunciated in the Supreme Court case of ***Gideon Mundanda v. Timothy Mulwani and the Agricultural Finance Co. Ltd and SSS Mwiinga***¹.

The above aptly apply to this case.

(vi) Equity

It was submitted by the learned counsel for the defendant that the plaintiffs had come to equity with dirty hands by breaching the contract. I have already pointed out that it was in fact the defendant who breached the contract by not revealing that he had obtained the certificate of title and swiftly proceeding to subdivisions up for sales. The evidence is that in fact it is the defendant and not the plaintiffs who have come to court with soiled hands.

(vii) Contract of sale (Ruling of 8th April, 2013)

On 8th April, 2013 Her Ladyship Madam Justice Christine BC Phiri had delivered couched in the following terms:-

“Upon hearing counsel for the plaintiffs and the defendant, I find both parties are infact in agreement on the law on states consent to assign under section 5 of the Lands Act subsequent to the parties entering into a contract of sale. It is my view that although no one shall contract without the President’s consent, one cannot obtain a states consent without entering into a contract of sale. I agree with counsel for the defendant that the contract of sale would not be invalidated if it did not provide for state consent to assign. For the foregoing, I dismiss the preliminary issue with costs in the cause”

On the basis of that Ruling, Counsel for the defendant submitted that the parties never entered in a Law Association of Zambia contract of sale and that there was no contract entered into between the parties.

With great respect to the Learned Doctor Banda Senior Counsel, the Ruling of my sister Madam justice Phiri (as she then was) did not nowhere in her Ruling did she say there was no contract between the parties. The contrary infact is what she said when she said

“The contract would not be invalidated if it did not provide for states consent to assign.....”

Counsel’s submission on this limb was thus misleading and it is disapproved. I however agree with the learned Senior counsels

submission that a decision of a Court of equal jurisdiction ordinarily binds another.

The doctrine of stare decisis entails that superior courts binds all the lower courts. Even courts of equal jurisdiction ordinarily are expected to follow earlier decision of the courts of equal jurisdiction unless good reason exist why the earlier decision cannot be followed or on the ground that the facts are different and the decision can be distinguished.

(viii) Illegal / crooked activities and use of law as instrument of fraud

Learned senior counsel made reference to the case of **Everando Balducci and Margaret Phiri v Ruth Nakazwe**² and quoted the following passage at page J.5

“We are satisfied therefore that the arrangement made by the appellant and the respondent was unlawful. In even if we had found that the arrangement contravened section (3) of the Trust Restriction Act, we would still not have upheld the learned trial Judge as the law cannot be used as an instrument of fraud”

Learned Counsel also made reference in the case of **Undi Phiri v. Bank of Zambia**³ **SCZ Judgment No. 21 (2007) ZR 186 on page 196 paragraphs 30** quoted as follows:-

“We are not prepared by our Judgment to promote and protect interests of people who indulge themselves in

illegal and crooked activities. This ground of appeal also fails”

In my view there was no illegality in the contract entered into by the parties. I however find and hold that there was crookedness on the manner and style the defendant conducted himself after securing the certificate of title. Behind the backs of the plaintiffs subdivided the property in numerous residential and commercial plots which he started selling at immense profit – no doubt enticed by greed.

To that extent, the cited authorities infact go to assist the plaintiffs and not the defendant. I therefore find and hold that *“the law cannot be used as an instrument of fraud, and I am not prepared in my Judgment to promote and protect interests of the defendant who has indulged in crooked activities to the total detriment of the plaintiffs who are the beneficiaries under the contract in which the defendant had initiated for the mutual benefit of the parties and the defendant only to contrive a stratagem to do away with the plaintiffs having used their money to acquire good title to the property which he was willingly supposed to assign to the plaintiffs”*.

