IN THE COURT OF APPEAL FOR ZAMBIA **Appeal No. 70/2017**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

B E T W E E N :

SAMUEL MUMBA **APPELLANT**

AND

LUSAKA CITY COUNCIL **RESPONDENT**

CORAM : Chisanga JP, Chishimba and Kondolo, JJA
5th February, 2018 and 8th May, 2018

For the Appellant : Mr. A. Mwansa of A.D. Mwansa Mumba & Associates
For the Respondent : Mrs. M. Mupeso – Legal Officer – Lusaka City Council

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J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court.

CASES REFERRED TO:

1. Michael Mabenga Vs. Sikota Wina, Wallace Mafo Mafiyo, George Samulela (2003) ZR 43
2. J Evans and Son (Portsmouth) Limited Vs. Andrea Merzario [1976] 2 All ER 930
3. Nkhata and Others Vs. The Attorney General (1966) ZR 124
4. Mobil Oil Zambia Limited Vs. Ramesh M. Patel [1988-89] ZR 12
5. Augustine Kapembwa Vs. Dan Maimbolwa and Attorney General [1981] ZR 127
6. Gideon Mulwanda Vs. Timothy Mulwani , the Agricultral Finance Co. Limited and SSS Mwiinga [1987] ZR 29
7. Zambia National Building Society and Legan Equipment Supplies Limited Appeal No. 79 of 2000
8. Match Corporation Limited Vs. Edward Choolwe and Khalid Mohammed Appeal No. 75 of 2002
9. The Attorney General Vs. Macus Achiume [1983] ZR 1
10. Mubita Mwangala Vs. Inonge Mutukwa Wina Appeal No. 80 of 2007
11. J. Evans and Son (Portsmouth) Limited Vs. Andrea Merzario Limited [1976] 1 WLR 1078
12. De Lassalle Vs. Guildford [1901] CA

13. City & Westminister Properties (1934) Limited Vs. Mudd [1959] Ch. 129
14. Kilner Vs. France [1946] 2 All ER 83
15. Oakacre Limited Vs. Claire Cleaners (Holding) Limited [1982] Ch.D. 197
16. Hutton Vs. Walting [1947] 2All ER 641
17. George Chishimba Vs. Zambia Consolidated Copper Mines Limited [1999] ZR 198
18. Orman Carrigan (Suing by his next friend), Albert John Carrigan Vs. Tiger Limited and ABDI Jumale [1981] ZR 60
19. George Chishimba Vs. Zambia Consolidated Copper Mines Limited [1999] ZR 198
20. Attorney General Vs. Marcus Achiume (1983) ZR 1 (SC)
21. Jacobs Vs. Batavia and General Planations Trust Trust [1924] 1 Ch 287
22. YB and F Transport Limited v Supersonic Motors Limited (2000) ZR.
23. Mutale v Zambia Consolidated Copper Mines. (1993 – 1994) ZR 94

LEGISLATION AND OTHER WORKS REFERRED TO:

1. Town and Country Planning Act, Chapter 383 of the Laws of Zambia
2. Land Survey Act, Chapter 188 of the Laws of Zambia
3. General Provisions Act Chapter 2
4. Snell's Equity 27th Edition
5. Law of Contract (G.Trietel) 10th Edition
6. Halsbury's Laws of England 4th Edition Vol. 9 paragraph 245.

This is an appeal against part of the judgment of the lower court dismissing the Appellant's claim for specific performance of sale of Subdivision 252 of Farm 441a Zambezi Road, Roma, Lusaka, the alienation of half the portion of the stand, as well as well as the refusal to grant consequential damages for delay in completion of the sale.

The brief facts in the court below were as follows; the Appellant was in the employ of the Respondent, Lusaka City Council. In the course of his employment, the Appellant was

allegedly offered to purchase the entire Subdivision No. 252 of Farm No. 441a at the purchase price of ZMW37, 600.00 as a sitting tenant. The offer was contained in a letter dated 18th December, 1995 and made pursuant to the House Empowerment Policy of 1995 by the Government.

The Appellant, accepted the offer. The purchase price was paid partly in cash and by commutation of leave days, in addition to his long service bonus. The initial purchase price was later reduced down to the sum of ZMW12, 500.

