

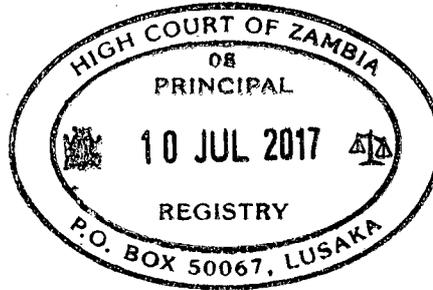
**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction).

2012/HP/0763

BETWEEN:

TIYE LIMITED

AND

KASHIWA MWABA BULAYA**ZWERE INTERNATIONAL LIMITED****PLAINTIFF****1st DEFENDANT****2nd DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 10th DAY OF JULY,
2017**

For the Plaintiff : Mr M. Ndhlovu, MRN Legal Practitioners

For the Defendants : Mr M. Mulele, GM Legal Practitioners

J U D G M E N T

CASES REFERRED TO:

1. *L'estrage V Groucob Limited 1934 2 KB 394*
2. *Sam Amos Mumba V Zambia Fisheries and Fish Marketing Corporation Limited 1980 ZR 135*
3. *Attorney General V Aboubaker Tall and Zambia Airways SCZ No 5 of 1995*
4. *Union Bank Zambia Limited V Southern Province Cooperative Marketing Union Limited SCZ No 7 of 1997*
5. *Isaac Tantameni Chali V Liseli Mwala 1997 SJ 22*
6. *Portland Managements Limited V Harte and others 1976 1 ALL ER 225*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The Conveyancing and Law of Property Act, 1881*
2. *Chitty on Contracts, General principles 27th edition Volume 1, London Sweet and Maxwell AG Guest*
3. *Chitty on Contracts, 29th edition*
4. *Trietel's Law of Contract, 13th edition*

5. Halsbury's Law of England 4th edition re-issue
6. Odgers Principles of Pleadings and Practice

The Plaintiff on 11th July, 2012 commenced this action by way of Originating Summons with an affidavit in support claiming;

- i. *That the 1st and 2nd Respondents are liable to the Applicants for mense profits in respect of Stand No 4634 Lusaka, from the date ownership of the said property passed from the 1st Respondent to the Applicant together with interest thereon*
- ii. *That possession of Stand No 4634 Lusaka be immediately availed to the Applicant who is the registered owner thereof having certificate of title number 125164*
- iii. *Costs of and incidental to this action be for the Applicant*
- iv. *Any other relief the court might deem fit*

On 25th June 2013 the court that had conduct of the matter then directed that trial in the matter would be had with pleadings, and to this end ordered that the applicant should a statement of claim, and the respondents should also file their respective defences within 14 days of service of the statement of claim. The statement of claim which was filed on 17th June, 2013, states that by an agreement dated 11th June, 2006 the Plaintiff and 1st Defendant had entered into an agreement for the 1st Defendant to assign Stand No 4634 to the Plaintiff at an agreed consideration of K400, 000, 000.00 then, and now ZMW400, 000.00.

Paragraph 5 of the statement of claim states that the ZMW400, 000.00 agreed had already been received by the 1st Defendant in the total sum of ZMW490, 000.00 on diverse dates from 13th May, 2005 to 25th January, 2006, and had been acknowledged by the 1st Defendant. That it was part of the repayment of the debt, and the balance of the debt amounting to ZMW90, 000.00 remained due to the Plaintiff from the 1st Defendant.

That as a result of the agreement, the Plaintiff and 1st Defendant executed a deed of assignment dated 3rd February, 2006 in respect of Stand No 4634,

assigning the said stand to the Plaintiff. It is stated in the statement of claim that the Plaintiff in pursuance of both the contract and the assignment on 6th July, 2011, applied for renewal of the consent to assign the property, which consent was renewed on 7th July, 2011.

The statement of claim further shows in paragraph 8 that on or about 11th July, 2011, the Plaintiff paid property transfer tax in the amount of ZMW50,000.00, being five percent of the value of the property that was assessed at ZMW1,000,000.00, by the Zambia Revenue Authority (ZRA). Further that by virtue of an ex-parte order granted by the High Court on 1st July, 2011, the Plaintiff registered the assignment at the Lands and Deeds Registry, and consequently certificate of title number 125164 was issued to it.

That thereafter on 10th October, 2011 the Plaintiff's advocates had written to the 2nd Defendant that was occupying the property, advising it that it was the registered owner of Stand No 4634 Lusaka, and further requested it to disclose the amount of rentals that it was paying to the 1st Defendant. However the 2nd Defendant had continued disregarding the Plaintiff as owner of the property, and had declined to account for the rentals that it has been paying to the 1st Defendant.

The statement of claim states that as a consequence, the Plaintiff has been denied possession of the said Stand No 4634, as well as the rental income for the property which the 1st Defendant continues to enjoy, despite having received the full purchase price from the Plaintiff.