(ix) Contract in respect of untitled property

It has not been disputed and it is common cause that the property did not have title at the time of execution. Indeed the issue of ownership is not in contention. The Supreme Court had occasion to pronounce themselves on a similar situation in the case of **Wesley Mulungushi v. Catherine Mizi Chomba** ⁴ when they observed:

“She may not have secured title to the stand at the time she offered to sell it to the appellant but that did not diminish her entitlement to the property. We hasten to add that even though a title deed is conclusive evidence of ownership of land there are other factors that precede the issuance of title”.

In applying this instructive legal position to the case in casu, I have not the slightest hesitation to find and hold that at the time the contract was entered into the property was not on title. It was on offer stage to the defendant who enlisted the plaintiffs to secure the property which was then agreed to be transferred to the plaintiffs secure the property which was then agreed to be transferred to the plaintiffs in accordance with the agreed terms of the contract which as I have already observed was breached by the defendant.

(x) Contract whether time is of essence

It was submitted by the defendants advocates that the delay or failure in paying the full purchase price at the agreed time justified the defendant to treat the agreement as at an end on account of alleged breach.

It is trite law that time in a contract will only be of essence if it is stipulated as such in the contract or where there has been undue delay by a party, time will be of essence if a notice to complete has been issued. The Supreme Court had occasion to restate the stated principle in the case of ***Jane Mwenya and Rand v. Paul Kapinga (1968) SJ 12 (SC)***.

In addition, I have already made a finding that upon acquisition of the certificate of title, the defendant became elusive and uncooperative. He subdivided the property and commenced disposing off the subdivisions behind the backs of the plaintiffs. The defendant did not give notice to complete. It is for these reasons that I find and hold that time was not of essence in the case in casu.

(xi) Termination of contract by defendant

This limb has been dealt with in one or more of the preceding paragraphs. Suffice is to state that there is no credible evidence on record to show or tend to show that the letter of 23rd May, 2009 purporting to terminate the tenancy was served on the plaintiffs.

There is therefore no basis on which the defendant claim that it had successfully communicated the rescission of the contract. In any event, since it was the defendant who was in breach the remedy of rescission of the contract was not available to the defendant.

On the foregoing, I have come to a firm conclusion that the plaintiffs have proved their case on a preponderance of probability and I make the following holdings and orders:-

- (1)The defendant was and is in breach of the contract dated 8th August, 2016.
- (2)The plaintiffs claim for specific contract of sale herein is upheld.


(3) In view of the successful claim for specific performance, I decline to award the plaintiffs for breach of contract as the order for specific performance will adequately compensate the successful litigants.

- (4) (i) The defendant is to surrender the original certificate of title dated 9th December, 2009, No. 81675 to the plaintiffs Advocates by 30th of October, 2016.
- (ii) The plaintiff having paid into court a sum of K50, 000, on 20th October, 2009 under receipt 2320790, the plaintiff shall pay a sum of K30, 000 balance due on the agreed purchase. The sum of K30, 000 shall carry interest at short term deposit bank rate per annum from the date of the writ which is 20th October, 2016 up to the date of Judgment.
- (iii) The principal i.e K30, 000 plus interest earned from 20th October, 2009 to date of Judgment shall form the amount due under contract and shall attract interest at bank lending or commercial rates but not exceeding the Bank of Zambia lending rate and the sum total shall be payable by the plaintiffs to the defendants Advocates by the 30th October, 2016.
- (iv) The plaintiff shall draw up the assignment which shall be executed by the parties on or before the 30th October, 2016.

- (v) In the event that the defendant is reluctant to execute the assignment, the learned Deputy Registrar shall direct one of the Assistant Deputy Registrars of the High Court to execute the assignment at the consideration of K110, 000 as per contract.
- (vi) The Zambia Revenue Authority property transfer tax imposition shall be paid by the plaintiffs.
- (vii) The necessary consent to assign shall be applied for and granted pursuant to the order of this Judgment.
- (viii) The costs are for the plaintiffs which costs are to be taxed in default of agreement.

Leave to appeal to the Court of Appeal is granted.

Dated at Lusaka this ^{25th}..... day of October, 2016



Mwila Chitabo, SC
Judge