The Appellant alleged that the property sold to him was the whole of Subdivision 252 of Farm 441a (hereinafter referred to as S/D 252) and that the Respondent had instructed the Commissioner of Lands to process title for the whole property in line with the offer. The original certificate of title for the property in question having been lost, the Appellant applied for a duplicate copy of title. In the process, he incurred advertisement costs in the sum of ZMW98.00. The Appellant paid for the advertising on the understanding that the Respondent would refund him. Consequently a Duplicate certificate title was issued. The Appellant

averred that the Respondent has to date failed or neglected to complete the sale of the property in issue.

The Respondent's defence in the lower court was that it had not refused to complete the transfer of the title to the Appellant. The only issue being the misunderstanding between the parties as to the extent of the property offered and intended to be sold to the Appellant. According to the Respondent, the property offered to the Appellant was subdivision 252A of Farm 441a and not the whole subdivision 252 of Farm 441a.

The learned trial Judge held that the intention by the Respondent was not to sale the whole subdivision 252 of Farm 441a but only subdivision 252A of stand 441a where the house was sitting. The learned trial Judge refused to grant the order of specific performance of sale of the whole subdivision. The court below ordered that the Respondent alienates half the portion of Subdivision 252 of Farm 441a Lusaka to include the dwelling house, domestic quarters and office block.

The trial Judge further ordered a refund of the sum of ZMW 98.00 with interest at 10% per annum from date of writ to date of payment of sum. The claim for damages was dismissed.

The Appellant raised the following grounds of appeal namely that;

1. ***The Court below erred in law and fact when it held that the Appellant has failed to prove his case on a balance of probabilities and purportedly dismissed all the Appellant's claims.***
2. ***The Court below erred and misdirected itself in law and fact when it ordered the Respondent to alienate a portion only instead of the whole and legally existing Subdivision 252 of Farm 441a, Zambezi Road, Roma, Lusaka.***
3. ***The Court below erred in law and fact when it found that there is no evidence before the Court that the necessary Consent to Assign or indeed any interest was assigned by the Respondent to the Appellant in view of the fat that the practice and procedure in the sale of Council houses just as Government houses, neither the Consent to Assign or Contracts were obtained nor drawn up or executed.***
4. ***The Court below misdirected itself in law and fact by failing to find that there was no Subdivision 252 A of Farm No. 441a, Roma, Lusaka properly and legally created prior to offering Subdivision 252 of Farm 441a to the Appellant. Equally no Subdivision 252B as claimed by Respondent – see page 192 lines 1-9 of that Record.***
5. ***The Court below erred and misdirected itself in law and fact when it found that the Respondent's intention was to sell a house depicting a structure or house built on the purported Stand No.***

252 considering that though the Local Government Circular No. 2 of 1996 referred to houses, in practice the actual transfers were or ought to be in the registered property number only and not house numbers whereof offers to purchase properties were made.

6. ***The Court below erred and misdirected itself in law and fact when it held that as a Sitting Tenant prior to the Letter of Offer, the Appellant never enjoyed the total occupation of the whole of the purported Stand No. (Subdivision 252 of Farm No. 441a), including the Nursery School against the weight of evidence and in the absence of any evidence supporting the Respondent's purported running of a Nursery School.***
7. ***The Court below erred and misdirected itself in law and fact in it's an unbalanced evaluation of the evidence where only the flaws of the Appellant but not the flaws of the Respondent who occupies a special status in land alienation matters have been considered.***
8. ***The lower Court below erred and misdirected itself in law and fact by refusing to Order damages for delay in completion of the Conveyance beyond the stipulated period of one (1) year.***
9. ***The Court below erred and misdirected itself in law and fact by condemning the Appellant in costs who substantially succeeded on being granted half a portion of Subdivision 252 of Farm 441a as well as the claims on refund of K98.00 with interest thereon.***

The Appellant filed into Court heads of arguments dated 30th June, 2017. In ground 1, it is argued that the Appellant was offered and accepted to buy the whole of Subdivision 252 of Farm No. 441a and paid the reduced purchase price of ZMW12, 500.00. Following the payment of the purchase price, the Director of Legal Services at Lusaka City Council wrote to the Commissioner of Lands advising

him to issue a direct lease and certificate of title to the Appellant in respect of the whole of Subdivision 252 of Farm 441a. This instruction was not executed on account that the original certificate of title had been destroyed or lost.

