

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA

2012/HP/0368

(Civil Jurisdiction)

BETWEEN:

STAFFORD CHEWE KAYAME

AND

VICTOR MAVUNGA



PLAINTIFF

DEFENDANT

Before the Hon. Mrs. Justice A. M. Sitali on the 4th day of May, 2015.

For the Plaintiff : *Mr. A. Chizu of*
Messrs Chanda Chizu and Associates

For the Defendant : *Mr. L. Zulu of*
Messrs Tembo Ngulube and Associates

J U D G M E N T

Cases referred to:

1. Zambia Railways Limited v. Pauline S. Mundia and Brian Sialumba (2008) ZR vol 1 287.
2. Khalid Mohamed v Attorney-General (1982) ZR 49.
3. Galaunia Farms Limited v National Milling Company Limited and Another (2004) ZR 1.
4. Colgate Palmolive (Z) Inc v. Chuka and Others Appeal Number 181 of 2005 (unreported).

Other works referred to:

5. Chitty on Contracts Volume 1, General Principles, Thirtieth Edition London: Thomson Reuters (Legal) Limited, 2008

The plaintiff commenced this action on 5th April 2012 by writ of summons accompanied by a statement of claim claiming for an order for payment of K40,000,000.00; damages for breach of contract and loss of use of the money or the vehicle; interest on the money found due; and costs.

At the trial of the action the plaintiff Stafford Chewe Kayame testified that on 11th July, 2007 he agreed to sell his Hino Truck Registration number ABE 1657 to the defendant Victor Mavunga at the price of K60 million (unrebased). The defendant and he proceeded to execute the agreement which is on page 1 of the plaintiff's bundle of documents. The terms of the agreement were that the defendant would first make a down payment of K25 million on 12th July, 2007 and that the balance of K35 million would be paid on 12th August, 2007. The plaintiff stated that it was agreed that the white book for the truck would be released by the plaintiff to the defendant upon payment of the full purchase price.

The plaintiff went on to testify that on 13th July 2007, the defendant informed him that he had a shortfall in the money and made a down payment of K20 million (unrebased). The defendant undertook to pay the sum of K40 million as a second instalment. The plaintiff stated that he issued the defendant with a receipt for the sum of K20 million and identified a copy of the said receipt on page 2 of the plaintiff's bundle of documents. The plaintiff further testified that the defendant requested to use the truck before he finished paying for it and that he authorised him to use the truck and wrote a note permitting him to use the truck within and outside Zambia. He identified the note on page 3 of the plaintiff's bundle of documents. The plaintiff stated that the note bears the defendant's registration card number 902230/13/2 and that he gave his residential address as Flat 7 Benakale Flats Northmead, Lusaka.

The plaintiff testified that when the defendant did not pay the K40 million balance of the purchase price in August 2007 as agreed, he went to flat No. 7

Benakale flats in Northmead and found that the flat was vacant. The plaintiff stated that after a number of years he managed to locate the defendant with the assistance of a pastor of a church in Woodlands Chalala, in Lusaka. The plaintiff stated that he demanded for payment of the outstanding balance of K40 million but the defendant told him that he had no money to give him. The plaintiff stated that he reported the matter to the police at Woodlands Police station and they advised him to take the matter to Court.

The plaintiff went on to state that he sold the truck to the defendant and not to Mr. Haruperi as the defendant alleged in the defence he filed into Court. He denied that the contract was rescinded or that he resold the truck to a farmer in Monze as alleged by the defendant. He said that he had not seen the truck since he sold it to the defendant. He prayed that he might be granted the reliefs he seeks in the writ of summons.

In cross examination the plaintiff testified that when he first met the defendant in his office, the defendant was with a foreign man whom he introduced as his business partner. He further stated that the foreigner did not express any interest in his truck and that it was the defendant who expressed interest in the truck. The plaintiff denied that he demanded that he would only deal with a person resident in Zambia and said that the foreigner did not play any role in the transaction for the sale of the truck. The plaintiff further stated that it was the defendant, and not the foreigner, who paid the first instalment of K20 million (unrebased) and that it was the defendant who got the truck from the garage where it was being serviced at the time it was sold to the defendant. The plaintiff reiterated that the defendant and he agreed that ownership of the truck would be transferred from the plaintiff to the defendant on 31st August, 2007 after the defendant paid the balance of K40 million (unrebased).

