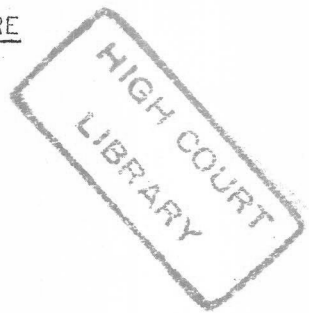


IN THE HIGH COURT OF MALAWI AT BLANTYRE



CIVIL CAUSE NO. 462 OF 1979

BETWEEN:

S. JANCHELLO.....PLAINTIFF

and

THE ADMINISTRATOR GENERAL.....1ST DEFENDANT

and

MRS. J.E. BRUINS.....2ND DEFENDANT

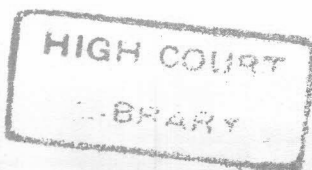
Coram: Villiers, J.

For the Plaintiff:	Nakanga of Counsel
For the 1st and 2nd Defendants:	Savjani of Counsel
Official Interpreter:	Mpalika
Court Reporter:	Caffyn

J U D G M E N T

The plaintiff's claim is for the specific performance of an alleged agreement between the plaintiff and the second defendant on the one part, and the first defendant on the other, for the sale to the plaintiff and the second defendant by the first defendant of certain freehold property at Kabula Hill, Blantyre, and known as Plot No. LK 303 (TP 254/5), at a price of K15,000. The plaintiff further claims all necessary and consequential accounts, directions and injuries, but also claims, in the alternative, damages for breach of contract in lieu or in addition to specific performance. The defendants plead that there was no note or memorandum in writing of the alleged agreement, as required by section 4 of the Statute of Frauds and that, in consequence, the alleged agreement, if any, is not enforceable against the defendants or either of them. In the alternative, the defendants deny the making of any concluded agreement between themselves and the plaintiff.

The first defendant was responsible for the administration of some forfeited property on Plot LK 303 at Kabula Hill in Blantyre. There were three houses on the plot and one of these had been leased to Bruco Refrigeration Ltd., a company owned and managed by the second defendant's husband. Some time in July 1978, the second defendant and her husband were informed



that the houses on Plot LK 303 were up for sale. The three houses were being sold at K18,300, K10,400 and K4,600 respectively. The second defendant and her husband did not have enough money for the purchase of all the houses, but after some negotiations with the first defendant, the second defendant wrote a letter, Exhibit D. 2, and offered to buy the two smaller houses, whose combined value was K15,000. She offered to pay for the two houses by three instalments of K5,000 each on the 1st October 1978, the 1st May 1979, and finally on the 1st October 1979. The first defendant accepted the offer in his letter dated 2nd August 1978 (Exhibit D.3).

The second defendant and her husband tried to raise funds but were apparently not successful. They then approached the plaintiff who, according to their evidence, was willing to finance the purchase of the two smaller houses if they would recommend him to the first defendant for the purchase of the house valued at K18,300. The plaintiff was duly introduced to the first defendant and was allowed to purchase the big house. At a later date, the plaintiff indicated to the second defendant and her husband that he could only finance the purchase of the two houses valued at K15,000 if they would let him have the small house valued at K4,600. It seems to me that the second defendant and her husband so desperately wanted to purchase at least the house in which they were living that they fell in with the plaintiff's second proposal.

On the 6th October 1978, the second defendant wrote a letter (Exhibit D.4), to the first defendant, referring to her agreement to purchase the two houses and asking whether the first defendant had any objection to an arrangement whereby the two houses could be purchased jointly with the plaintiff. She went on to say that if there was no objection then the first defendant should sign the letter and the first payment would be made on that day. The first defendant had no objection to the arrangement and he duly signed the letter. On the same day, the plaintiff and the second defendant's husband took the original of the letter (Exhibit D.4) to Messrs. Wilson & Morgan, Legal Practitioners, and asked Mr. Raval to start preparing the necessary conveyance. The plaintiff issued a cheque for K5,000, payable to the Malawi Government, and entrusted it to Mr. Raval with instructions (according to Mr. Raval), to hold it until the first defendant made a request for it. Mr. Raval informed the parties that the preparation of the deeds would take some time as there were numerous encumbrances to the property which had to be cleared first. At a later date the plaintiff, the second defendant, and her husband, together with Mr. Raval, all went to Plot LK 303 with a view to demarcating the boundary between the two houses. This was roughly agreed upon but the plaintiff was asked to procure the services of a surveyor to prepare a subdivision plan. The second defendant, according to her evidence, insisted that she should be present when the surveyor subdivided the plot.

Matters appear to have been left in abeyance from October 1978 to early March 1979. The plaintiff's cheque for K5,000 was still being held at the offices of Messrs. Wilson & Morgan.

The first instalment, due on the 1st October 1979, had not been paid. In early March 1979, the plaintiff informed the second defendant that a surveyor had subdivided the plot. He produced the proposed subdivision plan (Exhibit 3). According to her evidence the second defendant was very annoyed to note that the plaintiff had brought a surveyor to the plot without informing her. There was a quarrel and the plaintiff is alleged to have been very abusive, and to have eventually declared that he was no longer interested in the property or in financing the purchase of the same. The second defendant and her husband then approached the first defendant and informed him that the arrangement for a joint purchase of the property with the plaintiff had fallen through and that they intended to secure a loan for the purchase of the two houses themselves. The first defendant wrote a letter (Exhibit D.6) informing Mr. Raval of Messrs. Wilson & Morgan to convey the two houses to the second defendant only. When the plaintiff heard of this he attempted to have the first defendant's decision reversed, but failed. He has taken these proceedings to have the court compel the defendants specifically to perform the agreement for the joint purchase of the two houses.

I shall now refer to certain aspects of the evidence which are in dispute. The plaintiff informed the court that the original of the letter dated the 6th October 1978, typed by the second defendant, was signed by her and that the plaintiff took it to the first defendant alone. He further stated that so far as he was concerned the letter was still with the first defendant. The second defendant and her husband, on the other hand, informed the court that the letter was deliberately left unsigned by the second defendant because certain aspects relating to the financing of the proposed joint purchase of the two houses had not been agreed upon. The original of the letter, however, found its way into the hands of Mr. Raval on the same day. Mr. Raval stated in evidence that the letter was brought to him by the plaintiff and the second defendant's husband, together with other documents. The letter was produced by Mr. Raval and was marked Exhibit D.4. It has not been signed by the second defendant. The first defendant also stated that after he had signed Exhibit D.4 he returned it to the second defendant's husband so that the second defendant should append her signature. I am satisfied therefore that Exhibit D.4 was not signed by the second defendant.

The plaintiff also said that when he issued the cheque for K5,000 (Exhibit D.5), his instructions were that it should be sent forthwith to the first defendant. Mr. Raval and the second defendant's husband say, on the other hand, that the plaintiff's instructions were that the cheque was to be held until called for by the first defendant. I prefer to believe the evidence of Mr. Raval on this point because he was a disinterested witness and was, at the time, acting for all the parties.

The question then arises as to why the second defendant deliberately omitted to sign Exhibit D.4. She said that she wanted to ensure that financial arrangements had been concluded before committing herself. I accept her story. The plaintiff was aware that he had been brought into the

scheme in order to provide the funds. He should have taken immediate steps to inform the second defendant and her husband how he intended to finance the joint purchase of the property, and how they were to repay him. Instead of doing so the plaintiff withheld the payment of the first instalment, due in October 1978, and did nothing up to March 1979. He cannot have been mistaken as to whether the K5,000 had been paid to the first defendant because his account at the bank had not been debited with that amount.

I am convinced from the evidence that the second defendant and her husband would have been willing to put up with the delay much longer in the hope that the plaintiff would have been prevailed upon eventually to provide the money, but according to their evidence, which I accept, the plaintiff added insult to injury by producing a subdivision plan behind their backs: that, I believe, was the last straw. There had been an earlier dispute concerning the proposed subdivision of the property which necessitated the attendance of all parties and their solicitor at the plot where a rough subdivision boundary was agreed upon. Even if the second defendant had not specifically insisted on being present when a surveyor finally subdivided the property it would, I think, have been prudent to inform her. The plaintiff, however, ignored her request and brought the surveyor to the plot alone. I do not know what the plaintiff hoped to gain by such a procedure, but such conduct could certainly not be expected to please the second defendant. It is not surprising, therefore, that the second defendant threw the plaintiff out of the proposed joint venture since he was unable, or unwilling, to carry out his side of the bargain.

It was submitted on behalf of the defendant that there was not a sufficient note or memorandum in writing of the alleged agreement, as required by section 4 of the Statute of Frauds. I am satisfied, however, that Exhibits 1 and 5, when read together, constitute such a memorandum. The first defendant was quite prepared to sell the two houses valued at K15,000 on Plot LK 303 to whomsoever would pay. He indicated on the letter dated 6th October 1978, that he had no objection to the houses being bought jointly by the plaintiff and the second defendant. If these two had worked out a satisfactory financing arrangement I have no doubt that the two houses could have been sold to them jointly.

I have already decided that the plaintiff was to blame for the collapse of the proposed joint venture. I do not think it necessary to refer to the numerous authorities cited to me for or against the sufficiency of the memorandum. I dismiss the plaintiff's claim with costs.

Pronounced in Open Court this 3rd day of May 1980, at Blantyre.


J. B. VILLIERA
JUDGE