22 July 1992

AZH

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 412 OF 1990

BETWEEN:

MARGARET MKANDAWIRE.....PLAINTIFF

- and -

GEOFFREY M WAWANYA.....DEFENDANT

CORAM: MKANDAWIRE, J.
Msisha, of Counsel, for the Plaintiff
Nyirenda, of Counsel, for the Defendant
Kholowa, Court Clerk

J U D G E M E N T

In this originating summons the plaintiff is seeking specific performance of an alleged agreement for sale of land. Alternatively, the plaintiff prays that the defendant be ordered to pay damages in lieu of or in addition to specific performance. It is alleged that in or about February, 1989 the defendant agreed to sell and the plaintiff agreed to purchase Plot Number BW.434/30 Nancholi, in the City of Blantyre. It is further alleged that in breach of the said sale agreement the defendant terminated the same.

On the other hand, the defendant says that there was no contract in February, as the offer had lapsed. However, the contract that was subsequently entered into was repudiated by the plaintiff.

It is not in dispute that the defendant is the owner of the house situated on Plot Number BW.434/30, Nacholi in the City of Blantyre. It is also not in dispute that in his letter dated 13th February, 1989 he had offered to sell the house to the plaintiff at a price of K72,000.00. The offer was to be accepted within 14 days. There was to be a deposit of K7,200.00, which was 10% of the purchase price. Payment of the deposit within the stipulated 14 days would constitute acceptance. The offer was subject to completion of legal formalities and the provisions of the Land Act. It was the plaintiff's evidence that she accepted the offer on 28th February, 1989 when she personally handed the cheque of K7,200.00 to the defendant at the National Bank, Henderson Street Branch. The cheque, together with a covering letter were personally handed to the defendant in the presence of

Mr Chilingulo, who was then the plaintiff's legal practitioner. The plaintiff told the Court that the defendant needed the money urgently and so it was arranged that they meet at the Bank and the deposit would be paid. The defendant's evidence on the matter is that the cheque was not given to him personally, but that it was left at the offices of M/s Kaliwo & Company. No date was set for paying the balance of the purchase price, but it was understood that the usual conditions and procedures would apply.

It became clear that towards the end of 1989 relationship between the parties went sour. After the plaintiff's purported acceptance letter of 28th February, 1989, there were meetings and various correspondences passed between the parties. Perhaps at this stage I should refer to the defendant's letter of 12th October, 1989 in which he made it clear that he was not prepared to go on with the deal, because the time within which the plaintiff was to finalise the deal had expired, and because of certain allegations made against him. The final blow to the proposed deal came on 30th January, 1990 when the defendant wrote that he was not selling the property to the plaintiff.

Before I consider the question of breach, I think I must first determine whether there was indeed a contract of sale between the parties. If I find that there was a contract, I must further determine whether such contract was enforceable. The defendant made his offer on 13th February, 1989 and in terms of Order 3/2/2 of the Rules of the Supreme Court, this offer lapsed on 27th February, 1989. The plaintiff had to indicate her acceptance within 14 days. So that when she was writing her letter of acceptance of 28th February, 1989, there was, strictly speaking, no offer to accept. It is on this basis that it was submitted, on behalf of the defendant, that the defendant made a new offer which the plaintiff accepted. One of the terms of the alleged new offer was that the plaintiff was to furnish evidence of her ability to pay the purchase price. From the correspondence that passed between the parties, I do not think that the contention that there was a new offer can be sustained. There is absolutely no evidence of a new offer. According to the evidence before this Court, there was only one offer of 13th February, 1989.

On the other hand, it was submitted, on behalf of the plaintiff, that even if the defendant's offer lapsed on 27th February, 1989, from what passed between the parties he must be taken to have treated the plaintiff's letter and cheque of 28th February, 1989 as acceptance. The defendant's letter of 11th August, 1989 was cited as evidence. It is indeed very true that courts may infer the existence of contract from the conduct of the parties. If the defendant had rejected the plaintiff's purported acceptance on the basis that the offer had lapsed, that would have been the end of the matter. But that was not the case. The deposit

was accepted and the defendant must be taken to have waived the condition that the offer be accepted within 14 days, just like in the case **Cashill v. Carbolic Smoke Ball Co. (1963) 1 Q.B.256** in which the offeror was taken to have waived the requirement of communication of acceptance. That the defendant must be taken to have waived the time lapse is clear from his letter of 11th August, 1989, the first paragraph of which is pertinent. But I shall reproduce the entire letter because I shall refer to it on some other matter later in this judgement. The letter reads as follows, and it is important to note that it was personally written by the defendant:

"