The plaintiff said that he did not report the truck as missing because the defendant told him that he would be doing business between Zambia and

Zimbabwe and that he permitted him to use the truck only up to 31 July, 2007. He denied that he resold the truck to a farmer in Monze and said that he had not seen the truck since he sold it to the defendant. He said the truck was still registered in his name as the defendant has never paid the full purchase price of the truck.

In re-examination the plaintiff testified that he did not release the white book to the defendant because they agreed that he would only release the white book after the defendant paid the K40 million balance of the purchase price.

That was the plaintiff's case.

The defendant Victor Mavunga testified on his own behalf and called one witness. The defendant who was DW1 testified that he was taken to the plaintiff's office by Charles Haruperi, who is now deceased, and who wanted to buy a truck from the plaintiff. DW1 said that the plaintiff refused to sign the contract of sale for the truck with Charles Haruperi because he lived in South Africa. According to the defendant, the plaintiff insisted that he would only sign the contract with someone who was resident in Zambia. DW1 testified that Charles Haruperi convinced him to facilitate the transaction according to the conditions set by the plaintiff as seller. DW1 stated that the agreement was already typed and he signed it. DW1 stated that he got an invoice from the plaintiff after Charles Haruperi had paid the sum of K20 million. He said he was not present when money was paid.

The defendant went on to state that two years later, he was visited by the plaintiff who went to his church in the company of a police officer and demanded that he should find Charles Haruperi as he (DW1) had signed the agreement. DW1 stated that he found Charles Haruperi who furiously narrated that he was not informed the truck had a knock engine. DW1 testified that in sympathy he agreed to find another buyer for the truck and

that he found a mechanic called Mark Masubya who agreed to buy the truck at K40 million. DW1 said that the agreement between Mark Masubya and the plaintiff was verbal. Three (3) years later he was approached by the plaintiff and a police officer who took him to Woodlands Police station where he was directed to find Mark Masubya as he had not paid. DW1 said he volunteered to drive the police officers to Mazabuka in the hope of apprehending Mark Masubya but he eluded them. DW1 said that was when the plaintiff commenced this action.

DW1 confirmed that he signed the agreement for the sale of the truck, which agreement is on page 1 of the plaintiff's bundle of documents and that he did so in good faith although he was not the purchaser of the truck. He also testified that the receipt for the sum of K20 million bears his signature although he was not present when the money was paid. DW1 testified that he signed the receipt on the same day that the plaintiff issued the note at page 3 of the plaintiff's bundle of documents authorising him to use the truck to do business within and outside Zambia. DW1 said that the details of his registration card number and his residential address which were endorsed on the note marked P3 were obtained from the contract of sale on page 1 of the plaintiff's bundle of documents.

In cross examination DW1 testified that the details of the transaction for the sale of the Hino Truck number ABE 1657 were agreed by the plaintiff and Charles Haruperi and that he was not privy to the discussion. He stated that he went to the plaintiff's office only to sign the sale agreement to conclude the transaction for the sale of the truck. DW1 said that he voluntarily signed the sale agreement between the plaintiff and himself on 11th July, 2007 and was not forced to do so. He admitted that the sale agreement does not bear Charles Haruperi's name and that he signed the acknowledgement of payment and receipt for the K20 million on 13th July, 2007. DW1 conceded that all the three documents produced by the plaintiff relating to the Hino truck registration

number ABE 1657 were signed between the plaintiff and himself and that Charles Haruperi was not present when the plaintiff released the truck to him under the authority of the note marked P3 which is on page 3 of the plaintiff's bundle of documents. DW1 stated that Charles Haruperi is supposed to pay the balance of K40 million.

DW1 further conceded that he did not produce any document before this court to support his assertion that the plaintiff later sold the truck to a farmer in Monze.

In re-examination, DW1 stated that Mark Masubya should pay the sum of K40 million because there was an agreement between him and the plaintiff for the sale of the truck.

DW2 was Chabu Mulenga, a police officer who testified that some years back while he was stationed at Woodlands Police Station, the plaintiff reported that he had sold a truck to a person whom DW2 could not recall, who had not paid any money for the truck. DW2 said that the truck was reported to have been sold at K40 million at the time. DW2 said upon interviewing the plaintiff, the plaintiff informed him that the buyer of the truck lived in Libala. They together went to Libala but did not find the buyer as he was reported to be in South Africa. DW2 said he left the person a call out to report at Woodlands Police Station. DW2 said they proceeded to look for the defendant at a church in Libala as he was reported to have introduced the plaintiff to the buyer but they did not find him. DW2 said that on the date of the call out the buyer whose name he could not recall reported at Woodlands Police station and the plaintiff was called and confirmed that that was the person who had his truck. DW2 said the plaintiff and the buyer discussed in his hearing and the buyer promised to pay for the truck on a date that DW2 could not remember.

