

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA

Appeal No. 94 of 2023

(Civil Jurisdiction)

BETWEEN:

JUSTICE ELLIOT ESAU CHULU (Retired)
MUSEKE CHILUFYA
BEATRICE PHIRI MAKUKULA
KASHOKI GEORGE MUBANGA
RABECCA LWANDO
IGNATIUS MWANZA

1st Appellant
2nd Appellant
3rd Appellant
4th Appellant
5th Appellant
6th Appellant

AND

DAVID KABUKU MWITUMWA

Respondent

CORAM: Chashi, Sichinga and Sharpe-Phiri, JJA
on 27th March 2024 and 5th April 2024



For the Appellants: Mr. P. Kaluba of Mukanta Mulenga Legal Practitioners

For the Respondents: Mrs. P. Sibanda of SCPM Legal Practitioners

J U D G M E N T

SHARPE-PHIRI, JA, delivered the judgment of the Court

Legislation referred to:

1. *The Arbitration Act, No. 19 of 2000*

Cases referred to:

1. *Beza Consulting Inc Limited v Bari Zambia Limited and Gidey Genremariam Egziabher, CAZ Appeal No. 171 of 2018*
2. *Gateway Services Station v Engen Petroleum Zambia Limited, Appeal No. 31 of 2003 (SCZ)*

1.0 **INTRODUCTION**

- 1.1 This appeal is brought against a ruling made by Justice Charles Kafunda of the High Court on 8th August, 2022. In this decision, the trial Judge stayed the proceedings in the main action and referred the matter to arbitration for resolution.

2.0 **BACKGROUND**

- 2.1 The background of the matter is that the appellants initiated legal proceedings against the respondent regarding several contracts of sale of land that each of the appellants had separately entered with the respondent.
- 2.2 After the action was initiated, the respondent filed an interlocutory application seeking to stay the proceedings under **Section 10 of the Arbitration Act No. 19 of 2000**. The trial Court, concurring with the respondent, on the application issued its Ruling on 8th August 2022, which is the subject of this appeal.

3.0 **DECISION OF THE LOWER COURT**

- 3.1 In the Ruling of the High Court of the 8th day of August 2022, the learned trial Judge noted at page R2 thereof, (shown at page 12 of the record of appeal,) that the individual appellants entered various contracts for the sale of land between 2011 and 2013.

3.2 The contracts between the appellants and respondent all contained a common clause stating that the *“property is sold subject to the Law Association of Zambia General Conditions of Sale 1997 so far as the same are not inconsistent with or varied by these special conditions.”*

3.3 The trial Judge proceeded to reference Clause 26 of the General Conditions of Sale which states that:

“Any dispute mentioned in these conditions which is to be settled as provided by this condition shall be settled by some person agreed upon by the parties or in default of agreement, nominated for the particular purpose by the chairperson of the Law Association of Zambia in accordance with the Arbitration Act or any statutory modification thereof.”

3.4 The trial Judge concluded that the contracts of sale between the parties were subject to the Law Association of Zambia General Conditions of Sale to the extent that these were not inconsistent with or varied by the special conditions agreed upon by the parties. He further noted that the General Conditions of Sale clause provided for dispute resolution through arbitration. The trial Judge found that there was nothing in the special conditions that altered the General Conditions of Sale clause regarding dispute resolution. Consequently, he stayed the proceedings before him and referred the parties to arbitration in accordance with **Section 10 of the Arbitration Act No. 19 of 2000.**

4.0 **APPEAL**

4.1 Dissatisfied with the said Ruling of the High Court, the appellants have presented two substantive grounds of appeal before this Court through a notice of appeal and memorandum of appeal filed on 15th November 2022.

4.2 The grounds of appeal are as follows:

- (i) *The learned trial Judge erred and misdirected himself at law by holding that the dispute resolution clauses provided for in the Law Association of Zambia General Conditions of Sale 1973 and the Law Association of Zambia General Conditions 1997 are operative and applicable to the parties herein;*
- (ii) *That the learned trial Judge erred and misdirected himself at law by staying the proceedings and referring the matter herein to Arbitration as provided for in Section 10 of the Arbitration Act No. 19 of 2000;*
- (iii) *Any other grounds as may be adduced at the hearing.*

5.0 **ARGUMENTS OF THE PARTIES**

5.1 The appellants filed their heads of argument on 3rd April 2023 and the respondent filed his on 27th April 2023. The arguments will not be reproduced here but referred to where necessary in the analysis section of our decision below.

6.0 **HEARING OF THE APPEAL**

- 6.1 The appeal was heard before us on 27th March, 2024. All the parties were represented by their respective counsel, as previously mentioned. Counsel for the respective parties relied on their filed arguments during the proceedings.

7.0 **OUR DECISION ON THE APPEAL**

- 7.1 Having reviewed the record of appeal before us, we will consider the first ground of appeal, which argues that the learned trial Judge erred and misdirected himself in law by concluding that the dispute resolution clauses outlined in the Law Association of Zambia General Conditions of Sale 1973 and the Law Association of Zambia General Conditions 1997 are operative and applicable to the parties in this case.
- 7.2 The appellants argued that Condition 26 of both the 1973 and 1997 Law Association of Zambia General Conditions of Sale are only applicable and operative to disputes specifically mentioned in various conditions and not all disputes arising from matters subject to the 1973 and 1997 General Conditions of Sale. They cited a dispute resulting from misdescription of a property in relation to an approved plan or diagram, which is covered under Condition 20 of the Law Association of Zambia General Conditions of Sale, as one such dispute envisaged for settlement in accordance with Condition 26 of the General Conditions of Sale provisions. The appellants concluded by asserting that Condition 26 was not applicable to the facts of this case.

7.3 The respondent countered by arguing that the intention of the Law Association of Zambia General Conditions of Sale is for disputes arising from the contract of sale to be resolved through arbitration. It was also argued that, alternatively, if a contract or agreement provides for dispute resolution through both the Court and arbitration, such dual dispute resolution should not be allowed to proceed simultaneously as it could lead to conflicting outcomes. The respondent relied on the Supreme Court's decision in **Gateway Services Station v Engen Petroleum Zambia Limited**, where it was held that concurrent proceedings in Court and arbitration should be avoided, and Court proceedings could be stayed under **Section 10 of the Arbitration Act** pending arbitration.

7.4 The respondent further supported their alternative arguments by asserting that the appellants' action in the lower Court was for specific performance of the various contracts of sale, with each appellant seeking specific performance of the entire contract of sale and not just certain portions of it. It was argued that all the clauses in the respective contracts of sale were subject to the said proceedings, and therefore, interpreting the General Conditions of Sale using the literal rule would lead to some disputes under the same contract being taken to Court while others would be subjected to arbitration. This was deemed unreasonable, inconsistent, and absurd, based on the guidance of the Court in previous decisions on the rules of statutory interpretation.

- 7.5 After careful consideration of the arguments and submissions of the parties, we are of the opinion that the main issue for our determination is whether the dispute resolution clause provided for under Condition 26 of the Law Association of Zambia General Conditions is applicable to the parties in this case. Firstly, we observe that the trial Court did not make any reference to the 1973 Law Association General Conditions of Sale. The correct position is that the trial Judge's ruling only referred to and relied on the provisions of the Law Association of Zambia General Conditions of Sale of 1997, which we will refer to in this judgment whenever we use the phrase '**General Conditions**'
- 7.6 We shall also endeavour to analysis the relationship between the 1973 General Conditions and the 1997 General Conditions in relation to the circumstance of this case. We acknowledge that the argument the appellant seeks to advance regarding Condition 26 of the 1973 Law Association of Zambia General Conditions also applies in relation to Condition 26 of the 1997 General Conditions as the two sets of provisions are the same. It should be noted that the 1976 General Conditions are what applied by default of the Special Conditions to the contract of sale between the 1st appellant and the respondent dated 10 September 2012. This is shown in pages 197 to 201 of the record of appeal. However, it should be clarified that there were never 1976 General Conditions, but rather 1973 General Conditions.
- 7.7 In addressing this ground, we begin by examining the nature of the dispute brought before the lower Court by the appellants against the respondent.

Excerpts from the statement of claim filed in the Court below, found at pages 18 to 21 of the record of appeal, read as below:

- “3. The 1st plaintiff and the defendant entered into contract of sale relating to Twenty-Five (25) acres being proposed Sub-Division of Farm No. 2161 Chisamba, Chibombo District in Central Province...*
- 4. The agreement between the 1st plaintiff and the defendant stated that full purchase price for the property was... Two Hundred Thousand Kwacha rebased (ZMW200,000.00) and this amount was payable by initial installment of... One Hundred Thousand rebased on signing the contract and the balance thereof on or before completion.*
- 5. The 1st plaintiff paid the defendant the sum of... One Hundred Thousand Kwacha rebased (or ZMW 100,000.00) upon the exchange of the contract of sale.*
- 6. Similarly, the 2nd, 3rd and 4th plaintiffs, on or about the 30th of May 2013, were offered to purchase pieces of land in extent of five (5) acres each in Chibombo area by the defendant ... at the price of Kwacha Forty Thousand (K40,000.00).*
- 7. The 2nd, 3rd and 4th plaintiff will aver that they have since paid the full purchase price of Kwacha Forty Thousand (K40,000) together with the sum of Kwacha Two Thousand Four Hundred (2,400.00) being the conveyancing and lodging fees.*
- 8. ...*

