File

IN THE COURT OF APPEAL FOR ZAMBIA **CAZ/8/024/2016**

HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

MAXWELL CHONGO **APPELLANT**

AND

ZAMBIA NATIONAL COMMERCIAL BANK PLC **RESPONDENT**

CORAM: CHISANGA JP, CHASHI AND KONDOLO, SC JJA

On 14th December 2016, 31st January 2017 and 11th December 2018

For the Appellant: *Mr. G. Cornhill and Mrs. C. Msoni, Messrs Wilson & Cornhill*
For the Respondent: *Mrs. S. Wamulume, Legal Counsel*

JUDGMENT

CHISANGA JP, delivered the judgment of the Court

Cases cited:

1. ***Inutu Etambuyu Suba and Indo Zambia Bank[1] Ltd selected Judgment No 52 of 2017 at page J39 to J40***
2. ***Gondwe vs Supa Baking Company Limited (in Liquidation) and Another (2001) Z.R. 57***
3. ***Mercy Steel and Iron Co. Ltd vs Naylor, Benzon & Co. (1881-85) All ER Rep 365 at 370***
4. ***Trevor Limpic and 2 Others vs Rachel Mawere and 2 Others – SCZ Judgment No. 35 of 2014***
5. ***Namunga'ndu vs Lusaka City Council (1978) ZR 358***
6. ***Thornier vs Major and Others (2009) 1 WLR P 776***

7. ***Watkins vs Nash*** **- Watkins The Law Reports Equity Cases Vol XX 1875, 3-39 Victoria 261**
8. ***Smith vs Butler (1900) 1 QB 694***
9. ***Ramsden vs Dyson (1866) LR 1 HL 129***
10. ***Wilmot vs Barber (1880) 15 Ch D 96***
11. ***Taylor Fashions Ltd vs Liverpool Trustees Co Ltd (1982) 1QB 133***
12. ***Attorney General of Hong Kong and Another vs Humphrey's Estate (Queens Gardens) Ltd (1987) 1AC 114***
13. ***Amalgamated Investment and Property Co. Ltd vs Texas Commerce International Bank Ltd (1982) Q.B. 84***
14. ***Inwards vs Baker (1965) 2WLR 212, (1965) 2 QB 29***
15. ***Re Bashan (1986)*** **1WLR 1498**
16. ***Greasley vs Cook (1980) 3 ALL ER 710***
17. ***Gillet vs Holt (2001) 2 ALL ER 289***

Legislation referred to:

1. **Halsbury's Laws of England Vo. 9 (1) para 670 Edition**
2. **Chitty on Contract Volume 1 (2012) Sweet & Maxwell Limited**
3. **Treitel Law of Contract Thirteenth Edition 2011 Sweet and Maxwell at Para 2-105**
4. **Goff & Jones The Law of Restitution, London, Sweet & Maxwell 2007, Para 6-006, Page 242.**

Works referred to:

1. **Blacks Law Dictionary**
2. **Oxford Dictionary of Law Eighth Edition, Edited By Jonathan Law, 2015, Oxford University Press.**

The appellant was plaintiff in the court below whilst the respondent was the defendant. He sought damages for unexhausted improvements on Stand Number 252, Kafue, as well as damages for loss of business. He also craved interest, costs, and further ancillary relief. The claim arose in the alleged circumstances averred in the statement of claim.

The defendant was mortgagee in possession of property known as Stand Number 253 Kafue. The mortgagor was the late Raymond Wambinji Sitali, who died in 1987. On 11th October 1993, the defendant offered the property for sale to the plaintiff at a purchase price of K506.75, which was duly settled by the plaintiff. The plaintiff obtained approved building plans from the Town and Country Planning Authority, and commenced construction of a shopping complex. At the time he commenced this action, the building was at roof level, with a valuation of K450,000.00.

The defendant extended loan facilities to the plaintiff's company, Daddy Cool Enterprises Limited, on the security of the same property. However, despite several demands and reminders, the defendant neglected to obtain a foreclosure order against the estate of the late mortgagor, Raymond Wambinji Sitali. Unknown persons, purporting to be the beneficiaries of the estate of the deceased had on several occasions gone to the property and threatened the plaintiff and his workers with actual physical violence, and demanded that he

vacates the property. The plaintiff sought the defendant's protection from the unknown claimants, to no avail.

On 11th September 2014, the defendant purported to rescind the contract of sale by refunding the plaintiff the sum of K507.75 with interest, and refused to compensate him for the unexhausted improvements on the property, and the ensuing loss of business. Hence the claim.

The defendant admitted in its defence that it was at all material times mortgagee in possession of the property, which had belonged to the late Raymond Wambinji Sitali. It further averred that it agreed to sell the property at the stated consideration, with the specific condition that the sum be put in an escrow account pending complete transfer of title. It was a further condition of the offer that the amount paid would be refunded to the plaintiff in the event the defendant failed to convey the property.

The defendant also admitted lending the plaintiff's company, Daddy Cool Enterprises Limited on the security of the property. It however denied neglecting to procure a foreclosure order against the estate of the late Raymond Wambinji Sitali, and averred that the plaintiff was well aware that the defendant had taken out an action against the estate of the late Raymond Wambinji Sitali, and that the plaintiff was a party to the action.

It was averred that the defendant had tried to contact the administrator of the estate of the deceased in order to try and resolve the matter. The defendant denied rescinding the contract, and averred that it refunded the plaintiff in accordance with the conditions of sale which had been agreed to by the parties. It was pleaded that the plaintiff was not entitled to compensation for any unexhausted improvements on the property or loss of business from the said improvements.

The record reveals that the plaintiff's testimony largely echoed the assertions in the statement of claim. He added that he asked ZANACO whether they could allow him to develop the plot, and they were agreeable, since he had paid, and the property was his. He subsequently applied to Town and Country Planning, which approved the building plans. When he was about to commence construction beneficiaries of the late Wambinji began threatening his life and builders on site.

