CIV APP 5/2006

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

MARIE THOMAS - APPELLANT

AND

RAMATU SAMURA - RESPONDENT

CORAM:

THE HONOURABLE MS JUSTICE S KOROMA, JUSTICE OF THE SUPREME COURT

THE HONOURABLE MR JUSTICE S A ADEMOSU, JUSTICE OF APPEAL deceased

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL

COUNSEL:

AMADU KOROMA ESQ for the Appellant

R A CAESAR ESQ for the Respondent

JUDGMENT DELIVERED THE 21st DAY OF JUNE,2013.

INTRODUCTION

1. This is an appeal brought by the Appellant, Marie Thomas, by way of Notice of Appeal dated 24 January,2006 against the Judgment of the High Court, The Honourable Mr Justice L B O Nylander Presiding, dated 14 October,2005.
2. The Grounds of Appeal are:
   i. That the decision of the Court is not supported by both the documentary and oral evidence adduced in Court and the relevant law
   ii. That the Learned Judge was wrong in Law and in fact in holding that the Plaintiff was wrong to unilaterally terminate the Agreement for Sale of Land to the Defendant, the Defendant having failed to pay to pay the balance on time agreed upon.
   iii. That the decision of the Court is contrary to the weight of the evidence adduced in Court.

The Appellant therefore asks that the Judgment of the lower Court be set aside, and for the Costs of the Appeal.

FACTS OF THE CASE

3. The case centred around an agreement between the parties for the sale of land at Thunderhill Road, Kissy. The written agreement is at page 43 of the Record. It is dated 3 December,1996. It provided that both parties had agreed that the Respondent should sell, and the Appellant should buy the piece of land for the price of Le1.5million. It acknowledged that the Respondent had made a down payment of Le700,000 for which the Appellant had issued a receipt bearing the same date. The balance of Le800,000 was to be paid in six monthly instalments beginning 1 December,1996 and ending on 30 May,1997. Both parties signed the agreement.

LEARNED TRIAL JUDGE'S FINDINGS

4. The Learned Trial Judge found as follows, as recorded at pages 36-37 of the Record: "*Having reviewed the entire evidence before me, I must first comment on the sale agreement - exhibit A. It is badly prepared and does ('could', perhaps) not to my mind have been made by legally trained persons. To start with, there is no penalty Clause in case there is for example a failure to pay an instalment.....Also, there are no express provisions which would warrant termination of the Agreement. Irrespective of these omissions, the Plaintiff by her action had unilaterally terminated the flawed agreement by refusing the instalments when paid and more important refunding Defendant's deposit of Le700,000 by cheque. I note that Defendant said she too did not accept the refund deposit of Le700,000 (sent) to her lawyer...There is no evidence of what became of the cheque and Reply. Though the only witness for the Defendant was not strictly credible, yet I do believe Defendant when she said she could not pay the instalments as agreed because of the coup-d'etat in May,1997. For all the banks in the country were shut down. Because of the flaws and omissions from both sides, I consider this to be fitting for an equitable judgment....*"

ISSUES FOR DETERMINATION

5. We have studied the evidence led, the arguments of Counsel in their respective closing addresses, and the Learned Trial Judge's Judgment.

We believe that issues in this case were, whether there was an enforceable contract for the sale of land between the parties; whether time for payment of the full purchase price by the Respondent was of the essence; whether after payment of the deposit, the Appellant could be said to have held the property as a constructive trustee for the benefit of the Respondent on payment of the purchase price in full; whether, by failing to pay the full purchase price against 30 May,1997,the Respondent had, in effect, repudiated the contract; and whether that repudiation was accepted by the Appellant; and whether the Respondent was entitled to specific performance of the contract of sale entered into on 3 December,1996 based on her part performance, in paying Le700,000 out of the agreed purchase price of Le1.5m.

AGREEMENT OF 3 DECEMBER,1996 WAS ENFORCEABLE

6. As to the first question, we think the Trial Judge was right in holding that there was an enforceable contract of sale between the parties. He expressed his reservations about the wording of the contract: that it was badly prepared. But it satisfied, in our view, the requirements of Section 4 of the Statute of Frauds,1677:" *No action shall be brought whereby to charge.....any person upon agreement made upon any contract or sale of lands tenements or hereditaments....unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith....*" It specified the parties; the land to be sold; the full purchase price; the agreement to complete payment in instalments including the last date for payment; and it was signed by both parties. See also the case of THOMPSON, SMITH and JOHNSON v G B OLLIVANT AND CO LTD [1920-36] ALR SL 69 Full Court, where, SAWREY-COOKSON,J citing CHITTY ON CONTRACTS 14TH Edition, 1904 at para 80, had this to say at page 72 Line 35 to page 73 Line 3, about that Statute: " *The Statute of Frauds does not require a formal contract drawn up with technical precision. The requirement is of either 'the agreement' sued upon, 'or some memorandum or note thereof,' written and signed by the party to be charged. Any memorandum under the hand of the party made before action brought ....which names or so subscribes as to identify , the contracting parties...and which contains, either expressly, or by*

reference to other written papers, the terms of the agreement, is sufficient.