The Appellant contended that the fact that the Respondent had issued a receipt for the final purchase price in respect of Subdivision 252 of Farm 441a meant that the Respondent had realized that the letter 'A' at the end of the subdivision number was an error. Therefore, the Appellant had proved the case on a balance of probabilities. We were referred to the case of ***Michael Mabenga Vs. Sikota Wina, Wallace Mafo Mafiyo, George Samulela*** [1] in respect of the standard of proof required in civil matters.

In arguing grounds 2 and 4 the Appellant contended that the purchase price of ZMW12, 500.00 was consideration for the sale of the entire Subdivision 252 of Farm 441a. Therefore, the Respondent cannot argue that the purchase price was only reduced after taking into account the value of the pre-school when no valuation of the said school was ever tendered as evidence. In addition, that the reduction in the price was as a result of the Local Government

Circular No. 2 of 1996 as well as the written communication by the Respondent to the Appellant.

The Appellant argued that the trial Court did not evaluate all the evidence before him regarding the purchase price and which property the said purchase price related to. We were referred to the case of ***J Evans and Son (Portsmouth) Limited Vs. Andrea Merzario*** [(2)].

It was the Appellant's contention that the trial Court fell into error when it failed to hold that there was no subdivision 252A of Farm No. 441a. There was in existence only one piece of land namely subdivision 252 of farm 441a Roma on the title. The Appellant went on to define the term land pursuant to the **General Provisions Act Chapter 2** of our laws and **Section 2 of the Town and Country Planning Act Chapter 383**, as well as the **Land Survey Act Chapter 188** in respect of surveyed land. The gist of the contention being that there was no evidence of any subdivision whatsoever. Had the property in question been subdivided there would have been two subdivisions created and described as Subdivision 252a and 252B of Farm 441a, Lusaka. We were referred to the cases of ***Nkhata and Others Vs. The Attorney General*** [(3)],

Mobil Oil Zambia Limited Vs. Ramesh M. Patel [4] and ***Augustine Kapembwa Vs. Dan Maimbolwa and Attorney General*** [5] on the circumstances under which findings of fact maybe disturbed by an Appellate Court.

The Appellant argued that there having been no subdivision of the property in question, an order affirming any subdivision would not be enforceable. As authority the case of ***Gideon Mulwanda Vs. Timothy Mulwani, the Agricultral Finance Co. Limited and SSS Mwiinga*** [6] was cited particularly the holding that courts are not in the habit of granting orders that cannot be enforced. Therefore, it is untenable for the Respondent to maintain that there is Subdivision 252A of Farm 441a in the absence of any proof of survey diagrams prior to the sale of the property. The trial Court by ordering that the Appellant be given half of the property in issue went against the **Land Survey Act, Chapter, 188 of the Laws of Zambia**. We were invited to address our minds to the decision of the Court in ***Zambia National Building Society and Legan Equipment Supplies Limited*** [7] where the Supreme Court stated that illegality should not be encouraged by courts of law.

In grounds 3 and 5 the Appellant argue that the trial Judge erred by failing to give reasons as to why he departed from the practice of transferring the registered property numbers in considering the property offered to the Appellant. Further, that the Appellant's offer was in line with Circular No. 2 of 1996 as well as Council Resolution No. C/77/12/95. The Appellant maintained that he was offered to purchase and in fact purchased Subdivision 252 of Farm 441a, the only legally registered property.

In ground 6 the Appellant argued that the Appellant had paid the full price for the subsisting Subdivision 252 of Farm 441a, Roma. On the advice of the Respondent and direction of the Chief Registrar at Lands, the Appellant advertised for the loss of the original title of the property in question. By the agreement to advertise for the loss of title, the Appellant had acquired an equitable interest in the property in question and is entitled to the equitable remedy of specific performance.

It was contended that the trial court ought to have considered all the circumstances of the case including the conduct of the Respondent since the remedy of specific performance is an

equitable remedy. We were referred to the case of ***Match Corporation Limited Vs. Edward Choolwe and Khalid Mohammed*** [8] where the Supreme Court stated that in considering whether or not to order specific performance the court ought to take into consideration all the circumstances of the case. The Appellant contended that the following facts or circumstances points to the fact that the Plaintiff had acquired an equitable interest in the whole property in question namely;

i. *That the Respondent adhered to the conditions set by the Government of the Republic of Zambia through Ministry of Local Government and Housing Circular No. 2 of May, 1996 by invoking the then current valuation of the entire subdivision 252 of Farm 441a, Lusaka and NON at all for the house (252A) only*

ii. *That the high price of K37, 600,000=00n reduced to K35, 000,000=00n unrebased expressed in the letter of Offer to the Appellant was exact to the only valuation value of K37, 600,000=00n (rateable value).*

iii. *The reduction of the purchase price from K35,000,000=00n to K25,000,000=00n and subsequently reduced to K12,500,000=00n being the 50% in accordance with the directive contained in paragraph 2 of Circular No. 2 of 1996.*

iv. *The failure by the Respondent to subdivide Subdivision 252 of Farm 441a before offering it for purchase to the Appellant despite being experts knowledgeable and very familiar with the law.*

v. *The issuance of Rate Bills in the Appellant's name in respect of the whole property being Subdivision 252 of Farm 441a.*

vi. Absence of any documentary evidence such as fire Certificates and other necessary and relevant documentary evidence, to the effect that the purported school was duly registered with the Ministry of Education nor indeed any evidence of exemption from such legal requirement for registration.

vii. Absence of any Respondent's documentary evidence including publications (adverts) that Subdivision 252 of Farm 441a had been rezoned from residential to commercial (school) use.

viii. The issuance of Enforcement Notice by the Respondent to the Appellant

In ground 7, it is contended that the evaluation of the evidence was unbalanced as the Court failed to take into account that the Respondent, who deals in land issues, offered for sale a non-existent House No. 252A. Further, that the same property was referred to by two different numbers, a fact the trial Court did not consider. The Appellant Court should therefore, interfere with the findings of the trial Court. The cases of ***The Attorney General Vs. Macus Achiume*** [9] and ***Mubita Mwangala Vs. Inonge Mutukwa Wina*** [10] were cited on reversal of findings of fact made by a lower court.

The Appellant argued that the initial error on the description of the property was rectified by the Respondent when the Respondent wrote to the Commissioner of Lands to issue the Appellant a new lease and Certificate of Title. The agreement between the Appellant and the Respondent to advertise for the loss

of the certificate of title amounted to a collateral contract. The verbal agreement, advertising for the title and obtaining a duplicate title all formed part of the collateral contract. We were referred to the case of ***J. Evans and Son (Portsmouth) Limited Vs. Andrea Merzario Limited*** [11] in which the Court stated that where a contract is partly oral, partly in writing and partly by conduct the court ought to analyse all the evidence before it. The Appellant argued that the collateral contract stood side by side with the main contract. The contract to advertise cannot be looked at as a mere representation. We were referred to the cases of ***De Lassalle Vs. Guildford*** [12] and ***City & Westminister Properties (1934) Limited Vs. Mudd*** [13] as authority.

In ground 8, the Appellant argued that the Respondent failed to complete the conveyance of the property in question within the stipulated period of one year upon payment of the purchase price. We were referred to the case of ***Kilner Vs. France*** [14] in which the court defined the term 'completion' in a conveyancing transaction. It was submitted that in the event of delay in completion, damages are awardable. The Appellant referred us to an excerpt from **Snell's Equity 27th Edition** appearing at pages 585-586 as well as the case of ***Oakacre Limited Vs. Claire Cleaners (Holding) Limited*** [15] on the issue

of damages resulting from a claim for specific performance. The Appellant argued that there having been a delay of over 10 years it would be unjust for the Court not to award damages.

The Appellant submits that the remedy of specific performance be awarded instead of damages which would not be sufficient. We were referred to the cases of ***Hutton Vs. Walting*** [16] and ***Tito Vs. Waddal (No. 2)*** [17] in which the Court stated that damages in certain instances are not an adequate remedy for breach of contract. According to the Appellant, the latter case is on all falls with this case.

Ground 9 assails the award of costs to the Respondent when the Appellant had substantially succeeded in his claims. The trial court ought to have stated the reasons for doing so. The attention of the court was drawn to the cases of ***Orman Carrigan (Suing by his next friend), Albert John Carrigan Vs. Tiger Limited and ABDI Jumale*** [18] and ***George Chishimba Vs. Zambia Consolidated Copper Mines Limited*** [19] We were urged to set aside the award of costs.

The Respondent did not file into Court written heads of argument in response. Instead, Counsel made *viva voce*

submissions at the hearing of the appeal. In response to ground 1 Counsel submits that the offer letter made reference to Stand No. 252A of Farm No. 441a and not the whole of subdivision 252 of Farm No. 441a. In respect of the cited case of ***Michael Mabenga Vs. Sikota Wina, Wallace Mafo Mafiyo, George Samulela*** [1] the Respondent submits that it is inapplicable as it dealt with an election petition. Therefore the court ought not to place any reliance on it.

In response to grounds 2 and 4 Counsel argued that at the time the offer was made to the Appellant, the property in question was not yet subdivided into S/D 252A and S/D 252B. The evidence by PW1 in the court below was that the preschool ought to have had its own property number being 252 B as it was not part of the house. The Appellant had admitted that there were other properties on the land which do not form part of the house sold as a sitting tenant. The Appellant did not show that he was in occupation or running the pre-school on the property or any of the other properties on the premises other than the dwelling house for which he was a sitting tenant. The learned Counsel submits that even though there was no actual subdivision of the property at the time of the offer, it was not the intention of the Respondent to sell to the

Appellant the whole of Subdivision 252 of Farm No. 441a. In addition, that there was no need to communicate to him the value of the preschool. Neither was the value in contention. The primary issue was not the number of subdivisions which existed at the time but the property intended and offered for sale to the Appellant.

In response to grounds 6, 7 and 8, it was submitted that the court had evaluated all the evidence before it at trial. The cited case of ***Attorney General Vs. Marcus Achiume*** [20] made it clear that an Appellate Court will only reverse findings of fact made by a trial court if they are perverse or made in the absence of any relevant evidence. The court found that in the absence of a written contract depicting what the parties had agreed to, it was necessary to draw inferences from the evidence before it. We were urged not to reverse the findings of fact made by the trial court as the same were not perverse and were made after evaluation of the evidence before the court.

The learned Counsel submits that the contention by the Appellant that the Respondent rectified the error on the offer letter by instructing the commissioner of lands to issue the certificate of

title in respect of the whole property to the Appellant is not consistent with Circular No. 2 of 1996 which referred to the sale of council houses and not schools and other properties. The Appellant accepted the offer of the sale of House Number 252A, Zambezi Road. On the principle of the parole evidence rule, he is estopped from arguing that the agreement between the parties that he advertises for issuance of duplicate copy of the lost certificate of title amounted to entering into a collateral agreement. We were referred to the case of ***Jacobs Vs. Batavia and General Planations Trust Trust*** (21) It is contended that we must restrict ourselves to the letter of offer as opposed to the content of the advert of the loss of title.

The Respondent contended further that the lower court was on firm ground when it held that the intention of the Respondent was not to sale to the Appellant the whole of Subdivision No. 252 of Farm 441a, and ordered alienation only of a portion of the stand. The Respondent does not object to the inclusion of the domestic quarters and the office block on the said property awarded to him.

In response to ground 9, on the award of costs, the Respondent submits that the lower court was on firm ground when

it awarded the said costs against the Appellant as it had incurred costs from the time this matter was commenced in the Lands Tribunal. Counsel urged the Court to award out of pocket expenses applicable to In-house Counsel.

Mr. Mwansa reiterated the earlier arguments that the Appellant was offered the entire subdivision of Stand No. 252 of Farm 441a. He however conceded that the offer and acceptance letters both make reference to Stand No. 252A. Counsel contended that the Respondent in various correspondences describe the property differently, therefore it is not conclusive that the Respondent indeed intended to sale only a portion of Subdivision 252 of Farm 441a. Further, that there is no evidence on record suggesting that the Respondent only meant to sale the Appellant a portion of the property in issue.

The lower court misdirected itself when it condemned the Appellant in costs. The Appellant had partly succeeded in its claims as half of the property was given to the Appellant and the Respondent was ordered to refund the advertising costs incurred by

the Appellant. We were urged to allow the appeal with costs to the Respondent.

We have considered the appeal, the authorities cited and the arguments advanced. Though the appellant has raised nine grounds of appeal which are interrelated, the main issue in contention is whether the Appellant was offered to purchase the whole of S/D No. 252 of Farm 441a by the Respondent. In respect of what was intended to be sold, the evidence adduced in the court below was to the effect that the Appellant was offered to purchase on the 18th of December, 1995 House number 252A Zambezi Road Kalundu on undisputed terms as a siting tenant. We refer to the letter of offer at page 84 of the record which stated as follows;

> ***"I wish to inform you that being the sitting tenant of the above mentioned house, the Council pursuant to Ministerial consent and Council Resolutions C/77/12/95 resolved to offer you to purchase house number 252A Zambezi Road Kalundu".***

The Appellant accepted the offer to purchase House number 252A Zambezi Road Roma Township in his letter at page 89 of the record. The property offered for sale was referred to as house

number 252A. We refer to pages 90 and 91 of the record, namely the letters and receipts issued by Lusaka City Council.

It is not in dispute that subdivision number 252 of Farm number 441a Roma is comprised of the following;

(1) A house occupied by the Appellant as sitting tenant, in addition to servants quarters

(2) A pre-school building comprising of a single story classroom block

(3) Office block.

The contention by the Appellant is that he was offered to purchase the whole S/D 252 of Farm 441a Roma and not merely a house on the property. The issue is what was intended to be sold.

It is trite that an agreement is usually reached by the process of offer and acceptance. The offer must be on ascertainable terms and acceptance must be unqualified from the person to who it is made. There must be a *consensus ad idem* i.e meeting of the minds of the parties. We refer to **Law of Contract (G.Trietel) 10th Edition.** The issue in dispute revolves around the intention of the

vendor in respect of what property was offered and accepted for sale. Whether it comprised of the other buildings on the property.

It is trite that contractual construction depends on finding the meaning of the language of the contract, the intention which the parties expressed, and not subjective beliefs or understanding of the parties. What would a reasonable person in position of the party believe.

In respect of sale of an interest in land or property and there are negotiations, the usual expectation of the parties is that there will be no contract prior to the formal exchange of contracts ie made subject to contract. Where the phrase subject to contract is not used, written offers and acceptance will result in a binding contract (in casu) being a contract by correspondence.

In ascertaining the intentions of the parties, an objective test is applied, namely the question that what a reasonable person, circumstanced as the parties were, would have understood the parties to have meant.

The learned Judge below held that the intention was to sell the house on stand number 252 of farm 441a Roma which the Appellant occupied as a sitting tenant.

We are of the view that the learned Judge's holding cannot be faulted. The documentary evidence on record clearly show that the offer and acceptance was in respect of house number 252A Zambezi Road. The correspondence and receipts issued referred to house number 252A and not S/D 252 of Farm 441a. The evidence by the Respondent was that they intended to carry out a subdivision to demarcate the house from the preschool. The Appellant herein had accepted the offer.

An acceptance of an offer is an ***"indication, express or implied by the offeree made whilst the offer remains open and in the manner requested in that offer ... with the terms stated in the offer"*** see **Halsbury's Laws of England 4th Edition Vol 9 paragraph 245.** An acceptance being unqualified expression of assent to the terms of an offer is final. The Appellant having accepted to purchase house number 252A as a sitting tenant, we find no merit in ground 5.

In ground 3, the Appellant assails the holding that there was no evidence before the court that the necessary consent to assign or indeed any interest was assigned by the Respondent to the Appellant. The contention being that the practice in the sale of houses as per Circular No 2 of 1996 was to transfer the legally registered property number direct to sitting tenants.

The consent to assign referred to by the learned trial Judge in his judgment was in respect of transfer of S/D No. 252 of Farm 441a Roma. Hence his holding that the Appellant merely had an equitable interest in the stand having paid the purchase price for a house on offer and that signing of a contract of sale does not *per se* transfer ownership of land. We find no merit in the ground.

In respect of ground 4, the gist of the argument is that there was no subdivision 252A of Farm 441a, Roma legally created prior to the offer to the Appellant, neither was there a S/D 252 B. Therefore, there was no proper evaluation of evidence, hence the failure by the court to fail to hold that there was no subdivision 252A of Farm No. 441a.

It was not in issue that at the time of the offer there was only in existence S/D 252 of Farm 441a, Roma. We are of the view that there was no failure by the court below to hold that at the time of offer, there was not in existence S/D 252A. The learned Judge at page J11 dealt with the question of whether S/D 252 A of Farm 441a, Lusaka was property created. The learned Judge stated that this position is not in dispute.

We are of the view that the crucial issue was the intention of the seller whether it was to sell house number 252A. Having earlier upheld the lower court's holding that the intention was to sell number 252A Zambezi Road, a house the Appellant was a sitting tenant, we find no merit in ground 4.

Ground 6 raises the issue whether the Appellant, as a sitting tenant, enjoyed total occupation of the whole of S/D 252 of farm 441a including the preschool. Appellant's contention being that the issuance of Rate bills in his name in respect of the whole S/D 252 of Farm 441a proved that he was in occupation of the whole property and had acquired an equitable interest therein. Other factors such as the reduction of the purchase price, failure to

subdivide S/D 252 and absence of documentary evidence that the school was registered with Ministry of Education all established that the Appellant had acquired the whole property.

We are of the view that the learned trial Judge was on firm ground by holding that there was no evidence that the Appellant enjoyed total occupation of Subdivision 252 of Farm 441a including the preschool. This is on the basis that, though rates were issued in respect of Subdivision 252, there was no evidence of the leasing of the preschool and office block to the Appellant. The Appellant did not dispute non occupancy of the whole premises including the preschool and guest wing which was used during elections as a polling centre. We find no merit in ground 6.

The Appellant in ground 7 argued that there was unbalanced evaluation of the evidence with only his flaws and not the Respondents considered. Perusal of the judgment in issue shows that the Judge considered all the relevant issues raised and the evidence by both parties oral and documentary. We see no unbalanced evaluation and dismiss the ground.

In respect of the refusal to award damages for delay in the completion of the conveyance beyond the stipulated period of one year, the learned trial Judge was on firm ground. The delay in completion of the conveyance was clearly on account of the major dispute in respect of the extent of the property sold. The Appellant insisted that he was sold the whole S/D 252 and the Respondent averred that the delay was due to the misunderstanding as to the extent of the property offered to be sold.

In any event, damages must be proved and there being no proof of the injury suffered, the learned trial Judge was on firm ground by declining to award the remedy as there was no evidence adduced of any damages.

Before we move on to the last ground on costs, we will address the arguments raised in the submissions that by the agreement between the parties that the Appellant advertises for the loss of the original title deed, he had acquired an equitable interest in the property.

We hold the view that the mere fact that the advert for issuance of duplicate title was published and paid for by the

Appellant does not confer upon the Appellant an equitable interest in land. An equitable interest is an interest held by virtue of an equitable title (a title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title) or claimed on equitable grounds, such as an interest by one who has paid money on a property. The Appellant's equitable interest in house number 252A is by virtue of the purchase price paid and not by merely footing the advertising costs for loss of certificate of title. All the other factors or circumstances contended or alleged to point to the Appellants acquired equitable interest in the whole property do not qualify or indicate a beneficial interest in the whole property. Neither did the agreement to advertise for the loss of the certificate of title amount to a collateral contract to entitle the Appellant to the whole S/D 252 of Farm 441a Roma. A collateral contract is defined as a subsidiary contract, a side agreement that relates to the original agreement or main contract.

We now revert to the last ground raised in respect of the exercise of powers to award costs. The court below awarded costs to the Respondent. The contention by the Appellant is that he had

substantially succeeded in the claims and was awarded a portion of S/D 252 of Farm 441a Roma Lusaka.

The general principle is that costs follow the event and are awarded to the successful party. The exceptions being that costs can be awarded against a successful party if the party did something wrong in the action or conduct of proceedings. See the case of ***YB and F Transport Limited v Supersonic Motors Limited*** [22].

Further a successful litigant can be denied costs where the success is more apparent than real. Further, in instances where the successful party has put the other party to great expense and inconvenience. See the case of ***Mutale v Zambia Consolidated Copper Mines.*** [23]

We are of the view that the court below cannot be faulted for exercising his discretionary power to award costs against the Appellant. The Appellant's success was nominal, more apparent than real. The Judge ordered alienation of half of the portion of Subdivision number 252 of Farm 441a Lusaka to include the dwelling house, domestic quarters and office block. The Appellant

did not succeed in its main claim for Specific Performance of the sale of subdivision No 252 of Farm No 441a Zambezi Road, Roma.

All grounds of appeal having failed, the appeal is therefore dismissed with costs to the Respondent as applicable to In- house Counsel.

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F. M Chisanga

JUDGE PRESIDENT

COURT OF APPEAL

.....

F.M. Chishimba

COURT OF APPEAL JUDGE

.....

M. M. Kondolo

COURT OF APPEAL JUDGE