When he had constructed up to window level, he applied for a loan from ZANACO. ZANACO inspected the property, and availed him the first facility. They informed him that they were still in the process of changing ownership of the property in his name. The plaintiff borrowed on the same collateral several times. Title was however never transferred into the plaintiff's name. He was therefore asking the Court to refund him whatever monies he had spent on the

development of the plot, damages and loss of business. The plaintiff was not cross examined.

The second witness was a valuation surveyor, who spoke about the valuation done on the property on behalf of the plaintiff. This witness was equally not cross examined.

The defendant did not lead evidence, but filed submissions, which the learned trial judge took into account. In determining the matter before her, the learned judge formulated three questions as falling for determination:

1. What was the type of contract between the plaintiff and the defendant;
2. Could the defendant rescind the contract? And;
3. If so, whether the defendant was liable for the unexhausted improvements.

The learned judge found that the contract entered into by the parties was conditional, thus executory. That the parties had to abide by the terms of the agreement they executed. She was of the considered view that the defendant was entitled to rescind the contract. It was her further finding that the plaintiff's claim that he was granted approval to build on the property was unsubstantiated, and that it was not prudent for the plaintiff to commence construction in the absence of conveyance of title into his name.

It was the judge's further opinion that the plaintiff could not claim that the loans advanced to him by the defendant signified proof that the defendant had granted him approval to build on the property. She concluded by stating that the plaintiff built at his own peril, and that the defendant was liable only to the extent of refunding the plaintiff with interest, having failed to finalise the transaction. Thus, the plaintiff's claims were found unmeritorious and dismissed.

Dissatisfied, the plaintiff, now appellant, launched the present appeal, on four grounds, as follows:

1. The court below erred in law by holding that due to the contract being executory the respondent was at liberty to abrogate the contract, without considering the reasons for the respondent's failure to convey title;
2. The court below erred in law and misdirected itself when it held that the respondent was entitled to rescind the contract, when it was impossible to restore the parties to their original position because of the unexhausted improvements on the property;
3. The court below erred in fact and law when it failed to compensate the appellant for the unexhausted improvements. Thus the respondent has been unjustly enriched; and
4. The court below erred in law and fact by holding that the mere fact that the property was pledged by the respondent to secure loans for the

appellant's property, did not indicate that the respondent had given the appellant permission to build on the subject property.

Heads of arguments have been filed by the appellant, in accordance with the rules.

We note that the appellant's advocates have recast the grounds of appeal in the heads of argument, without amendment. We fail to conceive the premise of this approach. It is much like the approach condemned by the Supreme Court in ***Inutu Etambuyu Suba and Indo Zambia Bank***[1].

We are mindful that this court has power to entertain a ground of appeal not contained in the Memorandum of Appeal if the opponent has had opportunity to respond to the ground. This power is conferred by Order X(9)(4).

We should however state that this power is not a recipe for disorderly prosecution of appeals, allowing parties to recast grounds of appeal at will, without applying for leave to amend. Advocates who proceed in this manner risk visitation of unpleasant consequences on their clients as a result.

Leave to amend the grounds of appeal having not been obtained, we will consider the arguments tendered as relating to the grounds as stated in the Memorandum of Appeal, and proceed accordingly.

In arguing the first ground, the appellant's advocates recited the definition of an executory contract as rendered by William A Story in **'A Treatise on the Law of Contract'***(Citation incomplete).* Reference was also made to a case without a citation, where the Supreme Court pronounced itself on 'frustration.' Further reliance was placed on yet another case without a citation. It was then argued that a vendor is obliged to perform, and that one cannot hide behind assumed impossibilities or failure to obtain title if such failure is attributable to oneself.

It was learned counsel's contention that the parties concluded a contract of sale of the property in this case. The appellant having paid the purchase price in full, the contract was only executory with respect to the Respondent. Therefore, the court fell into error in finding that the contract was still executory.

Learned counsel's further submission was that the Respondent purported to make the passing of title a condition precedent to the contract, when this was its obligation, as it is every vendor's cardinal obligation to pass title.

It was argued that the court is obliged to analyse the Respondent's efforts to perform its obligations. That the Respondent's effort consisted of trying to have the property re-entered, and obtain an offer for the same from the Commissioner of Lands, a very strange procedure involving tax evasion.

Predictably, this unlawful and nebulous procedure failed to yield the desired results.

It was contended that all the Respondent was required to do was to commence a legal action against the mortgager's estate. If no administrator could be located, the Respondent was at liberty to serve process by substituted service. At the conclusion of the litigation, the Respondent would have transferred the property without any difficulty, unless the mortgagor showed that he had repaid the loan. Amazingly, the Respondent only commenced legal action in 2013, twenty years after the contract with the appellant. It was submitted that the court was oblivious to the Respondent's deliberate failure to transfer title. A party to a contract cannot set up its own ineptitude to justify rescission of a contract it is obligated to perform.

It was submitted that the respondent elected not to perform a concluded contract by embarking on a strange process. Irresponsibility and profligacy of this order, it was argued, cannot constitute a frustrating event or failure of a condition precedent because nothing untoward disturbed the process. Therefore, the respondent is in a position similar to that of the vendor in ***Gondwe vs Supa Baking Company Limited (in Liquidation) and Another***[2]. The appellant was thus entitled to damages for a lost bargain, and dismissal of the attempted rescission of contract, similar to specific performance.

The opposing arguments as contained in the Respondent's heads of argument on ground one were as follows:

The trial judge was on firm ground in holding that the contract was executory. This is because the offer was conditional on whether the bank was able to convey good title, as per the letter of 11th October 1993. The appellant accepted all the conditions by letter dated 14th February 1994. Learned counsel placed reliance on **A Treatise on the Law of Contract** *supra.* Further recourse was made to **Halsbury's Laws of England Vo. 9 (1) para 670,** and ***Mercy Steel and Iron Co. Ltd vs Naylor, Benzon & Co***[3].

