**Mushunga v Rwekanika**

**Division:** High Court of Tanzania at Mwanza

**Date of judgment:** 8 January 1974

**Case Number:** 16/1972 (103/74)

**Before:** Mfalila J

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*[1] Land – Sale – Agreement for sale – Presidential consent not obtained – Consent not required for*

*agreement – Land Regulations,* 1948, *r.* 3 (*T*).

*[2] Registration of Documents – Agreement of sale of land – Not compulsorily registrable –*

*Registration of Documents Ordinance* (*Cap.* 117), *s.* 8 (*T*).

**JUDGMENT**

**Mfalila J:** By an agreement dated 7 September 1967 the appellant Syliveri Mushunga agreed to sell his house on Jamhuri Street, Bukoba Township to the respondent, Theonestina Rwekanika for Shs. 10,000/-. It was a condition of the agreement that the respondent do pay Shs. 4,000/- in advance and the balance of Shs. 6,000/- in instalments of Shs. 500/- a month until full payment. This was done and on 31 October 1968 the respondent paid the last instalment. Thereupon she asked the appellant to go with her to the Revenue Office to sign the transfer forms in respect of the house in her favour. The appellant refused, giving as his reason that the respondent had not performed the terms of a collateral agreement regarding payments of certain costs relating to the house and the plot. The respondent filed an action in the Bukoba District Court praying among other things that the appellant be ordered to sign transfer forms in respect of the right of occupancy over the plot in question. At the end of the hearing in the District Court the resident magistrate found and entered judgment for the respondent and ordered the appellant to sign the transfer forms in her favour. Hence the appellant’s appeal to this court. In his memorandum of appeal the appellant attacked the judgment and order made by the resident magistrate in the court below on several grounds, but principally that the agreement to sell was not enforceable for two reasons. First that it was not registered under s. 8 of the Registration of Documents Ordinance (Cap. 117) and secondly that it did not receive the Presidential approval under reg. 3 of the Land Regulations 1948 and that therefore in view of the above the resident magistrate was wrong in ordering specific performance. I will come back to these points later, but at the moment, I will refer to another reason advanced by the appellant in the lower court as well as during the hearing of this appeal, i.e. his failure to sign the transfer forms. He said that the respondent failed to perform a collateral oral contract regarding the payments of site rates and other expenses pertaining to the land in question. But I think it is clear that independently of the collateral agreement dated 12 December 1968 the respondent was liable to pay such costs, for the effect of the contract was to pass the equitable interest in the house to the purchaser, although certainly the legal estate in the house remained in the vendor, until full payment and transfer was effected. Further, in law, from the date of the contract of sale the respondent assumed all risks of any loss or damage that might befall the house, for instance, accidental fire or earthquake, and she had to meet the costs of all the outgoings, so that in law, the obligations of the purchaser are not in dispute. Nevertheless, these cannot avail the appellant in the present case, because the trial magistrate made a specific finding of fact that the respondent had made good all these payments. I will now turn to consider the legal objections raised by the appellant in his memorandum of appeal. As I stated earlier, the appellant objects to the enforcement of the contract of sale between him and the respondent first because it was not registered and secondly because it was not approved by the President under reg. 3 of the Land Regulations 1948. With regard to s. 8 of the Registration of Documents Ordinance, it is clear that non-registration of this contract did not and does not have the effect of making it unenforceable. Ss. 8 and 9 provide: “8. ( 1) T he registration of the following documents if executed or made after the commencement of this Ordinance is compulsory: ( *a*) n on-testamentary documents, including decrees of any Court, and awards which purport or operate to create, confer, declare, limit, assign, transfer or extinguish any right, title, or interest, whether vested or contingent, to, in or overland; and ( *b*) n on-testamentary documents which acknowledge the receipt or payment of any consideration, on account of the creation, declaration, assignment, limitation or extinction of any such rights, title, or interest. (2) nothing in clauses (*a*) and (*b*) of sub-s. (1) applies to: ( *f*) any document not itself creating, declaring, assigning, limiting, or extinguishing any right, title or interest to or in land, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest. ( *k*) a ny document, if the only interest in land dealt with thereby relates to land registered under the Land Registration Ordinance. 