

**IN THE HIGH COURT FOR ZAMBIA**

**2011/HPC/0585**

**IN THE COMMERCIAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*

**BETWEEN:**

ADAM NJOBVU

PLAINTIFF

**AND**

RICHARD BANDA  
THOMAS BANDA

1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT

**BEFORE THE HON. MRS. JUSTICE F. M. CHISHIMBA ON THE 4<sup>TH</sup> DAY  
OF MARCH, 2014**

*For the Plaintiff* : *Mr. Songolo - Messrs Philsong & Partners*  
*For the Defendants* : *In Person*

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**J U D G M E N T**

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**CASE AUTHORITIES REFERRED TO:**

1. *Wesley Mulungushi Vs Catherine Bwale Mizi Choma 2004 (ZR) 96*
2. *Zambia State Insurance Corporation Limited & Others Vs Joseph Chanda (Trading as Link Express Motorways) S.C.Z Judgment No. 9 / 1992*
3. *Tito & Others Vs Waddel & Others No.2 (1977) Ch. D 106*
4. *Kafue District Council Vs James Chipulu (1997) ZR*
5. *Imperial Loan Company Vs Stone*
6. *Hart Vs O' Connor (1985) A.C. 100*
7. *Greenslade Vs Dare 1855 20 Bear 284*
8. *Syliva Bwalya Vs Imbwili Investments Limited and Andrew Kashita 2011/HPC/0115*

**LEGISLATION AND OTHER WORKS REFERRED TO:**

1. *Section 4 of the Statute Frauds 1677*
2. *Chitty on Contracts Volume 1 General Principles (2008)*
3. *High Court Rules*

The Plaintiff instituted an action by way Writ of Summons and Statement of Claim against the Defendants for the following reliefs;

1. *A declaration that the Plaintiff duly and lawfully bought the property otherwise known as House Number 61/10 Kaunda Square Stage 1, Lusaka from the 2<sup>nd</sup> Defendant herein and that he is now the legitimate owner of the said property from the date of sale and thus he is entitled to quiet and peaceful enjoyment of the same;*
2. *An injunction restraining the Defendants either by themselves, their agents or anyone acting under their direction from interfering with the Plaintiff's or his tenants' quiet and peaceful enjoyment of the said property;*
3. *Damages for mental torture and anguish occasioned to the Plaintiff over the last ten years by the 1<sup>st</sup> Defendant's continued harassment of the Plaintiff by taking him to all manner of authorities at the Plaintiff's cost to resolve the matter including insults directed at the Plaintiff and his tenants when he knew or ought to have known that the property was duly sold to the Plaintiff by the 2<sup>nd</sup> Defendant.*

According to the Statement of Claim the Plaintiff was at all material times the legitimate owner of House number 61 / 10 Kaunda Square Stage 1 following the sale by the 2<sup>nd</sup> Defendant on 31<sup>st</sup> July 2001. The Plaintiff bought the said house on the 31<sup>st</sup> July 2001 from the 2<sup>nd</sup> Defendant in the presence of the 2<sup>nd</sup> Defendant's son Luvella Banda and the Plaintiff's brother Isaac Njobvu who both witnessed the contract of sale.

The 2<sup>nd</sup> Defendant in the presence of his son authorized the Lusaka City Council to change ownership of the said house into the Plaintiff's name and confirmed by affixing his thumb print to the Council documents.

The Plaintiff after the change of ownership paid a down payment of K1, 000,000.00. The balance of K9, 000,000.00 was agreed to be paid when the 2<sup>nd</sup> Defendant vacates the house. In August 2001 three days after payment of KR1,000 the Plaintiff in the presence of his brother paid the 2<sup>nd</sup> Defendant in the presence of his son the balance of K9, 000,000.00. The 2<sup>nd</sup> Defendant handed over the said property to the Plaintiff. Thereafter the 1<sup>st</sup> Defendant went to inquire from the Plaintiff whether or not the 1<sup>st</sup> Defendant had sold the house to the Plaintiff.

The 1<sup>st</sup> Defendant then complained to the Plaintiff that the purchase price was not sufficient. The Plaintiff requested the 1<sup>st</sup> Defendant to refund him the sum of K10, 000,000.00 paid within ninety (90) days. The 1<sup>st</sup> Defendant failed to refund the money and disappeared.

After a year the 1<sup>st</sup> Defendant resurfaced and reported the Plaintiff to Kaunda Square Police Station that the Plaintiff had fraudulently obtained the said property. The police reviewed the matter and concluded that the said house was duly sold to the Plaintiff and dismissed the matter.

The 1<sup>st</sup> Defendant proceeded to lodge another complaint at Chelstone Police Station where it was confirmed that the house was duly sold to the Plaintiff. The 1<sup>st</sup> Defendant notwithstanding

the conclusions from Kaunda Square and Chelstone Police Station, reported the Plaintiff to Lusaka Central Police Frauds Section who requested him to confirm the status of the house. The Plaintiff in the company of two Police Officers and the 1<sup>st</sup> Defendant travelled to the 2<sup>nd</sup> Defendant's village in Katete. In 2006 the 2<sup>nd</sup> Defendant at a meeting held at Lusaka Central Police Frauds Section confirmed selling the house to the Plaintiff. The Plaintiff and the 2<sup>nd</sup> Defendant went to the Lusaka City Council to verify why the ground rate bills for the said house continued to come out in the 2<sup>nd</sup> Defendant's name four years after the change of ownership in 2001. The Local Authority apologized for its failure to change ownership as directed in 2001 and cited numerous paper work and lack of computers as a reason for the delay. The Council in the presence of the 2<sup>nd</sup> Defendant worked out the outstanding rates which rates the Plaintiff paid.

Lusaka Central Police Frauds Section after exhausting their investigations and reviewing all the documents available wrote to the Plaintiff clearing him of any fraud.

The 1<sup>st</sup> Defendant between 2007 and 2010 continued to report the same issue to YWCA and Zambia National Broadcasting Corporation. In September 2011 the police called the Plaintiff again over the same matter in the presence of the 2<sup>nd</sup> Defendant who came with a different story that the 1<sup>st</sup> Defendant did not know how to write and therefore could not have signed the sale agreement of 2001. The 2<sup>nd</sup> Defendant signed a Power of Attorney in favour of the 1<sup>st</sup> Defendant for purposes of the sale which signature is the same as on the 1<sup>st</sup> Defendant's National

registration card. Upon seeing the similarities on the signatures, the police threw out the Defendants accusations against the Plaintiff.

The claim that the 2<sup>nd</sup> Defendant was of unsound mind at the time of the contract is new to the Plaintiff as the 2<sup>nd</sup> Defendant was in full control of his faculties at the time he signed the sale agreement in the presence of his son. It was four years later that the 2<sup>nd</sup> Defendant was allegedly seen by doctor at Chainama Mental Hospital without any proof of any further reviews. The issue of unsound mind is an afterthought by the 1<sup>st</sup> Defendant in his desperation to try and portray the Plaintiff as a heartless individual.

The Defendants have over the years insulted and harassed the Plaintiff and his tenants without the Plaintiff retaliating. Zambia Revenue Authority property transfer tax and the ZESCO bill is the obligation of the Defendants as vendors under the law. The Plaintiff and his tenants do not enjoy peaceful and quiet enjoyment of the premises because the 1<sup>st</sup> Defendant has continued to insult them, hence the application for the injunction pending the final determination of the matter.

The Defendant in its defence and counterclaim dated 21<sup>st</sup> November 2011 disputes that the Plaintiff resides at house No. 20/58 Kaunda Square but resides at Kamwala South. It is disputed that the contract of sale contract was entered into between the 2<sup>nd</sup> Defendant and the Plaintiff on the 31<sup>st</sup> July, 2001 because the

2<sup>nd</sup> Defendant had no legal capacity to contract with anybody on the grounds that he was mentally ill.

The Defendants state that the Plaintiff never paid the sum of K10,000,000.00 on 31<sup>st</sup> July 2001 and has failed to provide evidence of such transactions by way of a bank certified statement of account. It is stated that the purported contract of sale was manufactured by one author as it can be deduced from the same handwriting on both the National Registration Cards of the 2<sup>nd</sup> Defendant and the Plaintiff.

Though Plaintiff alleges that all the necessary requirements have been compiled with regarding the change of ownership he has not provided proof of payment of the three percent (3%) payment to Zambia Revenue Authority for the Property Transfer Tax and the clearance certificate. The Defendant states that exhibit "AN3" stated to be a certificate of transfer is a mere Form. It does not indicate that the 2<sup>nd</sup> Defendant requested Lusaka City Council to do a Deed of Transfer, without giving consent by appending the signature on the purported Form.

It is stated that the certificate of receipt exhibited as "AN4" raises a lot of contradictions for it does not have an official stamp. The same is a fraudulent scheme meant to misrepresent the facts without a Deed of Transfer. The Plaintiff has continued to mislead the Court by stating that he is still paying ground rent to Lusaka City Council on the pretext of an Advice slip. The Plaintiff failed to produce the Title Deed to the Police after discovering that all the records of the house were still in the names of the 2<sup>nd</sup> Defendant. The failure by the 2<sup>nd</sup> Defendant to have his mental state

assessed led to a concessional agreement that allowed the Plaintiff to be collecting rental until the purchase price paid to the 2<sup>nd</sup> Defendant was recovered with interest.

It is stated further that the Plaintiff has collected the sum of K30, 000,000.00 which is more than the sum of K10, 000,000.00 purported to have been paid to the 2<sup>nd</sup> Defendant. Due to the 2<sup>nd</sup> Defendant's mental illness, the Plaintiff has taken advantage of the frailties and challenges that encompass people with mental challenges. The Plaintiff has not paid any of the bills with regards to the purchase of the house.

It is stated that the Plaintiff has threatened violence and harassed members of the Defendants family. In addition he has reconnected electricity illegally attracting a charge of K13, 000.00. This prompted the 1<sup>st</sup> Defendant to report the matter to the police.

In the counter-claim the Defendants claims for the following;

- i) An Order that the said Property still belongs to the 2<sup>nd</sup> Defendant.*
- ii) An Order that the Plaintiff settles the fraud charge of ZMK 13,000,000. An Order that the said property still belongs to the 2<sup>nd</sup> Defendant.*
- iii) An Order that he Plaintiff settles the Zesco fraud charge of ZMK 13,000,000.*
- iv) An Order that the Plaintiff returns all the items he collected at the premises of the 2<sup>nd</sup> Defendant.*

- v) *An Order that the concessional agreement should be upheld now that the Plaintiff has collected over ZMK 30,000,000.*
- vi) *An Order that manipulation, indoctrination under duress was involved to take cruel advantage of the 2<sup>nd</sup> Defendant mental sickness.*
- vii) *Damages for mental anguish caused to the Defendants by the actions of the Plaintiff, his agents and whosoever worked in collaboration with him.*

*The Plaintiff filed on record two witness statements. The 1<sup>st</sup> witness Statement by Adam Njovu is as narrated as in the Statement of Claim and needs no repetition.*

In cross examination the Plaintiff testified that he entered into a contract of the sale of house number 61/10 with the 2<sup>nd</sup> Defendant on the 31<sup>st</sup> July, 2001. After signing the contract the Plaintiff paid the 2<sup>nd</sup> Defendant K1, 000,000.00. The 2<sup>nd</sup> Defendant requested to be paid a deposit of K1, 000,000.00 as the whole sum of K10, 000,000.00 was too much. The balance would be paid after change of ownership. The 2<sup>nd</sup> Defendant acknowledge receipt of the K10, 000,000.00. It is stated that the 2<sup>nd</sup> Defendant signed on exhibit marked "AN3" authorizing the Council to proceed with the change of ownership. PW1 testified that the 2<sup>nd</sup> Defendant entrusted the balance of K9, 000,000.00 to PW1 because the 2<sup>nd</sup> Defendant's son could not keep the money.

PW1 testified that two weeks after the sale of the house the 2<sup>nd</sup> Defendant informed the Plaintiff that he wanted to refund him the money. A meeting was held at the PW1's house in the presence of the 1<sup>st</sup> Defendant. The witness denied that the 2<sup>nd</sup> Defendant



suffered from a mental illness. When referred to exhibit "AN2" the witness testified that the requirement of the production of certificates of clearance from Zambia Revenue Authority (ZRA) for the change of ownership to be transferred was not a requirement then.

The witness stated that he never went to ZRA to effect change of ownership. The 2<sup>nd</sup> Defendant did not give the Plaintiff the occupancy title because the document was burnt and he had no copies. It is further stated that three months after the sale of the house the 1<sup>st</sup> Defendant and PW1 agreed that the paid money was to be refunded. The 1<sup>st</sup> Defendant has not refunded the said money. The witness admitted collecting over K30, 000,000.00 in rentals from his property. PW1 denied drawing up the contract of sale and taking advantage of the 2<sup>nd</sup> Defendant's mental incapacitation. PW1 conceded that the signatures on the contract exhibited on page 1 of the Plaintiff's bundle of documents and in the contract of sale were the same.

The witness denied altering and manipulating any records in 2001. The house in 2001 was in the name of the 2<sup>nd</sup> Defendant. There is a letter from Lusaka City Council confirming that house 61/10 Kaunda Square was still in the name of the 2<sup>nd</sup> Defendant. PW1 has been attempting to get title from the council since the year 2001.

In re-examination the witness testified that he entered into a contract with the 2<sup>nd</sup> Defendant and paid him the purchase price in the presence of his son Luvale Banda. The Zambia Police

cleared the Plaintiff over the allegations of fraud. The 1<sup>st</sup> Defendant was given ninety (90) days to refund the money but to date he has not done so. The 2<sup>nd</sup> Defendant was paid the sum of K10, 000,000.00 which he received and signed for by affixing his thumb print.

The second Witness Statement is by Isaac Njovu dated 26th January 2012 and is as narrated in the Statement of Claim save for the following evidence. The 2<sup>nd</sup> Defendant at the time of signing the contract of sale of the house, was sane and showed no sign of being ill or not knowing what he was doing. It is stated that the 2<sup>nd</sup> Defendant knew what he was doing when he signed the contract and received money. PW2 states that the house in issue belonged to the 2<sup>nd</sup> Defendant who sold to the Plaintiff in the presence of the 2<sup>nd</sup> Defendant's son Luvela Banda.

In cross-examination the witness stated that the agreement was valid and binding. The contract was drafted on 31/7/2001. On the same day the Plaintiff organized the sum of K10, 000,000.00 and paid to the Defendant. The 2<sup>nd</sup> Defendant received the money at the Bank and signed the prepared document at Lusaka City Council.

After the 2<sup>nd</sup> Defendant received the money he requested that it be kept for him. At the time of change of ownership, the Council relied on the 2<sup>nd</sup> Defendant's NRC and the offer letter. PW2 did not see a certificate of clearance from ZRA. PW2 reported the 2<sup>nd</sup> Defendant to the police because after the sell of the house the 2<sup>nd</sup> Defendant kept asking for more money stating that the K10,

000,000.00 was too little. The letter exhibited on page 6 of the Defendant's bundle of documents was written to him because the Plaintiff (Adam Njobvu) was out of town and he was representing him. PW2 testified that possession of the house was handed over to him as he was responsible for the house. The house had no electricity and water at the time, though the Zesco power cable was there.

When referred to the exhibit on page 15 the electricity bill in the name of Taipa Banda. PW2 conceded that there was electricity at the premises.

PW2 testified that 2<sup>nd</sup> Defendant was not mentally ill.

In Re-examination, the PW2 testified that the house was still in the 2<sup>nd</sup> Defendant's name because of the confusion caused by the 2<sup>nd</sup> Defendant's son.

The Defendants filed two Witness Statements. DW1 is Richard Banda and his witness statement dated 26th October, 2012 is as stated in the Defence on record.

In cross examination DW1 testified that the 2<sup>nd</sup> Defendant is of unsound mind based on the fact that he has been admitted twice at Chinama Hills hospital. The 2<sup>nd</sup> Defendant has not been of his full mental capacity. The witness referred to the exhibit appearing on page 5 of the Defendant's bundle of documents. It was conceded that the last admission of the 2<sup>nd</sup> Defendant in hospital was in 1997 four years prior to the date of the contract of sale.

The witness further testified that no evidence was produced regarding the 2<sup>nd</sup> Defendant's retrospective examination nor that the 2<sup>nd</sup> Defendant was kept by the Plaintiff from 2006.

The witness further conceded under cross-examination that the complaints lodged to the police that the Plaintiff fraudulently obtained papers were all dismissed and the Plaintiff was cleared of the said complaints. The witness stated that he had to allow the Plaintiff to collect rentals in order for the Plaintiff to get back the K10, 000,000.00.

DW2 is Faides Chirwa and her witness statement dated 17th January, 2013 states that house number 61/10 Kaunda Square was handed over to the 1<sup>st</sup> Defendant when he settled in Katete. It is stated that by 1998 2<sup>nd</sup> Defendant's mental health had not improved and a resolution was made that 2<sup>nd</sup> Defendant be taken for medical attention at Chainama Hills Hospital. DW2 learnt of the sale of the house sometime in 2006 which she did not support because the house is a family inheritance. It is stated that the Plaintiff was aware of the mental challenges of the 2<sup>nd</sup> Defendant. The Plaintiff further threatening to use force to get rid of DW2.

The witness statement by DW2 was not cross-examined as the said witness did not appear before Court on the trial date.

The Plaintiff filed written submissions on record dated 26<sup>th</sup> January, 2012. It is submitted that there is no dispute that the contract of sale was made. The terms of the contract are clear

and both parties to that agreement had witnesses. There was no evidence whatsoever at the time of the transaction that there was anything amiss with the 2<sup>nd</sup> Defendant as alleged by the 2<sup>nd</sup> Defendant nearly 11 years after the fact.

It is submitted that if there was anything amiss with the 2<sup>nd</sup> Defendant, the Plaintiff being a seasoned businessman would not have been comfortable to part away with K10, 000,000.00 which was a lot of money at the time.

If there was anything amiss the 2<sup>nd</sup> Defendant's son would have called other relatives including his brother the 1<sup>st</sup> Defendant to try and stop the 2<sup>nd</sup> Defendant from going ahead with the sale of the house.

Instead the 2<sup>nd</sup> Defendant's son did not only witness the signing of the contract but also escorted the 2<sup>nd</sup> Defendant to the bank to collect the money.

The Plaintiff submits that a valid contract of sale was entered into. There is no evidence to support the claim that the 2<sup>nd</sup> Defendant was mentally unstable as alleged or indeed unfit to have known what he was doing at the time. This argument is a clear after thought after failing to win sympathy from so many offices the Defendants went to seek help.

It is further submitted that no evidence has been led of a retrospective assessment by a competent medical practitioner of the 2<sup>nd</sup> Defendant's mental state at the time he signed the contract of sale. It is the Defendants duty to lead evidence to prove what has been alleged. It is trite that he who alleges must prove. In the absence of such proof and in the circumstances, the

Court is and would be on firm ground to find for the Plaintiff. The 2<sup>nd</sup> Defendant was in charge of his faculties. He freely handed over the keys to the house to the Plaintiff and proceeded to relocate to his village.

It is submitted that the fact that the house continues to be registered in the name of the 2<sup>nd</sup> Defendant is as a result of lapses at the local authority. The failure by the council to carry out lawful instructions from the Plaintiff and the 2<sup>nd</sup> Defendant cannot be evidence enough to annul a valid contract of sale at law already concluded and evidenced by the document on page 1 of the Plaintiff's bundle of documents.

The documents appearing on pages 2 and 3 are evidence of the change in ownership papers that were duly filed at the Lusaka City Council authorizing the transfer of the house into the Plaintiff's name. The documents are available for scrutiny and the onus to prove that the thumb print is not genuine or does not belong to the 2<sup>nd</sup> Defendant lies on the Defendants as they are the ones who have alleged fraud on the part of the Plaintiff. It is submitted that without the Defendants leading such evidence and proving it the Court is fully entitled to take the documents appearing at pages 2,3 and 4 of the Plaintiff's bundle of documents as prima facie evidence of their authenticity.

The Plaintiff submits that the document at page 7 of the Plaintiff's bundle of documents clears the Plaintiff of any alleged criminality. The police did all their investigations and established that the Defendants were not telling the truth. It is therefore submitted

that the Defendants' evidence is unreliable and should be rejected.

The case of **Wesley Mulungushi Vs Catherine Bwale Mizi Chomba** <sup>(1)</sup> was cited in submitting that the document at page 1 of the Plaintiff's bundle of documents is sufficient memorandum that satisfies *Section 4 of the Statute Frauds 1677* which has a force of law in this Country. The document contains all the material terms of the contract of sale of the house. It identifies the parties to the agreement, the property to be sold, the nature and amount of the consideration and is fully signed and witnessed. Therefore a valid and binding contract of sale for house number 61/10 Kaunda Square Stage 1 was duly entered into by the Plaintiff and the 2<sup>nd</sup> Defendant.

The case of **Zambia State Insurance Corporation Limited and Helmos Transport Limited Vs Joseph Chanda (Trading as Link Express Motorways)** <sup>(2)</sup> was cited where it was held;

***“We are alive that it may be argued that the part payment of debt rule at common law should not apply where a claim is unliquidated since the Court would normally not be concerned with the adequacy of consideration”.***

It is submitted therefore that if the Plaintiff had not yet moved in the house, the Plaintiff would have sought the equitable remedy of specific performance but since vacant possession was freely and voluntarily given to him and has been in charge of the said house for the last 10 years, the Plaintiff prays for a declaration that he duly and lawfully purchased the house. The case of **Tito & Others Vs Waddel & Others** <sup>(3)</sup> was cited in submitting that the

Court will decree specific performance only if it will do more perfect and complete justice than the award of damages.

The Plaintiff further cited the case of ***Kafue District Vs James Chipulu*** <sup>(4)</sup> where it was held that;

***“...at the same time where the object of the contract is to provide peace of mind or freedom from distress, the Hayes case acknowledge that damages for anguish and vexation arising out of breach of such contract are recoverable”.***

It is submitted that this is a proper case for the Court to award damages for mental torture. The Plaintiff and his tenants were entitled to peaceful enjoyment of their property. They got none of that but instead received continuous harassment from the 1<sup>st</sup> Defendant.

The Defendants in response to the Plaintiff's submission filed submissions dated 19th August, 2013.

It is argued that the 2<sup>nd</sup> Defendant was and is mentally incapacitated and illiterate. The Plaintiff could have taken necessary precaution before contracting with people with limited capacity. It is submitted that the purported sale was a deliberate attempt to twist and distort the truth by fraudulently scheming to transfer property from Thomas Banda to Adam Njobvu. It is argued further that if the Plaintiff had indeed paid all the alleged monies to the 2<sup>nd</sup> Defendant, the Plaintiff would have demanded documents pertaining to the property.

The Defendants submit that the Plaintiff's statement is extremely inconsistent and lacks merit. All the claims have been falsified



during cross examination. The Court should therefore not enforce an illegal contract but quash it. The Plaintiff has recovered the alleged purported monies that he paid to the 2<sup>nd</sup> Defendant through the rentals he has been collecting. It cannot be held that the Plaintiff made payments towards the purchase of the house without demanding for the legal documents of the property.

It is submitted that the entirety of the Plaintiff's testimony is a mere fabrication of his imagination in order to corruptly grab the property using false pretences without remorse.

I have considered the case before me, together with the pleadings, the evidence adduced and the submissions by the Parties on record. The claim arises of a contract of sale of property.

The Plaintiff in this matter seeks a declaratory Order that he dully bought House number 61/10 Kaunda Square Stage One Lusaka and that he is the legitimate owner of the said property.

In general a valid contract requires an agreement, the intention to create legal relations and consideration.

The issue of whether or not the Plaintiff and 2<sup>nd</sup> Defendant entered into a contract of sale of the house is in my view not in issue. The 1<sup>st</sup> Defendant's contentions are two-fold. Firstly that the consideration paid for the house is inadequate and secondly that the 2<sup>nd</sup> Defendant at the time of entering into the contract was incapacitated. In a nutshell it is argued that there was no capacity to enter into contract by the 2<sup>nd</sup> Defendant.

I will first address the issue of consideration.

Under the doctrine of consideration contracts generally have no contractual force unless some value has been given for it. The Courts

***“do not concern themselves with the question whether ‘adequate’ value has been given or whether the agreement is harsh or one sided”.*** I refer to the ***Learned Authors of Chitty on Contracts Volume 1 General Principles (2008)***.

It is immaterial whether the person pays too much or too little unless evidence of fraud or mistake is proved.

One of the exceptions to the rule is for instance the existence of a relationship in which one party is able to take an unfair advantage of the other.

At both common law and equity, the Courts do not generally concern themselves with the adequacy of consideration, that is they do not make an attempt to audit the bargain made by the Parties to see if or whether it is a fair one. Though in equity it may give grounds for setting aside a bargain on the basis of fraud. I refer to *Halsbury’s Laws of England Volume 9 (4<sup>th</sup> Edition Paragraph 317)*.

The argument by the 2<sup>nd</sup> Defendant that the consideration paid by the Plaintiff for the property is in my view irrelevant as the Courts do not concern themselves with the adequacy of consideration.

This now brings the Court to the cardinal issue in this matter that of incapacity on the part of the 2<sup>nd</sup> Defendant at the time of the agreement to sale as contended by the Defendants. The cardinal

issue for determination as I see it is whether the 2<sup>nd</sup> Defendant had contractual capacity to transact.

According to the *Learned Authors of Chitty on Contract* incapacity of one or more of the contracting parties may defeat an otherwise valid contract. The law prima facie presumes that everyone has the capacity to contract. The 2<sup>nd</sup> Defendant essentially is pleading exception from liability to fulfill the obligation claimed by the Plaintiff by reason of want of capacity cited above.

The Defendants must strictly establish this fact. There are three classes of individuals subject to some degree of personal incapacity namely, minors, persons lacking requisite mental capacity and drunken persons. I refer to Chitty on Contract.

The principle of law on persons lacking mental capacity is that a person who is mentally disordered or otherwise lacking in mental capacity is bound by his contract unless he can show both that his lack of capacity meant that he did not understand what he was doing and that the other party was aware of this incapacity. When these two conditions are satisfied the contract is voidable at his option.

I refer to the case of *Imperial Loan Company Vs Stone* <sup>(5)</sup> which laid down the above rule where *Lord Esher M.R.* said

***“When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executor or***

**executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about”** (Courts emphasis)

The Defendants contend strongly that the 2<sup>nd</sup> Defendant is and was mentally incapacitated and illiterate at the time of contracting. It is further contended that the Plaintiff fraudulently schemed to transfer the property to himself from the 2<sup>nd</sup> Defendant.

In the case of *Hart Vs O’ Connor (1985) A.C. 100* <sup>(6)</sup> Lord Brightman stated that;

**“... the validity of a contract entered into by a lunatic who is ostensibly sane is to be judged by the same standards as a contract by a person of sound mind, and is not voidable by the lunatic or his representatives by reason of ‘unfairness’ unless such unfairness amounts to equitable fraud which would have enabled the complaining party to avoid the contract even if he had been sane”** (Courts emphasis).

The above doctrine is what is referred to as the doctrine of “*equitable fraud (unconscionability)*”.

There is no fixed standard of mental capacity which is requisite for all transactions. What is required is that the party in question should have an understanding of the general nature of what he is doing.

The evidence as to lack of capacity at Common Law is on the Party alleging. The burden of proof as to lack of mental capacity to make a contract lies on the person alleging it. I refer to the already cited case of ***Imperial Loan Company Limited Vs Stone 1892 1 QB 599*** <sup>(5)</sup>.

Evidence of previous or subsequent mental incapacity is not material if the Party possessed the requisite mental capacity when the contract was made though in some doubtful cases it might create suspicion of mental incapacity at the time of making the contract.

It has been held in a number of authorities that evidence that a Party to a contract is well known in the neighbourhood to be mentally disordered is not admissible to prove that the other Party knew of his lack of capacity. I refer to the case of ***Greenslade Vs Dare 1855 20 Bear 284*** <sup>(7)</sup>.

The 1<sup>st</sup> Defendant testified that the 2<sup>nd</sup> Defendant is of unsound mind and has been admitted twice at Chinama Hills Hospital and is not of full mental capacity.

DW2 in her witness statement which was not cross-examined as she was not brought before Court, testified that the 2<sup>nd</sup> Defendant's mental health problems had not improved by 1998 and he was taken to Chainama Hills Hospital. It is further stated that the Plaintiff was aware of the mental challenges of the 2<sup>nd</sup> Defendant.

I have perused the bundles of documents particularly page 5 produced therein a letter dated 2006 from Chainama Hills Hospital Board. The said letter is authored by Dr. M. Banda a Consultant Psychiatrist who states that he had reviewed the file of the 2<sup>nd</sup> Defendant Mr. Thomas Banda. It goes on to read as follows;

***“He has had two previous admissions to Chainama Hills Hospital. The 1<sup>st</sup> Admission was in 1994 and the last in 1997. There is no evidence that Mr. Banda attended any reviews”.***

The letter goes on to state further that;

***“I cannot comment on his competence at the time he is alleged to have entered into a contract to sale the house. This will require a retrospective assessment of his mental state at the time of the alleged act”.***

In a nutshell the 2<sup>nd</sup> Defendant’s mental incapacity at the time of entering into a contract with the Plaintiff has not been proved by the Defendants. The burden of proof as earlier stated lies on the Party alleging mental incapacity and inability.

The other fact to be proved is that the Plaintiff knew of the 2<sup>nd</sup> Defendant’s mental incapacity. The Defendants merely alleged that the Plaintiff knew that the 2<sup>nd</sup> Defendant was mentally ill. There is no proof showing that he knew of this mental incapacity. Even assuming that the 2<sup>nd</sup> Defendant was well known in the area or neighbourhood that he was mentally disordered, the said evidence is not admissible to prove that the other Party knew of his lack of capacity.

It is therefore my considered view that the Defendants has failed to prove the 2<sup>nd</sup> Defendant's lack of mental capacity to contract. I accordingly hold that the 2<sup>nd</sup> Defendant had full capacity to contract and that the contract was validly entered into.

It is my view that the Plaintiff has proved its case on a balance of probabilities and is entitled to a declaration that he dully and lawfully bought House Number 61/10 Kaunda Square Stage One and is the legitimate owner of the said property and is entitled to quiet and peaceful enjoyment of the same.

In respect of the claim for mental torture and anguish occasioned to the Plaintiff over the last ten years by the Defendant's continued harassment, I am of the considered view that this is not a claim arising out of a Commercial nature. *Order 53 of the High Court Rules* defines commercial action as one arising out of a commercial transaction or trade. The Plaintiff ought to have commenced this action in the General List. The *High Court (Amendment) Rules 2012 Order LIII (Commercial Actions)* has defined a Commercial Action as meaning

***“Any cause arising out of any transaction relating to Commerce, Trade, Industry or any action of a business nature”.***

I am of the considered view that the alleged claims as tabulated under item 2 of the statement of claim require a substantive hearing as a separate cause of action. The claim by the Plaintiff is in my considered view not of a commercial nature as envisioned

in Order LIII mentioned above. I refer to the case of **Syliva Bwalya Vs Imbwili Investments Limited and Andrew Kashita** <sup>(8)</sup> where the 2<sup>nd</sup> Defendant in his counter-claim, sought relief for damages for mental distress and anguish, malicious prosecution etc arising from a contract of sale of property.

It was held that;

***“The counter-claim by the 2<sup>nd</sup> Defendant ... was not of a commercial nature as envisioned in Order LIII”.***

As regards the counter claim by the Defendants for an Order that the property still belongs to him and the ancilliary Orders sought, I am of the considered view that the Defendant has failed to prove its counter-claim on a balance of probabilities. I had earlier on held that the 2<sup>nd</sup> Defendant had capacity to enter into a contractual contract and that he was not incapacitated at the time of contracting.

In respect of the counter-claim for an Order that the property belongs to the 2<sup>nd</sup> Defendant; this claim fails as I have already found that the house was sold to the Plaintiff and that the 2<sup>nd</sup> Defendant herein had capacity to contract.

It goes without saying that the counter-claims for Orders that the Plaintiff settles the alleged fraud charge of Zesco bills and returns all items collected at the premises of the 2<sup>nd</sup> Defendant fails. No evidence lead was as to the items collected.

There is further no evidence produced before Court of the alleged concessional agreement between the parties that the Plaintiff was to have collected rentals as refund of the purchase price. The



evidence adduced was that the Plaintiff had requested that he be refunded the purchase price and further that he was not refunded.

It is my view and holding that there was no concessional agreement between the parties as alleged and the Order sought to uphold the alleged concessional agreement is dismissed. Equally the Orders sought for mental anguish, manipulation and indoctrination as claimed by the Defendants are without merit and are declined and dismissed accordingly.

I hereby accordingly enter Judgment in favour of the Plaintiff and hereby declare that the Plaintiff duly and lawfully bought the property known as House Number 61/10 Kaunda Square Stage 1 Lusaka from the 2<sup>nd</sup> Defendant and that he is the legitimate owner of the property.

The Interlocutory Injunction granted to the Plaintiff pending determination of the matter restraining the Defendants either by themselves, agents or anyone from interfering with the Plaintiff's or his tenant's quiet and peaceful enjoyment of the said property is hereby made permanent.

Costs to the Plaintiff to be taxed in default of agreement.

Leave to Appeal is granted.

**Dated the 4<sup>th</sup> Day of March, 2014**

.....  
Hon. Mrs. Justice F. M. Chishimba  
**HIGH COURT JUDGE**