It was submitted that the court simply found that the bank could rescind the contract solely based on what the parties had agreed, and there was therefore no need for the court to delve into the reasons why the bank failed to convey title to the appellant.

The appellant's arguments purportedly under ground two were that premised on ***Trevor Limpic and 2 Others vs Rachel Mawere and 2 Others***[4], a party rescinding a contract is only entitled to his former position. He cannot benefit from the efforts of the other party. Reliance was also placed on ***Namung'andu vs Lusaka City Council***[5] for this proposition.

It was then argued that the respondent sold the appellant a bare piece of land. The appellant built a structure up to roof level. The respondent cannot, in the event of rescission, obtain the land with the massive development. Equity demands that the respondent compensates the appellant. It was contended that the appellant has been treated like a trespasser who takes or remains in possession without the consent of the title holder. While such a one builds at his own risk, the appellant is not so placed. This is because he had a valid contract with the mortgagee of the property. He was entitled to expect that title would be transferred to his name. He cannot therefore be reasonably treated as having built at his own risk.

The opposing arguments on this ground are that the trial court rightly held that the Bank was liable only to the extent of refunding the plaintiff with interest, having failed to finalise the transaction. It was argued that the court below could not delve into matters beyond what the parties had contracted to do in the manner suggested by the appellant. That the improvements on the property were done by the appellant at his own peril knowing fully well that the contract was conditional and without consent from the respondent.

He was warned by the respondent that it had failed to convey title to him. The appellant had a duty to mitigate his loss. Recourse was made to **Clerks and Lindsell on Torts** *(Complete citation not provided)* in Support of this contention.

At the hearing, Mrs Msoni, appearing for the appellant augmented the heads of argument. She submitted that the legal action which would have resulted in the appellant acquiring title was only commenced in 2013. Therefore the respondent could not rely on their inability as a ground for rescinding the contract. When asked by the court which party rescinded the contract, Mrs Msoni said it was the respondent who did so. That the rescission arose from the appellant's purported refund in the sum of K2,153.91.

It was her further argument that the appellant's evidence that he was allowed to build on the property was not challenged. She also drew the court's attention to page 62 of the record, where the respondent stated that Bank officials would conduct quarterly visits to the business premises and the property held on security. Mrs Msoni pointed out that in another valuation done in 2008, the property was valued at K125 Million.

It was her submission that the respondent was aware of the development, and did nothing to stop or prevent the appellant from building. She referred to ***Thornier vs Major and Others***[6] where it was stated as follows:

> ***"This court will not permit a man knowingly, though but passively to encourage another to pay out money under an erroneous opinion of title and the circumstances of looking on is as good in many cases as using terms of encouragement."***

Mrs. Msoni contended that the giving of loans to the appellant on the security of the property, and doing nothing to prevent him from building was as good as

encouragement. In addition to this, the respondent earned interest and bank fees on loans earned which unjustly enriched them.

In opposing the appeal, Mrs Wamulume relied on the heads of argument, which she augmented. She contended that the appellant was at all material times aware of the possibility of the bank being unable to pass title on to him. That the appellant proceeded to make the improvements on the property fully aware of the conditions precedent in the letter of 11th October.

Regarding the case of ***Thornier vs Major and Others***[6], Mrs Wamulume submitted that although she had not read it, the case made reference to an erroneous assumption of title, while that was not the case here.

She also argued that a party has a duty to mitigate his damages. She urged the court to dismiss the appeal.

Mrs. Msoni responded by submitting that the bank's actions did not reveal inability to transfer the title as all avenues had not been exhausted, the bank having only commenced an action in 2013. She argued that the rescission of the contract did not put the Respondent in the original position he was in, neither had the appellant been restored to its original position because of the monies expended in developing the property.

We have considered the submissions of the parties and the judgment appealed against. We have equally considered the evidence led before the learned trial judge. Before we delve into the arguments, we will advert to the position revealed by the pleadings.

The plaintiff in the court below alleged that he was offered the property in question by the defendant for sale at the stated purchase price, which he duly paid, and begun construction. The defendant had taken the same property as security for loans extended to the plaintiff's company. Despite several demands and reminders, the defendant neglected to procure a foreclosure order against the estate of the late mortgagor Raymond Wambinji Sitali.

The defendant's defence was that the sale was with the specific condition that the sum be put in an escrow account pending complete transfer of title, and that the amount paid would be refunded to the plaintiff in the event the defendant failed to convey the property. The defendant also averred that it had not neglected to procure a foreclosure order against the estate of the late Raymond Wambinji Sitali, and that the plaintiff was aware that the defendant had taken out an action against that estate.

The originating process against the administrator of the estate under Cause No. 2013/HP/266 has been produced at page 6 of the supplemental record of appeal. In the statement of claim, ZANACO averred that Raymond Wambinji Sitali, deceased, had owed the bank the sum of K506,745.84, which was still outstanding at his

demise. The Kafue District Council recommended, on 14th September 1993, that the property in question be re-assigned to the 1st plaintiff in order to service the mortgage as it had been long overdue. However, the property was not re-assigned.

It was further averred that ZANACO sold the property to Maxwell Chongo, 2nd plaintiff to that action, in order to recover the money it was owed by the deceased. Although the property was sold to the 2nd plaintiff, the certificate of title had remained in the name of the deceased. The plaintiff thus sought an order compelling the administrator of the Estate of Raymond Wambinji Sitali to execute conveyance documents of Stand Number 252 Kafue in the name of Raymond Wambinji Sitali to Maxwell Chongo.

We should remind the parties that it is a settled rule of pleading that a party is bound by its pleadings. The respondent confirms that it took out proceedings for foreclosure, in its defence. Additionally, we take judicial notice of the action brought to our attention by the defence, as revealed in the Supplemental Record of Appeal.

To recap the sequence of events, the letter dated 11th October 1993, from ZANACO to Mr Maxwell Chongo stated that the Bank had applied to the Commissioner of Lands for the re-entry of the property, and transfer to itself. It was prepared to dispose of the property to Mr. Chongo upon acquiring title on condition that he paid the sum of K506,745.84; that amount would be put in

an escrow account earning interest pending complete transfer to him, and that the amount to be paid would be refunded to him with interest in the event of the bank's failure to finalise the matter in his favour.

Mr. Chongo made a counter offer by letter dated 13th October 1993, offering to pay K200,000 instead, pointing out that there was no development on the plot, and that selling it as a commercial property may prove difficult. He however later wrote a letter dated 14th February 1994, confirming his acceptance of the conditions stipulated by the bank in its letter of 11th October 1993, and requesting that his counter offer be ignored.

In acceding to his request, ZANACO emphasized that the decision of the Commissioner of Lands would ultimately determine the bank's ability to transfer the property to him.

We should here advert to the meaning of *'escrow'*. An escrow account is defined as, "a bank account, generally held in the name of an escrow agent, that is returnable to the depositor or paid to a third person on the fulfillment of specified conditions.' See **Blacks Law Dictionary**.

In ***Watkins vs Nash***[7]**,** the Court dealt with the question whether a document delivered by a grantor was a re-conveyance or was an escrow. The court held that the delivery to the solicitor of the grantee of an instrument executed by the

grantor would not convert the instrument from an escrow into a deed, provided the delivery was of a character negativing its being delivered to the grantee.

Sir Charles Hall, VC explained the definition of an escrow at page 266. He said:

> ***"Now, as to this execution operating effectually or not at law, there can be no doubt that it was intended to be what is called an escrow. But it is said the deed thus executed could not be an escrow, because it was not delivered to a stranger; and that is, no doubt, the way in which the rule is stated in some of the text-books – Sheppard's Touchstone, for instance; but when those authorities are examined, it will be found that it is not merely a technical question as to whether or not the deed is delivered into the hands of A. B., to be held conditionally; but when a delivery to a stranger is spoken of, what is meant is a delivery of a character negativing its being a delivery to the grantee or to the party who is to have the benefit of the instrument. You cannot deliver the deed to the grantee himself, it is said, because that would be inconsistent with preserving the character of an escrow. But if upon the whole of the transaction it be clear that the delivery was not intended to be a delivery to the grantee at that time, but that it was to be something different, then you must not give effect to the delivery as being a complete delivery, that not being the intent of the person who executed the instrument".***

We gather from this statement of the law that the intention of the parties is of essential consideration when determining what is meant by the delivery of an instrument, and by extension, payment of money, in escrow.

Turning to the case with which we are concerned, and applying the import of payment or delivery in escrow, the conclusion that the payment of the purchase price was conditional is inevitable. It would become operative if the commissioner of lands effected a re-entry of the land in question in favour of

the bank. Therefore, the purchase price could not be deemed to have been conclusively paid to the bank until the condition was fulfilled. The payment was suspensive as revealed by the terms on which it was was made.

It is however undeniable that the Bank later changed its position. Whereas the payment had been made in escrow, the Bank began to regard it as paid. This change of position is disclosed by the action commenced against the estate of Raymond Wambinji Sitali for an order compelling the administrator of the Estate to execute a conveyance in favour of Maxwell Chongo. We will revert to this issue later.

We turn to the grounds of appeal as argued.

The finding that the contract between the parties was executory is said to be erroneous. The word *'executory'* means *'remaining to be done...'* Thus, a contract that has yet to be carried out is said to be an executory contract. Consideration that has still to be given for a contract is described as executory consideration. See **Oxford Dictionary of Law Eight Edition, Edited By Jonathan Law, 2015, Oxford University Press.**

The question then is whether there was between the parties a contract that had yet to be carried out. When the meaning of a payment in escrow is applied, together with the contingent of re-entry on which conclusion of the proposed sale depended, it is impossible to conclude that there was here a contract that

had yet to be carried out. In our considered opinion, the parties had entered into a conditional agreement. The learned authors of **Chitty on Contract Volume 1 2012 Sweet & Maxwell Limited** state, at paragraph 2 -150 that:

> ***"An agreement is conditional if its operation depends on an event which is not certain to occur."***

They further state that contingent conditions may be precedent or subsequent. Conditions precedent are also sometimes called suspensive.

The learned author of **Treitel Law of Contract Thirteenth Edition 2011 Sweet And Maxwell** states at para 2-105 that where an agreement is subject to a contingent condition precedent, there is, before the occurrence of the condition, no duty on either party to render the principal performance promised by him, e.g. a seller is not bound to deliver and a buyer is not bound to pay.

In ***Smith vs Butler***[8] A bought land from B on condition that a loan to B (secured by a mortgage on the premises) would be transferred to A. It was held that A could not withdraw before the time fixed for completion. He was bound to wait until then to see whether B could arrange the transfer.

When however it becomes clear that the condition has not occurred, or can no longer occur on the time specified in the contract, the parties will be under no further obligations under the contract. The effect of the non-occurrence of the

condition is that the parties are no longer bound to the contract or that the contract is discharged. See Treitel *supra*, at para 107.

In the present case, the agreement between the parties was subject to a condition precedent. The fulfillment of this condition depended on a third party, the Commissioner of Lands. The Kafue District Council had recommended a re-entry of the property in favour of the respondent. This was to enable it realize its security. The manner in which the respondent proposed to realize its security was unorthodox. Instead of commencing an action for foreclosure, the respondent elected to proceed as done.

Be that as it may, Mr. Chongo initially agreed to go along with the proposed course of action. Therefore, contrary to the learned trial judge's finding, there was no executory contract between the parties. Instead, what they had was a conditional agreement. They would only become bound upon the re-entry of the land in the respondent's favour. That being the case, we are not at all impressed by the argument that all that remained for the respondent was to perform its part of the contract. The respondent had to procure a re-entry, and this entailed appealing to the discretion of the Commissioner of Lands.

In the course of time the respondent enclosed the original certificate of title in a letter dated 15th November 2000, addressed to Mr. Chongo. It was explained that the bank had tried without success to trace the late Mr. Wambinji Sitali's

representative who could have assigned the property to him. He was advised that he could liaise with the Commissioner of Lands to find ways of ensuring that ownership of the property vested in him. This letter clearly indicates that the bank had, besides hoping for a re-entry, tried to trace the mortgagor's representative, to try and obtain finalisation of the arrangement in the appellant's favour.

It will be noticed that instead of withdrawing from the conditional agreement altogether, on failing to procure a re-entry in its favour, the bank gave the plaintiff the certificate of title and in effect asked him to try his luck at procuring a re-entry in his favour. Mr. Chongo's reaction was to consult his lawyers, whereupon he handed the certificate of title back to the bank to do the transaction for him, as it was the seller of the property.

It is equally undeniable that the respondent began to treat Mr. Chongo as the owner of the property in question. We say so because ZANACO registered a third party mortgage in its favour over the subject property. The mortgagors were Sitali Raymond Wambinji, who had expired 17 years before this registration, and Daddy Cool Enterprises, the appellant's business. The bank had availed the appellant's business, Daddy Cool Enterprises, a facility, and secured it by the said property. This was a clear indication to Mr. Chongo by the bank that the property was as good as his. Had that not been the case, the bank would not itself have registered a third party mortgage on the property.

True it is, that the agreement was contingent on the re-entry. However, by the year 2004, the respondent had by its conduct portrayed the picture that the property was as good as Mr. Chongo's.

We find Mrs Wamulume's arguments that the bank informed the appellant that they were unable to obtain title and therefore cannot be held accountable for the appellant's ill-advised construction unpersuasive. We take this position because the bank itself registered a third party mortgage on the property, thus representing that it viewed Mr. Chongo as the owner of the property. Had he not been so viewed, the bank would not have lent him money on the security of the property.

The act of lending Mr. Chongo's firm, Daddy Cool Enterprises on the security of the property in issue damnifies the bank. We fail to conceive the basis on which it can extricate itself from the tacit acknowledgement that the property was as good as Mr. Chongo's. The escrow arrangement was undermined by the bank's conduct. Instead of being non-committal, the bank took a positive step, that represented to the appellant that the property was as good as his. The evidence reveals that he constructed on the property. The bank inserted a condition in the facility letter that it would visit the property to inspect it for purposes of availing the plaintiff's business the facility requested for.

Another term of importance in the credit facility letter is the following, at page 63 of the record:

(a) The bank reserves the right to recall the facility at any time, if in the opinion of the bank, there is a change in the ownership of the company, resulting in the change of control whether such change be by way of management and policies through the acquisition of shares by contract or otherwise, or if the Bank obtains any information that it deems adverse to its interest.

On record are three such credit facility letters dated 9th August 2007, 4th October 2007 and 10th October 2008. Yet another credit facility was extended on the same security, to Daddy Cool Enterprises, the plaintiff's business by letter dated 14th January 2009.

It is beyond question that the property in question was treated as belonging to Mr. Chongo.

The Bank was purporting to protect its interest in stating that if there was a change of ownership of the company, the Bank had a right to recall the facility. It was important to the bank, that Mr. Chongo remains in control of Daddy Cool Enterprises.

At some point, the appellant began to agitate for conclusion of the sale. The bank took out an action, seeking an Order compelling the administrator of the estate of Raymond Wambinji Sitali to execute a conveyance in favour of Maxwell Chongo. This was on the premise that it had sold the property to Mr. Chongo, but title had not been conveyed to him. As earlier noted, this revealed a change of stance from that stated in the initial correspondence.

The appellant was aggrieved at the length of time that had elapsed, and withdrew from the sale, demanding a refund and compensation for the improvements done to the property. The bank's response was a refund of the purchase price, with interest as initially agreed. The learned trial judge held that the respondent could rescind the contract as it had failed to obtain a re-entry.

It is imperative at this juncture to examine the workings of rescission. According to **Chitty on Contracts Volume 1** General Principles 2008 Thomson Reuters Para 22-025, Where a contract is executory on both sides, that is, where neither party has performed the whole of his obligations under the contract, it may be rescinded by mutual agreement, express or implied. The learned author states further that a partially executed contract can be rescinded by agreement provided that there are obligations on both sides which remain unperformed. Similarly, a contract which has been fully performed by one party can be rescinded provided that the other party returns the

performance which he has received and in turn is released from his own obligation to perform under the contract. The consideration for the discharge in each case is found in the abandonment by each party of his right to performance or his right to damages as the case may be.

In the present appeal, the respondent having changed its stance, from a conditional sale, to an actual sale as revealed by the Writ taken out against the administrator of the late Raymond Wambinji Sitali, there remained nothing more to be done by the appellant. Rescission could therefore only be effected if the respondent returned the performance which it had received. The respondent returned the money paid by the appellant, with interest. The appellant claims that he is entitled to be paid the value of the improvements made to the land in issue. He has prayed ***Thornier vs Major and Others*** *supra* in aid.

This leads us to consideration of the doctrine of proprietory estoppel. This doctrine resides in equity. This kind of estoppel arises in an instance where A assures B of future rights in land and B relies on the assurance and acts to his detriment. B would be entitled to equitable relief. The assurance given may be express or implied.

In ***Ramsden vs Dyson***[9], the workings of proprietory estoppel were stated by Lord Kingsdown as follows:

> ***"If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own."***

In ***Wilmot vs Barber***[10], proprietory estoppel was said to be premised on the presence of five probanda:

(a) Claimant of an equity makes a mistake about his or her legal rights;

(b) On the basis of the mistake, the claimant acts to his or her detriment by spending moneys or carrying out some act;

(c) Knowledge by the possessor of the legal right of the other party's belief;

(d) Knowledge by the other party that the belief is mistaken; and

(e) The other party must have encouraged the claimant in the expenditure incurred.

The five probanda were considered by Oliver J in ***Taylor Fashions Ltd vs Liverpool Trustees Co Ltd***[11] who articulated the elements required to be proved by a claimant in order to successfully raise proprietory estoppel against a land owner.

The facts were that a 28-year lease had been granted to the predecessors in title of the claimants, Taylor Fashions. It carried an option to renew for a further 14 years. The option had not been registered because the claimants mistakenly believed that it was not necessary and, as a result, it was not

binding on the third-party purchasers of the freehold title. After taking possession of the property, the claimants had carried out extensive improvements to the property with the consent of the landlords. Taylor fashions claimed that the landlords were estopped from denying the exercise of the option to renew, even though it had not been registered because they had known of the improvements made by the claimants,. In the course of his judgment, Oliver J made the following observations:

> ***"In Lord Kingsdown's example in Ramsden vs Dyson L.R IHL 129 for instance, there is no room for the literal application of the probanda, for the circumstances there postulated do not presuppose a 'mistake' on anybody's part, but merely the fostering of an expectation in the minds of both parties at the time from which, once it has been acted upon, it could be unconscionable to permit the landlord to depart. As Scarman LJ pointed out in Crabb vs Arun District Council (1976) Ch 179, the "fraud" in these cases is not to be found in the transaction itself but in the subsequent attempt to go back on the basic assumptions which underlay it".....***
>
> ***"The fact is that acquiescence or encouragement may take a variety of forms. It may take the form of standing by in silence whilst one part unwittingly infringes another's legal rights. It may take the form of passive or active encouragement of expenditure or alteration of legal position upon the footing of some unilateral or shared legal or factual supposition. Or it may, for example, take the form of stimulating or not objecting to, some change of legal position, on the faith of a unilateral or shared assumption as to the future conduct of one or other party. I am not at all convinced that it is desirable or possible to lay down hard and fast rules which seek to dictate, in every combination of circumstances, the considerations which will persuade the court that a departure by the acquiescing party from the previously supposed state of law or fact is so unconscionable that a court of equity will interfere. Nor in my judgment do the authorities support so inflexible an approach, and that is***

particularly so in cases in which the decision has been based on the principles stated by Lord Kingsdown. Thus in Plimmer vs Mayor of Wellington (1984) 9 App. Cas 699, 700 the stated case makes it clear that the respondent, who sought to raise the estoppel, knew the state of the title at the date when he incurred the expenditure. There was simply a supposition that he would not summarily be turned out. Now this case cannot, I think be explained as being one of estoppel by representation or of promissory estoppel, for the interest arising by estoppel was treated as giving rise to a cause of action which enabled the respondent to claim compensation".....

"Furthermore, the recent cases indicate, in my judgment, that the application of the Ramsden vs Dyson L.R. 1 HL 129 principles, whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial–requires a very much broader approach which is directed rather at ascertaining whether, in particular circumstances, it would be unconscionable for a party to be permitted to deny that which knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving a universal yardstick for every form of unconscionable behaviour...this approach, so it seems to me, appears very clearly from the authorities to which I am about to refer. In Inwards vs Baker (1965) 2QB 29 there was no mistaken belief on either side. Each knew the state of the title, but the defendant had been led to expect that he would get an interest in the land on which he had built and, indeed, the overwhelming probability is that that was indeed the father's intention at the time. But it was not mere promissory estoppel, which could merely be used as a defence, for as Lord Denning M.R said, at p. 37, "it is for the court to say in what way the equity can be satisfied." The principle was expressed very broadly both by Lord Denning M. R. and by Dankwert L.J. Lord Denning said, at page 37:

"But it seems to me, from Plimmers case, 9 App Cas. 699, 713-714 in particular, that the equity arising from the expenditure on land need not fail merely on the ground that the interest to be secured has not been

expressly indicated..... the court must look at the circumstances in each case to decide in what way the equity can be satisfied."

Oliver J further observed as follows:

"An even more striking example is F. R. Ivs Investment Ltd vs High (1967) 2 QB 379. Here again, there does not appear to have been any question of the persons who had acquiesced in the defendant's expenditure having known that his belief that the agreement between them created effective rights. Nevertheless the successor in title to the acquiescing party was held to be estopped. Lord Denning M. R said, at pages 394 – 395:

"The right arises out of the expense incurred by Mr High in his garage as it is now, with access only over the yard. And the Wrights standing by and acquiescing in, knowing that he believed he had a right of way over the yard. By so doing the Wrights created in the Highs mind a reasonable expectation that his access over the year would not be disturbed. That gives right to an equity arising out of acquiescence. It is for the court in each case to decide in what way the equity can be satisfied....."

"It should be mentioned that the Wrights themselves clearly also believed that the Highs had a right of way, because when they came to sell, they sold expressly subject to it. So once again, there is an example of the doctrine of estoppel by acquiescence being applied without regard to the question of whether the acquiescing party knew that the belief of the other party in his supposed rights was erroneous .....More clearly in point is Crabb vs Arun District Council (1976) Ch. 179 where the plaintiff had altered his legal potion in the expectation, encouraged by the defendants, that he would have a certain access to a road. Now there was no mistake here. Each party knew that the road was vested in the defendants and each knew that no formal grant had been made."

