

IN THE COURT OF APPEAL OF ZAMBIA  
HOLDEN AT NDOLA  
(Civil Jurisdiction)

CAZ Appeal No. 60/2021  
CAZ/08/249/2021



BETWEEN

ANTHONY CHARLES MERVIN UYS 1<sup>ST</sup> APPELLANT  
ANTHEA ELIZABETH MURRAY 2<sup>ND</sup> APPELLANT

AND

NATALIE DANENE COOK 1<sup>ST</sup> RESPONDENT  
LEON STOLTZER 2<sup>ND</sup> RESPONDENT

**CORAM : Kondolo, Chishimba and Sichinga JJA**

On 22<sup>nd</sup> February, 2023 and 17<sup>th</sup> July, 2023

For the Appellant : Mrs. M. Kamwi of Messrs Kamwi Andeleki Legal  
Practitioners.

For the Respondent: Messrs. Silweya & Company ✓

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## J U D G M E N T

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**CHISHIMBA, JA delivered the Judgment of the court.**

**CASES REFERRED TO:**

- 1) Atlas Copco (Z) Limited v Andrew Mambwe SCZ Appeal No. 137 of 2001
- 2) Zambian Breweries Limited v Lameck Sakala SCZ Appeal No. 179 of 2009
- 3) Examinations Council of Zambia v Reliance Technology Limited SCZ Judgment No. 46 of 2014
- 4) Kitwe City Council v William Ng'uni (2005) ZR 57
- 5) Zambia Revenue Authority v Hitech Trading Company Limited (2001) ZR 17
- 6) National Housing Authority v Chali Tumelo SCZ Appeal No. 19 of 2007
- 7) Undi Phiri v Bank of Zambia (2007) ZR 186
- 8) Wilson Masautso Zulu v Avondale Housing Project Limited (1982) ZR 172

- 9) Zambia National Building Society v Ernest Mukwamataba Nayunda (1993) ZR
- 10) Chilufya v City Council of Kitwe (1967) Z.R. 115
- 11) Attorney General, Development Bank of Zambia v. Gershom Moses Burton Mumba (2006) ZR 77
- 12) Zambia Revenue Authority v Jayesh Shah SCZ No. 10 of 2001

### **LEGISLATION CITED:**

- 1) The Law Reform (Miscellaneous Provisions) Act Chapter 74 of the Laws of Zambia
- 2) The High Court Rules, Chapter 27 of the Laws of Zambia
- 3) The Judgment Act, Chapter 81 of the Laws of Zambia

### **OTHER WORKS CITED:**

1. Oxford Dictionary of Law 1997 Edition
2. Osborne's Concise Law Dictionary

## **1.0 INTRODUCTION**

At the time we heard the appeal, we sat with Sichinga JA who has since proceeded on long leave. This is therefore a majority decision.

- 1.1 This appeal is against the judgment of the Hon. Madam Justice C. B. Maka-Phiri dated 29<sup>th</sup> April, 2020. The learned Judge found for the respondents (the Plaintiff) on the claim for the refund of monies expended on a disputed property and awarded interest at 7% on the amounts to be found due after assessment from the date of writ to the date of payment.



- 1.2 In the court below also dismissed the counterclaim by the appellant (the defendant) for vacant possession of a disputed island, mesne profits and damages for unlawful demolition of structures.

## **2.0 BACKGROUND**

- 2.1 In the court below the respondents issued a writ of summons and statement of claim. They pleaded that they were intending purchasers of a lease from the appellants for Mala Island trading as Kulota Island and Safari Lodge together with the lodge equipment thereon all situate in Kazungula District of Southern Province. They averred that the appellants represented themselves to them as having a valid lease from the Government of the Republic of Zambia for Mala Island.
- 2.2 On 1<sup>st</sup> August, 2013, the appellants and respondents entered into an agreement for the sale and assignment of Mala Island at the price of US\$300, 000.00. In view of the agreement, the respondents occupied the island and allegedly invested the sum of GBP£160, 000.00 in constructing five chalets, a water pumping station and undertaking the construction of bridges and other works on the island.

- 2.3 It was agreed that the purchase price would be deposited in a trust account pending the registration and transfer of the property. In due course, the respondents discovered that the appellants had no valid lease for Mala Island.
- 2.4 The respondents were subsequently evicted from the island by the appellants prompting the respondents to commence an action against them seeking several reliefs.
- 2.5 In their defence, the appellants denied holding themselves out as having a valid lease for Mala Island or that the respondents spent the sum of GBP£160, 000.00 in respect of the alleged construction works. They averred that the respondents failed to pay the purchase price. Therefore, they have the right to evict them from the property for occupying and operating Kulota Island and Safari Lodge without their consent. It was also pleaded that the respondents demolished some of the appellant's structures on the island.
- 2.6 In their counterclaim, the appellants averred that after failing to pay the purchase price of US\$300, 000.00, the respondents continued occupying and operating Kulota Island and Safari Lodge as a business. The appellants claimed that as a result of the aforementioned they have suffered loss and damage.



2.7 By consent, the parties in the lower court agreed to narrow down the issues for determination resulting in the respondents pursuing the claim for an order for the refund of the sum of GBP£160, 000.00 invested on the island. The appellants' claims were also narrowed down to seeking an order for vacant possession of Kulota Island and Safari Lodge, mesne profits from 31<sup>st</sup> July, 2015 to date and damages for unlawful demolition of structures namely, the bridge, decking, fishing camp, six chalets and the locker.

### **3.0 EVIDENCE IN THE COURT BELOW**

- 3.1 At the trial, the sole witness for the respondent was Natalie Danene Cook (PW1) whose testimony, in brief, was that the respondents and appellants entered into an agreement for the sale of Mala Island trading as Kulota Island and Safari Lodge for US\$300, 000.00 on 1<sup>st</sup> August, 2013. The respondents moved on the island on a two year lease for purposes of marketing and making the island a viable business.
- 3.2 Due to the dilapidated state of the infrastructure on the island, the respondents put up five chalets with the consent of the appellants. She conceded that the purchase price was not paid

on the due date and that a new deadline was fixed by the appellants being 28<sup>th</sup> February, 2017.

3.3 The non-payment of the purchase price and differences between the parties arising from the discovery that the appellants had no valid lease from the government for the island, led to the appellants forcing the respondents off the island on 7<sup>th</sup> September, 2017.

3.4 In cross-examination, PW1 stated that the respondents occupied the island on the basis that the appellants would complete the documentation for the island so that the purchase price could be paid. She admitted that they did not pay the purchase price but insisted that they could only vacate the island upon the appellants refunding them the sum of GBP£160, 000.00 spent in renovations and erection of chalets.

3.5 DW1, Anthony Charles Uys testified that the respondents came as tenants on Mala Island after executing the sale agreement with the intention to purchase it. The respondents failed to pay any sums towards the purchase price even after being granted an extension of time within which to pay. In in 2016, DW1 became aware that the respondents were trying to transfer the interest in Mala Island to themselves.



- 3.6 DW1 told the court that it was a term of the agreement that the respondents would maintain the property in lieu of rentals but that most of the structures are still in the same condition as when the respondents moved in.
- 3.7 DW1 however conceded that the five chalets were built by the respondents. He prayed that an assessor be appointed by the court to determine the value of the structures erected on the island by the respondents.
- 3.8 DW1 stated that the respondents should be ordered to pay rentals from the date they occupied Mala Island in 2013 or in the alternative, from 2015 when the contract of sale was rescinded.
- 3.9 In cross-examination, DW1 explained that the trust fund account for the purchase price was not set up because the respondents had asked for two more years in which to pay the purchase price. He denied that the respondents are entitled to any compensation.
- 3.10 DW2, Goddwin Sianga, worked as a general worker on the island between 2007 and 2013. He testified that when the respondents took over the island, the structures left by the appellants were in good condition. The destruction of some of

the structures such as the bridge and deck started when the respondents moved on the island. According to the witness, the appellants built five chalets before leaving the island.

3.11 In cross-examination, DW2 admitted that a truck fell on the bridge before the respondents occupied the island. At the material time, the bridge was under construction. At the time he stopped working for the respondents, some structures were still under construction.

#### **4.0 JUDGMENT OF THE COURT BELOW**

4.1 The learned Judge found that the sale agreement between the parties was rightly rescinded by the appellants when they evicted the respondents due to the failure of the respondents to pay the agreed consideration or part thereof. The court below found that though the respondents put up some structures and completed those left by the appellants, the evidence regarding the value of the works done was unsatisfactory as there were no receipts of items bought or labour hired to help the court quantify the exact amount expended by the respondents.