9. N o documents of which the registration is compulsory shall be effectual to pass any land or any interest therein or render such land liable as security for the payment of money or be received as evidence of any dealing effecting such land unless and until it has been registered.” These are the provisions under which the appellant submits that the contract of sale entered into between him and the respondent is unenforceable. But on the true construction of the section it is clear that it cannot avail the appellant for clearly the contract of sale does not or was not intended to create, declare, assign, transfer or extinguish any right in this house. All it did is what is provided in s. 8 (2), that it is merely created a right, after its terms were complied with for the parties to obtain another document, that is to say the transfer document whose registration is compulsory under s. 8(1). The second objection against the enforceability of this contract advanced by the appellant is that the contract did not receive the Presidential approval or consent under reg. 3 of the Land Regulations 1948 which provides as follows: Regulation 3. (1) A disposition of right of occupancy shall not be operative unless it is in writing and unless and until it is approved by the President. Disposition means among other things: (*a*) A conveyance or assignment other than by way of mortgage or a gift, a settlement, a deed of partition, assent, vesting declaration or a sale in execution of an order of a court. The appellant relied on several authorities for this proposition, principally, *Patel v. Lawrenson*, [1957] E.A. 249, *Patterson v. Kanji* (1956), 23 E.A.C.A. 106, and lastly, *Fazal Kassam* (*Mills*) *Ltd. v. Kassam*, [1960] E.A. 1042. The effect of the decisions in all these cases was that courts will not enforce a claim which can only be established by relying upon a transaction declared by law to be inoperative for lack of approval under the Land Regulations. I do not think the construction that has been put by the appellant on the decisions in all these cases is a correct one and even if it was, I think that the facts of this case are distinguishable from those cases. In the present case, the appellant has not even attempted to obtain the Presidential approval and I think if courts are not careful, reg. 3 of the Land Regulations 1948 may be abused by unscrupulous sellers. I think that reg. 3 is applicable only to situations where the President’s consent has been sought and refused. It should not, and sellers should not be allowed, to use this regulation when they deliberately refuse to seek this consent. All arrangements to sell or in any way deal with rights of occupancy are contingent. The contingency being the consent by the President, it follows that parties to an agreement of sale must take all the necessary steps to obtain such consent and a seller cannot be heard to deny the validity of the agreement freely entered into by him by pleading lack of consent under reg. 3 when he deliberately takes up the position wherein consent cannot be obtained. There is another consideration regarding this objection. A contract of sale was not contemplated by reg. 3. This regulation refers to dispositions which are defined by the same regulation to mean either conveyances or assignments. A contract of sale is neither of these. It is just what it says it is, a contract by one party to sell and by the other to buy. When both parties have completed their respective obligations, the seller is then obliged to convey the property to the buyer. It is only at this stage that the Presidential consent comes in because for the conveyance to become operative it must have the consent of the President. If at that stage the consent of the President is not obtained for any reason, the buyer is entitled to a refund of all that he paid under the contract of sale, but he is not entitled to damages because it is through no fault of the seller that he cannot convey the property. This to my understanding is what reg. 3 means and the lack of consent is only a defence to an action for specific performance or damages, but cannot be a reason for holding the agreement to sell void. It is for these reasons that the resident magistrate was correct in ordering specific performance of the contract of sale entered into between the parties and that the appellant must take all the necessary steps that are required before the Presidential consent is sought. When the appellant has signed the transfer forms at the Revenue Office Bukoba, these together with the certificate of title will be forwarded to the Commissioner for Lands Dar es Salaam for approval and subsequently for registration at the Land Registry, and if for any reason the Commissioner refuses to approve the conveyance, so that it cannot be registered, no court of law will be able to compel the appellant to convey the house to the respondent, the respondent will only be entitled to a refund of what she paid under the contract of sale. For these reasons I am in complete agreement with the decision of the resident magistrate and that

therefore this appeal should and is hereby dismissed with full costs to the respondent.

*Order accordingly.*