9. *The 5th plaintiff will aver that she has since paid the full purchase price as agreed between her and the defendant.*
10. *...*
11. *The 6th plaintiff will further aver that he was shown a piece of that is on the road frontage of the Great North Road, in Chibombo area.*
12. *...*
13. *The 6th plaintiff will further say that the defendant's agent approached him and advised him that the piece of land that was offered to him had been offered to another purchaser and that he would be given another piece of land instead.*
14. *The 6th plaintiff shall aver that he has since rejected that [the] overtures and insisted that he takes possession of the piece of land that was initially offered to him.*
15. *Despite the 1st plaintiff remitting the initial payment to the defendant, the defendant neglected and/or willfully decide not be comply with the terms of the contract by failing to obtain consent to assign or to complete the contract with the Ninety (90) days allocated from the date of execution of the contract of sale.*
16. *On the 6th day of March 2020 the defendant through his agents Nationwide Estate Agents wrote a letter to the 1st plaintiff alleging that the contract of sale had become out-dated, frustrated and expired due to excessive lapse of time without performance therefore the defendant through his agents purported to make a new offer of the sale of the*

property at Three Hundred and Sixty Thousand Kwacha rebased (ZMW360,000.00).

- 17. The 2nd, 3rd, 4th, 5th and 6th Plaintiffs will aver that similar letters referred to in paragraph 12 herein were written to them in breach of the earlier agreed terms of the contract.*
- 18. The plaintiffs will also say that the contents of the letters referred to in paragraph 12 herein were to the effect that the purchase price had been adjusted upwards due to inflation rate and appreciation of the Kwacha against the dollar.*
- 19. ...*
- 20. ...*
- 21. ...*
- 22. ...*
- 23. That in the premises, the plaintiffs seeks the following reliefs against the defendant*
 - i. The specific performance of the various contracts of sale;*
 - ii. Exemplary damages;*
 - iii. Damages for mental distress and anguish;*
 - iv. Interest on the amounts due;*
 - v. Costs of and incidental to these proceedings; and*
 - vi. Any other relief the Court may deem fit."*

7.8 From the information provided, it is clear that the main relief in the action before the lower Court was for specific performance of contracts for the sale of land, which were at various stages of execution. Some appellants

alleged that they had paid the purchase price and other obligatory transaction fees in full, while others alleged that they have made part payment of the agreed respective purchase prices and were awaiting further action by the respondent towards processing title. Some were at the stage of seeking to obtain possession of their respective parcels of land. Although not explicitly stated in the reliefs being sought, the appellants also alleged that some of the land under the respective contracts of sale with the respondent was purported to have been sold to other third parties. Additionally, they alleged that the respondent unilaterally changed the purchase price of the subject parcels of land due to inflation, under the excuse that the contracts had become outdated, frustrated, and expired due to excessive lapse of time without performance.

- 7.9 Having outlined the details above, we will now examine the respective contracts of sale between the parties. It is noted from a review of the record of appeal that the 1st appellant fully executed a contract of sale with the respondent on 10th September, 2012, as previously mentioned. The contract had a price consideration of K200,000. Clause 1 of the special conditions, as shown at page 200 of the record of appeal, contained the following provision:

“The property is sold subject to the Law Association of Zambia General Conditions of Sale 1976 so far as the same are not inconsistent with or varied by these special conditions.”

- 7.10 Furthermore, pages 111 to 115 of the record of appeal shows what appears to be another contract of sale between the 1st appellant and the respondent. This document only bears the respondent’s witness’ signature, Hastings

Charles Banda, on page 112. It is dated 6th March, 2020, and it has a price consideration of K360,000, yet purports to be a transaction for the same parcel of land, measuring 25 acres, as the earlier contract of 2012. The document's clause 1 of its special conditions is similarly worded as clause 1 of the 2012 contract between the 1st appellant and the respondent, except that it states that it is subject to the General Conditions of 1997 and not 1976.