The prayers in the statement of claim are that;

- i. *A declaration that as the 1st defendant signed the contract of sale dated 11th January, 2006, and an assignment dated 3rd February, 2006 for the sale to the Plaintiff of Stand No 4634 Lusaka, and received the full purchase price thereof, the Plaintiff lawfully obtained certificate of title number 125164 for Stand No 4634 Lusaka, and is the rightful owner registered owner of the said property.*

- ii. *Recovery of the sum of ZMW90, 000.00 as the balance due from the 1st Defendant after the deduction of ZMW400, 000.00, as the purchase price for Stand No 4634 from ZMW490, 000.00.*
- iii. *Loss of rental income in respect of the said Stand No 4634, Lusaka*
- iv. *Interest on (i) and (ii) above*

As against the 2nd Defendant

- v. *An order of possession of Stand No 4634 Lusaka*

As against the 1st and 2nd Defendants

- vi. *Costs*

The 1st and 2nd Defendants filed their defence on 6th September, 2014 in which the 1st Defendant denies the amount stated as consideration by the Plaintiff. The 1st Defendant avers that the ZMW400, 000.00 was not an agreed consideration as the Plaintiff took advantage of the 1st Defendant's criminal prosecution, and demanded that the 1st Defendant assigns his property as a result of the ZMW50, 000.00 that he had borrowed to pay for his bail, and the ZMW53, 000.00, which was the balance outstanding on building materials that were obtained.

It is the 1st Defendant's defence that the correct amount owing was ZMW103, 000.00, to which the Plaintiff added interest, raising it to ZMW400, 000.00, and thereafter started pressurizing the 1st Defendant to change ownership of the house, and hand it over. Further that due to the problems that the 1st Defendant had with the State, the Plaintiff forced him to assign the property which is worth billions of kwacha for a mere ZMW103, 000.00, which the Plaintiff had raised to ZMW400, 000.00.

The 1st Defendant maintains that the property is worth more than ZMW400, 000.00. It is also the 1st Defendant's defence that during his criminal prosecution all his properties including Stand No 4634 were restricted from being sold by the Task Force on Corruption, and he had appealed against the

said decision, which is yet to be determined by the Supreme Court in cause number Appeal No SCZ/01/2009.

Paragraph 9 of the defence states that the Plaintiff was written to, and accordingly advised that the sale could not go ahead.

At the hearing the Plaintiff called one witness, while the 1st and 2nd Defendants called four witnesses. PW1 was Sanmukh Ramanlal Patel. His evidence was that Astro Holdings is a company with a group of associate companies, including the Plaintiff Company. He stated that they had bought Stand No 4634, Lusaka from the 1st Defendant in 2006, after the 1st Defendant had informed them that he had bought the property with benefits he was paid at the Ministry of Health. It was PW1's evidence that a contract of sale, and an assignment were executed between the Plaintiff and the 1st Defendant at a price of \$125, 000.00 or ZMW400, 000.00.

He identified the document on page 1 of the Plaintiff's bundle of documents as the said contract, and he produced it and it was marked 'P1'. Further in his testimony PW1 told the court that the contract was signed on 11th January, 2006, and thereafter the assignment was executed on 23rd February, 2006. He stated that he had signed it on the Plaintiff's behalf, and the 1st Defendant had signed on his own behalf. The assignment was produced as 'P2'. That after that the Plaintiff had registered the assignment, but the 1st Defendant had told them that the property was restricted, and the sale was put on hold.

He further testified that in 2011 he had asked his lawyers to conduct a search at the Ministry of Lands on the property, and he was advised that there was no restriction on the property, and what they instead found was that the property had been provided as security for a mortgage with 1st Alliance Bank. That PW1 had proceeded to clear the mortgage, and an application to extend time within which to register the assignment was made, and granted. He identified the document on pages 8-20 of the Plaintiff's bundle of documents as the affidavit that was filed in support of the application for extension of time within which to register the assignment. It was produced and marked as 'P3'. He also

identified the order granting extension of time on page 21 of the Plaintiff's bundle of documents, and it was produced and marked 'P4'.

Further in evidence, it was stated that the Plaintiff had also paid the property transfer tax, and conveyancing charges on behalf of the 1st Defendant. The receipt issued by ZRA for the payment of property transfer tax was identified as the one on page 25 of the Plaintiff's bundle of documents, and it was produced and marked as 'P5'. The tax clearance issued by ZRA was also identified as the document on page 26 of the bundles, and it was produced and marked 'P6'.

PW1 stated that after the property was registered they tried to take possession of it, as they had not been getting rentals for it from the time they bought it in 2006, as it was occupied by a tenant. They then executed a lease which was between the Plaintiff and Mwashia Medical Centre, on 5th February, 2006. The said lease is on page 1 of the Plaintiff's supplementary bundle of documents, and it was produced, and marked as 'P7'.

It was PW1's evidence that for the first three months the rentals were agreed at \$1000 a month, and thereafter at a monthly rate of \$2, 000. However they did not receive any rentals as injunctions were filed. That thereafter proceedings for possession of the property were commenced, but they were stayed. In conclusion PW1 told the court that they would like to take possession of the property, as well as recover the rentals for the said property.

In cross examination PW1 stated that he had known the 1st Defendant for a long time, possibly twenty two years. That they had a friendly relationship until the 1st Defendant had misled him that the property was restricted. He agreed that there are numerous subsidiaries under Astro Holdings, one of them being Ronax Suppliers. He also agreed to being a shareholder in Ronax Suppliers.

PW1 stated that in 1994 the 1st Defendant had obtained some materials from Ronax Suppliers on credit, and that during his criminal trial the 1st Defendant had borrowed money from Astro Holdings for his bail and legal fees. He denied that these monies were converted into the purchase price for the property, stating that cash was given. He told the court that he had no proof to that effect.

It was also stated that the advocates for both the 1st Defendant and the Plaintiff when the contract of sale was executed, was Katayi of KCK, and that at the time PW1 was aware that a mortgage was registered on the property. When referred to page 3 of 'P1', PW1 stated that the special conditions of sale do not make reference to the mortgage. He agreed that consent to assign the property was granted after the contract of sale was executed, the consent having been obtained on 27th January, 2006. He said this was after they had undertaken to clear the mortgage.

He agreed that page 5 of the Plaintiff's bundle of documents states that the purchase price for the property as \$125, 000, but could not say why the amount had not been stated in kwacha. It was his evidence that the property transfer tax was not paid in 2006, even though paragraph 3 of the assignment on page 6 of the bundles states so.

PW1 also agreed that he has an interest in First Alliance Bank, being a chairman and shareholder in the same. He could not recall when the Plaintiff discharged the mortgage against the property. When referred to page 28 of the Plaintiff's bundle of documents he stated that the discharge of the mortgage was done in 2011. He could not say why there had been no foreclosure against the property despite the 1st Defendant not servicing the loan. PW1 stated that he could not recall having received written communication to the effect that the property had been restricted, though he was communicated to orally. He maintained that the offer of sale of the property was never withdrawn. When referred to page 13 of the Defendant's bundle of documents, PW1 stated that he did not recall having received that letter, stating that they did not have anyone occupying the office of general manager.

PW1 could also not recall the date when legal action was first taken to recover the rentals, but agreed that Mr Gupta used to work as Director for him at Astro Holdings. He stated that Mr Gupta could have been director at the Plaintiff Company. His evidence was that the Plaintiff only became aware in 2011 that the property was not restricted, and that they could not conclude the conveyance as the 1st Defendant had told him that the property was restricted.

The first defence witness was Kashiwa Mwaba Bulaya, the 1st Defendant. He stated that he knew PW1 as director and shareholder of the Plaintiff Company. That he had known him for over twenty two years, stating that he is a British national, and not a Zambian as he claims. That the documents for First National Bank, Tiye Limited and Ronack Suppliers where he is director and shareholder show that he is a British national. He identified the document on page 27 of the Defendant's bundle of documents as the Patents and Company Registry (PACRA) printout for Tiye Limited, and it was marked 'DD1' and produced as 'D1'.

Further in his testimony DW1 told the court that when he was arrested by the Task Force on Corruption, for commission of alleged criminal offences, his accounts were frozen, so he could not access any money from those accounts. Further that a number of his properties, movable and immovable were also seized. He stated that as a result of the relationship that he had with PW1, his company Anbul Investments applied for a loan at First Alliance Bank for ZMW60, 000.00, and he pledged his property which was at the time operating as Mwasha Medical Centre as security for the loan.

That he was in custody at Kamwala Remand prison after his second arrest, after a nolle prosequi was entered after the first arrest, and he had no money to pay for bail. His lawyers then Mumba Kapumpa of Mumba S.K advocates, and Mr John Sangwa of Simeza Sangwa and Associates, together with his elder brother Chisha Nkatya Kasenga went and saw PW1, who lent them ZMW50, 000. 00. He stated that later he had to pay legal fees to his lawyers, and he sent his wife to PW1 who gave him ZMW15, 000.00, and his wife and brother signed for that money.

Further in his testimony DW1 explained that when he was building his house he had obtained building materials from Ronack Supplies on credit worth ZMW35, 000.00. He identified the documents on pages 1, 2, 3 and 5 of his bundle of documents as containing proof of the money that he had borrowed. They were marked 'DD2', 'DD3', 'DD4' and 'DD5' and produced and marked accordingly. DW1 told the court that he had borrowed a total sum of ZMW200,

000.00, and a further ZMW40, 000 obtained from the Plaintiff through his lawyers Mumba Kapumpa and his brother, for bail pending appeal. That it was at that point that PW1 started charging interest on the amount and the amount came to ZMW400, 000.00.

He told the court that he raised objection to the interest, as he had borrowed the money as a friend, and when they sat to discuss, DW1 had decided to sell the property in dispute, so that he could offset the amount owed to the Plaintiff. As none of them knew the value of the property, they obtained three valuation reports. That the Task Force on Corruption learnt that DW1 wanted to sell the property and they wrote to his lawyers instructing them to stop DW1 from selling it, as the property was before court, and had not been disposed of by the court. That any sale of the property would amount to contempt of court. He identified the document on page 12 of the Defendant's bundle of documents as the letter from the Task Force.