DW2 said that he was surprised that the buyer did not bring the money on the agreed date. He stated that when he and the plaintiff went to his house in Libala, they found that he had shifted. It was then that the plaintiff decided to pursue the defendant who had introduced the buyer to him. DW2 said that he summoned the defendant to Mtendere Police Post where he had been transferred to as officer in charge. The defendant readily came and undertook to find the buyer. He said that the defendant organised transport and they asked the plaintiff to accompany them to Mazabuka to look for the buyer but that the plaintiff refused to come along.

DW2 said that they did not find the buyer in Mazabuka and that he (DW2) did not hear anything else from the plaintiff until he was contacted by the defendant in this case in relation to this case.

In cross examination, DW2 said that the plaintiff reported the matter as a criminal case in 2010 and that the plaintiff had no issue with the defendant at that time. DW2 said that he could not recall if the plaintiff showed him any documents which the defendant signed. When shown exhibit P1 the agreement between the plaintiff and the defendant on page 1 of the plaintiff's bundle of documents, DW2 conceded that that was an agreement between the plaintiff and the defendant for the sale of the Hino truck registration No. ABE 1657. He confirmed that the agreement revealed that the plaintiff sold the truck in issue to the defendant. He also confirmed that exhibit P2 the receipt on page 2 of the plaintiff's bundle of documents revealed that the defendant paid K20 million to the plaintiff as a down payment for purchase of the truck.

In re-examination, DW2 testified that the sale agreement for the sale of the Hino Truck registration number ABE 1657 exhibit P1 which was signed between the plaintiff and the defendant was not the document the plaintiff showed him at the police station. He said that the letter of sale was hand

written in pen. He said the white book and the letter of sale were shown to him by the plaintiff.

That was the defendant's case.

Both parties filed written submissions. Mr Chizu counsel for the plaintiff submitted that based on the evidence adduced by the plaintiff and the defendant which is supported by the documents produced by the plaintiff, namely exhibits P1, P2 and P3, on pages 1, 2, and 3 of the plaintiff's bundle of documents respectively, it is not disputed that a valid contract existed between the plaintiff and the defendant. Counsel submitted that the defendant did not dispute the fact that he signed the agreement with the plaintiff but admitted that he signed the agreement voluntarily. Counsel submitted that since the parties voluntarily executed the contract and as the terms of the contract were clearly spelt out in the said contract, this Court's hands are tied and the court must enforce the written agreement. To support his submission, counsel drew my attention to the case of Colgate Palmolive (Z) Inc v. Chuka appeal No. 181/205 – SCZ 269/2005 in which the Supreme Court quoting from the case of Printing and Numerical Registering Company v. Simpson stated that:

“If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by courts of justice.”

Counsel further cited the case of President of India v. Jesben (UK) Limited (1991) 1 Lloyd Rep at page 9 on construction of words and terms in a contract in which Lord Goff stated that:

“I must confess I am reluctant to speculate on the motives of a party for adopting a clause in any particular form. For once a clause is embodied in

a commercial contract; it has simply to be construed in its context, from the objective point of view of a reasonable person in the shoes of the contracting parties.”

Mr Chizu submitted that the contract entered into between the plaintiff and the defendant is clear and it needs only to be construed as it is and be enforced accordingly.

Counsel contended that the defendant merely gave oral evidence and called DW2 to support his assertion that the contract he entered into with the defendant was rescinded and that the plaintiff in fact resold the same truck to another person, which assertions the plaintiff totally denied. Counsel went on to submit that this evidence was an afterthought and does not come within the exception to the general legal principles on parole evidence and should, therefore, not be accepted. Counsel contended that there were also discrepancies in the evidence of the two defence witnesses. Counsel observed that while DW1 in line with his defence alleged that one Charles Haruperi who was not resident in Zambia had bought the truck, DW2 testified that a certain farmer of Mazabuka, whom he did not name, had bought the truck.