- 7.11 Additionally, the record also indicates two other contracts of sale that the respondent entered with the 3rd appellant on 30th May, 2013, as shown on pages 181 to 185 of the record of appeal. These contracts are fully executed by the parties and have a price consideration of K40,000. They also contain a clause in their special conditions, found on page 184 of the record of appeal, which subjects the contracts to the 1997 General Conditions of Sale, insofar as they are not inconsistent with the express terms therein.
- 7.12 Pages 191 to 195 of the record of appeal shows another document purported to be a contract between the respondent and the 4th appellant. This document is also only executed by the respondent's witness, Hastings Charles Banda at page 192 of the record of appeal. It is dated 26th June 2020. It also has clause 1 in its special conditions which refer to the 1997 General Conditions, like the other contract mentioned above. Page 97 of the record also includes an excerpt from an email dated 25 June 2020 from the 4th appellant to the respondent's agent. In this email, the 4th appellant discusses a discrepancy between the amounts stated to have been paid and the amounts he claims to have actually paid.

- 7.13 Other than the evidence provided, the record does not contain any other document that establishes the arrangements the other appellants had with the respondent over the subject matter. However, it is clear from the documents available that all the appellants had entered into various agreements with the respondent, which they now seek specific performance of through the action in the Court below.
- 7.14 The question at hand regarding this ground of appeal is whether the trial Judge was correct in holding that the dispute resolution clause of the General Conditions is applicable to all the appellants. We answer this question in the negative, as the evidence does not contain the agreements entered with the other appellants, such as the 2nd, 5th and 6th appellants.
- 7.15 Additionally, while the fully executed contract of sale with the 1st appellant shows that it is subject to the 1976 General Conditions, the contract that is fully executed with the 3rd appellant is subject to the 1997 General Conditions. Therefore, it is evident that the appellants' respective agreements and arrangements were governed by different dispute resolution clauses with varying terms as shown above. We therefore concur with the appellants' arguments that the lower Court erred in holding that the dispute resolution clause of the General Conditions is applicable to all the appellants. The first ground of appeal is therefore successful.
- 7.16 Having made the above determinations, we now turn to address ground 2 of the appeal, which argues that the learned trial Judge misdirected himself

in law by staying the proceedings and referring the parties to arbitration, as provided for in **Section 10 of the Arbitration Act No. 19 of 2000**. The relevant provision of the Arbitration Act states as follows:

“(1) A court before which legal proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so request at any stage of the proceedings and notwithstanding any written law, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where proceedings referred to in subsection (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.”

7.17 Building on our findings in the first ground of appeal, we note that the contracts of sale executed with the 1st appellant and the 3rd appellant were subject to the 1973 and 1997 General Conditions, respectively. Both sets of conditions contain a similarly worded Condition 26, which provides for dispute settlement. The provision states as follows:

“Any dispute mentioned in these conditions which is to be settled as provided by this Condition shall be settled by some person agreed upon by the parties, or in default of agreement, nominated for the particular purpose by the Chairman of the Law Association

of Zambia in accordance with the Arbitration Act or any statutory modification thereof.”

- 7.18 In our assessment, while we acknowledge that the 1st appellant and the 3rd appellant’s grievances and disputes with the respondent regarding their respective contracts of sale would typically be subject to arbitration as stipulated in their agreements, the circumstances of this case make it impractical to enforce the arbitration clauses contained therein. This is since the action in the Court below has been brought as a group action, where the appellants share a common interest in the land subject of the dispute and are all seeking common reliefs from the respondent.
- 7.19 Additionally, there is no evidence that the other parties had agreed to have their disputes with the respondent resolved through arbitration. In the absence of such evidence, it would be improper to subject these parties to arbitration. Furthermore, it would also be inappropriate to subject the appellants, who share a common interest, to different modes of dispute resolution, as that has the potential to result in conflicting decisions.
- 7.20 In **Beza Consulting Inc Limited v Bari Zambia Limited and Gidey Genremariam Egziabher**, we clarified the implications of a stay of proceedings under the Arbitration Act.
- 7.21 We stated that *Section 10 of the Act requires the ouster of the Court’s jurisdiction to be triggered by a request from a party to the arbitration agreement, who must also be a party to the proceedings. Upon such a*

request, as per the guidance in the China Henan case, the Court's jurisdiction is ousted. A clear instruction to trial Courts that once a request is made, the Court cannot refuse to refer the matter to arbitration unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. Based on the reasons provided, this second ground of appeal also succeeds, as the arbitration clauses in the identified contracts of sale are incapable of being performed.

8.0 **CONCLUSION**

- 8.1 The appeal is successful in its entirety, and the matter is referred back for determination in the High Court.
- 8.2 In light of the reasons we have provided for the success of the appeal, we order that each of the parties bear their own costs.



J. Chashi
COURT OF APPEAL JUDGE



D. L. Y. Sichinga, SC
COURT OF APPEAL JUDGE



N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE