

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICTREGISTRY
HOLDEN AT KITWE

2011/HK/410

(CIVIL JURISDICTION)

BETWEEN:

FRANK CHALE JIYA (MALE)	-	1ST PLAINTIFF
PHOEBE CHISAKULO JIYA (Married Woman)	-	2ND PLAINTIFF
AND		
SITEMBA AGREY PEVERIL (MALE)	-	DEFENDANT

Before the Hon. Mr. Justice I.C.T. Chali in Open Court on the 16th day of April, 2013.

For the Plaintiffs: Mr. S.A.G. Twumasi – Kitwe Chambers

For the Defendant: Mr. C. Kaela – Messrs Katongo and Associates

JUDGMENT

Cases referred to;

- 1. Mobil Oil (Zambia) Limited v. Loto Petroleum Distributors Limited (1977) Z.R. 336,*
- 2. Mwenya And Another v. Kaping'a (1998) Z.R. 17*
- 3. Anderson Kambela Mazoka And Others v. Levy Patrick Mwanawansa And Others (2005) Z.R. 138,*
- 4. Wesley Mulungushi v. Catherine Bwale Mizi Chomba (2004) Z.R. 96*

Legislation referred to;

- 1. Statute Frauds, 1677 (UK)*

This is an action for, inter alia, a declaration that the Plaintiffs are entitled to the ownership of Plot Number 353 Itimpi, Kitwe. Further or in the alternative, the Plaintiffs seek an order of specific performance of the contract of sale of the said property by the Defendant to the Plaintiffs, and for damages for breach of contract.

In their Statement of Claim, the Plaintiffs pleaded that in or about 1991 the Defendant offered the said property for sale to the 1st Plaintiff at a price of K900,000. Among the terms of the said contract were that the 1st Plaintiff would pay the purchase price in four instalments; that the purchaser would take possession and occupation of the property upon payment of the full purchase price; and that the property would be registered in the name of the 2nd Plaintiff.

The Plaintiffs further pleaded that the parties engaged Messrs Kaweche and Company, a firm of lawyers, to handle the transaction and to register the property as aforesaid. Further and pursuant to the said agreement, the Plaintiffs made full payment of the said purchase price and, in or about 1991, took possession and occupation of the property and have been in occupation thereof ever since. However, the Advocate who had been instructed to handle the transaction died before he could register the change of title. Thereafter the Defendant has refused to complete the transaction which refusal, the Plaintiffs claim, amounts to a breach of contract. Hence these proceedings.

In his defence, the Defendant denied that there was an agreement for the sale of his property at K900,000. He stated that it was the 1st Plaintiff who expressed interest in purchasing the property and paid to the Defendant a commitment fee of K200,000. He further stated that the purchase price was not agreed upon and no contract of sale was ever executed between the Defendant and the 1st Plaintiff regarding the sale of the property. The Defendant stated that the 1st Plaintiff took possession of the property after paying the aforesaid commitment fee. The Defendant denies having been in breach of any contract of sale and states that the Plaintiffs are not entitled to any relief.

Further, the Defendant has raised a counterclaim in which he states that the Plaintiffs have been mere licencees on his property. He stated that the 1st Plaintiff has been out of jurisdiction thereby making it difficult for the Defendant to take action against the 1st Plaintiffs' family which has been in occupation of the property out of the Defendant's sympathy. The Defendant pleaded that the Plaintiffs have not paid anything to the Defendant during the time they have occupied the property, but have instead incurred huge debts on the property by way of water and electricity bills as well as Council and land rates.

On account of the foregoing, the Defendant counter claimed, inter alia;

1. A declaration that he still is the owner of the said property;
2. An order of possession of the property;
3. An order for the payment of mesne profits; and
4. An order for payment by the Plaintiffs of all bills incurred by them over the property.

At the trial of the action the 1st Plaintiff (PW1) testified that between 1990 and 1991 he was looking for a property to buy in Kitwe. In due course, he met a Mr. ELIAS TEMBO, who used to have an office near his, who told him that he knew of someone who was selling a property in the Garneton, otherwise also known as the Itimpi, area of Kitwe. PW1 expressed an interest and asked Mr. TEMBO to request the owner of that property for permission to inspect it. Mr. TEMBO got the permission and took PW1 to the office. It was on Plot 353 or No. 111 DOLOMITE ROAD, Garneton. After the said inspection, arrangements were made to meet with the owner of the property, who happened to be the Defendant in this case and whom PW1 had previously known when the two used to live in Garneton.

Mr. TEMBO took the Defendant to PW1's office at the 2nd Class Trading Area of Kitwe. The Defendant was accompanied by a Mr. NYIMBIRI. Mr. TEMBO left PW1's office before the discussions over the property began. That left PW1, the Defendant and Mr. NYIMBIRI. At the said meeting the Defendant confirmed to PW1 that it was his property

and that he was selling it. The Defendant was asking for K1,000,000 but said he could settle for K900,000 as the purchase price. The parties then agreed on K900,000 as the price for the property. The parties further agreed that PW1 would pay the said price in four instalments. At the end of the meeting they drew up an agreement on the said terms which both signed, whereupon PW1 paid the Defendant the sum of K200,000 cash towards the purchase price.

Up to that point in time the parties had not involved the services of any lawyers. However, on his own accord PW1 went to consult Mr. BALDWIN KAWECHE, a lawyer at the law firm of KAWECHE AND COMPANY. The lawyer advised PW1 not to pay the Defendant any further amounts until both had received legal advice. PW1 informed the Defendant accordingly whereupon they both went and met with the lawyer. They both agreed that future payments should be made through the lawyer or with his knowledge and that the Defendant would be issuing a receipt for each payment made. A formal agreement of sale was drawn up by the lawyer which both parties signed. In due course the Defendant requested the lawyer, who also agreed, to act for both parties in the transaction.

PW1 said that through the said arrangements he managed to pay off the full purchase in the four instalments that had been agreed. Thereafter a meeting was convened at the lawyer's office at which Mr. NYIMBIRI was present and at which the Defendant agreed to PW1 taking possession of the property, which was in fact a residential house. At the said meeting a question arose as to who was to pay the taxes, ground rates, electricity and other utility bills that were found to be outstanding. Since it appeared to PW1 that the Defendant had not saved some money for those costs, PW1 agreed to settle them himself. The Defendant was requested to surrender all the documents relating to the property to the lawyer so that the lawyer could apply for the necessary consent to assign and prepare the assignment. At that point PW1 instructed the lawyer to have the property assigned to PW1's wife, the 2nd Plaintiff in this case. This was in the presence of the Defendant and Mr. NYIMBIRI.

PW1 further testified that after taking possession and before actual occupation of the house he contracted Mr. TEMBO to do some renovations to the property. He said he occupied the house some time towards the end of 1991 and that it has been occupied by his family ever since.

Before PW1 left for Malawi sometime in 1993, he said he used to check upon the lawyer to find out the progress on the papers for the property. By the time he left for Malawi the transfer had not been concluded. He left the family in the house and would visit Zambia from time to time when he could also see the lawyer. However, the process was delayed because the lawyer was sickly and he eventually died before the transfer was effected. PW1 said that attempts to retrieve the file relating to the property from the law firm after the lawyer's death proved fruitless. At the trial PW1 was only able to produce two letters from the law firm to the 2nd Plaintiff which were dated 9th December, 1997 and 30th March, 1998. I propose to revert to the said letters later in this judgment.

PW1 said that at the time of paying the K200,000 the witnesses to the agreement were Mr. NYIMBIRI, the Defendant's friend, and Ms. EVELYN PHIRI who used to work at PW1's office. He said both witnesses have since died. He said that the K200,000 that he paid was towards the purchase price, not as commitment fee. He only took occupation of the house after he had paid the full purchase price.

The outstanding utility bills at the time were settled by PW1, he said, since taking occupation of the house. PW1 said before he commenced this action in 2011, the Defendant had not demanded any rent from PW1's family or given them any notice to vacate the house. He said the house is his and he will pay any outstanding bills relating thereto.

Under cross examination, PW1 said that when he first went to view the house, he had found a Caretaker by the name of Mr. BANDA at the house. He said the agreement they drew up at his office was in duplicate. He took one copy which he later surrendered to his lawyer, and the Defendant got a copy for himself. He said later the lawyer drew up another contract for them which they both signed in three parts, two of which remained

on the lawyer's file while the Defendant took a copy. Mr. NYIMBIRI was present when both documents were signed by PW1 and the Defendant. He said he introduced his wife to the lawyer after he had paid the full price and that the Defendant was present during the introductions. After the lawyer's death he did not make any follow up with the Defendant over the matter of the house because he did not know the Defendant's whereabouts. He said that although he was aware of the whereabouts of the Defendant's wife and children he did not contact them because the Defendant had told PW1 from the outset that he did not want them to know about the sale of the property.

The 2nd Plaintiff (PW2) also testified that some time in 1990/1991 her husband (PW1) bought the subject property from the Defendant. After PW1 had paid the full purchase price, he took her to Mr. KAWECHE's office where, in the presence of the Defendant and Mr. NYIMBIRI, her husband instructed the lawyer to transfer the property in her name. She said during that meeting the Defendant even advised her not to disappoint her husband who had bought the house for her. Her family then took occupation of the house and have never been disturbed in their occupation thereof either by the Defendant himself or his family. Neither has the Defendant made any demand for rent for the house.

PW2 said that when her husband left for Malawi in 1993 she remained in the house up to 1995 when she went to join him in Malawi. She left their son, HAROLD JIYA in occupation of the house. She later learnt that the lawyer who had been handling the matter had died. Upon her return she went to the law offices of Kaweche and Company but the file relating to the property could not be located either at the law firm or at the offices of the Law Association of Zambia where the files from the law firm were said to have been taken. She said she did not know the whereabouts of the Defendant in order to contact him. She only got to know his whereabouts after the Court action was advertised in the newspaper in May, 2011.

Under cross examination, PW2 said that she had not been present when the transaction started between her husband and the Defendant. She did not also witness when payments were being made. She said her husband did not take home any documents concerning the transactions.

Mr. ELIAS KALENGO TEMBO (PW3) told the Court that sometime in 1990/1991 he had been engaged by the Defendant to repair the electrical faults at the Defendants house in Garneton/Itimpi which is the subject of this case. In the course of working at the house, PW3 came to learn from the Defendant that the house was on sale. It was at the time being occupied by a tenant by the name of Mr. BANDA. PW3 then informed PW1 about the Defendant's intention to sell the house. He even took the Defendant to PW1's Office and introduced him.

Later PW3 was contracted by PW1 to do the electrical rewiring of the whole house. He said that for the first repairs he had done to the house he had been paid by the Defendant, while PW1 paid for the rewiring of the whole house.

HAROLD JIYA was PW4 who said that his father, PW1, had bought the house in issue some time in 1990/1991 from the Defendant and PW1's family has been in occupation thereof ever since. He said that he used to go to Kaweche and Company to check on the file but they could not locate it after the lawyer had died. He said during the time he was communicating with the law firm he received some letters which he identified in the Plaintiffs' Bundle of Documents dated 9th December, 1997 and 30th March, 1998. This was while his parents were away in Malawi. PW4 said that ever since the family took occupation of the house neither the Defendant nor any other person has demanded rent or asked them to vacate the house. He said the Defendant has visited Garneton several times since 1990 but has never gone anywhere near that property nor accosted PW4 over the house. On one occasion, PW4 said, he met the Defendant at a pub who even praised PW1 for having bought that house for the family.

Under cross examination PW4 said that to his knowledge the K750,000 requested by the lawyer for costs in the letter of 30th March, 1998 was paid by his parents.

PW5 was SAMUEL KAYULA MULENGA who used to live in Garneton with the Defendant at the material time. He said he knew the Defendant very well. Sometime in the early 1990's PW5 learnt that the Defendant had sold the property in issue to the JIYA family who even went to occupy it. In 2004 when PW5 met the Defendant at a tavern in Race Course Compound in Kitwe, the Defendant told PW5 that he had sold the Garneton house to the 1st Plaintiff and that he, the Defendant, had since settled in Choma. PW5 said he had learnt from the City Council earlier that the Defendant had sold that house before he learnt of the sale from the Defendant himself later.

PW6, Mr. FELTON SICHALI, said he had been a workmate of the Defendant at the Kitwe City Council. He was a Librarian while the Defendant worked in the Department of Housing under the Squatter Control Unit. The two were also neighbours in Garneton. PW6 said that when the Defendant was leaving Garneton in 1990/1991 he went to introduce PW1 as the new neighbour of PW6. PW6 and the Defendant were close friends at the time to the extent that the Defendant used to allow PW6 to cultivate part of the Defendant's land at the Garneton house. From then onwards PW6 said the JIYA's occupied the house up to the time he was testifying. PW6 said that he was surprised that the Defendant was claiming back the house.

PW7 was Mr. JOHN PHILEMON MWANZA who said he used to work for the security company owned by the Plaintiffs at the material time. He also knew the Defendant who used to work for the Kitwe City Council. He learnt that the Defendant was selling his house in Garneton to PW1 and later saw the Defendant on two occasions in the company of Mr. NYIMBIRI when the Defendant went to PW1's office to collect payments for the house. PW7 even saw the Defendant the third time he visited PW1's office to collect the final instalment. On that occasion PW1 and the Defendant later went to the offices of Kaweche and Company.

Under cross examination PW7 admitted that he was not present in PW1's office when the money was being paid. He said he did not know how much was paid on each occasion. What he knew was that the purchase price for the property was K900,000.

The last witness for the Plaintiff's was Ms. PAMELA TEMBO (PW8). She said she had worked for the firm of Kaweche and Company as a typist between 1994 and 2001. She said she left the law firm after the death of Mr. Kaweche who was the owner and sole practitioner in the firm. She identified the letters dated 9th December, 1997 and 30th March, 1998 in the Plaintiffs' Bundle of Documents as having originated from that firm. In particular she identified the second letter as having been typed by herself because it bore the initials of Mr. KAWECHE and herself in the reference BBK/PMT/S.10030. She said that although she did not type the letter dated 9th December, 1997, she believed from Mr. Kaweche's initials thereon and signature that it also originated from that law firm. Under cross examination she said that she had never met the Defendant in this case.

In his defence, the Defendant testified that in 1975 whilst working for the Kitwe City Council he obtained a loan and bought the house in issue at K900,000. In 1981 when he decided to retire to his home village, he left his wife in the house up to 1990 when he returned and decided to lease it. When he did not find a tenant he decided to sell it. Towards the end of December, 1990 he met and mentioned this to PW1, whom the Defendant knew having living with PW1 in Garneton, and PW1 expressed interest in buying the house. The two arranged to meet at PW1's home where the Defendant went the following day in the company of Mr. NYIMBIRI. The Defendant again confirmed to PW1 his intentions to sell his property. PW1 continued showing interest in buying it. The two agreed to meet and indeed met after a couple of days at PW1's office. The Defendant said he went alone to the said meeting and found PW1 with his wife, PW2. He told the couple that he wanted K9,100,000 for the house, which he told them was the open market value. Although the couple complained about the price, PW1 still showed a lot of interest to buy the house. PW1 suggested he pays K200,000 as commitment fee and promised to finalise the transaction upon his return from Malawi where he was going for a short while. PW1 paid the K200,000 to the Defendant who

signed on a small piece of paper for it. PW1 suggested to the Defendant to find a lawyer, but the Defendant refused saying he did not have the money to pay a lawyer. PW1 mentioned Kaweche and Company as his lawyers whom he said he would instruct to conduct his affairs.

The Defendant said he felt comfortable that PW1 was serious about buying the house and agreed to allow PW2 to move into the house as caretaker while PW1 was away in Malawi. The Defendant then left for Choma, his home village, leaving his contact address with PW1 who promised to contact the Defendant when he returned from Malawi.

In 1993 the Defendant was visiting Kitwe when he learnt that PW1 had taken his wife with him to Malawi and that the couple had left their children in occupation of the house. He said the idea of selling the house started fading because he had not received any communication from PW1.

The next thing the Defendant saw was an item in the Zambia Daily Mail Newspaper of 17th and 18th May, 2011 advertising an action for a vesting order which PW2 had applied for under Cause No. 2011/HK/54 which PW2 had applied for over the Garneton house. He said he objected to that application.

He said he had remained quiet over the years because he was comfortable that the house was maturing. He also did not disturb PW2's occupation of the house out of sympathy for her. He denied that he had sold the house to the Plaintiffs. He also denied ever having gone to the offices of Kaweche and Company or collected any money from the firm. He said he did not know PW3, the witness who said he had introduced him to PW1. Further the Defendant said he only met PW1's son, HAROLD (PW4), in Court. He said he knew Mr. SAMUEL KAYULA MULENGA (PW5) whom he said was a teacher in Garneton at the material time, as well as Mr. FELTON SICHALI (PW6) whom he said had been his workmate at the Council as well as a neighbour. But he denied having told them that he had sold the house to the Plaintiffs. He admitted that he had gone twice to

PW1's office and that in the circumstances Mr. JOHN PHILEMON MWANZA (PW7) might have seen him.

Under cross examination, the Defendant said that he never went back to PW1 or to the house to inspect it for over 20 years. He admitted that he never paid any rates and only did so after this action had been commenced. The payment for rates was on 15th September, 2011 while the action was commenced on 2nd September, 2011. He said he knew PW2 was at the house as caretaker but did not speak to her or to PW1 or to the children over anything to do with the house. He admitted that PW1 had not been challenged at the trial when he mentioned K900,000 as the agreed purchase price for the house. He further stated that he considered PW1 as caretaker of the house and not as a tenant. He said he was claiming mesne profits because he had been inconvenienced by PW1 who had not gone back to him to conclude the deal. He said he had accepted the K200,000 as commitment fee, not towards the purchase price. He stated that he had not refunded the money because PW1 had been in Malawi. He said he did not go to Mr. Kaweche's office although he knew the lawyer from the time he had worked with the lawyer at the City Council. While the case was going on the Defendant said he had applied for duplicate title deeds because he found that the originals were missing from the file at the Lands Department. He was not aware of Mr. Kaweche's correspondence over the house because he never dealt with the lawyer over the house. He said he had not been paying the rates over the 20 years because he had financial difficulties whilst he was at the village. He said that he had not been in contact with the Plaintiff's over the 20 years because he was comfortable with their stay in the house because they were looking after his property, and also because the property was maturing.

At the close of the trial I invited Counsel for the parties to file written submissions, which both did and which I have duly considered and taken into account in arriving at my decision.

In his submissions, Mr. Kaela, Counsel for the Defendant, cited section 4 of the Statute of Frauds, 1677 of the United Kingdom. The said law provides that a contract affecting the transfer or sale of land or an interest in land must be evidenced in writing and must be signed by the party to be charged. In aid of his submission Mr. Kaela further cited the Supreme Court decisions in the cases of MOBIL OIL (ZAMBIA) LIMITED v. LOTO PETROLEUM DISTRIBUTORS LIMITED (1977) Z.R. 336, and MWENYA AND ANOTHER v. KAPING'A (1998) Z.R. 17 which dealt with what is required to be established in order to enforce such a contract, namely, the identity of the parties, the subject matter of the agreement, the price, and any other terms and conditions of the bargain.

In response to the said submission Mr. Twumasi, Counsel for the Plaintiffs, argued that the Defendant had not raised that defence in his pleadings. He submitted that on the authorities of, inter alia, the case of ANDERSON KAMBELA MAZOKA AND OTHERS v. LEVY PATRICK MWANAWANSA AND OTHERS (2005) Z.R. 138, the Defendant ought not to be allowed to rely on that defence. In that case the Supreme Court held, concerning pleadings, that;

“The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings and the court has to take them as such”.

Under paragraph 3 of their Statement of Claim the Plaintiffs stated thus;

“In or about 1991 the Defendant offered to the 1st Plaintiff the sale of the (said) property at the price of K900,000”.

In response to the said averment the Defendant stated;

“3. Paragraph 3 of the statement of claim is denied and the Defendant shall aver that it is the 1st Plaintiff who expressed interest in purchasing the property and paid the Defendant a commitment fee of K200,000.00. The Defendant shall aver that the purchase price of the property was not agreed upon and no contract of sale was ever executed between the 1st Plaintiff and the Defendant as regards the purchase of the property”. (The under lining is mine).

In my view the Defendant did give notice of non-compliance with the provisions of section 4 aforesaid. It is my opinion that a party need not cite the applicable law verbatim for him to be availed a statutory defence. He will be allowed such defence as long as he makes it clear, in his pleading, what facts he intends to adduce at the trial. I, therefore, find that, by the second sentence in paragraph 3 of his Defence, the Defendant had complied with the rules as regards pleadings. The objection by Mr. Twumasi cannot, therefore, be sustained.

In any case, in the MAZOKA Case cited by Plaintiffs' Counsel, the Court held further that;

“In a case where any matter not pleaded is let in evidence, and not objected to by the other side, the Court is not and should not be precluded from considering it. The resolution of the issue will depend on the weight the Court will attach to the weight of unpleaded issues”.

Indeed in the instant case the issue was raised during the testimonies of the Plaintiffs and the Defendant whether there was any written agreement between the 1st Plaintiff and the Defendant for the sale of the property and, if so, what was the price.

I will accordingly disallow the objection on that ground also.

The evidence in the instant case, which I have accepted as more probable than not, is that the PW1 and the Defendant met on a couple of occasions to discuss the sale/purchase of Plot No. 353 Itimpi, Kitwe. On one such occasion the Defendant

received from PW1 a sum of K200,000. The Defendant described that payment as “**commitment fee**” For reasons I shall give later herein, I do not accept it to have been intended by the parties to have been a “**commitment fee**”. My finding is that it was part payment of the purchase price, which I find to have been agreed at K900,000 and not the K9,100,000 trumped up by the Defendant.

The Defendant admitted in his testimony that he received the said sum of K200,000 and signed a note for it. In interpreting the provisions of section 4 of the Statute of Frauds, 1677, our own Supreme Court, in the case of WESLEY MULUNGUSHI v. CATHERINE BWALE MIZI CHOMBA (2004) Z.R. 96 looked at the explanatory notes to that section and held that “**before a seller of land can be held liable on the contract, there must be an agreement contained in a note or memorandum; that the memorandum or note must be signed by the person to be charged and that a written proposal accepted orally is sufficientthe law does not prescribe the statutory form the note or memorandum must take**” (Page 104 of the Report).

I am satisfied, from the Defendant’s own admission at the trial, that the Defendant had signed a note or memorandum concerning the sale of his property. The property itself had been identified by both parties at the material time, with PW1 having even inspected it.

I also find as a fact that the matter was referred to a firm of lawyers, Messrs Kaweche and Company, to complete the legal formalities. This is evidenced partly from the two letters from that firm to PW2. The one dated 9th December, 1997 reads in part;

“ ***Re: AGREY SITEMBA v. YOURSELF***

We refer to the above matter and will be most grateful if you could obtain the property transfer certificate from the Commissioner of Lands as soon as possible to enable us register the assignment.....”

The other letter of 30th March, 1998 partly reads;

“ **Re: AGREY SITEMBA – ASSIGNMENT OF PLOT 353 ITIMPI FROM AGREY SITEMBA.**

We refer to the above matter and will be most grateful if you could let us have the sum of K750,000=00 on account of further costs for the following;

(a) Payment of consent to assign from the State;

(b) Payment of ground rent to the State;

(c) Payment of property transfer tax to the Zambia Revenue Authority;

(d) Registration of assignment”

It will be recalled from the testimony of PW1 that PW1 had taken over the responsibility of paying the consent fee, ground rent and property transfer tax because the Defendant had indicated that he did not have any money; that he had used up the money he had been paid for the house on his emerald mine in the then Ndola Rural District. That was at a meeting with the lawyer attended by, among other people, PW1 and the Defendant. That is why the lawyer was asking for that money from the Plaintiffs. It is obvious from that correspondence that an assignment had been signed between the Defendant and PW2. What was awaited were further legal formalities. It is also my finding that all necessary documentation, including title deeds, were in the possession of the lawyer.

Unfortunately, the lawyer died without having effected the transfer of title into PW2's name. The matter was further compounded when the file of papers pertaining to the transaction could not be located, thereby prompting PW2 to take out an application under cause No. 2011/HK/54 for a vesting order. The loss of the file, in my view, cannot be construed to mean there was no contract of sale between the parties.

It was only upon seeing the advertisement of that application in the press that the Defendant woke up from his slumber to protest PW2's claim to the property.

The Defendant's conduct in this matter cannot be said to be that of a reasonable property owner. I find as a fact that PW1 had paid the agreed purchase price in full. That is why the Defendant allowed him to take possession and occupation of the house. For over 20 years the Defendant never visited the house to inspect "**his**" property; he never demanded any rent from the Plaintiffs or their children who have been in occupation thereof; he never wrote or spoke to the occupiers of his property even when he was visiting the area; he never gave them any notice to vacate it; he never paid any utility bills such as municipal rates or State lease charges over the 20 years the Plaintiffs have been in occupation or possession of "**his**" property. He admitted that he only paid ground rent of K2,461,000 to the commissioner of Lands on 15th September, 2011 after this action had been commenced against him. In my considered opinion the Defendant's inaction over the house over the 20 years of the Plaintiffs' occupation goes to confirm that he had sold the property to the Plaintiffs'.

The reasons given by the Defendant for his inaction can only be described as nonsensical. He said he had left PW2 to continue in occupation out of sympathy. There was no evidence to even remotely suggest that the Plaintiffs had been homeless or that they deserved his sympathy. He said he did not pay ground rent over the 20 years because he had financial difficulties. And yet, all at once, after this action was commenced, he was able to muster a colossal sum of K2,461,000 to secure "**his interests**". He said he was comfortable with the Plaintiffs' occupation of the property because they were taking care of it, and that "**the property was maturing**". The Defendant's conduct and attitude over the house are utterly unacceptable of a genuine property owner. I accordingly dismiss the Defendant's claims to the house as an intention to have a second bite at the cherry. The Defendant's defence and counter claim are accordingly dismissed.

In the result, I find that the Plaintiffs have proved their case against the Defendant on a balance of probabilities, and I accordingly enter judgment in their favour. I, therefore, declare that the Plaintiffs are the lawful owners of Plot No. 353 Itimpi, Kitwe. I further order the Defendant to assign the said property to the 2nd Plaintiff. In default the Plaintiff's shall be at liberty to apply to Court. I also order the Defendant to pay the costs of this action, which shall be taxed if not agreed.

Although the Plaintiffs had claimed the relief of damages for breach of contract, I am unable to award them such relief because no evidence was adduced as to what damage they had suffered by reason of the Defendant's failure to complete the transaction.

Leave to appeal granted.

Delivered at Kitwe in Chambers this 16th day of April, 2013

I.C.T. Chali
JUDGE