WHETHER TIME OF THE ESSENCE?

7. As to whether time was of the essence, it generally is not, unless the parties contract otherwise, as explained by SIR SAMUEL BANKOLE JONES,P in THOMAS v JOHNSON & THOMAS [1968-69] ALR SL 380 at page 389 LL15-17; or, it may be implied as stated by LUCIE-SMITH,CJ in PRATT v THE SHERIFF [1950-56] ALR SL 251 at page 256 LL7&8. Undoubtedly, it was agreed between the parties that payment should be completed against 30 May,1997. The coup d'etat took place on the 25th of that month. Banks were closed, though the Sierra Leone Commercial Bank Limited remained open, contrary to what the Learned Trial Judge said at page 38.

WHETHER FAILURE ON TIME AMOUNTED TO REPUDIATION

8. But did the Respondent's failure to pay as against that date, amount to a repudiation of the agreement? In PRATT v SHERIFF, LUCIE-SMITH,CJ cited with approval the judgment of COTTON,LJ in HOWE v SMITH 27 Ch.D at page 95 [1881-85] All ER Rep at p.205 where the Learned Lord Justice of Appeal said: "*It may well be that there may be circumstances which would justify this Court in declining, and which would require the Court, according to the ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser has repudiated the contract, or, that he had entirely put an end to it so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but would make his conduct amount to a repudiation on his part of the contract.*" The Learned Trial Judge clearly found that the Respondent's acts did not amount to repudiation. She had given what he considered to be a reasonable explanation for the delay. These were troubled times. The Learned Trial Judge must have accepted the Respondent's evidence as recorded at page 32 of the Record, that she had offered Le250,000 in March,1997, but that this amount had been rejected by the Appellant, and that in 1998, she had offered other

payments which had likewise been rejected by the Appellant, the Appellant wanting payment of the balance in full. The fact that the Appellant did not offer the refund until October,1998, shows that she did not treat the Appellant's failure to meet the 30 May,1997 deadline as a repudiation of the agreement.

PLAINTIFF'S REFUND OF LE700,000- CHEQUE NOT PRESENTED

9. The refund offered by the Appellant was of importance at the trial, but as the Learned Trial Judge noted during the course of his Judgment at page 38 of the Record, "*...There is no evidence of what became of the cheque and Reply.....*". In his synopsis, and during the course of the hearing of the appeal , Mr Amadu Koroma, Counsel for the Appellant had argued that the cheque for Le700,000 had been cashed by the Respondent, and that this meant that Respondent had accepted the refund. In his synopsis, Mr Caesar had not clarified whether this was so or not. At the hearing, when asked, Mr Caesar said the cheque had not been cashed. We then asked him, in the exercise of the Court's powers as conferred on it by Rule 31 of the Court of Appeal Rules,1985, to forward copies of the same to us for clarification. He forwarded the copies to us, and it was evident, the cheque had not been presented, much less cashed. Though the neither the Respondent, nor her Solicitor replied to the letter dated 28 October,1998 forwarding the cheque, written by the Appellant's then Solicitor, Mr Oliver Nylander, this must have been obvious to Mr Nylander as the amount stated on the cheque could not have been debited from the account on which the amount was drawn.
10. Our view and thus our finding, is that the delay in making full payment did not amount to a repudiation of the agreement of sale, which would have entitled the Appellant to an Order for Recission of the agreement.