Counsel further submitted that there were elements of lies in the testimony of the two defence witnesses and so their testimony cannot be relied upon. Mr Chizu contended that it is not the number of witnesses called to testify in a matter which counts but the cogency or authenticity of the evidence. In support of his contention counsel cited the case of Zambia Railways Limited vs. Philemon Kaunda (1999) (unreported) where at page J.3 the Court stated that:

“it does not matter therefore how many witnesses a party called, what mattered at the end of the day was proper evaluation of evidence by the Court.”

Counsel submitted that the defendant in trying to escape liability testified that he only facilitated the sale and contended that this testimony cannot legally discharge him from being liable. Counsel submitted that even if the defendant's version of the story was taken to be true, it would not change matters at all as he would be considered as an agent of the buyer and would personally be liable as an agent. The case of Cavmont Merchant Bank Limited v. Amaka Agriculture Development Company Limited (2001) ZR 73, was cited in support where it was held that

“Where an agent is a contracting party he will be held personally liable even if he names his principal.”

In conclusion counsel submitted that based on the facts of the case and the authorities cited above, this court should enter judgment in favour of the plaintiff and grant him the reliefs he seeks with costs, as the plaintiff has proved his claim on a balance of probabilities.

Mr. Zulu, counsel for the defendant, submitted that the plaintiff's evidence was essentially that he had concluded a written contract with the defendant which was not fully satisfied by the defendant. Counsel submitted that the defendant on the other hand testified that even though the contract of sale was in his name, he was merely a nominee for one Charles Haruperi, a Zimbabwean national who actually contracted with the plaintiff and that it was only upon the plaintiff's insistence that a local person should be a party to the contract that the defendant decided to accept to be party to the contract. Counsel submitted that in addition to this, DW1 testified that the contract was rescinded after the defendant and Charles Haruperi had differences over the Hino truck which developed problems. According to the defendant the Hino truck was then re-sold by the plaintiff for K40 million to one Mark Musubia, a farmer or mechanic of Monze. Counsel submitted that the defendant

introduced Mark Musubia to the plaintiff and that a contract was concluded between the two although the defendant was not given a copy.

Counsel went on to submit that by law, a contract or an agreement can be discharged by way of rescission. Counsel cited Chitty on Contracts, 29 edition which provides that:

“Where a contract is executory on both sides, that is to say, where neither of the parties has performed his obligations under it, it may be rescinded by mutual agreement, express or implied. A partially executed contract can be rescinded by agreement provided there are obligations on both sides which remain unperformed.”

Counsel further submitted that Black’s Law Dictionary, 8th edition defines rescission as *“an agreement by contracting parties to discharge all remaining duties of performance and terminate the contract”*.

Counsel cited the case of R V Ward v. Bignall [1967] 2 ALL ER 449, in which Lord Diplock LJ, according to counsel, stated the effect of rescission to be as follows:

“rescission of a contract discharges both parties from any further liability to perform their respective primary obligations under the contract, that is to say to do those things which by their contract they had stipulated that they would do.”

It was submitted that the defendant is not liable because the contract of sale was rescinded and that there is evidence of rescission in this matter. It was submitted that the contract for the purchase of the Hino Truck was executory in that both parties had not fully performed on the contract. According to Mr. Zulu, the plaintiff had not surrendered the white book and transferred the

property in the truck to the defendant while the defendant had not fully paid the purchase price. Counsel submitted that since it was executory, the contract could have been rescinded by the parties which is what happened.

It was submitted that the defendant testified that the parties agreed to find another buyer for the motor vehicle which agreement was acted on by both parties. That the plaintiff clearly accepted the arrangement to find another buyer which buyer was actually found and introduced to the plaintiff by the defendant. According to Mr Zulu, there is corroborative evidence of the rescission of the agreement in that the plaintiff himself even went to the police to report against the subsequent purchase of his Hino truck. Counsel submitted that at the police station, the plaintiff did not report the defendant as the buyer but rather reported the person who was introduced to him as the buyer. Mr Zulu contended that the plaintiff did not even avail the police with the contract of sale between him and the defendant but rather availed to the police the contract between him and the subsequent buyer.

Counsel submitted that the conduct of the plaintiff was consistent with the fact that the contract had been rescinded. Counsel contended that in the circumstances, the defendant was discharged from the contract and that the plaintiff's claim against him is without merit and devoid of any legal support. He, therefore, prayed that the matter be dismissed with costs.

I have considered the evidence adduced by the respective parties and the written submissions filed by their respective counsel on their behalf. From the evidence on record the following facts are not disputed and have been proved: that on 11th July, 2007, the plaintiff and the defendant executed an agreement in which the plaintiff agreed to sell to the defendant a Hino truck registration number ABE 1657 at the price of K60 million (un rebased). The terms of the contract were that the defendant would pay the sum of K25 million as a first instalment by 12th July, 2007. The second instalment of K35 million was to be

paid on 12th August, 2007. On 13th July, 2007, the defendant paid the sum of K20 million and was issued with a receipt to that effect in his name leaving a balance of K40,000,000.00 (unrebased).

On 14th July, 2007, the plaintiff released the Hino truck to the defendant for the defendant to use in his business within and outside Zambia until 31st August, 2007. The defendant did not pay the balance of K40,000,000.00 (unrebased) to the plaintiff on the agreed date and he has not returned the truck to the plaintiff or paid the balance to date. Hence this action.

It is settled law that a person who commences a civil action must prove his case against the defendant in order to succeed in his claim. To that effect, the learned authors of Phipson on Evidence, 17th edition in paragraph 6-06 at page 151 state the following regarding the burden of proof in civil cases:

“So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons.”

The standard to which the person must prove his case is on a balance of probabilities. In the case of Zambia Railways Limited v. Pauline S. Mundia and Brian Sialumba (1) the Supreme Court held that the standard of proof in civil matters is not as rigorous as the one obtaining in criminal matters and that simply stated, the proof required is on a balance of probability, as opposed to beyond reasonable doubt in a criminal case. The Supreme Court further reiterated that the old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable.

If the plaintiff fails to prove his case against the defendant to the required standard, judgment will not be entered in his favour, even if the defendant's case fails: see Khalid Mohamed v Attorney-General (2).

The plaintiff claims for the sum of K40 million unrebased or K40,000.00 rebased as the balance of the purchase price payable to him under a contract of sale of a Hino truck by the defendant. The plaintiff asserts that the defendant undertook to pay the said amount by 13th August, 2007 but has not paid the money to him to date. The defendant on the other hand denies that it is he who owes the plaintiff the said sum of money and asserts that although he signed the contract, he did so, on behalf of one Charles Haruperi. It is the defendant's assertion that the plaintiff refused to sign the agreement with Charles Haruperi because the said Charles Haruperi was a non-Zambia and resided outside Zambia at the time when the contract was executed.

The plaintiff denies that he contracted to sell his Hino truck to Charles Haruperi and asserts that although there was a foreign man with the defendant when he agreed with the defendant regarding the sale and purchase of the Hino truck, the said foreign man did not participate in the discussions and he expressed no interest whatsoever in purchasing the Hino truck.

The contract on page 1 of the plaintiff's bundle of documents which was produced and admitted into evidence as exhibit P1 shows clearly that the parties to the contract were the plaintiff and the defendant. The contract makes no mention of Charles Haruperi and exhibit P2 and P3 on pages 2 and 3 respectively of the plaintiff's bundle of documents reveal that it is the defendant in whose name the receipt was issued in acknowledgment of the payment by the defendant of the sum of K20 million down payment for the truck in issue. Exhibit P3 also reveals that the plaintiff released the truck to the defendant for use in his business within and outside Zambia. The note stated that the

defendant was permitted to use the truck under that note until 31st August, 2007.

The validity of the contract between the plaintiff and the defendant is not disputed. In fact the defendant admitted that he signed the contract in issue voluntarily. However, he contends that he was merely acting on behalf of Charles Haruperi as an agent. Counsel for the plaintiff submitted that the defendant's claim that he acted on Charles Haruperi's behalf does not assist the defendant as it does not take away the defendant's liability for the breach of the contract. I fully agree with Counsel's submission because even assuming that the defendant acted as an agent of Charles Haruperi which fact the defendant has not proved before this court, the defendant undertook to perform the contract and cannot be heard to say he was merely a friend or agent of the purchaser of the truck at this late stage.

Further, the defendant asserted in paragraph 10 of his amended defence that the contract between the plaintiff and Charles Haruperi was rescinded after the plaintiff and Charles Haruperi disagreed over the truck and that the motor vehicle was surrendered to the plaintiff. He further alleged in paragraph 12 of the said defence that after the rescission of the contract, the plaintiff sold the same motor vehicle to a farmer of Monze at K40 million. Mr. Zulu submitted that the contract between the plaintiff and the defendant was rescinded because both parties had not fully performed their obligations under the said contract. According to counsel, the plaintiff did not perform his obligations under the contract because he did not surrender the white book of the truck to the defendant and so he did not transfer title in the truck to the defendant.