DW1 went on to testify that he signed the contract of sale so that he could raise money to pay PW1. That KCK had prepared the contract, and PW1 had pressurized DW1 to sign it, as he wanted to be paid his money. That PW1 thereafter threatened to close Mwashwa Medical Centre. He denied having given instructions to KCK when they prepared the contract, so they did not act for him. He identified the proceedings of the Subordinate Court where the application to restrict sale of the property was made, and they were marked 'DD6', and produced as 'D6'. He further identified the newspaper article on pages 19 and 20 of the Defendant's bundle of documents over the sale of the property, and it was marked 'DD7', and produced as 'D7'.

He continued with his evidence testifying that thereafter a letter was written to the Plaintiff informing it of the restriction on the sale of the property, which letter is at page 13 of the Defendant's bundle of documents. It was marked 'DD8', and produced as 'D8'. DW1 further stated that in the affidavit in opposition to the Originating Summons he had deposed that he had given Suresh Gupta a certificate of title for a small holding being Plot 43 Kapilyomba Farms in Chongwe as replacement.

It was his evidence that the Subordinate Court convicted him, and he was sentenced to five years imprisonment, and all the properties including Stand No 4634 were forfeited to the State, as evidenced on the document on page 21 of the Defendant's bundle of documents. The said forfeiture order was marked as 'DD9', and produced as 'D9'. DW1 testified that the forfeiture order still stands, as he had appealed against the Subordinate Court judgment. It was his evidence that the matter is still active in the Supreme Court under cause number SCZ/9/01/2009.

It was further stated that DW1 through his lawyers Simeza Sangwa and Associates had requested the Director of Public Prosecutions (DPP) to sell the property, but the response had been that there was nothing that could be done as the court had made an order on the property, and that the application should be made through the court. He identified the letter on page 22 of his bundle of documents as the one written by Simeza Sangwa and Associates, and it was marked as 'DD10', and produced as 'D10'. He further identified the response from the DPP which is on page 24 of the Defendant's bundles, and it was marked 'DD11'. On production it was marked 'D11'.

DW1 testified that when PW1 registered the assignment out of time, the property was encumbered by a mortgage. He stated that he was in prison from 26th December, 2008 until 26th April 2012 after his appeal was dismissed by the High Court, and PW1 went behind his back and registered the assignment out of time, without his knowledge. That the mortgage against the property was with the bank where PW1 is director and shareholder, and he does not know how it was discharged. That there should have been foreclosure, and PW1 should explain how the mortgage was discharged. He also testified that when the court forbade sale of the property all transactions in relation to the property fell through, as they were overtaken by the court order.

It was stated that despite the property being sold at ZMW400, 000.00, the property transfer tax paid was ZMW50, 000.00. This he attributed to ZRA rejecting the value of ZMW400, 000.00 as the purchase price. That the property transfer tax on the ZMW400, 000.00 should have been ZMW20,

000.00. DW1 testified that the purchase price indicated on the assignment was stated in dollars, an amount determined by PW1. He denied having agreed on the purchase price of ZMW400, 000.00, stating that even the consent to assign the property is addressed to Kashiwa Mumba Bulaya, and not Kashiwa Mwaba Bulaya. He further denied that PW1 could have paid ZMW400, 000.00 using petty cash vouchers, adding that he was not paid for the property.

When cross examined DW1 agreed having borrowed money from PW1. He also agreed that PW1 is the chairperson of First Alliance Bank. It was his evidence that PW1 confirmed having added interest to the money that DW1 had borrowed, and the affidavit shows that indeed the interest was added.

DW1 also testified that there was no document before the court showing agreement on the principal and the interest charged, but he stated that PW1 had offered to buy the property. He stated that when he signed the contract of sale, there was no restriction on sale of the property at the Ministry of Lands, but stated that the property was encumbered by a mortgage.

Further in cross examination, DW1 told the court that he only became aware that the property was registered in the Plaintiff's name when he received the summons for this case. He stated that he was in prison up to 26th April, 2012, so he was not aware of the demand for payment of rentals made to the 2nd Defendant. He agreed that he is challenging the sale transaction, as the property was forfeited to the State, but stated that the State had not been joined to the proceedings, as he had appealed against the forfeiture order.

He further denied having been appointed by the State to claim the property on its behalf. It was his testimony that he has asked the court to cancel the title deed issued to the Plaintiff, and he told that court that he had not paid back the money he owes the Plaintiff, stating that he intends to pay it back.

He agreed that the lease on page 1 of the Plaintiff's supplementary bundle of documents is between the Plaintiff and Mwashu Medical Centre, and that PW1 had signed on behalf of the Plaintiff, and the witness was Suresh Gupta. That Mr C.N.K Mwaba had signed on behalf of Mwashu Medical Centre, and DW1 as the witness. It was his evidence that he does not know who has been receiving

all the rentals referred to in the document, but stated that no money has ever been paid to the Plaintiff.

He maintained that there were criminal proceedings as pages 17 to 20 of the Defendant's bundle of documents show that the prosecutor had applied to the court for forfeiture of the property to the State, and that page J71 of the judgment by the Subordinate Court lists the properties that were forfeited.

DW2 was Didi Kangwa, an Acting Senior Clerk of Court at the Lusaka Subordinate Court. He told the court that he had been subpoenaed to produce the record under cause number SSP/69/2005 for the People V Kashiwa Bulaya. He stated that he had not managed to trace the record as there had been an appeal to the High Court, against the said judgment. The matter was adjourned, and on 4th April when the matter came up, DW2 informed the court that he had the case record for the criminal trial which contained the proceedings held on 14th February, 2006, stating that on that date the prosecutor had informed the court that DW1 was in the process of selling the property, and the defence had undertaken to stop the sale of Stand No 4634, Lusaka, as evidenced on page 224 of the record of appeal.

He also stated that the court granted the order of forfeiture of the property, and that the judgment at page 71 had named all the properties, including Stand No 4634, which was produced as 'P46'. The witness also produced 'DD12' in evidence, and it was marked 'D12'. He was not cross examined.

The third defence witness was Chisha Nkatya Kasenga Mwaba. He is the Finance Director of Anbul Investments, and Mwashwa Medical Centre. It was his evidence that as director of finance he is responsible for the financial affairs of Anbul Investments, and its subsidiaries namely Mwashwa Medical Centre Limited, and Sofia Blocks Limited. He testified that in 2006 as finance director of Anbul Investments he had gone to First Alliance Bank and secured a standing overdraft facility of ZMW60, 000.00 which was meant to help the company's operations from time to time, if there were liquidity problems.

DW3 told the court that the overdraft facility was secured by Stand No 4634 Rhodespark, Lusaka. That in the same year 2006 they had received a letter

from lawyers representing DW1 over a letter written to them by the Task Force on Corruption. That the letter from the Task Force had warned of serious consequences if they proceeded to sell the property, which had been intended to be sold to help DW1 liquidate the amount of ZMW218, 000.00.

The evidence of DW2 was that the ZMW218, 000.00 was broken down as ZMW50, 000.00 obtained from Astro holdings for the 1st Defendant's bail at the Subordinate Court, another ZMW40, 000.00 obtained from Astro Holdings for bail for the 1st Defendant, ZMW15, 000.00 for legal fees also obtained from Astro Holdings bringing the total to ZMW105, 000.00. Then there was the amount of ZMW53, 000.00 that the 1st Defendant owed Ronac Limited, and the overdraft of ZMW60, 000.00.

He stated that the Plaintiff is a subsidiary of Astro Holdings, and that DW2 witnessed the execution of the contract of sale between the Plaintiff and the 1st Defendant for the sale of Stand No 4634, Lusaka, but he did not recall the Plaintiff paying ZMW400, 000.00, as consideration for the sale. He stated that the amount of ZMW400, 000.00 emanated from the pressure exerted by PW1 to liquidate the amounts owed. That PW1 had proposed to buy off the property after professional valuers were engaged. Further that PW1 had added interest of ZMW180, 000.00 to the ZMW218, 000.00 owed, as the amount had taken long to be paid back.

It was stated that the contract of sale had a proviso that the proceeds of sale would go towards the ZMW400, 000.00, and the balance to the 1st Defendant, as contained in clauses 4, 8 and 9 of the contract. He stated that the discussion was freely done, and PW1 had stated that the property would be in the Plaintiff's name, stating that no actual sale price was agreed by the parties.

DW2 explained that what was agreed was that they would reduce the agreement into writing, and call for valuation of the property, and from that, the ZMW400, 000.00 owed would be knocked off, and the 1st Defendant would remain with the balance.

He stated that the property was not handed over to the Plaintiff, as before they could engage the professional valuers, they received a letter from the Task

Force on Corruption through the 1st Defendant's lawyers stating that if they proceeded with the sale, they would be in contempt of court. That is how DW2 had written to the Plaintiff withdrawing both the contract of sale and the assignment, to avoid being in contempt of court. He identified the letter at page 27 of the Defendant's bundle of documents as the said letter that he had written to the Plaintiff, withdrawing the offer.

DW3 also testified that the 1st Defendant had offered Stand No 4634 to Mwasha Medical Services as his contribution as a shareholder, and it was agreed that once the property was valued, the amount would be a debenture loan to the 1st Defendant, by Mwasha Medical Services. He told the court that the property is in his care. It was further his testimony that when he wrote to the Plaintiff withdrawing the offer of sale of the property, the Plaintiff just acknowledged receipt of the letter but did not respond to the contents. He stated that the Plaintiff had demanded payment of rentals, as the property was not handed over to them.

He restated the 1st Defendant's evidence that the State forbade disposal of the property during the 1st Defendant's criminal trial, and that after the trial the properties were forfeited to the State. He further testified that the matter is currently before the Supreme Court, and he was therefore shocked that the Plaintiff had obtained ownership of the property.

In cross examination DW3 testified that the contract and the assignment were discussed in friendly atmosphere. He agreed that when he wrote to the Plaintiff cancelling the contract of sale, they did not pay the Plaintiff the money owed to it. He further agreed that when the contract was executed, the property was mortgaged by First Alliance Bank. He maintained that the matter involving forfeiture of the properties is still active in the Supreme Court, under cause number SCZ/9/01/2009, but could not say if there is a date set for the hearing of the appeal.

DW3 testified that he did not know if the State had placed a restriction on the property at the Ministry of Lands. He however agreed that Mwasha Medical Services had been renting out the property, and had been receiving the rentals.

Whilst agreeing that the Plaintiff as landlord, and Mwashu Medical Services as tenant, had executed a lease agreement for the rental of Stand No 4634, he stated that the Plaintiff had not received the rentals, as the property was not theirs.

The last witness called by the defence was Gray Ngandu, who is a director in the 2nd Defendant. He testified that he could not recall having received or acknowledged having receiving the letter on page 8 of the Plaintiff's supplementary bundle of documents. He stated that as he does not know the Plaintiff he referred all queries in this matter to his lawyers.

DW4 in cross examination maintained that he did not receive the letter on page 8 of the Plaintiff's bundle of documents. When referred to paragraph 10 of the defence, he stated that it states that they admit paragraph 10 of the statement of claim.

I have considered the evidence in this matter. The question in this matter is whether the Plaintiff is entitled to the reliefs sought. It is not in dispute that PW1 Sanmukh Ramanlal Patel is a director and shareholder of the Plaintiff Company, and he enjoyed a personal relationship with the 1st Defendant spanning a period of over twenty years. The evidence in this matter shows that the 1st Defendant borrowed over K200, 000.00 from the Plaintiff in the form of money when he was facing criminal charges, and also in the form of building materials.

It has also been seen from the evidence that the Plaintiff and 1st Defendant entered into an agreement that the 1st Defendant would convey the property known as Stand No 4634, Lusaka to the Plaintiff in consideration for the amount of money borrowed. This agreement is embodied in the contract of sale for the property, which is at pages 1-3 of the Plaintiff's bundle of documents, which was produced as 'P1'. This document is dated 11th January, 2006.

The evidence further shows that after the contract of sale was executed, an assignment was also executed on 3rd February, 2006, transferring ownership of the property to the Plaintiff. However before that assignment could be registered, the 1st Defendant through his advocates received communication in

the form of a letter from the Task Force on Corruption, that was prosecuting the 1st Defendant for various criminal offences, which is on page 12 of the Defendant's bundle of documents, directing that the 1st Defendant should not dispose of the property, as it was the subject of criminal proceedings. He testified that as a result of the said correspondence, DW3 who was operating Mwasha Medical Centre at the subject property, wrote to the Plaintiff as evidenced on the letter dated 10th February, 2006, which is on page 13 of the Plaintiff's bundle of documents, withdrawing the offer of sale.

The Plaintiff in the submissions states that it is trite law, and hence a fundamental principle of contract law that when two people append their signatures to a document, they are bound by the terms therein. To this effect they rely on Chitty on Contracts, General Principles 1 at paragraph 12-001 at page 559. That based on the contract of sale that was executed, the Plaintiff has a right to the property, and applied ex-parte to register the assignment out of time, obtained consent to assign the property, and paid tax for the conveyance of the property, as well as obtained the title deed for the property, which is on page 31 of the Plaintiff's bundle of documents.

To support the acts of obtaining title to the property, the Plaintiff relies on Section 7 of the Conveyancing and Law of Property Act of 1881, which states that a person selling property covenants to transfer title of the property to the buyer. That the Plaintiff acquired this right upon the contract of sale 'P1', and the assignment 'P2', being executed. Further that as result of the contracts, the Plaintiff is entitled to possession of the property.

That based on the case of **PORTLAND MANAGERMENTS LIMITED V HARTE AND OTHERS 1976 1 ALL ER 225** where it was held that "**where an absolute owner of land brings an action for trespass against a person alleged to be in possession, all that the owner needs to do is to prove his title, and an intention to regain possession**". Further that Halsburys Laws of England provides that the Plaintiff recovers on the strength of his own title, not on the weakness of the Defendant.

It is further submitted that there is no evidence on record to show that the State had registered its interest in the property at the Lands and Deeds Registry, that would have prevented the 1st Defendant from assigning the property to the Plaintiff, and that if the property had been forfeited to the State, it is for the State to challenge the acquisition of the property by the Plaintiff, and not the 1st Defendant.

Therefore the 1st Defendant should have joined the State to this action in line with Order 14 Rules 1- 5 of the High Court Rules, Chapter 27 of the Laws of Zambia, as it has an interest in the subject matter of this suit. The case of **ATTORNEY GENERAL V ABOUBAKER TALL AND ZAMBIA AIRWAYS SCZ No 5 of 1995** is relied on, as is the case of **ISAAC TANTAMENI CHALI V LISELI MWALA 1997 SJ 22**, in this respect.

The Defendant in the submissions however argues that the contract of sale could not be fulfilled due to circumstances beyond the 1st Defendant's control, as the property was subject of court proceedings in a criminal trial against the 1st Defendant, and the task Force on Corruption had warned the 1st Defendant against disposing of the property. That the property was restricted, and subsequently forfeited to the State, after 1st Defendant was convicted.

