

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE
Civil Jurisdiction

2015/HK/846

BETWEEN:

MAYWYNNE SILCHEME LIMITED
SAMMY MAYWYNNE SIAME
(Suing in his capacity as Director)

1ST PLAINTIFF

2ND PLAINTIFF

AND

PATBILL INVESTMENT

1ST DEFENDANT

BILLY MUKANGO CHISHA
(In his capacity as 1st Director)

2ND DEFENDANT

PATRICIA MUKUMBA
(In her capacity as 2nd Director)

3RD DEFENDANT

Before: Mrs. Justice C. B. Maka – Phiri

For the Plaintiffs: In Person

For the Defendants: Mrs. M. Lamba of Mwaba Lamba & Associates

J U D G M E N T

Legislation referred to:

- 1. The High Court(Amendment) Rules, No.71 of 1997**

This is an appeal to a judge in chambers against the decision of the Registrar to set aside the writ of Fifa and Certificate of default. The plaintiff advanced the following grounds of appeal:

1. **The Honourable Registrar erred in law and fact by setting aside the writ of Fida and certificate of default without considering that the defendants have breached the consent mediation settlement order dated the 12th May 2016.**

2. **The Honourable Registrar erred in law and fact by not considering that the defendants had not honored the consent mediation settlement order by 8th July, 2016 which is a clear indication that the defendants are in total fundamental breach of the consent mediation order and clause 8 of the special conditions of the contract of sale dated 7th April 2014 and the letter of repossession and withdraw of offer of plot for sale document number 2 in the notice to produce.**

The plaintiff filed skeleton arguments in support of appeal on 25th July, 2017. The gist of the submission was that the defendants were in breach of the contract of sale dated 1st April, 2014 by which the parties had agreed to buy plot number 1411 B Sub Division 04 at the purchase price of K75, 000.00. The defendants paid a sum of K53, 000.00 leaving a balance of K22, 000.00 which was to be paid within a period of 18 months. The defendant did not pay the balance within the 18 months which prompted the plaintiff to sue. It was the plaintiff's submission that under any contract of sale of land, completion time is of essence and that failure to comply with the completion time justifies rescission of the contract of sale dated 7th April, 2014.

The plaintiff submitted further that by consent mediation settlement order dated 12th May, 2016, the balance of K22, 000.00 being final payment should have been paid on 8th July, 2016. That considering the conduct of the defendants in this matter, it is clear that the lower court erred in law and fact by setting aside the Certificate of default and the writ of Fifa without considering the fact that the defendants were in fundamental breach of the consent mediation settlement order, clause 8 of the special condition of the contract of sale and the letter of repossession and withdrawal of offer of sale.

The defendant's heads of argument were filed into court on 5th September, 2017. The defendant argued the two grounds of appeal as one and submitted that the Registrar did not error at law when he declined to set aside the writ of Fifa and the certificate of default as the ruling is fortified at law. It was the defendant's contention that they have settled the amounts due under the consent mediation settlement order through the plaintiff's advocates Messrs Forrest Price and Company and the only amount outstanding was the sum of K7, 000.00 being the survey fees.

It was submitted further that a consent mediation settlement order is a final judgment of the court and the terms agreed therein by the parties are binding. This is the position of the law as embodied under Order XXXI Rule 12 and 14 of the High Court Rules.

It was the defendant's contention that it is misleading therefore for the plaintiff to allege that the Registrar did not consider the terms of the mediation consent order when it is in fact the plaintiffs who failed to comprehend the terms of the mediation settlement consent order. The defendant was in support of Registrar's ruling, that the plaintiff's calculation of what is due and payable should be guided by the mediation order. It was therefore misleading for the plaintiff to refer to the contract of sale and letter of repossession and withdrawal of the offer of the plot at the hearing of this appeal.

It was the defendant's submission that the plaintiff flouted the terms of the mediation consent order and sought to execute based on terms which were not the subject of the order by causing to be issued on Certificate of default a total sum of K71, 000.00 based on erroneous calculations. Consequently, the writ of Fifea was based on erroneous figures outside the agreed terms of the mediation consent order. It was the defendant's submission that their appeal has no merit and should be dismissed with costs.

The plaintiff filed what he titled affidavit in reply to the respondent's heads of arguments on 15th September, 2017, wherein he deposed that the consent mediation order dated 12th May, 2016 was a conditional order which granted the defendant some reasonable time within which to conclude making the payments. It was contended that the defendant ignored the mode of payment in the consent order and since the same is binding, the defendants are in

fundamental breach of the mediation order. It was the plaintiff's deposition that it was not misleading for the plaintiff to refer to the contract of sale, letter of repossession and withdrawal of offer as the same go to the root of this matter. It was deposed further that the defendant deliberately choose not to include 20% interest for a period of three years on the principal sum of K 22,000 and that orders 12 and 14 cited by the defendant do not exist following Amendment rules of 1997. The Plaintiff reiterated that the defendants had only paid a total of K26, 000 contrary to the terms of the mediation order.

At the hearing of the appeal, the plaintiff was not in attendance. Counsel for the defendant urged the court to determine the appeal based on the arguments on record filed by both parties.

I have considered this appeal and the written heads of arguments by both parties. I have also considered the application that was before the Registrar, the affidavit evidence and the ruling dated 26th May, 2017.

The first ground of appeal is that the Registrar erred in law and fact by setting aside the writ of Fisa and Certificate of default without considering that the defendant had breached the mediation settlement order dated 12th May 2016. It is not in dispute that this matter was settled at mediation on 12th May, 2016. According to the consent mediation order on record, the parties had agreed as

follows: 1) Payment of the balance of K22, 000.00 at 20% interest; 2) For the claim of survey agreed on K7000; 3) Payment schedule agreed as follows: 18/5/2016 payment of K5000, 8/6/2016 payment of 50% of the balance and 8/7/2016 payment of outstanding balance plus interest. It is not in dispute that the defendant defaulted in the payments of the outstanding balances agreed in the consent settlement order. This prompted the plaintiff to take out ex-parte summons for leave to issued writ of Fifa on 9th September, 2016 which order was granted on 3rd May, 2017.

The plaintiff's Certificate of default shows an amount of K45, 000.00 as interest at 20% from date of contract and yet the mediation order was silent in that regard. It should be noted that though interest can be paid from date of cause of action or writ to date of Judgment, the practice is that interest is payable from date of writ to date of Judgment unless directed otherwise. Secondly, the balance on mediation was put at K22,000 as at 21st April, 2017 and yet the plaintiff has shown by his own deposition and evidence that the defendants had paid the sum of K5,000 on 23rd May, 2016; K9000 on 27th July, 2016, K4000 on 16th September, 2016. This evidence clearly shows that the Certificate of default was erroneous on the face of it. The Registrar was therefore justified to set aside the writ of Fifa and Certificate of default as it was premised on wrong calculations. I cannot fault the Registrar in his findings. The fact that the defendant defaulted in making payments did not entitle the plaintiff to make computations outside the scope of the

mediation order. I am satisfied that the first ground of appeal has no merit and it is hereby dismissed.

The second ground of appeal was that the Registrar erred in law and fact by not considering that the defendants had not honored the consent mediation settlement order by 8th July, 2016 which is a clear indication that the defendants are in total fundamental breach of the consent mediation order and clause 8 of the special conditions of the contract of sale dated 7th April 2014 and the letter of repossession and withdraw of offer of plot for sale document number 2 in the notice to produce. I should state from the outset that this ground of appeal is premised on the plaintiff's lack of understanding of how mediation works. It is trite that mediation in Zambia is court annexed meaning it is part of the judicial system. According to the High Court (Amendment) Rules of 1997, a mediation settlement duly registered shall have the same force and effect for all purposes as a Judgment, order or decision and shall be enforced in like manner. I therefore agree with the defendant's submission that a consent mediation order is a final judgment of the court, and is binding on the parties. Conversely, the plaintiff's submission that a mediation settlement order is a conditional order that was intended to give the defendants' sufficient time within which to pay the outstanding balance is contrary to the law and as such misleading. It should further be noted that having settled the matter at mediation, the plaintiff cannot on account of the defendants' default attempt to annul the consent mediation order.

All the plaintiff can do under the Law is to enforce the consent mediation order so as to actualize what was agreed by the parties. The Plaintiff cannot revert to the pre-mediation claims and attempt to enforce his rights based on what existed before mediation. It is my considered view that the Registrar did not error in any way when he based his decision on the mediation order and that computations of any outstanding balances should be in tandem with it. The plaintiff's attempt to sway this court to consider issues that existed before the settlement order cannot be sustained. I am satisfied that ground two of appeal has no merit and it is hereby dismissed.

With the foregoing, I come to the conclusion that this appeal has no merit and it is hereby dismissed in total. I have awarded costs for this appeal to the defendant to be taxed in default of agreement.

Leave to appeal is hereby granted.

Delivered in Open Court at Kitwe; this 1st day of March, 2018



MRS. C. B. MAKA - PHIRI
HIGH COURT JUDGE