It is trite law that a contract can be rescinded by agreement of the parties. In paragraph 22-025 the learned authors of Chitty on Contracts, Thirtieth Edition, at page 1461 state the following:

“Where a contract is executory on both sides, that is to say, where neither party has performed the whole of his obligations under it, it may be rescinded by mutual agreement, express or implied. A partially executed contract can be rescinded by agreement provided that there are obligations both sides which remain unperformed.” (Emphasis mine).

In the present case however, the defendant’s allegation that the plaintiff rescinded the contract by reselling the truck to a farmer of Monze as stated in paragraph 12 of the defence or to a mechanic of Mazabuka, namely Mark Mazubya as the defendant stated in his oral testimony is not supported by any evidence on record. The agreement on page 1 of the plaintiff’s bundle of documents which was signed by the plaintiff and the defendant, and which was admitted into evidence as exhibit P1, clearly sets out the terms of the agreement. According to that agreement, the price of the truck was K60 million. A down payment of K25 million was to be made by the defendant on 12th July, 2007. The final payment of K35 million was to be paid by the defendant on 12th August, 2007.

Nowhere in that agreement is there a term that the plaintiff was to surrender the white book to the defendant before the defendant paid the full price for the truck as Mr Zulu submitted on behalf of the defendant.

It is trite law that a party who makes an allegation in a civil matter must prove it. In the case of *Galaunia Farms Limited v National Milling Company Limited and Another* (3) his Lordship, Sakala, C.J., as he then was, reaffirmed this position and stated that *“the burden to prove any allegation is always on the one who alleges.”*

Further, as Mr. Chizu rightly submitted, and I agree with him, there were inconsistencies in the testimony of the defendant and his witness DW2. Whereas the defendant stated in paragraph 12 of his amended defence that

after the alleged rescission of the contract, the plaintiff sold the truck to a farmer of Monze whose name he did not state, the defendant asserted in his oral testimony that the plaintiff sold the truck to one Mark Masubya a mechanic of Mazabuka.

The defendant further testified that the agreement between the plaintiff and the alleged Mark Masubya was verbal. However, DW2 said that he was shown a hand written letter of sale by the plaintiff relating to his resale of the truck to a buyer whose name DW2 said he could not recall. DW2 also testified that the plaintiff and the unnamed buyer discussed the payment of K40 million for the truck to the plaintiff in his presence. The defendant on the other hand alleged in paragraph 12 of his amended defence that the plaintiff and the farmer concluded the contract of sale in the presence of police officers at Mtendere Police Post.

The contradictions in the testimony of the defence witnesses clearly show that the two witnesses are not credible witnesses and that their testimony cannot be relied upon.

From the evidence on record, it is clear that the defendant breached the contract he entered into with the plaintiff when he failed to pay the balance of K40 million for the truck as agreed under the contract dated 11th July, 2007. The parties having freely entered into the contract for the sale and purchase of the Hino truck, it remains for this court to enforce the contract as held in the case of Colgate Palmolive (Z) Inc v. Chuka (4).

Based on the evidence before me, I find that the plaintiff has proved on a balance of probabilities that it was the defendant with whom he entered into a contract to sale the Hino truck for the sum of K60 million. I further find that the defendant paid the sum of K20 million out of that sum leaving a balance of K40 million for which the plaintiff now claims. I accept the plaintiff's evidence

to that effect as he has ably supported it with documentary evidence which is on pages 1, 2 and 3 of the plaintiff's bundle of documents.

I, therefore, enter judgment in favour of the plaintiff and order that the defendant shall pay to the plaintiff the sum of K40,000.00 rebased being the outstanding balance of the purchase price. The plaintiff has also claimed for damages for breach of contract. The plaintiff did not adduce evidence to show what specific damage he has suffered. Therefore, I will award him only nominal damages of K5,000.00 for breach of contract. In total the defendant will pay the sum of K45,000.00 rebased with simple interest at 10% per annum from the date of issue of the writ of summons until final payment.

I award costs to the plaintiff to be agreed and taxed in default of agreement. Leave to appeal is hereby granted.

Dated the 4th day of May, 2015.



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A. M. SITALI
JUDGE