

JIMMY GAZI

Versus

MBALABALA PROPERTIES

IN THE HIGH COURT OF ZIMBABWE

KABASA J

BULAWAYO 26 MAY, 14 OCTOBER 2021 AND 20 JANUARY 2022.

Civil Trial

Advocate L. Nkomo with J Tshuma, for the plaintiff

N. Mazibuko, for the defendant

KABASA J: The plaintiff instituted proceedings against the defendant claiming the following relief:-

- “1. An order compelling the defendant to pass transfer to the plaintiff or his nominee, of a certain immovable property, being Lot 3 of Lot 1 of Swaite, measuring 45,4835 hectares situate in the District of Umzingwane.
2. An order directing the defendant to, within 21 days of the date of this order, execute all documents, and take all steps necessary to procure the transfer of the above-described property to the plaintiff, and authorising the Sheriff to execute all documents and take all actions in the defendant’s place and stead, should the defendant fail to comply.
3. Costs of suit.”

This claim is premised on the following, as elaborated in the plaintiff’s declaration:-

In 2007 the plaintiff and defendant, represented by its director, Enos Nkala (deceased) entered into an oral Memorandum of Understanding the terms of which were that :-

- (a) the plaintiff would: - assist “Nkala’s daughter by paying tuition fees and other charges for the daughter at Solusi University.
- (b) deliver a Nissan Terrano vehicle to Nkala.
- (c) deliver 30 head of cattle to Nkala.
- (d) deliver 16 sheep to Nkala.
- (e) pay GBP 2 000 and ZAR 30 000 to Nkala, and the defendant, through Nkala would: -

- (a) Procure the survey and subdivision of an immovable property owned by the defendant, known as Lot 1 of Swaite, situate in the Umzingwane District, to separate and identify a portion to be known as Lot 3 of Lot 1 of Swaite, measuring 45,4835 hectares.
- (b) Secure a certificate of no present interest from the government of Zimbabwe.
- (c) Sign a formal written Memorandum of Sale of the subdivided property to the plaintiff, for the purposes of taxation and transfer, and
- (d) Transfer the subdivided portion, namely Lot 3 of Lot 1 of Swaite, to the plaintiff.

The plaintiff duly discharged his obligations per the Memorandum of Understanding and following this, the defendant duly obtained a subdivision permit, procured a survey for the purposes of identification of the proposed subdivision and procured a certificate of no present interest from the Government of Zimbabwe.

In 2013 plaintiff and Nkala approached Webb, Low and Barry legal practitioners and Conveyancers for purposes of drawing up a formal Memorandum of Agreement of Sale for purposes of valuation and taxation. This was duly done and Nkala was supposed to sign the agreement. Nkala had however fallen sick and efforts to get access to him were frustrated by his family. He subsequently died in August 2013 without signing the agreement. Nkala had however acknowledged the defendant's obligation to transfer this piece of land to the plaintiff.

Following Nkala's death, the plaintiff's efforts to get the other director who is Nkala's wife to transfer the subdivision hit a brick wall. Whilst she did not dispute the defendant's obligation to effect the transfer she stated that she needed to consult first.

The plaintiff subsequently issued summons, which the defendant, represented by Mrs Nkala, defended. An appearance to defend was entered followed by a plea which raised a number of defences. The defence can be summarised as follows:-

1. The agreement between Nkala and the plaintiff, if there was one, was not authorised by the defendant. If there was such an agreement it was entered into by Nkala in his personal capacity.

2. The subdivision and procurement of Certificate of no present interest was not reflective of an agreement between the defendant and the plaintiff as the defendant never authorised such and never desired to conclude a Memorandum of Agreement of Sale with the plaintiff.

In the alternative the defendant pleaded as follows:-

1. The plaintiff's cause of action arose more than 3 years ago and so the claim has prescribed.
2. The Memorandum of Agreement was first entered into in 2007 before the issuance of a sub-division permit and so fell foul of the provisions of section 39 (1) (b) (i) of the Regional Town and Country Planning Act (Chapter 29:12) rendering the agreement illegal.
3. To the extent that there was payment of foreign currency without exchange control authority, the agreement is unlawful and consequently unenforceable.
4. To the extent that the defendant is a corporate legal entity it could not enter into a verbal agreement and consequently nothing can flow from the unauthorised verbal agreement.
5. Even assuming all legal requirements were followed and an agreement reached, the defendant denied that the plaintiff discharged his obligation as per the agreement.

With the closure of pleadings the parties attended a pre-trial conference and the following issues were referred for trial.

1. Whether the parties entered into an Agreement of Sale of certain immovable property being Lot 3 of Lot 1 of Swaite measuring 43,4835 hectares situate in the district of Umzingwane.
2. If the agreement was entered into as above stated, whether the plaintiff's claims are prescribed.

3. If the parties did enter into an Agreement of Sale as above stated, what were the exact terms and conditions of the agreement and whether the plaintiff fulfilled its side of the bargain.
4. If the agreement was entered into as above stated in the year 2007, whether the agreement was legal and enforceable.
5. If an agreement was concluded as above stated which include payment of foreign currency by the plaintiff to or on behalf of the defendant or the late Mr Nkala, whether that rendered the agreement void and unenforceable.
6. Whether the plaintiff is entitled to transfer of the disputed property.

At the trial the plaintiff testified and also relied on the evidence of three witnesses. The defendant led evidence from Mrs Nkala, one of the directors.

Mr Gazi is a medical doctor practising in Eswatini (formerly Swaziland) and he is also a farmer. When not in Eswatini he resides at his farm, Hilton farm in Umzingwane. His family resides in the United Kingdom and he is a permanent resident of that country where he lived from 1974-1981 before coming back to study medicine at the University of Zimbabwe. Thereafter he went back for post graduate studies. Although now working in Eswatini he goes back to the UK three to four times a year.

He first met Mr Nkala in the 1980s through a mutual friend. They were both farmers and used to meet at a service station which was located at defendant's property. Mr Nkala was also married to his step mother's sister, a director of the defendant.

In 2007 Nkala informed him that BP Shell was selling the assets located at Nkala's property. The defendant did not have the money to buy such assets. The witness showed interest and eventually negotiated directly with BP and bought the assets (Exhibit 4). He then sought to agree on how he was to run the fuel station which was on defendant's property. Nkala proposed to sell the piece of land on which the fuel station was located. He was shown the diagram depicting the location of the fuel station (Exhibit 5). The area was 7,9274 ha and Nkala said he would negotiate with the company so the witness could buy that piece of land. The two discussed the value and the witness reminded Nkala of the money he had lent him and the motor vehicle he was driving which he had borrowed from the witness. Nkala

acknowledged the monies he owed and the motor vehicle he had borrowed and was using but advised the witness that he was not in a position to pay these amounts back. He proposed that the witness buys a bigger piece of land instead and that is when it was decided to involve lawyers. In early 2008 the two approached Webb, Low and Barry, Mr Tshuma to be precise, who then asked if the property had been subdivided. Upon being advised it was not the lawyer advised them they could not enter into a sale agreement without such sub-division. They then agreed that Mr Nkala would get whatever documents that were required and he commenced that process. The process took time. Nkala was subsequently authorised by the defendant to apply for a replacement of a lost Certificate of title for the property (Exhibit 6 and 7).

On 8th August 2008 Nkala applied for a sub division permit (Exhibit 8) which was granted in March 2009 (Exhibit 9). After it was granted Nkala representing the defendant then advised the witness that they could now negotiate the price for the acquisition of the land. The sub division permit was paid for (Exhibit 10) by a Mr Sigogo, plaintiff's employee who he had availed to do all the leg work required in obtaining these documents.

The parties agreed that the totality of all the plaintiff had lent to Nkala would be transferred towards the purchase price and in addition the 4 x 4 Terrano vehicle, GBP 2 000, ZAR 30 000, 17 sheep, 30 head of cattle and ZWD2,5 billion paid as tuition fees for Nkala's daughter who was studying at Solusi University would be the total purchase price. These obligations were fulfilled and the Terrano was transferred to Mr Nkala in June 2011. The GBP 2 000 had been loaned in 2006 upon the witness's return from the UK and he had withdrawn part of it from his HSBC and Lloyds UK bank accounts (Exhibit 11). His wife also gave him a bit of cash. All the payments were done between 2007-2011 when the last batch of livestock was delivered (Exhibit 12). After the delivery of the last batch of cattle the parties went back to Webb, Low and Barry to advise that the purchase price had been paid. They now wanted to have a written Agreement of Sale. The lawyer required a certificate of no present interest. The certificate was later procured (Exhibit 17) and various other documents requested by the legal practitioner (Exhibit 13, 14, 15, 16).

The witness later visited Mr Nkala's home and Mrs Nkala tried to persuade Mr Nkala to revert to the original Agreement of Sale of the smaller portion of land but Mr Nkala would not budge, reminding his wife that the total purchase price had been paid and they were not in

a position to refund same. On this visit they, the witness accompanied by his sister, obtained the certificate of no present interest. A second visit to the Nkala home in the company of the same sister was meant to get Mr Nkala to sign the sale agreement. Mrs Nkala tried to get the witness to talk in the absence of his sister and when that was rebuffed, she became verbally abusive resulting in the witness and his sister leaving the premises. The purpose of the visit was not accomplished and that was the last visit to the Nkala home. Mr Nkala died 3 months later and after allowing time for Mrs Nkala to mourn her husband the witness tried to engage her to finalise the sale but all was in vain.

Under cross-examination the witness was adamant the permit was granted in 2009 and the date and date stamp showing 25/3/2010 must be an error. He acknowledged that the subdivision application fee was receipted on 5th October 2009 and he entered into the Agreement of Sale towards end of 2009.

Mr Gazi gave a detailed account of his dealings with Mr Nkala. Such detail could not have been manufactured or rehearsed. He knew what he was talking about because it was a narration of what he knew to have happened.

The amounts of money paid and the purpose of such payment, the lending of the Terrano and the delivery of the livestock were details that spoke to the reality of what actually transpired.

The issue of when the sub-division permit was applied for and granted may ultimately turn the matter on its head and the court will have to rely on the documentary exhibits which ought to tell a story on their own without the aid of *viva voce* evidence.

The fact that the evidence on when the sub-division permit was granted was not clearly articulated by Mr. Gazi is no reason, given the totality of the evidence, to regard him as an unreliable witness.

In so far as the detail of what the witness was personally involved in, I was of the view that his evidence could be relied on.

The witness's evidence was materially corroborated by the evidence of the other 3 witnesses. The plaintiff's sister Sitholakele Dewa confirmed accompanying the plaintiff to the Nkala home where the plaintiff was given the Certificate of no present interest by Mrs.

Nkala on the directions of Mr. Nkala. She also confirmed the conversation Mrs Nkala had with Mr Nkala as she tried to talk him out of selling a larger portion of the land. She recalled that Mr Nkala told her that full payment had been received and they were not in a position to reimburse the plaintiff.

On the second visit she again accompanied the plaintiff. This was the visit meant to get Mr Nkala to sign the Agreement of Sale. Mrs Nkala denied them access to him and when she failed to get the plaintiff to talk to her in private she hurled insults at brother and sister who promptly left leaving the unsigned Agreement of Sale.

This witness's evidence touched on the little she knew about the matter. She did not seek to exaggerate or speak on issues she had no personal knowledge of.

The fact that she and her brother left without seeing Mr Nkala and without getting the Agreement signed is indicative of the fact that all was not well and the mission was aborted due to the hostile response by Mrs Nkala when her efforts to talk to the plaintiff in private failed.

I considered her a credible witness. So too was Bernard Sigogo, the employee who was assigned to do the running around meant to secure the documents required by the lawyers. He confirmed obtaining what turned out to be the sub-division permit and the certificate of no present interest. He also appended his signature to the document signalling the fulfilment of the plaintiff's obligations towards what was owed to Mr Nkala.

The last witness, a simple unsophisticated man who gave his age as 42 when he is obviously in his late 60s or early 70s was employed as a herdsman at the plaintiff's farm. He witnessed the delivery of livestock from plaintiff's farm to Mr Nkala's, that is, sheep and cattle and this was done between 2009 - 2010.

His unassuming nature was disarming. He clearly only spoke about that which he knew to have happened with no embellishments.

The defendant applied for absolution from the instance after this witness's evidence which marked the end of the plaintiff's case and I dismissed the application.

From the totality of the evidence, I came to the conclusion that Mr. Gazi knew Mr Nkala at a personal level as well as, as a director of the defendant. He entered into an

agreement for the purchase of the property in question and paid for it in monetary as well as non-monetary means.

Mrs Nkala's evidence that she was unaware of the agreement as a co-director and that her husband and Mr. Gazi were close friends who were doing things at a personal level does not make much sense regard being had to the fact that authority was given to Mr Nkala to apply for the replacement of a Title Deed of this property at a time the two were "doing these things" as put by Mrs Nkala.

She would also want the court to believe that the Terrano vehicle was payment for the use of the service station yet evidence showed that she at one time called Mr. Gazi over the purchase of this property. She obviously knew more than she was letting on. I got the distinct impression that she was determined to deny anything and everything that would remotely go to show that she was aware of what was going on between Mr Nkala and Dr Gazi over the property in question.

She had a calculated way of responding to questions, carefully thinking through what to say lest she inadvertently gave anything away.

In all the discussions at her home there was never an issue of her ignorance of the agreement. It was more on her attempts to ensure not so much land was disposed of.

Her husband told her the full purchase price was paid and they could not pay it back. Under cross-examination she let out that:-

"They (her husband and plaintiff) were in agreement to transfer the property and any objection was that this was a family issue and they could not agree on their own. In my opinion I felt they should have done things above board if touching Mbalabala. They should have gone legal. I had no confidence in what they were doing on their own."

Asked whether her objection was on the manner in which they were going about it, she responded: -

"That was my major objection."

She was also asked, "Is that why even after Nkala's death you didn't want to finalise this" and her answer was:-

“No, that surely how can you buy such amount of land including the garage for that amount and with no legal formalities followed.”

Asked why she wanted a private conversation with the plaintiff she responded:-

“That’s why I wanted to talk to plaintiff alone on what he wanted with Mbalabala, clarification so I would know the purchase price and get proper evaluation of the property if my husband was still interested in us selling.”

A follow up question was posed to her:-

“Q. You said your husband was in agreement with plaintiff,” and she responded:-

“A. Yes they were in agreement with their own lawyers but I believed they were not in order.”

Q. Correct to say you and your husband had a deadlock on how to proceed with the plaintiff transaction.”

A. As Directors in the company yes.

Q. What was to be your proposed resolution of the transaction.

A. My proposed resolution would have been to get a fair market value, go back to rentals of garage as Terrano was to be rentals for use of garage and these other monies, fees and pounds was their personal business. Get fair value of the land.”

These are not responses from one who was feigning ignorance of any agreement for the sale of land and equally that the payments made by the plaintiff were meant to pay for such land. Her issue was that there was no proper valuation of the land and probably wanted more for it if the request for the reduction of the land size failed.

Given this witness’s testimony and the clear evidence from the plaintiff, I was left in no doubt that the first issue was resolved in the plaintiff’s favour.

There was an agreement for the sale of Lot 3 of Lot 1 of Swaite situate in Umzingwane district.

That said, has the plaintiff’s claim prescribed?

Evidence showed that there were on going discussions between Nkala and the plaintiff right up to the time Nkala was taken ill and access to him was denied.

After his death the plaintiff tried to engage Mrs Nkala who did not disown the agreement but said wanted to consult others. It therefore cannot be said the plaintiff ought to

have issued summons based on May 2013 as the date it was clear the plaintiff's claim was not going to be met.

For as long as Nkala was alive and the plaintiff was still relying on the ongoing efforts, including sending an envoy who also met with no success, it cannot be said the claim prescribed as at May 2016 and was therefore about 3 months out as at the time summons were issued.

In *Read v Brown* (1888) 22 QBD 128 (CA) at 131, a cause of action was defined as follows:-

“A cause of action is every fact that it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”

And in *Lyon v SA Railways and Harbours* 1930 CPD 276 at 285 WATERMEYER J accepted the meaning ascribed to the phrase in *Jackson v Spittall* (1970 LR 5 CP 542) as “that particular act on the part of the defendant which gives the plaintiff his cause of complaint” and added that he:-

“..... would have preferred to call it the final act on the part of the defendant which completes the plaintiff's cause of action and gives him a right to invoke the aid of the court.”

In casu the plaintiff was engaging the defendant as represented by Nkala up to Nkala's demise and when efforts to engage the wife proved fruitless that to me was the final act giving the plaintiff a right to invoke the aid of the court.

As at 17th August 2016 when the summons was issued the claim had not prescribed.

In *Brooker v Mudhanda and Anor* SC 5-18 GOWORA JA had this to say:-

“At issue before the court *a quo* was whether or not the claims mounted against the appellants by the respondent had prescribed. The party who alleges prescription must allege and prove the date of the inception of the period of prescription. Generally, prescription starts to run as soon as the debt becomes due.

In order to determine the question of prescription the court first had to make a finding on the cause of action upon which the respondent's claim was premised and when specifically, the cause of action arose.”

It is my considered view that the spurned overtures by the plaintiff after Nkala's death marked the final act and gave the plaintiff the right to approach the court.

The second issue is therefore resolved in the plaintiff's favour.

The plaintiff gave detailed evidence regarding how the payment for the piece of land was to be effected. The first part being the school fees, GDP 2000 and Terrano and the second being the cattle, sheep and the ZAR 30 000.

Exhibit 12 which was signed by Nkala, the plaintiff and Sigogo on 30th January 2011 whose contents read:-

"30/01/11

Dr Gazi and Mr Enos Nkala

Agreement to close Mbalabala matter

Three weaner heifers (six months old). All obligations by Dr Gazi to Mr Nkala have been discharged and he owes nothing to Mr Nkala," provided clear evidence of the discharge of the plaintiff's obligations.

In discharging an onus in a civil case, the standard of proof is not as onerous as that which relates to criminal matters.

Counsel for the plaintiff cited the case of *City of Gweru v Mbalabala* 2014 (1) ZLR 248 (H) which essentially states that the standard of proof is never anything other than proof on a balance of probabilities. "If the evidence is such that the tribunal can say "we think it more probable than not," the burden is discharged."

In casu the cumulative effect of Dr Gazi and the two farm employees' evidence coupled with exhibit 12 is ample proof that the plaintiff discharged his obligations. I therefore resolve this issue in plaintiff's favour.

The next issue is when the agreement was entered into. The relevance of this stems from the fact that section 39 (1) (b) (i) of the Regional, Town and Country Planning Act, Chapter 29:12 states that:-

- "(1) Subject to subsection (2) no person shall –
- (a)
 - (b) Enter into any agreement –

- (i) for the change of ownership of any portion of a property Except in accordance with a permit granted in terms of section forty.”

Counsel for the defendant cited *X-Trend-A-Home (Pvt) Ltd v Hoselaw Investments (Pvt) Ltd* 2000 (2) ZLR 348 (S) where McNALLY JA had this to say:-

“It seems to me to be clear that the legislature has simplified, but not modified, the previous wording. The statute no longer speaks of “a sale” or “an agreement of sale.” It uses the much wider expression “agreement for the change of ownership.” The agreement with which we are concerned is clearly “an agreement for the change of ownership” of the unsubdivided portion of a stand. What else could it be for? Whether the change of ownership is to take place on signing or later on an agreed date, or when a suspensive condition is fulfilled, is unimportant. It is the agreement itself which is prohibited.”

In casu Dr Gazi said the subdivision permit was obtained on 25 March 2009 and the 2007 Memorandum of Understanding was an agreement to agree on some later date. It was therefore not an agreement as envisaged by section 39 and so the parties’ agreement does not fall foul of the provisions of section 39. The agreement itself was concluded towards the end of 2009 and the permit had been obtained.

A reading of the plaintiff’s declaration, paragraphs 4 – 6.3 suggests that the plaintiff discharged his obligations in fulfilment of the agreement whereupon the defendant through the agency of Nkala obtained the sub-division permit and the rest of the documents necessary for the transfer of the property.

The Terrano vehicle which was initially just for Nkala’s use but later converted to be part of the purchase price as per parties’ agreement was transferred into Nkala’s name on 27 March 2007 (Exhibit 28). This would tend to show that the agreement of 2007 was not a mere agreement to agree at a later date, inchoate agreement but was an agreement which saw the discharging of the obligations meant to purchase the land in question. Otherwise if by 2007 the vehicle was only for Nkala’s use and not tied to the purchase of the property, why would the registration book show that registration into Nkala’s name was done as early as 27 March 2007?

Even accepting that the agreement was concluded end of 2009, exhibit 10 shows that an application for sub-division permit was paid for on 5th October 2009. The particulars describing the purpose of the payment clearly state: -

“Sub-division application fees.”

It means therefore that as at 5th October 2009 the permit had not been granted but an application had been made.

Exhibit 9 shows that the permit was granted and the date in ink and the date stamp thereon bears the date 25 March 2010. This date appears at the bottom of the permit where it was signed by the Provincial Planning Officer for Matabeleland South.

An accompanying letter addressed to Mr Nkala has 25/3/2009 informing him of the approval to sub-divide and it is stamped 25 March 2010. The date stamp thereon tallies with the date stamp and date at the bottom of the permit where the issuing officer signed.

The court was not favoured with an explanation as to why the letter has 25 March 2009 informing Mr Nkala of the approval of his application which application was paid for on 5th October 2009. One can be forgiven to conclude that the date 25 March 2009 must have been an error. The permit itself also refers to an application dated 18 June 2009.

Without an explanation as to why the receipt for payment of the application fee is dated 5 October 2009 and the permit itself has 25 March 2010 as date of issuance, can it be said the plaintiff obtained a permit first before entering into the agreement for change of ownership of this property? I think not.

In *MB Ziko (Pvt) Ltd & Anor v Cestaron Investments (Pvt) Ltd & Anor* 2008 (2) ZLR 1 (S) MALABA JA (as he then was) stated that there is a presumption that a document is executed on the date stated in that document. This would tend to show that the permit was granted on the date that appears thereon – 25 March 2010. I do not see how a letter accompanying that document whose date is different can be taken as showing the date the permit was granted, more so when such date does not tally with the date stamp which bears the same date as that on the permit, i.e., 25 March 2010.

If, as testified by the plaintiff the agreement was concluded at the end of 2009 it follows that it was before the grant of the sub-division permit.

Whilst in *CAG Farms (Pvt) Ltd v Hativagoni and Ors* 2014 (1) ZLR 440, a case cited by counsel for the plaintiff for the proposition that an agreement to agree in the future does

not constitute a contract between the parties as they lack legal certainty, the point is the learned Judge made the observation that each case is to be considered on its own merits.

Given the issues highlighted on the Terrano registration, the payment of the GBP 2 000, the college fees and most important the pleadings as per the plaintiff's declaration, the parties' agreement of 2007 was a contract with certainty where the parties' minds met, the property was identified and the purchase price agreed on.

I therefore come to the conclusion that the documentary evidence and the pleadings do not support the assertion that a sub-division permit was obtained first before the parties concluded an agreement to change the ownership of this property.

As for the issue relating to payment of GBP 2 000 and ZAR 30 000, the ZAR 30 000 was paid in 2009 when there was a multi-currency basket and so such payment was above board. As for the GBP 2 000, in *Attorney-General v Makamba* 2005 (2) ZLR 54, the Exchange Control Regulations section 2 thereof defined "free funds" as "money which is lawfully held outside Zimbabwe by a Zimbabwean resident and which was acquired by him otherwise than as the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe."

The plaintiff explained that the GBP were free funds, he is a permanent resident of UK and has an account in that country where his family resides. That money was withdrawn from that account and a bit was obtained from his wife.

There was nothing to controvert this evidence. Equally there is nothing to suggest that the plaintiff required authority from the authorities to give Nkala that loan in 2006, which loan was then converted to go towards the purchase price.

Whilst all the issues were resolved in the plaintiff's favour, the issue on whether the agreement was concluded after the issuance of a sub-division permit literally scuttled the plaintiff's claim.

The agreement fell afoul of s 39 (1) (b) (i) of the Regional Town and Country Planning Act, Chapter 29:12 and was therefore illegal and unenforceable.

I have dealt with the issues referred to trial and find it unnecessary to deal with the issue of whether Nkala had authority to enter into the agreement. Suffice to say in *Mills v*

Tanganda Tea Company Ltd 2013 (1) ZLR 38 it was held that section 12 of the Companies Act codified the so-called Turquand rule or presumption of regularity in corporate affairs. Dr Gazi was entitled to presume whatever internal procedures that were necessary were complied with authorising Mr Nkala whom he knew as a director of the defendant to act on its behalf.

As regards whether a corporate entity could enter into a verbal agreement BHUNU JA in *Guoxing Gong v Major Logistics (Private) Limited and Anor* SC 2-2017 had this to say:-

“It is plain that the verbal agreement was lawful and binding. The intended reduction of the verbal agreement to writing was a mere formality not forming part of the contractual agreement. It is trite that in the absence of any prohibition or agreement to the contrary, a verbal agreement is lawful and binding. This explains why by far the majority of contractual agreements are verbal. There is no legal requirement in our jurisdiction that every contractual agreement be reduced to writing.”

The parties’ agreement was therefore a valid contract and the fact that it was not reduced to writing did not make it any less valid.

But for the failure to obtain a sub-division permit first before concluding the agreement the plaintiff would have succeeded in his claim.

That said, the last issue as to whether he is entitled to transfer of the disputed property is resolved against him. He is not so entitled.

This is one case which speaks to the unfortunate consequences of innocently entering into agreements without full knowledge of what is required.

Nkala and Dr Gazi’s intentions were undoubtedly to have this property sold to Dr Gazi and for him to take transfer. They ought to have sought legal counsel before reaching such agreement.

The circumstances of this case make me averse to punish the plaintiff with costs as prayed for by counsel for the defendant.

This is one case where each party should pay its own costs. The defendant’s representative was clearly being economical with the truth in seeking to deny all and any knowledge of the agreement and payments made by Dr Gazi. Such lack of honesty cannot be rewarded by mulcting the plaintiff with punitive costs.

In the result, I make the following order:-

1. The plaintiff's claim be and is hereby dismissed.
2. Each party is to bear its own costs.

Webb, Low & Barry Incorporating Ben Baron and Partners, Plaintiff's legal practitioners
Calderwood, Bryce Hendrie and Partners, defendant's legal practitioners