After examining the ratio decidendi in a good number of cases, among which are those reflected in the portions of Oliver J's judgment, he reached the conclusion that the Court of Appeal had asserted a broader test of whether in

particular circumstances the conduct complained of was unconscionable without the necessity of forcing those encumbrances into a procrustean bed constructed from some unalterable criteria. The judge then proceeded to enquire whether, in all the circumstances of the case, it was unconscionable for the defendants to seek to take advantage of the mistake which, at the material time, everybody shared. He dismissed Taylor's claim but upheld Old's claim. The latter claim was upheld on the ground that they were encouraged by the defendants to expend a very large sum on the premises and to take a lease to the adjoining premises, upon the faith of the expectation, encouraged by the Defendants that they would be entitled to renew in a particular event which, whether it was probable or not, Olds were at least invited to believe was possible. And they acted on that supposition. ***[Emphasis ours]***

Based on Oliver J's judgment, at present, a claim for proprietory estoppel must be based on proof of an assurance, detriment and reliance. The learned Authors of **Snell's Equity** have, at paragraph 10-16 of that work defined the doctrine of proprietory estoppel by uplifting Oliver J's articulation of the doctrine in ***Taylor Fashions Ltd vs Liverpool Victoria Trustee Co Ltd***[11] they state:

> ***"If A, under the expectation created or encouraged by B that A shall have a certain interest in Land thereafter, on the faith of such expectation and with the knowledge of B and without objection from him, acts to his detriment in connection with such land, a court of Equity will Compel B to give effect to such expectation."***

Attorney General of Hong Kong and Another vs Humphrey's Estate (Queens Gardens) Ltd[12] is another case in which the Privy Council considered the doctrine of proprietory estoppel.

In that case, the defendants, as representatives of the government of Hong Kong, and a group of companies, which included the plaintiff company, entered into negotiations for the government to acquire 83 flats in premises owned by the group in exchange for the grant of a Crown lease of government property to the group with the right to develop it and the group's adjoining property.

In January 1981 an agreement in principle was reached *"subject to contract"* and providing that the terms could be varied or withdrawn and that any agreement was subject to the necessary documents, giving legal effect to the transaction, being executed and registered. The group permitted the government to take possession of the flats. After spending money on them, the government had, by August 1981, moved senior civil servants into the flats, and disposed of the residences they formerly occupied.

Although a draft licence was prepared giving the group the right to terminate the government's occupation of the flats, it was never executed. However, the government granted the group a licence, expressed to be revocable at any time without notice, to enter its property and allowed the group to demolish the existing buildings in preparation for redevelopment. By August 1982 the group

had paid the government $103,865,608, being the agreed difference in value between the two properties, and the basic terms of the agreement in principle had been agreed and had been substantially performed.

The requisite documents were drafted but they were not executed because in April 1984 the group decided to withdraw from the negotiations and the plaintiff gave notice to the government determining its licence to occupy the flats. On an action by the plaintiff against the defendants in the High Court the judge ordered, inter alia, that the first defendant should pay $103,865,608 to the plaintiff and the plaintiff was entitled to possession of the flats, and he dismissed the defendants' counterclaim holding that the plaintiff was not estopped from requiring the government to deliver up possession. The Court of Appeal of Hong Kong dismissed the defendants' appeal.

It was held on appeal to the Privy Council that for the group to be estopped from withdrawing from the agreement in principle the government had to establish that it had taken possession of the flats and had spent money on them under an expectation or belief created or encouraged by the group that the group would carry out the agreement, but that since the evidence plainly showed that the group to the government's knowledge had retained the right to resile from the agreement, the government had failed to prove that the group had created or encouraged the government to expect that there would be no withdrawal by the group, or that the government had relied on such

expectation that accordingly, although the government had acted to its detriment in the circumstances, it was not unconscionable for the group to resile from the agreement.

Lord Templeman delivered the Judgment on behalf of the Privy Council. He made the following observations:

The agreement in principle was not binding in its inception, the letter of offer having been marked "without prejudice" the offer was 'subject to contract, and was in part as follows:

> ***"I must, however, point out that the above basic terms may be varied or withdrawn prior to formal execution of the transaction. Furthermore, any agreement reached shall be subject to formal approval by the government and until the documents or documents necessary to give legal effect to this transaction are executed and registered, this letter should not be considered as binding the government in any way."***

Lord Templeman went on to observe as follows: after stating the above:

> ***"Thus the author prudently gave emphasis to the principle that an agreement which is "subject to contract" has no binding force. The government was fully aware and intended that either party could at any time and without any reason withdraw from the agreement in principle".***

His Lordship referred to a number of cases, including Taylor's case, and ***Amalgamated Investment and Property Co. Ltd vs Texas Commerce***

International Bank Ltd[13], where Lord Denning reduced the doctrine of estoppel, at page 122, *"into one general principle shorn of limitation. When the parties to a transaction proceed on the basis of an underlying assumption - either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so."*

In apparent application of the applicable principles, The Privy Council accepted that the government acted to their detriment and to the knowledge of HKL in the hope that HKL would not withdraw from the agreement in principle, but that in order to found an estoppel, the government had to go further. First, they had to show that HKL created or encouraged a belief or expectation on the part of the government that HKL would not withdraw from the agreement in principle. Secondly the government must show that government relied on that belief or expectation. Their Lordships found that the government failed on both counts.

In considering the arguments pressed on the court by the government's lawyer, Lord Templeman said:

> ***"Their lordships accept that there is no doubt that the government acted in the confident and not unreasonable hope that the agreement in principle would come into effect. As time passed and more and more actions were undertaken***

in conformity with the proposals contained in the agreement in principle, the government's hopes were strengthened. It became more and more unlikely that either the government or HKL would have a change of heart and would withdraw from the agreement in principle. But at no time did HKL indicate expressly or by implication that they had surrendered their right to change their mind and withdraw. That right, expressly reserved and conferred by the government, was to withdraw at any time before "document or documents necessary to give legal effect to this transaction are executed and registered." HKL did not encourage or allow a belief or expectation on the part of government that HKL would not withdraw. HKL proceeded in accordance with the proposal contained in the agreement in principle but at the same time they continued to negotiate the exact provisions of the documents which were necessary to be executed before the parties could become bound."

In ***Inwards vs Baker***[14], it was held that the promise of assurance must relate to a present or future interest in land of the promisor. In ***Ramsden vs Dysoul***[9] it was held that a representation may be made expressly or impliedly.

A claimant is required to show that he has changed his position in reliance on the representation made by the owner of the land. This was held to be so in ***Re Bashan***[15]. Thus, there must be a causal link between the representation and the change of position. ***Greasley vs Cook***[16] is authority for the proposition that once a representation has been made and the claimant has shown that he altered his position, inferring that he acted in reliance on the promise, the burden of proof shifts to the landowner to show that there was no reliance on the promise.

In ***Gillet vs Holt***[17], the court stated in effect that there requires to be both detrimental reliance by the claimant and proof that the landowner is acting unconscionably in seeking to enforce his strict legal rights. Detriment can arise in cases where the claimant has derived some benefit from the landowner.

Coming to the present case, premised on the cited authorities, which we endorse, the appellant was required to show an implied or express assurance by the respondent that he would acquire an interest in the property in question; that he relied on that assurance, and suffered detriment.

We have expressed the view that the respondent, contrary to the position envisaged in the letter of offer and acceptance, had begun to treat the appellant as the owner of the property, by allowing his business enterprise to borrow on the security of the property. The evidence also reveals that the bank had begun considering conveying the property to the appellant by engaging the administrator of the estate of the deceased.

When withdrawing from the arrangement, the plaintiff had by letter dated 9th January 2014, addressed to the Legal Counsel of the respondent bank, reminded the bank that he was authorized to go ahead with developing the plot while the bank was undertaking to process the ownership change. We have seen no response to this letter on the record. We have equally seen no notice of non-admission. Therefore, this letter passed between the parties. We are

mindful that the fact that no reply had been sent to a letter received is not as a rule regarded as an admission that the statements in it are correct. But the circumstances or the relations between the parties may be such that a reply might properly be expected, and in such cases the failure to reply is some evidence that the statements in the letter are true. See **Powell's Principles and Practice of The Law of Evidence.**

In this case, the circumstances in which the parties were, undeniably demanded that the Respondent responds to the assertion that it had allowed the appellant to commence construction on the plot in question. A reply to that statement would properly be expected. The failure to deny it is some evidence that the Appellant was authorized to construct on the plot in question by the Respondent. We cannot conceive how the respondent would elect to be silent unless the assertions by the appellant were true. It is more probable than improbable that he was so allowed.

The Respondent admits having lent money to the Appellant on the security of the Property in question and in all the credit facility documents, indicated that bank officials would conduct quarterly visits to the business premises and the properties held as security. There certainly was tacit approval on the part of the Respondent. Were that not so, and had the respondent not allowed the appellant to construct on the plot as asserted, he would have been directed to stop the construction he had embarked upon by the Respondent.

The authorities referred to above leave no doubt that even passive encouragement of another to incur expense on the assumption fostered by the party against whom estoppel is raised is sufficient. In Oliver J's word's, the question is whether in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he had allowed or encouraged another to assume to his detriment.

Had the learned trial judge considered this correspondence in light of the stated principle, she would have found differently.

The position then is that the respondent represented to the appellant, by conduct, that the property was as good as his. The appellant suffered detriment, by constructing on this property. This leads to the inference that he relied on the assurance. We are here reminded of Lord Templeman's words in the Humphrey's Estate case, *supra,* at 127-128:

> ***"It is possible but unlikely that in circumstances at present unenforceable a party to negotiations set out in a document expressed to be "subject to contract" would be able to satisfy the court that the parties had subsequently agreed to convert the document into a contract or that some form of estoppel had arisen to prevent both parties from refusing to proceed with the transaction envisaged by the document."***

In our considered view, this is what occurred in the present case. Whereas the parties had at inception not firmly committed themselves to a sale of the land

in issue, this view changed. The payment in escrow was treated as payment of the purchase price, the respondent referring to the transaction as a sale. The appellant was treated as the owner of the land. On the unrefuted evidence, he was allowed to develop the plot by the respondent and he expended monies to develop it.

In the circumstances, it would be unconscionable for the respondent not to pay the appellant the improved value of the land. It will be remembered that the appellant withdrew from the transaction. The respondent accepted the withdrawal, by refunding the appellant the purchase price. Our considered opinion is that he is additionally entitled to damages equivalent to the increased value of the land.

On the foregoing, we disagree with the learned trial judge's view that the appellant built at his own peril. We thus set aside the decision of the trial judge.

In determining the appropriate remedy, it is said that the court must look at the circumstances in each case to decide in which way the equity can be satisfied.

It is also said that there must be proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and

unjust to insist upon the disproportionate making good of the relevant assumption. On the other hand, the remedy should go no further than is necessary to prevent unconscionable conduct, and should be the minimum equity to do justice to the plaintiff. See **Goff & Jones The Law of Restitution, London, Sweet & Maxwell 2007, Para 6-006, Page 242.**

The learned authors proceed to state that the improver (of the land) should be entitled to the higher of two figures, namely the increased value of the land, or the market value of his services.

In the present case, the evidence on record is that the plaintiff improved the land thereby increasing its value. The valuation report obtained by the plaintiff states the value of the land as improved. We award the plaintiff the increased value of the land, in the sum of K450,000.00, as stated in the valuation report undertaken by Mak Associates Consulting on the appellant's behalf. We award him interest on the same from date of writ to date of judgment at short term deposit rate, and thereafter at current bank rate until payment. We award the appellant costs here and in the court below, to be agreed and in default taxed.

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F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

.....

J. CHASHI
COURT OF APPEAL JUDGE

.....

M. M. KONDOLO, SC
COURT OF APPEAL JUDGE