

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO. 21/2020



BETWEEN:

LESLIE CHIKUSE

APPELLANT

AND

JEREMY BAKANGABA TSHINKOBO

RESPONDENT

CORAM: CHASHI, SIAVWAPA AND BANDA-BOBO, JJA.

On 18th May and 9th September 2021.

FOR THE APPELLANT: MR. K. MWALE OF K. MWALE & CO

**FOR THE RESPONDENT: MR. J. K. MATENDE OF LEGAL AID BOARD
(PROBONO)**

J U D G M E N T

SIAVWAPA, JA delivered the Judgment of the Court.

Cases referred to:

1. *Benedetti v Sawiris and Others (2013) UK SC 50.*
2. *Bank of Cyprus UK Limited v Menelaou (2015) UK SC 6*
3. *Daniel Peyala v Zambia Consolidated Copper Mine SCZ Appeal No. 81 of 2012*

Legislation referred to

1. *High Court Rules, Chapter 27 of the Laws of Zambia*

1.0. INTRODUCTION

1.1. This is an appeal against the Judgment of the Hon. Mrs. Justice M. M. Kawimbe delivered on 24th June 2019. The learned Judge found the Appellant liable in unjust enrichment and ordered restitution in favour of the Respondent.

1.2. The learned Judge came to the above conclusion despite finding that the Respondent, had no Locus Standi to sue on a Contract to which he was not a party.

2.0 BACKGROUND

2.1 The Appellant contracted to sell a portion of his land to one Claude Kantshiana Ngalula for a consideration of K153,000.00. The Appellant however, failed to render vacant possession to the purchaser.

2.2 The Respondent then commenced an action against the Appellant in the High Court seeking a refund of the sum of consideration paid to the purchaser. The argument advanced by the Respondent for suing although not a party to the contract of sale is that he was the intended beneficiary of the Contract.

3.0 HIGH COURT DECISION

3.1 The learned Judge heard the evidence and opined that the Appellant knew that the Respondent was the intended

beneficiary of the contract. This was on the fact that the learned Judge accepted that the Respondent was a foreigner not entitled to own land.

3.2 The learned Judge however, found that the Appellant had unjustly enriched himself by collecting the money but failing to deliver vacant possession of the land to the intended beneficiary, the Respondent.

4.0 **THE APPEAL**

4.1 The Appellant, dissatisfied with the outcome filed his Notice of Appeal and Memorandum of Appeal on 16th December 2019.

4.2 The Memorandum of Appeal contains two grounds of Appeal as herein reproduced;

- 1. That the High Court misdirected itself both in law and in fact when it found that the Plaintiff was entitled to a refund on account that the keeping of the money by the Defendant would amount to unjust enrichment.*
- 2. That the High Court misdirected itself both in law and in fact when it rejected the Defendant's objection to the admission of the Contract of sale on grounds that the objections ought to have been made during discovery.*

5.0 ARGUMENTS BY THE APPELLANT

5.1 The Appellant filed heads of argument on 14th February 2020 in support of his two grounds of appeal. The gist of his arguments in ground 1 is that the Respondent was not covered by the doctrine of unjust enrichment.

5.2 The Appellant argued that the case for unjust enrichment did not meet the tests set out in the case of Benedetti v Sawiris and Others.¹ The said criteria comprises the following questions;

1. *Has the Defendant been enriched?*
2. *Was the enrichment at the claimant's expenses?*
3. *Was the enrichment unjust?*
4. *Are there any defences?*

5.3. In the latter case of Bank of Cyprus UK Limited v Menelaou², it was stated ***“that if the first three questions are answered affirmatively and the fourth negatively, the claimant will be entitled to restitution”***.

5.4. The other line of the argument is that the Respondent could not benefit from a Contract to which he was not privy. A number of authorities among them, Daniel Peyala v Zambia Consolidated Copper Mines³ were cited. A portion of the Judgment relied upon states as follows;

“The principle of privity of Contract provided that a Contract could not confer rights or impose obligations arising therefrom on to other persons except the parties.... only parties to a Contract can sue, enforce rights or claim damages in a contractual situation.”

5.5. In ground 2 the argument is that Order 5 Rule 21 of the High Court Rules permits the raising of an objection to admission of evidence by a party at the time the evidence is offered.

6.0. ARGUMENTS BY THE RESPONDENT

6.1. The Respondent filed his heads of argument on 11th May 2020 and argued in ground 1 that having admitted receipt of the money and failing to deliver vacant possession, the Appellant was liable in unjust enrichment.

6.2. It is further argued that the Appellant received money from the Respondent and as such he unjustly enriched himself at the Respondent's expense.

6.3. In ground 2 it is argued that the issue was moot for the reason that the Appellant had admitted in cross-examination that the handwriting and the National Registration Card number on the Contract of sale and the signature were his.

7.0. OUR ANALYSIS AND DECISION

- 7.1. We have carefully considered the record and in particular, the Judgment of the Court below and the arguments in support and opposition to the two grounds of appeal.
- 7.2. In our view, the issue of Locus Standi is cardinal to the resolution of this appeal. The Respondent commenced an action in the Court below by which he sought to recover from the Appellant the sum of K153,000.00 being the purchase price for a piece of land. He also sought damages for inconvenience and breach of the sale agreement.
- 7.3. It is common cause that the Respondent was not a party to the sale agreement upon which he sought the stated remedies from the Appellant. According to the Contract of sale exhibited in the Plaintiff's bundle of documents at page 41 of the Record of Appeal, the parties to the Contract are Leslie Chikuse, as seller and Claude Kantshiana Ngalula as purchaser.
- 7.4. In paragraph two of the Contract, and throughout the Contract which runs up to page 42 of the Record of Appeal, Claude Kantshiana Ngalula is recorded or presented as the one who paid the purchase price in the installments as agreed by the parties.

- 7.5. There is nothing in the Contract to show or suggest that the Contract of sale was for the benefit of the Respondent herein. As clearly shown earlier, the doctrine of privity of Contract prohibits a non-party to a Contract to derive any rights or benefits out of it. Further, a non-party to a Contract lacks Locus Standi to sue on it.
- 7.6. All the witnesses in the Court below testified that the Contract of sale was between the Appellant and PW2, Mr. Claude Kantshiamia Ngalula. This clearly put the two as the only persons with Locus Standi in an action arising out of Contract.
- 7.7. We stated earlier in this Judgment that the learned Judge below recognized the fact of none Locus Standi on the part of the Respondent on account of privity of Contract. The learned Judge however, veered off the contents of the Contract when she opined that the Appellant was aware that the Contract of sale was for the Respondent's benefit.
- 7.8. It is trite law that parole/extrinsic evidence cannot be used to vary the terms of a written Contract. In this case, the Respondent sought to introduce oral evidence before the Court below to show that he was the intended beneficiary of the Contract when there is no such indication in the Contract. The Respondent also told the Court that he was the one who

gave the money to PW2 to pay the Appellant while PW2 states that he produced the money.

8.0. **UNJUST ENRICHMENT**

8.1 Having found that the Appellant knew that the Contract was for the benefit of the Respondent, the learned Judge invoked the doctrine of unjust enrichment. We stated earlier in this Judgment that in accordance with the four questions posed in the case of Benedetti (Supra), it is clear that even though the first question as to whether or not the Appellant was enriched is in the affirmative, the second question whether or not the enrichment was at the Respondent's expense is answered in the negative.

8.2. The learned Judge therefore, fell into error when she failed to uphold the doctrine of privity of Contract by entertaining a cause at the instance of the Respondent who is a non-party to the Contract.

8.3. We take the view that on that point alone, the learned Judge should have dismissed the cause. It is not known why the person who signed the Contract did not commence the action but chose to be a mere witness at trial.

9.0. CONCLUSION

9.1. This appeal therefore succeeds on account that the Respondent had no Locus Standi to commence the action. Further that the doctrine of unjust enrichment did not apply as there is no evidence that it was the Respondent who paid the money to the Appellant to his detriment.

9.2. In view of our position on the first ground, we find it unnecessary to say anything more than what we have already said on ground two which has become otiose.

9.3. All in all, the appeal succeeds and we set aside the Judgment of the Court below.

9.4. We award costs to the Appellants here and below.



J. CHASHI
COURT OF APPEAL JUDGE



M. J. SIAVWAPA
COURT OF APPEAL JUDGE



A. M. BANDA-BOBO
COURT OF APPEAL JUDGE