4.2 However, as the appellants did not dispute the fact that the respondents spent some money in carrying out the works; that there was a consent order to have the works done valued; and



in view of the undisputed evidence of items bought and fitted, the lower court accepted that the respondent's evidence that they actually effected the projects.

4.3 The learned Judge then referred the matter to the District Registrar for assessment of the value of works done. She awarded interest at 7% on the amount to be found due from the date of writ to the date of payment.

4.4 With respect to the appellants' claim for vacant possession, the court below was of the view that justice would only prevail if the respondents' received their claim first before giving vacant possession of Mala Island. She thus ordered that the respondents remain on the island pending assessment and the subsequent payment of the assessed amount by the appellants.

4.5 On the claim for mesne profits, the court below took the view that when the agreement was rescinded on account of the failure of the respondents to pay the agreed consideration, the parties' relationship became that of licensee and licensor because the respondents continued occupying the island. The occupation was merely to use the premises and nothing more. The license to occupy the island prevented what would

otherwise have been a tort of trespass on the part of the respondents.

4.6 There being no proof of payment of rent and the length of the term of a lease, the court below found that the appellants did not discharge their duty by adducing evidence to enable the court make an order for mesne profits.

4.7 The lower court dismissed the claim for damages for unlawful demolition of structures having believed the version of the respondents that the removal of some of the poles to the chalets and replacement of the bridge, decking and fishing camp was in the course of their responsibility to maintain Mala Island.

4.8 Consequently, the respondents claim succeeded and the appellants' counterclaim failed.

## **5.0 GROUND OF APPEAL**

5.1 The appellants being dissatisfied with the decision of the lower court, appealed advancing six grounds couched as follows:

- 1) ***The court below erred in law in awarding interest at the rate of 7% interest from the date of the writ of summons to the date of payment contrary to the provisions of the law;***
- 2) ***The court below erred in law when it failed to or did not give sufficient consideration to the pertinent principle of the effect of rescission of a contract viz: "to restore the parties to their original positions" when it allowed the respondents continued***



- occupation of the appellants' property after holding that the sale was properly rescinded; and*
- 3) *The court below erred in law and fact when it ordered the appellants recompense the respondents for the value of a list of structures erected on the appellants' property;*
- (i) contrary to her finding that the whole of the respondents main claim of GBP£160, 000.00 had failed;*
  - (ii) in the absence of any documentary evidence adduced by the respondents allowing them to put up any structures on the appellants' property; and*
  - (iii) contrary to the evidence adduced by the appellants indicating that the respondents were to maintain the appellants' property in lieu of rentals during the period of occupation pending sale.*
- 4) *The learned trial Judge erred in law and in fact when she ordered the respondents recompense for the value of structures erected on the appellants' property and considered the respondents' list of structures built in their submissions when the same was not specifically pleaded, cross-examined and supported with any documentary evidence or list of items produced in the pleadings to prove the respondents' claims;*
- 5) *The learned trial Judge erred in law and in fact when she held that the relationship between the appellants and respondents became that of licensor and licensee and;*
- (i) failed to adjudicate on the position or relationship of the appellants and respondents after the expiration of time by the respondents to purchase the property;*
  - (ii) allowed the respondents to continue occupying the appellants' property without paying rent until assessment; and*
  - (iii) denied the appellants' claim for mesne profits contrary to the evidence on record which indicated that the appellants*

*around 2017 moved to evict the respondents from the property after the sale failed.*

- 6) *The trial Judge erred in law and fact when she failed to consider the appellants' evidence on record and order that the appellants be compensated for the destruction of their structures on the property by the respondents.*

## **6.0 APPELLANT'S HEADS OF ARGUMENTS**

6.1 The appellants filed heads of argument in support of their appeal on 6<sup>th</sup> April, 2021. In ground one, the appellants challenge the award of interest at 7% per annum from date of writ to date of payment. That while it is trite that courts are entitled to determine the rate of interest payable from date of judgment until full settlement, the rate should not exceed the current lending rate as determined by the Bank of Zambia.

6.2 In support thereof, the appellants cited some provisions of the law beginning with **section 4 of the Law Reform (Miscellaneous Provisions) Act Chapter 74 of the Laws of Zambia** which provides as follows:

*4. In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:*



This was followed by **Order 36 Rule 8 of the High Court Rules Chapter 27 of the Laws of Zambia** which reads as follows:

*8. Where a judgment or order is for a sum of money, interest shall be paid thereon at the average of the short-term deposit-rate per annum prevailing from the date of the cause of action or writ as the court or judge may direct to the date of judgment.*

Lastly, **section 2 of the Judgments Act Chapter 81 of the Laws of Zambia** was also cited which states that:

*2. Every judgment, order, or decree of the High Court or of a subordinate court whereby any sum of money, or any costs, charges or expenses, is or are to be payable to any person shall carry interest as may be determined by the court which rate shall not exceed the current lending rate as determined by the Bank of Zambia from the time of entering up such judgment, order, or decree until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment, order, or decree.*

6.3 The appellant also placed reliance on the cases of **Atlas Copco (Z) Limited v Andrew Mambwe** <sup>(1)</sup> and **Zambian Breweries Limited v Lameck Sakala** <sup>(2)</sup> wherein the Supreme Court guided that interest up to date of judgment should be at the average lending rate as determined by the Bank of Zambia. That the standard practice on debts is to award interest on the sum owing at the average short term bank deposit rate from the date of issue of the writ of summons to the date of judgment and

thereafter, to the date of settlement, interest is awarded at the current lending rate as determined by the Bank of Zambia.

6.4 Grounds two, three and four were dealt with together. The appellants submitted that the object of rescission of contract is to extinguish it and restore the parties to their pre-contractual positions and cancel the contract from the beginning as if it never existed, and that each party must so far as is possible, be restored to the other benefits received under the contract. It is not in dispute that the contract was rescinded and that the court below properly established that fact but neglected to consider the effect of rescission of contract on the parties when it allowed the respondents to continue occupying the appellants' property.

6.5 It was further contended that the decision of the court below to order recompense to the respondents for the value of the structures erected on the appellants' land and continued stay and use of the same after finding that the contract was properly rescinded, was against the evidence tendered and totally perverse. On the authority of the case of **Examinations Council of Zambia v Reliance Technology Limited** <sup>(3)</sup>, this court was invited to interfere with the findings of fact of the trial court.



- 6.6 The appellant outlined the findings of the trial court sought to be interfered with for being contrary to the evidence and totally perverse. The first is the finding that the respondents' occupation of Mala Island was merely to use the premises and nothing more and that the respondents' obligation to the appellants was to maintain the island. The second is the acceptance of the respondents' evidence that they actually effected the projects as listed at page 29 of the record of appeal.
- 6.7 It was argued that the finding that the respondents' obligation was to maintain the land and then order that they be compensated for works done on the property based on a mere list in the respondents' submissions in the court below, in the absence of evidence proving that the stated works were effected, fell below the requisite burden on the respondents to prove their claim. That this was a misdirection on the part of the court below for which reason, the order for assessment and that the respondents continue to occupy the appellants' property ought to be discharged.
- 6.8 The cases of **Kitwe City Council v William Ng'uni** <sup>(4)</sup> and **Zambia Revenue Authority v Hitech Trading Company Limited** <sup>(5)</sup> were called in aid where it was held that a court is

not bound to consider counsel's submissions because they are not a substitute for sworn evidence but are only meant to assist the court in arriving at a decision.

6.9 Lastly, in grounds five and six, the appellants took issue with the order of the court below allowing the respondents' continued occupation of the their property without paying rent until assessment, and subsequent payment of the assessed amounts after finding that the sale agreement was properly rescinded when the appellants evicted the respondents.

6.10 It was argued that the respondents' interest in the appellants' property came to an end when the sale agreement was rescinded and the appellants moved to evict the respondents. Therefore, the continued use and occupation of the property kept the appellants out of use of their own property for which they ought to be compensated. That the court below misdirected itself in denying the appellants mesne profits contrary to the evidence on record.

6.11 The appellant cited the case of **National Housing Authority v Chali Tumelo** <sup>(6)</sup> particularly page J19 where **Osborne's Concise Law Dictionary** was quoted for the definition of mesne profits as being:



*"The profit lost to the owner of land by reason of his having been wrongfully dispossessed of his land".*

In the same judgment, **Oxford Dictionary of Law 1997 edition**, was also resorted to on the definition of mesne profits and was cited as stating that mesne profits were

*"Money that a landlord can claim from a tenant who continues to occupy property after his tenancy ends, the amount being equivalent to the current market rent of the property."*

## **7.0 ARGUMENTS BY THE RESPONDENTS**

7.1 On 9<sup>th</sup> June, 2021, the respondents herein filed their heads of arguments. In ground one, the respondents submit that it is trite law that the court is empowered to impose interest on a judgment sum pursuant to **section 2 of the Judgment Act** and **Order 36 rule 8 of the High Court Rules**. It was contended that the award of interest at 7% per annum from date of writ until final payment of the judgment sum is within the ambit of the law.

7.2 It was further argued that the court below was lenient enough in not awarding further interest after the date of judgment at commercial lending.

7.3 Grounds two, three, four, five and six were argued together. It was submitted that the contract was rescinded on the premise

that time was of the essence as the respondents failed to pay the purchase price of US\$300, 000.00. The court below was on firm ground to make an order to recompense the respondents for the value of the structures erected on the appellants' property as the appellants never disputed and they consented. That the claim for GBP£160, 000.00 succeeded and the only thing the court below did was to refer it to the assessment process to ascertain the said sum.

7.4 Citing the case of **Undi Phiri v Bank of Zambia** <sup>(7)</sup>, it was submitted that it is trite law that if a party does not object to evidence on an un-pleaded matter immediately it is adduced, the court is not precluded from considering that evidence. Therefore, the court below was on firm ground to consider evidence on the structures built by the respondents on the appellants' property as the same was adduced by the respondents, and the appellants not only conceded to it but also never objected to it.

7.5 It was further contended that the lower court was on firm ground to hold that the relationship between the appellants and respondents was that of licensor and licensee as the respondents were allowed to stay on the property by the



appellants, and that there was no tenancy agreement. That the claim for mesne profits failed because it was neither backed by the law or by the evidence to entitle the appellants to judgment being entered in their favour.

7.6 The case of **Wilson Masautso Zulu v Avondale Housing Project Limited** <sup>(8)</sup> was called in aid where the Supreme Court guided that a plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent's case. Therefore, the learned trial Judge was on firm ground to hold that the respondents' obligation on the property was to maintain the same property. Consequently, the replacing of the poles on the Chalets and repair of the bridges does not amount to destruction of such structures. As a result, the appellants are not entitled to any compensation.

7.7 Lastly, the respondents contend that an appellate court can only reverse findings of fact by a trial judge if satisfied that the findings in question were either perverse or made in the absence of any relevant evidence, or upon a misapprehension of the facts, or that they were, on a proper view of the evidence, such that no trial court acting correctly could reasonably make. That



in this case, there was no misapprehension of facts or perverse decision made by the trial court.

## **8.0 DECISION OF THE COURT**

8.1 We have considered the appeal, the arguments and authorities cited by the Learned Counsel for the parties. The appellants have raised six grounds of appeal. We will not determine them in the order raised as doing so will make the judgment haphazard.

8.2 It is not in dispute that the parties executed a formal agreement for the (lease) sale and assignment of Mala Island trading as Kulota Island and Safaris on the 1<sup>st</sup> of August 2013. The agreed purchase price being US\$ 300,000. The said purchase price was not paid by the date agreed namely 31<sup>st</sup> July 2015. Arising from the above, the appellants demanded that the intending purchasers vacate the Island. Therefore, the respondent, commenced the action before court. The appeal is in respect of the lower court's decision earlier highlighted in paragraph 4.0.

8.3 The issues for determination in our view are as follows:

- (i) Whether the respondent had proved its claim for refund/ compensation in respect of the value of structures (works) built/erected on the Island.**

- (ii) Whether the appellants had proved its counter-claim for damages for unlawful demolition of structures against the respondents.
- (iii) Whether the court erred by failing to award mesne profits against the respondents for occupation of the Island and allowing the respondents continued occupation until assessment of the sum and payment of assessed sum.
- (iv) Whether the nature of the relationship between the parties after termination of the contract sale was of Licensor and Licensee or become one of landlord and tenant.
- (v) Whether the court erred by awarding interest at 7% on the amount to be found due from date of writ to date of payment.

8.4 In grounds two to four, the appellant argued that the parties ought to have been restored to their original positions upon the contract being rescinded; and that the respondents should not have been compensated for the value of the structures there being no evidence to support the claim.

8.5 In respect of the claims for compensation of money for the value of works/structures undertaken, the respondent claimed the sum of £160,000 invested on the Island. PW1's evidence was

that the structures at the time of moving onto the Island were in a state of disrepair, rotting and falling apart. The tents were badly withered, the bridge from the main Island was unstable and sagged. In fact a Tata truck fell on the bridge prior to possession of the Island. Permission was obtained from the appellant to pull down the said structures and to build Chalets. Evidence of the said construction of the five Chalets was adduced.

8.6 The respondent testified that five Chalets were constructed, fittings, plumbing, taps, electricity, generators and a bridge were put up in addition to a new storeroom. That the written contract came to an end in 2015. The respondents stayed on the property because of the injunction.

8.7 Further that they were never tenants and would only vacate the Island after refund of the sum of £160,000 expended was paid. In addition the respondents conceded that they did not produce the receipts in court to show that the sum of £160,000 was actually spent on investments in the lodge.

8.8 The appellant on the other hand testified that prior to the contract, they had built structures on the Island such as a 75 meter bridge, a 135 meter walk way, built six Chalets, men's and women's ablution block, a store room and a house. The



total cost in 2007 was K638,441 and current cost being K1,095,063. Further that at one point a Tata Truck did fall through at the bridge whilst under construction.

8.9 DW1 conceded that 5 Chalets were built by the respondents but disputed the claimed value of £160,000 and stated that the costs of any works put up by the respondents be valued.

8.10 In cross examination, DW1 conceded that the respondents were in occupation with their consent.

8.11 DW2 testified that he was not working at the Island at the time the respondents built the structures being claimed.

8.12 The evidence on record shows that the appellants implicitly admitted or conceded to the fact that the respondents built structures on the property when they entered a consent order to have Kulota Island and Safaris Lodge undergo a valuation to determine the market value of the property. By this consent, the appellants were indicating that some works had been done on the property by the respondents.

8.13 Secondly, in his evidence, DW1 did not appear to challenge the assertions of PW1 that due to the dilapidated state of the lodge, they put up five chalets on the island with the appellants' consent and carried out a number of works.

8.14 DW2's evidence that the respondents did not build or repair any structures can be discounted as he left the place in 2013 when the respondents came to the island. Therefore, DW2 was not present when other works were being carried out. In our view, the respondents did adduce evidence showing that they constructed five Chalets, a bridge and the other works highlighted earlier. The only issue was the value of the structures built by the respondents who did not produce the actual receipts for the works undertaken. Therefore, the court below was on firm ground to award the respondents refund of the money spent in carrying out the works to be assessed by the Deputy Registrar.

8.15 The fact that the court below considered the list of items and works done by the respondent is immaterial in view of PW1's evidence which was largely unchallenged.

8.16 It cannot be argued that the contract being rescinded, the parties should be restored to their former positions on account of the value added to the property by the respondents. To do otherwise would amount to unjust enrichment of the appellants. Thus in **Zambia National Building Society v Ernest Mukwamataba Nayunda** <sup>(9)</sup> it was held that:



*"The essence of damages has always been that the injured party should be put, as far as monetary compensation can go, in about the same position he would have been had he not been injured. He should not be in a prejudiced position nor be unjustly enriched."*

8.17 The second issue to be determined is in respect of the alleged unlawful demolition of the appellants structures (ground six). The appellants allege that the respondents damaged their property on the island. In our view, this claim is not supported by the evidence on record which shows that in fact, the respondents made improvements to the island. The appellants contend that the respondent demolished their structures to the current value of K1,095,063. The evidence on record was that the alleged demolished structures were in a state of disrepair. Evidence was adduced showing the state of disrepair. As regards the bridge, it was damaged prior to the respondents moving onto the premises by a truck that fell onto it, partially submerging the bridge into the water. The respondents were permitted to maintain the premises and removed rotting poles replacing them accordingly. Therefore the appellants failed to prove its counter claim for unlawful demolition of structures.

8.18 As regards the claims for mesne profits for continued occupation of the Island, the appellants contend that, the contract having been rescinded, they ought to be paid mesne profits by respondent who had continued occupying the property.

8.19 The Learned trial Judge addressed the principle of law which dictates that where a person is wrongfully deprived of use of his property, he/she is entitled to damages known as mesne profit for loss suffered as a result of anothers use of that property. The trial-judge had to first determine the nature of the relationships between the parties: whether it was of landlord/tenant, vendor/purchaser or licensee/licensor.

8.20 The initial agreement between the parties was a contract of sale and assignment of the appellants rights in the Island to the respondents for £300,000. After the agreement fell through, the respondents remained on the premises by consent of the appellants. The parties' obligations which are not disputed are that the respondent were allowed use of the premises on condition that they maintain the Island. The learned trial Judge was therefore on firm ground in holding that the true nature of the relationship between the parties was that of licensee and



Licenser by virtue of the subsequent agreement. Therefore, the court below did not err by refusing to award mesne profits as they are inapplicable in the circumstances of this case where the respondent was allowed to remain in occupation of the property.

8.21 The other issue raised for determination is in respect of the judgment order of the court below allowing the respondents continued occupation of the Island, until assessment of the sum in respect of the value of structures and payment of the assessed sum.

8.22 We hold the view that the court below erred by allowing the respondents to continue to be in occupation and having the benefits of use of the premises until assessment of the sum due in respect of the value of works and payment of the same. The court ought not to have ordered continued occupation. The reason being that a judgment sum is enforceable and the respondents are or would be at liberty to execute. Therefore there was no basis to order continued occupation of the Island by the respondents until payment of the assessed judgment sum.

8.23 We therefore set aside the order of the court below and substitute it with an order that vacant possession of the Island be yielded to the appellants within 30 days from date hereof, failure to which the appellants shall be at liberty to enforce the order by issuance of a writ of possession. We find merit in the second ground of appeal. The court below erred in fact and law. It should not have granted the respondents continued occupation after holding that the sale was rescinded.

8.24 Ground five, assails the finding by the court below that the relationship existing between the parties was that of licensor and licensee. We had earlier under paragraph 8.19 determined this issue. We will expand it by distinguishing a licence from a lease. In the case of **Chilufya v City Council of Kitwe** <sup>(10)</sup> it was held that:

- (iii) *An exclusive right to do something on a property (as opposed to exclusive possession thereof) is merely a licence;*
- (iv) *The effect of a licence is to give the licensee an authority to use the premises, without which he would be treated as a trespasser;*
- (v) *A licence may be either gratuitous or for value. If the latter, the consideration may be given either once for all or by periodic payment.*



8.25 In this case, it is not in dispute that the appellants allowed the respondents to be on the island without charging any rent. Further, the evidence of PW1 shows that the respondents were allowed to move onto the island for purposes of marketing and making the island a viable business with the purchase price to be paid after the agreement. The appellant testified that no rent was payable in exchange for the respondents maintaining the premises.

8.26 Clearly, the licence was gratuitous in the absence of the payment of any rent and the respondents were allowed onto the island. Therefore, the court below was on firm ground to find the existence of a licensor/licensee relationship between the parties.

8.27 The last issue to be determined is that raised in ground one. The appellants contend that in awarding interest, the court below should not have made an award that exceeds the current bank lending rate as determined by the Bank of Zambia. The record shows that the court awarded interest at the rate of 7% per annum from the date of writ to the date of payment on the amount to be assessed by the deputy registrar for the value of the structures built.

8.28 The respondents in their writ and statement of claim claimed a refund of the foreign currency sum of US\$ 160,000=00. The court below found that the respondents had put up some structures and completed those left by the appellants though the evidence regarding the value of works done was unsatisfactory as there were no receipts of items bought etc. As earlier indicated, the learned trial Judge referred the matter for assessment of the value of works done and awarded interest at 7% on the amount found due.

8.29 It appears to us that the learned trial Judge awarded the rate of 7% bearing in mind that the amount sought or claimed was in a foreign currency. The issue is twofold, what is the interest rate applicable on foreign currency and on the Kwacha judgment debt. In the latter, **section 2 of the Judgment Act** stipulates the interest awarded to be ***“at the rate as may be determined by the Bank of Zambia, from the time of entering up of such judgment, order or decree until the same shall be satisfied.”*** Order 36 rule 8 of the HCR provides that the interest to be paid on a judgment or order for a sum of money, shall be ***“at the average of the short-term***



*deposit rate per annum prevailing from the date of the cause of action .... to the date of judgment”.*

8.30 **Section 4 of the Law Reform (Miscellaneous Provisions) Act**

requires that the interest awarded be at such a rate as the court thinks fit for the period between the date of when the cause of action arose and the date of judgment.

8.31 In **Zambian Breweries Limited v Lameck Sakala** <sup>(2)</sup> cited by the appellants, the Supreme Court guided that:

*“... As to the rate of interest and the effective date, the standard practice on debts, is to award interest on the sum owing, at the average short term bank deposit rate, from the date of issue of the writ of summons to the date of Judgment. This is pursuant to Order 36, Rule 8 of the High Court Rules. Thereafter, up to the date of settlement, interest is awarded at the current lending rate, as determined by the Bank of Zambia. This is pursuant to Section 2 of the Judgments Act, CAP 81 of the Laws of Zambia, as amended by Act No. 16 of 1997.”*

8.32 In respect of a kwacha denominated judgment, interest is payable from the date of issue of the writ of summons to the date of judgment at the average short term bank deposit rate. Thereafter interest is awarded at the current lending rate, as determined by the Bank of Zambia.

- 8.33 In respect of the award of interest on foreign currency, it is trite
- that the court has the power to give judgment for payment of money in a foreign currency where the action is brought to enforce a foreign money obligation. In the case of **Attorney General, Development Bank of Zambia v. Gershom Moses Burton Mumba** <sup>(11)</sup> with regard to the interest rate on the US\$, the court stated that the interest on foreign currency is generally low and awarded interest on the dollar component of the damages at 3% from date of Notice of complaint until final Payment.

8.34 In the **Zambia Revenue Authority v Jayesh Shah** <sup>(12)</sup> an appeal against the allowance of a rate of interest at 18% awarded on the dollars, the Supreme Court held as follows:

*"It seems to us that an inquiry could easily have been held below to ascertain what could be considered to be a fair average rate of interest on dollar deposits in an interest bearing account. From the figures tendered by the parties, ranging from a low saving rate of 2.5 per cent to 3.1 percent obtained by the appellant to the rather higher rate of 12 per cent to 18 per cent in First Alliance Bank and even 21 percent suggested from Credit African Bank an average rate on interest could have been selected. We also take into account the rate in Order 42 of the White Book. Rather than remit the case below for such an exercise to be conducted, as Mr. Banda suggested, we are in a position to do so on the material on*

*record and in keeping with the requirement for finality to litigation whenever possible. It seems to us a fair rate is to be found half way between the two extremes and this we consider to be 10 per cent. Accordingly, we allow the appeal against a rate of interest of 18 per cent and substitute one of 10 per cent. The same should also apply as the post judgment rate.*

8.35 It is trite that the applicable interest rate on foreign currency judgment debt is at the LIBOR rate, which is generally low. Currently the GBP LIBOR rate ranging between 3.97% to 4.70%. The respondents sought a foreign currency sum of £160,000 which was ordered to be assessed.

8.36 In our view, the court below erred by awarding 7%. The court below ought to have awarded interest on the assessment sum from date of writ of summons to date of final payment at the LIBOR rate.

8.37 We therefore set aside the award of 7% and substitute it with the applicable interest at four percent (4%) from date of writ to date of complete payment.

## 9.0 **CONCLUSION**

9.1 The appeal succeeds on grounds one and two. Ground three to six are dismissed. We reiterate that the court erred by allowing the respondents to continue being in occupation and having the




benefits of the use the Island until assessment and payment of sums due in respect of value of works. Further that the court erred by awarding interest at 7% from date of writ to date of final payment. The above holdings by the court below are hereby set aside and substituted with the following orders:

- (i) An order that vacant possession of the Island be yielded to the appellants within 30 days from date hereof, failure to which the appellants shall be at liberty to enforce the order by issuance of a writ of possession.
- (ii) Interest on the assessment sum found due in respect of value works done at four percent (4%) from the date of writ to date of complete payment.

9.2 The appeal having substantially succeeded, we award costs to the appellants to be taxed in default of agreement.

  
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**M. M. Kondolo, SC**  
**COURT OF APPEAL JUDGE**

  
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**F. M. Chishimba**  
**COURT OF APPEAL JUDGE**

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**D. L. Y. Sichinga, SC**  
**COURT OF APPEAL JUDGE**