PART PERFORMANCE

11. That there was part performance by the Respondent of the Agreement is quite clear. She not only paid the deposit requested by the Appellant, but she took possession of the land, and she erected a structure on the land. She must therefore be entitled to the remedy of Specific Performance. In IBRAHIM v SOLOMON [1950-56] ALR SL H.C.331 at 335 LL5 et seq, LUKE,Ag.J explained thus:"*Specific Performance is a discretionary*

remedy which is exercised on well-settled principles. For a Plaintiff to succeed in such an action there must be (i) proof of a contract between the parties and (ii) acts of part performance, if the contract is not in writing, which are exclusively referable to the contract set up by the plaintiff, i.e. such as could be done with no other view or design than to perform the agreement." At LL10-38 the Learned Judge cited with approval, the judgment of SWINFEN-EADY,L.J. in CHAPRONIERE v LAMBERT [1917] 2 Ch.D356 C.A. at 359 where he said: *"It must be remembered that the ground upon which a Court of Equity enforces specific performance of a contract affecting land is that the person to be charged is charged, not upon the contract itself, but upon the equities arising out of the changed position caused by the acts of the parties done in execution of the contract.....It is not enough that an act done should be a condition of, or, good consideration for a contract, unless it is, as between the parties, such a part execution as to change their relative positions as to the subject matter of the contract."* The Respondent's position was certainly changed after she paid the deposit: she started construction on the land, and as she said at the trial at page 29 of the Record, the Appellant was well aware of this. In MEGARRY & WADE 4th edition at page 562, it is stated that it is a requirement when relying on the doctrine of part performance, that there should be not only proof that the purchaser has paid the vendor in full, but also, that the purchaser has gone into possession of the land paid for. The act of part performance must be referable to the contract of sale. Of course, here, the learned authors were dealing with cases of part performance where there was no agreement in writing. In this case however, there is written evidence that the payment made by the Respondent was referable to the land sold by the Respondent.

WHETHER APPELLANT CONTSTRUCTIVE TRUSTEE OF PART PAYMENT

12. It is sometimes said that a vendor who has received part of the purchase price for his property, holds the same as a constructive trustee for the purchaser until the purchase price is paid in full. This principle was fully explored by this Court in Civ App 50/2007 - ELIZABETH AHMED v MEMUNA BAH, Judgment delivered, February,2010 where I said at paragraph 44 et seq: *"Having held that there was an enforceable contract*

for sale evidenced by exhibit "L", the next question is, what is its effect? That question was answered by the great equity Judge JESSEL,MR in LYSAGHT v EDWARDS (1876) 2 Ch D 499 at page 506: "It appears to me that the effect of a contract for sale has been settled for more than two centuries;.....it is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money.....". And at page 507: "*Valid contract means in every case a contract sufficient in form and in substance, so that there is no ground whatever for setting it aside as between the vendor and purchaser - a contract binding on both parties." Once the contract has been created, the equitable interest in the land is deemed to have been transferred automatically to the purchaser of that interest. It is at this stage that the constructive trust comes into operation on the basis of the equitable principle that 'equity looks upon as done, that which ought to be done.' The vendor holds the property on constructive trust for the purchaser until completion of the sale or transfer. In this respect also, see also the case of JEROME v KELLY [2004] UK HL,25 [2004] 2 All ER 835 LORD WALKER at paragraph 31 cited with approval the judgment of Mason J in Chang v Registrar of Titles (1976) 137 CLR 177, 184.*

FINDINGS

13. We agree with the Learned Trial Judge that the Respondent was entitled to an Order for Specific Performance of the Agreement made on 3 December,1996, and that the Respondent's Counterclaim should be dismissed. It would have been inequitable for the Respondent to succeed on her Counterclaim, when the Court had Ordered that she should retain the land she had built on. We do not find it necessary to interfere with the Order he made as to the Costs of the action, and of the Counterclaim. But in view of the time which has elapsed since Judgment, and in exercise of the powers conferred on this Court by Rule 32 of the Court of Appeal Rules, 1985 we shall vary the Orders of the Learned Trial Judge, slightly.

ORDERS

14. We Order as follows;

i. The Appellant's Appeal against the Judgment of NYLANDER,J dated 14 October,2005, is dismissed with Costs to the Respondent.

ii. This Honourable Court Grants the Respondent an Order of Specific Performance of the agreement dated 3 December,1996. Consequently, the Respondent shall pay into Court for the benefit of the Appellant the sum of Le800,000 plus interest thereon at the rate of 25% per annum with effect from 31 May,1997 until payment.

iii. On full payment of the said amount of Le800,000 plus the interest awarded above, the Respondent shall file a copy the receipt issued by the Judicial Sub-Treasury to her, in this Court's Registry. The Respondent shall cause a Deed of Conveyance to be prepared in her name, or, in the name of a person nominated by her, with the Master and Registrar as Vendor, and she shall forward the same to the Registrar of this Court. The Registrar of this Court shall forward the said Deed and a copy of the said Receipt to the Master and Registrar of the High Court for engrossment, after which, he shall hand the same over to the Respondent for registration.

THE HONOURABLE MS JUSTICE S KOROMA, JUSTICE OF THE SUPREME COURT

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL.