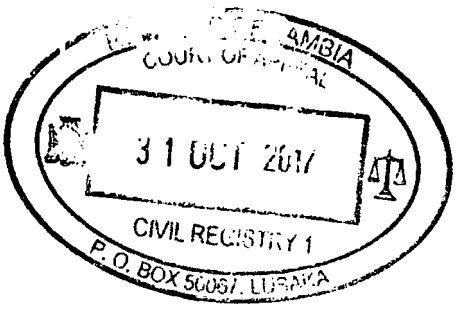
IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 29/2017**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:



ARDY MNJAIDI **APPELLANT**

AND

MOLLY PELEKAMOYO **RESPONDENT**

Coram: **Mchenga DJP, Chashi and Mulongoti JJA**

On 6th June, 2017 and 31st October, 2017

For The Appellant: Mr. M. Chitundu and Mr. M. Chitunga of Messrs Barnaby and Chitundu Advocates

For The Respondent: N/A

JUDGMENT

MULONGOTI, *JA, delivered the judgment of the Court.*

Cases referred to:

1. *Mijoni v Zambia Publishing Company Limited SCZ Appeal No. 10 of 1986 (unreported)*
2. *Mwenya and Randee v Kapinga (1998) ZR 17 at 24*
3. *Peter Militis v Wilson Kafuko Chiwala (2009) ZR 34*
4. *Valentine Webster Chansa Kayope v Attorney General (2011) ZR 424 at 428 vol.2*
5. *Limpic v Mawere and Others Appeal N0. 126 Selected Judgment No. 35 of 2014 and Judgment of 24th July, 2008*
6. *Philip Mhango v Dorothy Ngulube and Others (1983) ZR 61 (SC)*
7. *Charles Kajimanga(Hon. Judge) v Marmetus Chilemya SCZ Appeal No. 50 of 2014*
8. *Cowan v Stanhill Estates Pty Ltd No.2 (1967) VR 641*
9. *Robinson v Harman (1848) 1 Exch. 850, (1843-60) ALL ER 383*
10. *Hadley v Baxendale (1854) EWHC Exch. J70*
11. *Raineri v Miles (1980) 2 WLR 847*
12. *Phillips v Lamdin (1949) 2 KB 33*
13. *Bank of Zambia v Aaron Chungu and Access Bank Financial Services Limited and Access Leasing Limited (2008) ZR 81 vol.1*
14. *Huddersfield Police Authority v Watson (1947) KB 842*
15. *Morelle Limited v Wakeling (1955) 1 ALL ER 708*
16. *Wesley Mulungushi v Catherine Bwale Mizi Chomba (2004) ZR 96*
17. *David Howes and others v Betty Butts Carbin (sued in her capacity as Trustee of the Estate of the late Daisy Butts)(2012) ZR 239 at 253 vol.1*
18. *Kellog v Shushereba (2011-355) 2013 VT 76 (Vermont Supreme Court)*

This appeal arises from the decision of the High Court at Lusaka which ordered specific performance of the contract of sale between the appellant and the respondent pertaining to a main house.

Briefly, the background is that the respondent owned a property in Lusaka's Olympia Park at Plot number 6854 Akataka Road. The property comprised a main house and a guest wing. According to the appellant, who is the only one who testified, from about 2003, he entered into a number of arrangements and agreements with the respondent. The first one was when the respondent requested him to source a motor vehicle to be sold to her. He purchased the vehicle as requested; a Mitsubishi RVR at US$9,000. The vehicle was delivered to the respondent who failed to pay. She later asked the appellant to move into her guest wing rent free at 6854 Akataka Road Olympia Park while she occupied the main house. The appellant effected some improvements to the guest wing.

Eventually, the respondent offered him the main house to purchase at K600,000.00. He made payments in instalments. The first being on 8th August 2003 when he paid K450,000.00. Later the respondent leased out the main house and the appellant supplied her with leather chairs for her

new place. The leather chairs were worth K35,000.00 which the respondent never paid.

She later relocated to the United States of America. He continued paying for the house by depositing money into her account held at Indo Zambia Bank. No written contract was executed between the parties due to excuses by the respondent.

The appellant testified that in 2009, the respondent offered him the guest wing for sale at K400,000.00. He paid a total of US$32,000. He also advanced the respondent money to assist her discharge a mortgage over another house she owned located in Rhodespark, Lusaka.

Attempts by the appellant to have the respondent complete the transactions and to pay back the money she owed yielded no fruit as evidenced by the various emails. He sued seeking specific performance of the contracts of sale.

Apart from specific performance, the appellant had sought *inter alia*:

(i) An order for the defendant to refund the plaintiff the sum of US$32,000 for the aborted sale of the remaining extent of the property being the guest wing.

(ii) Mesne profits in the sum of K5,000.00 per month arising from the main house from 2009 to date of payment.

(iii) The sum of US$9,000 being the purchase price of the Motor vehicle Mitsubishi RVR registration Number AAV 7920.

The respondent (defendant) denied the appellant's (plaintiff) allegations that she had sold him the main house and the guest wing. She counter claimed from him K36,000.00 for rentals from 2009 to date.

The trial court found that the document signed by the parties where the respondent acknowledged receipt of K450,000,000.00 (now K450,000.00) "being part payment for the main house on Plot No. 6854 Akataka Road, Olympia Park, Lusaka" qualified as a contract as guided by the Supreme Court in the case of **Mijoni v Zambia Publishing Company Limited**[1] which was followed in **Mwenya and Randee v Kapinga**[2]. The Court then ordered specific performance of the contract pertaining to the main house as the appellant had paid for it in full. According to the trial judge there was no evidence suggesting that the guest wing was also offered to the plaintiff for sale. However, the plaintiff was awarded a refund of the cost of improvements to the guest wing to be assessed by the Deputy Registrar.

The appellant has mainly appealed on the basis that the trial Judge did not consider all his claims. The grounds of appeal read as follows:

(i) The Court misdirected itself both in law and fact when having correctly held that the plaintiff had paid in full the purchase price for the main house yet failed to order that the appellant recovers mesne profits from the respondent from date of full payment of the purchase price to date of being granted vacant possession.

(ii) The court misdirected itself in both law and fact in that having found that there was no valid contract for the sale of the guest wing, it should have ordered for refund of the total amount paid for purchase of the same by the plaintiff.

(iii) The honourable trial Judge fell in error in both law and fact when he held that whatsoever funds paid by the plaintiff for the purchase of the guest wing should be deemed as rent when there was no lease agreement to that effect and was contrary to the agreement by the said parties and evidence on record.

(iv) The honourable trial Judge fell in error in both law and fact when he held that the appellant bears the cost of property transfer tax

for the sale of the main house, when the law put such obligation on the respondent.

The appellant's counsel also filed heads of argument in support of the grounds of appeal. In relation to ground one, he argued that having ordered specific performance of the contract of sale of the main house, the trial Judge should have proceeded to order payment of mesne profits. The Supreme Court decision in **Peter Militis v Wilson Kafuko Chiwala**[3] is relied upon where that Court stated:

> ***"what is mesne profits and when are they due? In Halsbury's Laws of England, vol.28, 3rd edition at page 561 paragraph 1230, and the legal position is that the landlord may recover in an action for mesne profits, damages which he has suffered through being out of the land. Mesne profits, being damages for trespass, can only be claimed from the date when the defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does not lie unless either the landlord has recovered possession or the tenant's interest in the land has come to an end."***

It was the further submission of counsel that since the appellant only took possession of the house after Judgment of the High Court, he is entitled to payment of mesne profits from the date he completed paying the full purchase price to the date he recovered possession. The case of

Valentine Webster Chansa Kayope v Attorney General[4] is cited in support of this argument.

In arguing ground two, learned counsel adverted to the provisions of section 13 of the High Court Act which enjoins the Court to administer law and equity concurrently in the exercise of its jurisdiction. Counsel maintains that equity will not allow the respondent to go away with the full purchase price of the guest wing as well as the guest wing itself. This Court is urged to order refund of the full purchase price of the guest wing. The Supreme Court decision in the case of **Limpic v Mawere and Others**[5] is relied upon in this regard. The Court observed in that case that:

> ***"But before we leave this matter, we wish to say that from the pictures which we were shown in the Motion that was made in this appeal, the appellant has expended a lot of money on the property in question. To allow the respondents to take the property in question with the massive improvements made by the appellant would be unjust enrichment of the respondents. Equity will not allow that. We, therefore, order that the improvements be assessed by the Deputy Registrar and the appellant be paid by the respondents the worth of the improvements."***

According to counsel, evidence was led in the Court below that in 2009, the respondent offered the guest wing to the appellant at a sum of

K400,000.00, on the basis that he had bought the main house and to avoid subdividing the property. Furthermore, evidence was led that the sum of US $32,000.00 was paid towards its purchase. Part of this money was what the respondent had been borrowing from the plaintiff but it was later agreed that it be converted towards the purchase of the guest wing. Counsel also submits that evidence was led that the unpaid sum of K35,000.00 and US $9,500.00 which are the cost of the leather seats and motor vehicle the respondent bought for the appellant, be treated as payment towards the guest wing.

Thus, following the finding by the trial Judge that there was no valid contract of sale of the guest wing, the Court should have ordered for refund of the purchase price of the guest wing in line with the decision of the Supreme Court in **Limpic v Mawere and Others**[5]. Failure to do so would amount to unjust enrichment of the respondent.

It is contended in ground three, that the trial Judge erred in law and fact when he allowed the counter claim and ordered that all the funds paid by the appellant for purchase of the guest wing be applied towards rentals for the guest wing, when there was no proof of existence of a lease agreement between the parties. Furthermore, that the respondent was not before court to adduce evidence in support of the counter claim

and did not file any bundle of documents. Therefore, the Court had no evidence on which to base its finding that the funds for the purchase of the guest wing be converted to rent of the guest wing. This finding should therefore be reversed as it is not premised on evidence before the Court. The case of **Philip Mhango v Dorothy Ngulube and Others**[6] was cited as authority in aid of this argument.

Learned counsel wondered how the monthly rentals would be arrived at since the respondent occupied the guest wing rent free as he was paying for the main house. This evidence remains unchallenged. The Court below misdirected itself by going beyond its mandate and reading in or imposing new terms on the parties' agreement that the appellant pays rent for the guest wing contrary to what they had agreed.

Counsel submitted in relation to ground four that the trial Judge did not address the claim that the vendor (respondent) be ordered to pay property transfer tax. Counsel concedes that the agreement between the parties did not state who was to pay property transfer tax. However, section 4 (i) of the Property Transfer Act provides that the vendor is the party responsible for the payment of property transfer tax. We are urged to Order a refund if it turns out that the appellant has attended to payment of property transfer tax which is payable at 5% of the purchase

price as provided in the Property Transfer Tax Act. In this case the amount is K30,000.00.

At the hearing of the appeal the appellant relied on the appellant's heads of argument. In response to a question from the Court as to whether mesne profits are payable to the appellant in relation to the main house, in the absence of a landlord-tenant relationship between the parties, Mr. Chitundu who appeared for the appellant conceded that they were not and prayed for damages in the alternative.

The respondent did not attend the hearing of the appeal or file her heads of argument. Upon perusal of the record we are satisfied that she was served with the necessary notices.

We have considered the submissions by counsel, the evidence before the trial Judge and the Judgment appealed against.

The critical issue this appeal raises is whether the appellant is entitled to mesne profits as a purchaser of the main house at Plot No. 6854 Olympia Park, Lusaka, from the date of sale to date. It is also imperative for us to determine whether the appellant is entitled to a refund of the purchase

price of the guest wing. We note that Mr. Chitundu properly conceded that the appellant is not entitled to mesne profits as there was no landlord-tenant relationship between himself and the respondent. Authorities abound in which Courts have pronounced themselves on the subject of mesne profits such that it is crisp that these are awarded where the landlord has suffered loss through being wrongly kept out of possession of his house by a tenant. Some of the authorities have been cited by Mr. Chitundu like **Peter Militis v Wilson Kafuko Chiwala**[3]and **Valentine Webster Chansa Kayope v Attorney General**[4] where the Supreme Court pronounced thus:

> ***"The landlord may recover in an action for mesne profits the damages he has suffered through being out of possession of the land, or if he can prove no actual damage caused by him by the defendant's trespass, the landlord may recover as mesne profits the amount of the open market value of the premises for the period of the defendant's wrongful occupation. In most cases the rent paid under any expired tenancy will be strong evidence as to the open market value. Mesne profits being a type of damages for trespass can only be recovered in respect of the defendant's continued occupation after the expiry of his legal right to occupy the premises."***

This position of the law was confirmed in the recent case of **Charles Kajimanga (Hon. Judge) v Marmetus Chilemya**[7] per Mambilima, CJ, observed that in an action for mesne profits, a landlord may recover the

damages he or she has suffered through being out of possession of the land (house).

It is undisputed that the appellant here was never a landlord of the respondent. The facts are clear that he purchased the main house from the respondent at the time he occupied her guest wing. It is equally common cause that at that time the house was rented by a third party who was the respondent's tenant. It is therefore abundantly clear that the appellant is not entitled to an award of mesne profits.

However, we are mindful that the Judge in the court below erred in not pronouncing himself on this claim. In addition, although the appellant is not entitled to mesne profits, he is entitled to damages for breach of contract. Having found that there was a valid contract of sale between the parties and ordering specific performance, the Court should have awarded damages to the appellant as he had prayed for "*any other relief the court deems fit*".

It is a general rule of the common law that where a party sustains loss by breach of contract even in real estate, he is, so far as money can do it, to be placed in the same position as if the contract had been performed. See **Cowan v Stanhill Estates Pty Ltd No.2**[8] and **Robinson v Harman**[9] where it was stated that the words 'loss by reason of breach of contract'

encapsulate the ideas of causation, remoteness and mitigation. However, it is well settled that to be recoverable the loss and damage must be seen as arising naturally from the breach or must be within the reasonable contemplation of the parties. This was enunciated in the old case of **Hadley v Baxendale**[10].

Furthermore, where the vendor fails to give vacant possession of the property, the purchaser will be entitled, in appropriate circumstances, to obtain damages for the costs of obtaining vacant possession, including legal costs if proceedings are taken against a tenant and damages for delayed possession. See **Raineri v Miles**[11] and **Phillips v Lamdin**[12]. In *casu,* the trial Court observed that the respondent was deliberately trying to avoid specific performance of the contract of sale.

The documentary evidence is clear that the appellant has paid for the house in full as determined by the trial Judge at page 26 of the record of appeal line 12 at J9 of the Judgment. The appellant has obviously suffered damages for delayed possession and for loss of use of the house and or land from the date of completion to date. He is therefore, entitled to an award of damages. The appellant contends that the respondent has been deriving rentals from the house at a value of K5,000.00 per month. This evidence was unchallenged and it is undisputed that the

respondent resides in the United States of America to date and left the house on rent. We therefore, award as damages the said rentals from the date of completion in mid 2006 to date of being granted vacant possession under any other relief the court deems fit. Accordingly, ground one succeeds.

We will consider grounds two and three simultaneously as they are interlinked. These two grounds present us with the task of resolving the fall out from a collapsed, unwritten real estate transaction over the guest wing. The evidence regarding the guest wing is that the respondent allowed the appellant to live there rent free after she failed to repay US$9,000, he used to purchase a motor vehicle for her. She also owes him K35,000.00 for leather chairs and moneys she continued borrowing even after he paid for the main house. According to the appellant, the respondent failed to pay back the moneys she borrowed from him. In 2009, she offered to sale him the guest wing as well at K400,000,000.00 then (K400,000.00 now).

She pleaded with him to purchase the guest wing reasoning that it would be easier to conclude the transaction as it was on the same title as the main house. He agreed and paid a total of US$ 32,000.00 for the guest wing through the respondent's account held at Barclays Bank. The

appellant also testified that some of the deposits he made had no narration.

After evaluating this evidence the trial Judge found that there was no evidence before him to suggest that the respondent offered the guest wing for sale to the appellant. Nothing was evidenced in writing as required by the Statute of Frauds.

We are alive to the fact that the trial Court, relying on the case **of Limpic v Mawere and Others**[5] ordered the respondent to refund the appellant the cost of the improvements to the guest wing. At this juncture we must state that both the trial Court and the appellant's counsel relied on the earlier revisited Supreme Court decision of 2008 in **Limpic v Mawere and Others**[5]to the effect that allowing the respondents to take back the property (guest wing here) with the massive improvements made by the appellant would amount to unjust enrichment. This was despite the Supreme Court's finding that the property in question was sold/transferred to the appellant fraudulently and the certificate of title was accordingly cancelled.

Years later after hearing a Motion filed by the respondents regarding the Order that they refund the appellants the value of the improvements, the Supreme Court in its Judgment No. 35 of 2014 found that that portion of the judgment was *obiter* and not part of the *ratio decidendi*. Following its earlier decision in **Bank of Zambia v Aaron Chungu and Access Bank Financial Services Limited and Access Leasing Limited**[13] the Court held that being *obiter* the comment did not form part of the Judgment and is not binding. The Court then considered the effect of the comments per se which the appellant's counsel suggested were made *per incuriam*. The Court observed that *per incuriam* as opposed to *obiter* are decisions made when a case or statute had not been brought to the Court's attention and the Court gives the decision in ignorance or forgetfulness of the existence of that case or statute per Lord Goddard CJ in **Huddersfield Police Authority v Watson**[14] **at page 196** following **Morelle Limited v Wakeling**[15].

The Supreme Court subsequently concluded that the order for compensation it made in 2008 was made after the Court considered a set of pictures depicting the purported improvements which pictures were not part of the evidence in the Court below. Furthermore, that having found the transaction or sale to be fraudulent, the Order for compensation was at variance with its earlier decisions by which it was

bound by *stare decisis* unless it can be shown that the earlier decision was wrongly decided and there is sufficient good reason to decline to follow it. It reasoned that this was not the case in the appeal before it. It concluded that the statement or comment was made *per incuriam*. The Order was accordingly varied or expunged.

The trial Judge in this appeal before us therefore, wrongly followed the earlier decision in that case which was revisited and varied for being *obiter* and *per incuriam*. However, there being no cross appeal on the Order for refund of the improvements/refurbishments to the guest wing, we will not interfere with that Order.

Reverting back to grounds two and three regarding the issue of sale of the guest wing and the Order of payment of rent of the guest wing, the Judge accepted that there was no formal lease regarding the guest wing but opined that the respondent was entitled to payment. He reasoned that the value of the vehicle of US$9,000 which the appellant claimed the respondent owed him would be insufficient to cover rentals from 2003 to date. Accordingly, that the amount should count towards the appellant's occupancy of the guest wing as well as any other moneys that

he paid, part of which could be deemed to have been gratuitous gifts to the respondent.

The appellant contends that this order was erroneous in law and fact as there was no lease agreement between the parties. And that having found that there was no valid contract for the sale of the guest wing, the Court should have ordered for refund of the purchase price of the guest wing. In our considered view the question here is about legal interpretation of whatever hazy agreement was between the appellant and the respondent over the guest wing. Did it constitute a lease agreement or was it a failed contract of sale?

Analysis of the evidence is clear that there was some sort of arrangement whereby due to the debts the respondent owed the appellant she allowed him to stay in the guest wing. The appellant then made some improvements and refurbished the guest wing. He claimed that the respondent had allowed him to make it habitable. Later she offered it to him to buy.

The circumstances are such that there is no written contract or evidence of any receipt or written memoranda regarding the sale of the guest wing.

In **Wesley Mulungushi v Catherine Bwale Mizi Chomba**[16], the Supreme Court held that for an oral contract to be valid, the note or memoranda thereto must contain the names of the parties to the contract and all the essential terms of the contract. This was the case with the main house, in *casu* where the trial judge accepted the receipt to constitute written memoranda.

In **David Howes and others v Betty Butts Carbin (sued in her capacity as Trustee of the Estate of the late Daisy Butts)**[17], receipts were held to be sufficient memoranda to satisfy section 4 of the Statute of Frauds since they specified the names of the parties, adequately identified the subject matter, and stated the nature of the consideration.

In *casu* the letter at page 113 of the record of appeal, from the respondent to the appellant depicts a contrary intention to the appellant's testimony that the parties had agreed to sale of the guest wing. The letter shows that the respondent was agreeing to proceed with

demarcation of the property. It is dated 3rd June 2013, which is long after the appellant claims to have paid the US$32,000 for the guest wing. To us, it is clear she was agreeing to subdividing the property in 2013; to separate the main house and from the guest wing which would defy logic if the appellant had bought both properties.

Furthermore, the respondent's bank statements which the appellant exhibited at trial do not show any payment of US$32,000 let alone K400,000.00 he alleged was the purchase price for the guest wing allegedly offered to him in 2009. The only money deposited from the appellant was in December, 2010 of K17,000.00 (rebased). The trial Judge was right in finding that there was no sale regarding the guest wing and not ordering refund of the alleged purchase price. We cannot fault him and therefore, we uphold this finding.

The question then remains was there a lease agreement between them? We have noted the circumstances under which the appellant occupied the guest wing. We note his arguments that he had never paid rent for occupying it. It is trite law that a lease agreement can be express or implied. An implied lease agreement should none the less have certain characteristics like paying or contributing some money to the landlord

periodically or paying for expenses like security and food. The agreement here was not for payment of rent or a lease agreement. To the extent that the trial Court found in favor of the respondent in its counter claim for rentals, the Judgment was erroneous because their relationship was not of landlord-tenant.

However, we are not saying the respondent has no avenue for relief. We are persuaded by the American case of **Kellog v Shushureba**[18] where it was observed that in such circumstances the plaintiff (respondent here) is entitled to relief based on the defendant's (appellant) occupation of the premises, even though he is not entitled to back rent where no rental agreement existed. It was observed that:

> ***"under the doctrine of unjust enrichment a party who receives a benefit must return the benefit if retention would be inequitable. Unjust enrichment applies if 'in light of the totality of the circumstances, equity and good conscience demand' that the benefitted party return that which was given".*** **Thus where** ***"a defendant received a benefit of staying in plaintiff's home without paying for that benefit, the retention of the benefit is unjust and he must pay for the value of the benefit."***

It is our considered view that it would be unjust enrichment of the appellant in the present case to receive the benefit of living in the guest wing from about 2003 when he bought the respondent a vehicle to date, without paying for the benefit. We take judicial notice that Olympia Extension where the property is situated is a prime area of Lusaka. Accordingly, we substitute the Order for payment of rentals and Order that the appellant should instead pay for the benefit of occupying the guest wing.

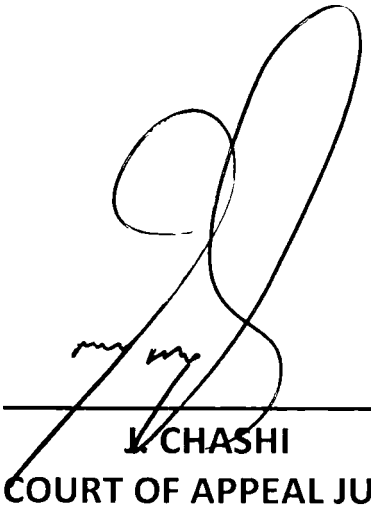
The Deputy Registrar should assess the value of the benefit less the value of the car at US$9,000.00, and the balance to be paid to the respondent.

Grounds two and three are therefore unsuccessful.

We would readily allow ground four. As argued by the appellant's counsel the law is clear that the property transfer tax is paid by the vendor. If the appellant has paid for it the amount of K30,000.00 be deducted from the amounts owed by the respondent to the appellant.

The appeal having substantially succeeded, we award costs both in this Court and below to the appellant, to be taxed failing agreement.

C.F.R MCHENGA
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL



J. CHASHI
COURT OF APPEAL JUDGE

J. Z. MULONGOTI
COURT OF APPEAL JUDGE