Therefore the contract of sale was prevented from execution on the grounds of impossibility, mistake and frustration. That Halsbury's Laws of England 4th edition, at paragraph 441 is authority for this, as it states "**that where performance is impossible at the time of contracting, the case is one of impossibility or mistake; where impossibility arises after the formation of the contract, there is a case of subsequent impossibility or frustration.....that subsequent impossibility brings a valid contract to an end**".

Further reliance is placed on *Trietel on the Law of Contract*, 13th edition, which at paragraph 219-044 states that "**a contract may be discharged by supervening prohibition, if the prohibition would have made the contract illegal, had it been in force when the contract was made**". Counsel also relies on the case of **SAM AMOS MUMBA V ZAMBIA FISHERIES AND FISH**

MARKETING CORPORATION LIMITED 1980 ZR 135 which held that **“a subsequent change in the law or in the legal position affecting a contract is a well-recognised head of frustration at common law, the occurrence of a frustrating event terminates the contract forthwith”**.

Also relied on is Chitty on Contracts, 29th edition at paragraph 23-069, which states that **“at common law, frustration does not rescind a contract ab initio: it brings the contract to an end forthwith, without more and automatically, in the sense that it releases both parties from any further performance of the contract. A court does not have power at common law to allow the contract to continue, and adjust its’ terms to the new circumstances”**.

It is submitted that the subject matter of the contract had been frustrated, and to proceed with the transaction would amount to contempt of court. Further that it is not tenable for this court to order that the State should have been joined to these proceedings so that it could claim the property, as seen from paragraph 23-069 of Chitty on Contracts above. It is submitted that the order of forfeiture of the property to the State upon the 1st Defendant’s conviction has been challenged, and there is an appeal pending to that effect before the Supreme Court.

Other arguments against the grant of the reliefs sought are that the Plaintiff did not fulfil the terms of the contract, as despite the claim that it paid the purchase price of K400, 000.00 as stated in the contract, there is no evidence to that effect. That PW1 had alleged that petty cash vouchers were used to pay the purchase price, but what is on record is that the 1st Defendant borrowed money and building materials, which were converted into the purchase price.

Further that the money and building materials borrowed amount to K200, 000.00, entailing that interest of K200, 000.00 was added. That this amounts to penal interest, which is illegal at law, as was held in the case of **UNION BANK ZAMBIA LIMITED V SOUTHERN PROVINCE COOPERATIVE MARKETING UNION LIMITED SCZ No 7 of 1997**.

It is also submitted that a third party mortgage had been executed in favour of First Alliance Bank Limited by the 1st Defendant for funds lent to Anbul Investments Limited. That even though PW1 is a shareholder in First Alliance Bank Limited, this bank has a separate legal existence from PW1, and as such the contract between the Plaintiff and the 1st Defendant was subservient to the rights of First Alliance Bank Limited, as mortgagee.

Therefore in the absence of a power of attorney from the 1st Defendant or Anbul Investments Limited, empowering the Plaintiff to deal with the mortgage or a special condition in the contract to that effect, the Plaintiff had no right to deal with the mortgage.

The 1st Defendant also submits that the Plaintiff's conduct in relation to this matter leaves much to be desired, as despite PW1 testifying that the Plaintiff was notified of the withdrawal of the offer to sell the property, it elected not to respond to the same, signifying acquiescence to the same. However after the 1st Defendant was convicted, and the subject property forfeited to the state, the Plaintiff proceeded to register the assignment out of time, by misleading the court that this was on account of the fact that the property had been encumbered by a mortgage. That when cross examined on this, PW1 had stated that he had deposed to the affidavit according to the advice that he was given by Counsel. Therefore the Plaintiff had not come to equity with clean hands.

It is also submitted that PW1 had testified that the assignment was not registered in time as the Plaintiff was misled into believing that the said property was restricted by the courts, yet as could be seen from affidavit at page 8 of the Plaintiff's bundle of documents, the reason advanced for registering the assignment out of time, was that it was encumbered by the mortgage.

In the submissions in reply it is noted that on page 4 of the Defendant's submissions there is an assertion that no property transfer tax has been paid, and that this contrary to the evidence on record that at pages 25 and 26 of the Plaintiff's bundle of documents which are the tax receipt and certificate. That

the assertion regarding PW1 having stated what Counsel had advised him, amounts to giving evidence at the bar, and should be disregarded.

Further that at page 7 of the submissions in the third paragraph fraud is alleged. Counsel's submission is that this cannot be raised at this stage as fraud was not pleaded in the defence.

To this effect reliance is placed on *Odgers' Principles of Pleadings and Practice* which in relation Order 18 Rule 12 of the Rules of the Supreme Court opines at page 100 that ***"any allegation of fraud must be expressly pleaded together with the facts, matters and circumstances relied on to support the allegation. In practice the acts alleged to be fraudulent should be set out, and then it should be stated that those acts were done were fraudulently"***.

As regards the submissions on the application of interest at 100%, the Plaintiff submits that there was no evidence that was adduced to that effect, and no such questions were put to PW1 when he testified. That this matter hinges on a contract for the sale of Stand No 4634, whose consideration was confirmed by the 1st Defendant, as being the financial support that was availed to him by the Plaintiff. Reliance is placed on the case of ***L'ESTRANGE V GROUCOB LIMITED 1934 2 KB 394*** where an exclusion clause was held to form part of the contract despite being disputed, and that it was immaterial that L'estrage had not read it, as she had signed the contract.