Landed Property Agents
P.O. Box 2387
BLANTYRE

11th August, 1989

Miss M. Mkandawire
C/O Messrs Chilingulo & CO.
Legal Practitioners
C/O INDE Bank
P.O. Box 358
BLANTYRE

THROUGH : Messrs G.G. Kaliwo
P O Box 2640
BLANTYRE

Dear Madam

PROPOSED SALE OF PLOT NO. BW/434/30, NANCHOLI

On 13th February, 1989 we had offered through Landed Property Agents to sell the above premises to yourself. You paid a deposit and advised that would obtained a loan from your employers for the transaction. We have been waiting since then. Your employers requested initially for a valuation, this was provided by the Government valuer in March. They further requested for a structural survey, rather a strange thing to request for on a single storey building in Malawi. This was later provided for.

Meanwhile you requested for drawings of the property inorder to see possible extension, I provided these and also assisted in obtaining technical advice. To-date you have not been able to secure a loan with your employers.

On Thursday 10th August, 1989, you approached me to brief me of latest developments on your loan application. From your brief I have gathered that the Bank is not happy with the transaction. Apparently the Bank thinks the property is not fully secured by me, they have intimated to you that I have already obtained a deposit from some other person and that I have problems with Malawi Housing Corporation my previous employers.

These developments cast doubts on your ability to secure a loan with your employers and I am hereby giving you notice that should we not hear from you within seven days from the date of this letter we will have no option but to cancel and withdraw the offer. Arrangements will thereby be made to refund your deposit within 90 days.

Yours faithfully

G.M. Wawanya"

From a reading of the first paragraph of the letter, there can be no doubt that, inspite of the 14-day requirement, the defendant must be taken to have kept his offer open up to the 28th February, 1989 when the plaintiff accepted it. To hold otherwise would only amount to ignoring the clear intentions of the parties. It is quite significant that in this letter the defendant is not referring to a new or subsequent offer, but to his offer of 13th February, 1989 which the plaintiff accepted unequivocally. There was, therefore, a valid contract for the sale of Plot No. BW/434/30, Nancholi, in the City of Blantyre.

The next question I must determine is whether this contract was enforceable. Section 4 of the Statute of Frauds 1677 requires that a contract for the sale of land be evidenced in writing. In this case, no doubt, the Statute of Frauds has been satisfied. The defendant's offer of 13th February, 1989 sufficiently describes the property to be sold and the consideration to be paid. When this letter is read together with the letter of acceptance and then the defendant's letter of 11th August, 1989, there can be no doubt there was a sufficient memorandum in terms of the Statute of Frauds - see the case of **Studds v. Watson, 28 Ch.D.305.** The contract was, therefore, enforceable.

Now to the question of breach. Each party blames the other. It is contended by the defendant that it was the plaintif who had breached the contract by her failure to pay the balance of the purchase. It is conceded that no date was fixed for the payment of the purchase price, but that his letter of 11th August, 1989 had made time of the essence of the contract. The plaintiff's contention is that time

was not of the essence and she was not guilty of unreasonable delay. As a matter of fact, in January, 1990 the plaintiff paid K62,800.00 and the final payment was offered in March, 1990. It was also submitted, on behalf of the plaintiff, that the defendant cannot properly complain of delay when he himself had not carried out the vendor's obligations under the contract.

This contract had limited no time for completion and as such each party was entitled to a reasonable time for doing the various acts which he had to do. It is contended by the defendant that by his letter of 11th August, 1989 he had made time of the essence and that the plaintiff had failed to pay the purchase price within the time given. Was the defendant entitled to give such notice? The law is that he was not, unless the plaintiff was guilty of unreasonable delay. In the case of **Green v. Sevin, 13 Ch.D.589**, Fry J. had this to say at page 599:

> "That which is not of the essence of the original contract is not to be made so by the volition of one of the parties, unless the other has done something which gives a right to the other to make it so. You cannot make a new contract at the will of one of the contracting parties. There must have been such improper conduct on the part of the other as to justify the rescission of the contract **sub modo**, that is, if a reasonable notice be not complied with. That this is the law appears to me abundantly plain."

If I may ask. Was the plaintiff guilty of any impropriety or unreasonable or unjustified delay so as to give the defendant the right to give notice? I think that she was. What is unreasonable or unjustified delay depends on the circumstances of each case. In the **Sevin** case there was a delay of two years, but that was held not to be unreasonable due to the complications that existed between Green and his mortgagees. In any case, it was found that Seven had acted promptly in sending an abstract to the vendor's lawyers. Indeed, the facts of that case are entirely different from the present.

What then are the circumstances of the instant case? The plaintiff accepted the offer to purchase the property on 28th February, 1989. On that day the contract was born. She paid a deposit of K7,200.00 and said she was going to obtain a loan from her employers to pay the balance of the purchase price. Payment of the balance of the purchase price did not depend on the obtaining of the consents. Although the contract fixed no date for the payment of the balance of the purchase price, the plaintiff well knew that the defendant needed money urgently. She said so in her own evidence, that the defendant needed the money urgently. He had just lost his job with the Malawi Housing Corporation and he was just setting up a new business for himself. These facts

were well known to the plaintiff. She, therefore, ought to have known that delays in paying the money would occasion the defendant financial hardship. Up to the 11th August, 1989 the plaintiff had six months in which to raise the money, but she had not done so. During that period the defendant had supplied drawings of the property and assisted in obtaining technical advice. All this was to ensure that the plaintiff got the loan, but to no avail. Perhaps the defendant was right when he doubted the plaintiff's ability to get the loan. As if the delay of six months was not long enough, the reply to the letter of 11th August, 1989 was quite cool. No doubt the plaintiff was buying time. This letter was written by her lawyer, at the time Mr C S Chilingulo, and it was vouched in the following terms:

> "I refer to your letter of August, 11, 1989 addressed to Miss M. Mkandawire and to subsequent telephone conversation I had with you this morning.
>
> I would like to confirm, that my client is out of the country at the moment. However before she left she assured me that she had sufficient funds of her own to top up whatever shortfall there will be on the house purchase loan her employers will finally grant her.
>
> In view of the foregoing and as agreed during the telephone converation, I should be grateful if you would pend any action in this matter until my client returns at the end of next month."

This letter was dated 17th August, 1989. The defendant was requested to pend any action until the end of September. Although the plaintiff was said to have sufficient funds of her own, no payment was made at the end of September. It seems clear that the plaintiff was not able to raise the balance of the purchase price which stood at K64,800.00 and failure to pay constituted a breach of a fundamental term of the contract. Because of the plaintiff's conduct, the defendant was forced to obtain a loan from the Leasing and Finance Company of Malawi Limited to buy himself a pick-up for his new business. This he did on 27th September, 1989. On 12th October, 1989 the defendant sent the following letter which was copied out to the plaintiff's legal practitioner:

> "I refer to your letter dated 6th October 1989 and correspondence exchanged earlier between the proposed purchaser's counsel and myself and the discussion we held in your office on Wednesday, 11th October 1989 and wish to confirm that in as far as I am concerned the proposed transaction cannot proceed in good faith and was cancelled by my agents after giving the purchaser time in which to finalise the deal, time which has since expired.

> I am looking forward to the proposed meeting as suggested by you. I feel in acting in god faith, my own personal name and reputation are being scandalised by the proposed deal."

Although the defendant has referred to certain allegations made against him, it is quite clear that he is complaining that the plaintiff was not paying and did not pay within the time given and that as a result he was treating the contract as repudiated. However, inspite of this letter, there was still correspondence between the parties, but no payment. The plaintiff finally paid in January, 1990. But by that time the defendant had had enough. In so far as he was concerned, the contract was no more. Even at that time the plaintiff had not paid the full balance of the purchase price, but had left K2,000.00 unpaid.

I think that in these circumstances, the defendant was entitled to treat the contract as repudiated. Although the defendant's letter of 11th August did not specifically fix a date for payment of the purchase price, it is clear that he wanted to have a definite commitment within 7 days. Mr Chilingulo replied on the plaintiff's behalf that she had sufficient funds of her own and requested the defendant to pend any action up to the end of september. Nothing happened at the end of September and the defendant had to wait for months. As I have already said, the delay was unreasonable and wholly unjustified.

Specific performance is an equitable remedy. The conduct of a party who seeks an equitable remedy is always under consideration. As the saying goes: "he who comes to equity must come with clean hands." In the case of **Measures Brothers Ltd v. Measures (1910) 2 Ch.248** Sir H H Cozens-Hardy, M.R. said at page 254:

> "I prefer to base my judgement upon the ground that the plaintiffs, who are seeking equitable relief by way of injunction, cannot obtain such relief unless they allege and prove that they have performed their part of the bargain hitherto and are ready and able also to perform their part in the future."

In the instant case I am of the clear view that the plaintiff failed to pay the purchase price or at least failed to pay within a reasonable time. It cannot, therefore, lie in her mouth that the defendant be compelled to perform his part of the contract when the plaintiff is unable to perform hers.

With these observations I would dismiss this originating summons with costs and I so do. Of course, the plaintiff is entitled to all the money that she paid under the abortive contract.

PRONOUNCED in open Court this 22nd day of July 1992, at Blantyre.

M. P. Mkandawire
JUDGE