Thus in this matter the figure put as the purchase price comprising the principle and interest at 100%, or whether it was paid or not, cannot arise, as the 1st Defendant signed the contract. With regard to the submissions on frustration of the contract, it is stated that the contract of sale and the assignment were executed, and there was nothing left for the 1st Defendant to do as he had already assigned his interest in the property to the Plaintiff, and the supervening prohibition could not discharge the contract.

That this is on account of the fact that even as late as 2011, no restriction notice had been entered against the property at the Ministry of Lands, and the state has not made itself a party to these proceedings, to challenge the

registration of the property in the Plaintiff's name. It is also argued that the Plaintiff was entitled to discharge the mortgage in favour of First Alliance Bank, so that it could register the assignment.

I will start with the purchase price stated in the contract of sale. As already seen the 1st Defendant borrowed money and building materials from the 1st Defendant which were converted into the purchase price for the property. The amounts borrowed total around K200, 000.00. For the purchase price to be stated as K400, 000.00 it can only be speculated that interest was added to the amounts owed as submitted by the Defendants.

However it is curious that PW1 who is the person that DW1 alleged put pressure on him to sign the contract of sale and the assignment was not cross examined on the interest. There is also evidence on record as adduced by DW3 that the contract and assignment were discussed in a friendly environment, despite DW1's testimony to the contrary. The two witnesses contradicted each other on the aspect of force or pressure having been exerted on DW1 so that he could sign the same, and the question is which one of the two witnesses is to be believed?

There is nothing in the evidence pointing to any pressure being exerted on DW1, as even his own evidence shows that they had agreed to sell the property so that he could pay off what he owed the Plaintiff. The submission that DW1 was pressured to sign the contract after he was convicted by the Subordinate Court is not supported by any evidence on record. It is therefore my finding that there was no such force.

It is trite that parties have the freedom to contract, and in this case the 1st Defendant signed the contract of sale with the stated price. As to whether the K400, 000.00 was not the actual amount borrowed, the evidence of DW3 was that after the parties discussed, it was agreed that the house would be sold, and if it was sold for over K400, 000.00, any excess would be given to the 1st Defendant. This evidence establishes that the parties were negotiating.

Therefore, it is my finding that DW1 agreed to the purchase price stated in the contract of sale. The agreement would have only been illegal if it had been

shown that penal interest was charged on the amount borrowed, which has not been established.

There is also an assertion that the Plaintiff went behind DW1's back to discharge the mortgage, and thereafter registered the property in its name. That it had no right to do so as the mortgage was in favour of First Alliance Bank, of which PW1 is a shareholder. Further that the Plaintiff and First Alliance Bank have separate legal existence from PW1.

In my view the Plaintiff could have gone ahead to discharge the mortgage, but of course only with the mortgagor's knowledge and consent, as a mortgagor in equity retains a right to redeem a mortgage. PW1 took advantage of his position as shareholder and chairperson in both the Plaintiff and First Alliance Bank to discharge the mortgage.

The Plaintiff claims a declaration that it is the owner of Stand 4634 Lusaka, an order for possession, and loss of rental income.

After the contract of sale and the assignment were executed, the Plaintiff was informed by DW3 through Mwasha Medical Services, that the Task Force on Corruption had restricted the property. It is true as argued by the Plaintiff that no restriction notice was registered against the property at the Ministry of Lands. However it is not in dispute that the 1st Defendant was warned not to dispose of the property, and that upon his conviction by the Subordinate Court, an order of forfeiture was made against that property, as seen from the evidence of DW2. The High Court upheld both the conviction and forfeiture orders. It is on record that the 1st Defendant has appealed to the Supreme Court against the forfeiture order, which fact was not disputed by the Plaintiff.

The restriction and forfeiture were brought to the Plaintiff's attention. Therefore to go ahead and register the assignment out of time, and thereafter obtain title to property that had been forfeited to the State, goes against the principles of protecting a bonafide purchaser for value. This is because the Plaintiff was aware that the property had been forfeited to the state. The order challenging the forfeiture is pending before the Supreme Court, and it cannot therefore be said that the order has been reversed.

I therefore agree that while the parties had signed the contract of sale, and the assignment when the order prohibiting the 1st Defendant from selling it, and the property being forfeited to the state was made, the contract was frustrated by supervening factors.

The argument that there was nothing for the 1st Defendant to do at that stage, as he had already assigned his interest in the property to the Plaintiff cannot stand, as frustration came after that, and it is trite that criminal proceedings take precedence over civil matters. Thus the forfeiture order is a supervening factor that has frustrated the contract. On that basis the Plaintiff cannot be declared the owner of Stand No 4634 Lusaka, and the claim fails.

It therefore follows that the Plaintiff is equally not entitled to an order of possession of the property as well as rentals for the property, and these claims equally fail, and are dismissed. Costs of the matter go to the Defendants to be taxed in default of agreement. Leave to appeal is granted.

DATED THE 10th DAY OF JULY, 2017

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE