

IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

2008/HP/0609

BETWEEN:

LIEUTENANT ALEX CHEWE

PLAINTIFF

AND

27 MAR 2017

ANNIE MWINGA MAPALA

DEFENDANT

**BEFORE HONORABLE MR. JUSTICE MWILA CHITABO, SC**

*For the Plaintiff:*

*Mr. W. Mwenya of Messrs Lukona  
Chambers*

*For the Defendant:*

*Mr. A. Siwila of Messrs Mambwe Siwila &  
Lisimba Advocates*

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

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**Cases referred to:**

- (i) *Wesley Mulungushi v. Catherine Bwale Mizi Chomba (2004)  
ZR 96*
- (ii) *Sable-hand Zambia Limited Revenue Authority Appeal No. 5  
of 2003*

- (iii) *Lt. General Geojago Chewe Musengule v. Attorney General* 2004/HP/0589
- (iv) *Jonas Amon Banda v. Dickson Machiya Tembo* (2008) ZR 204
- (v) *Muliwana v. Lusaka City Council and Christopher Mulala* (2002) ZR 1
- (vi) *Peter Militis v. Wilson K. Chiwala* (2009) ZR 34
- (vii) *Nkongolo Farms Limited v. Zambia National Commercial Bank Limited Plc, Kentchoice Limited (in receivership) Charles Haruperi* (2003) ZR 78
- (viii) *Khalid Mohamed v. Attorney General* (1982) ZR 49
- (ix) *Wilson Masauso Zulu v. Avondale Housing Project Ltd* (1982) ZR 172
- (x) *Premish Bhai Megan Patel v. Rephidim Institute Ltd* (2011) 1 ZR 134

**Legislation referred to:**

- (i) *High Court Rules Chapter 27 of the Laws of Zambia*
- (ii) *Rules of the Supreme Court of England, White Book 1999 Edition*

**Other works**

1. *Phillip S. James General Principles of Law of Torts 2<sup>nd</sup> Ed. 1964*

The genesis of this matter is that the Plaintiff Lieutenant Alex Chewe commenced proceedings by way of writ of summons and statement of claim on 23<sup>rd</sup> June, 2008 against the Defendant Annie Mwiinga Mapala seeking the following reliefs:-

- (i) *An order for specific performance of the contract of sale of House No. 27, Pemba Road, Chilenje South, Lusaka entered into between the Plaintiff and the Defendant;*
- (ii) *Damages for wrongful fraudulent conversion of property and or for breach of contract;*
- (iii) *An order of injunction to restrain the defendant either by herself, her agents or servants or by whosoever from in any way interfering with the Plaintiffs possession and enjoyment of the said House No. 27, Pemba Road, Chilenje South, Lusaka;*
- (iv) *Interest;*
- (v) *Any other relief the Court may deem fit;*
- (vi) *Costs.*

Following the demise of the Plaintiff, he was subsequently substituted by **George Chewe** and **Naomi Chitambala Chewe** (as administrator and administratrix) of the estate of the late Lt. Alex Chewe.

The Defendant took issue as to the amounts paid towards the purchase price of house No. 27, Pemba Road, Chilenje South, Lusaka. She then counterclaimed for:-

(1) A declaration that the defendant is the beneficial owner of the subdivision 769 of Stand No. 7417 Chilenje South;

(2) That of the purchase price of K45, 000 the plaintiff paid a sum of K26, 000, 000 leaving a balance of K19, 000, 000 (unrebated) and sought reliefs of:-

- (i) Rescission of the contract of sale to sell the subject property to the plaintiff;*
- (ii) An order directing the defendant to refund the plaintiff together with interest at average bank rate;*
- (iii) Recovery of mesne profits and rents accrued to the plaintiff from the date the plaintiff took possession of the property to date of Judgment;*
- (iv) Costs; and*
- (v) Any other relief the Court may deem fit and just.*

In her reply and defence to counterclaim, it was averred that the Plaintiff has so far paid K39, 200, 000 leaving a balance of K5, 800, 000 pending completion. She denied owing a balance sum of K19, 000, 000 on the agreed purchase price. She equally denied owing any mesne profits to the Defendant in respect of property.

In support of her claim, the Plaintiff Naomi Chitambala Chewe called one witness that is PW1 (herself). In her sworn testimony she testified that she is a plaintiff by virtue of her appointment as administrator of the estate of the late husband Lieutenant Alex Chewe, who died intestate on 3<sup>rd</sup> March, 2012 and also by virtue of

a consent order sealed by the Learned Deputy Registrar on 16<sup>th</sup> October, 2014 making her a party to the proceedings.

It was her evidence that she knew the defendant as she was their matron at her wedding with her late husband in the year 2003. She respected, trusted and treated her as her mother.

At that time the Defendant has property house No. 27 Pemba Road, Chilenje South in Lusaka. She offered it for sale to me and my husband at a consideration of K45, 000, 000 (unrebased). There was no duration in which to complete as according to the vendor the Plaintiff and her husband were the first couple she was marrying off.

By letter dated 29<sup>th</sup> November, 2002, the Defendant wrote an offer letter to Mr. Alex Chewe under the name of Annie Mwiinga Mapala as per document No. 7 in the Plaintiffs bundle of documents. The offer was valid for 15 days.

By letter dated 4<sup>th</sup> December, 2002, Mr. Alex Chewe accepted the offer and requested for an early processing of the contract of sale as soon as possible as appears as per document number 8 in the Plaintiffs bundle of documents.

It was her testimony that the vendor had intimated that the purchaser/s could pay anything they had and there was no duration in which to pay the balance. This agreement was beknown to the Plaintiffs auntie Mrs. Ngoma.

She made reference to document No. 9 which she said was prepared by the Defendant reflecting the payments made in respect of the purchase of the property aggregating K39, 200, 000 (unrebased) leaving a balance of K5, 800, 000 on the purchase price. Defendant allegedly signed against the last payment of K2, 500,000.00.

The purchaser took possession of the property in 2003 but when they asked for certificate of title from the vendor, they were advised that the certificate of title was with the council. The understanding was that the balance would be paid upon presentation of the Titled Deeds.

The vendor then disappeared only to reappear in the year 2007 to ask for the balance. She was told the same would be paid upon exchange of the Title Deeds. She complained about the City Councils delay in giving Title deeds. A sum of K1, 500, 000 (unrebased) was given to her to back her up to speed up acquisition of the Title Deeds.

On 2<sup>nd</sup> October, 2007, the purchasers received a demand letter from Messrs Mutemwa Chambers, the Advocates for the Defendant as per document 10 of the Plaintiffs Bundle demanding payment of the balance on the purchase price and interest thereupon at 40% from the time of the agreement in 2002.

It was communicated that if payment was not made within 14 days the contract would be rescinded. They offered to refund the deposit paid on the property.

It was her evidence that they (her husband and herself) could not understand the claim of 40% because it was the vendor who had delayed conclusion of the sale by her failure to provide Title Deeds.

They thus instructed their Attorneys Messrs Lukona Chambers to respond, which they did in their letter dated 11<sup>th</sup> October, 2007 in which they pointed out that the balance due on the purchase price was K5, 800, 000 (unrebased).

It was further pointed out that the contract was not subject to the LAZ General conditions of sale and that in any event it was stating that their client who had failed to produce a certificate of title could now throw the blame on the purchaser who was willing to complete upon deduction of title.

It was her evidence that in 2009 they relocated to Kabwe leaving the Plaintiffs aunt in occupation of the property. They then received a report from the Plaintiff's aunt that a lady answering to the name of Chipso a sister of the defendant had gone to inspect the property.

Investigations and searches and inquiries were done at the Lusaka City Council and Indo (Z) Bank Limited where it was revealed that the Defendant had obtained a credit facility through the Kamwala Branch against mortgage over House No. 27, Pemba Road, Chilenje in Lusaka and that the facility had been paid in full as at 10<sup>th</sup> December, 2007 as appears at page 15 of the Plaintiff's bundle of documents.

It was her further evidence that Indo (Z) Bank Ltd had placed a caveat on the property.

Mr. Alex Chewe then on 19<sup>th</sup> February, 2008 placed a caveat on the property to secure his interest in the property as per document No. 16 in the Plaintiffs bundle of documents.

It was her further testimony that at the time of purchase, the house required attention and certain renovations were made to include putting up wall fence around the house, painting ceiling board and replacement of windows. The said renovations were with the consent of the vendor. She pointed out that the vendor issued a notice to complete after 5 years from the date of the offer.

She finally asked for the reliefs ought in the writ and paragraph 7 (i) – (v) as appears at page 3 of the statement of claim in the Plaintiffs bundle of documents.

Cross examined by Senior Counsel Siwila and in so far as the answers were not repetitive, PW1 testified that the offer of sale of property was made to her late husband. She conceded that the contract did not indicate how long it would take to complete paying the purchase price; it could have been 3 years.

Shown document No. 9 which an alleged record or acknowledgment of payments by the purchaser towards the purchase price, she conceded it could have been neater if the document had been signed by both parties, but pointed out that she trusted and treated the vendor who was her matron as a mother.

She insisted the document had been signed by the vendor by appending the signature against the last payment demonstrating



that the whole amount had been paid though she did not sign against the payments of K15, 000, 000; K3, 000, 000 (unrebased).

She conceded that she had no proof of the payment of K1, 500, 000. She had given to the vendor to assist her follow up the uplifting of the certificate of title.

She admitted she not paid the balance of K5, 800 on the purchase price because they were waiting for the vendor to surrender the Certificate of Title.

She confirmed they had put up a guest wing on the premises and a parameter fence, but she was not aware if the Council consent was given for their construction as it was the husband who was very much involved in the transaction.

She conceded that if council permission for construction of the structures had not been granted, then the structures were illegal. She denied breaching any contract. She denied that there was any contract.

The Plaintiff rested her case.

DW1 was the Defendant herself who gave her name as Anne Mwiinga. She testified that she had been introduced to Mr. Alex Chewe by a Mr. Jongolo who was a co-worker with the Plaintiff and took up occupation of the property as her tenant at plot 27, Pemba Road, Chilenje South, Lusaka.

The terms were monthly rentals of K850, 000 to be paid 3 months in advance. Plaintiff took occupation in 2002; due to failure to pay rentals she made decision to dispose or sell the house.

When the Plaintiff got wind of the sale, he expressed interest to purchase the same, though he had no means. He then brought in his uncle a Mr. N'gona who he claimed had pledged to buy him the house.

A commitment sum of K15, 00 was paid and an offer letter was written on 29<sup>th</sup> November, 2002 though document reflected Ms **Annie Mwiinga Mapala**, the original document only showed **Annie Mapala**.

It was her testimony that the said Mr. N'gona undertook to complete paying the purchase price between January 2003 and March 2003. He however only paid one installment in January 2003 of K8, 000,000 through his wife and the former since then vanished abandoning the transaction.

In June, 2003 she made follow up with the Plaintiff (Mr. Alex Chew) who paid a sum of K500, 000 towards the rent and a further sum of K2, 500,000 for that purpose for period August, 2002 to December, 2002. In August, 2003 she made a further follow up and the Plaintiff allegedly told her that Mr. N'gona was infact indebted to him in respect of a loan house the later had facilitated for him.

In the course of time, the Plaintiff became hostile so she refrained from pursuing matter in respect of eviction of the Plaintiff and recovery of rent arrears until the year 2007 when she handed the matter to her lawyers, who generated a letter on 2<sup>nd</sup> October, 2007, demanding of payment of balance on purchase price with interest there upon at 40% from date of offer.

It was her evidence that as at 2<sup>nd</sup> October, 2007 the Plaintiff had only paid K23, 000, 000 in 2 installments of K15, 000, 000 and K8, 000, 000 through Mr. N'gona.

The Plaintiff directly paid K3, 000, 000 bringing the total amount towards the purchase price to K26, 000, 000.00. She denied having received a total sum of K39, 00 from the Plaintiff. She admitted receiving a bank loan from Indo (Z) Ltd over the property but pointed out that she had lawfully done so since that was her property and has since paid off the loan.

She denied delaying completion.

It was her evidence that no evidence had been led that she was a crook nor was evidence led to show that she had received K39, 200 towards the purchase price.

It was her further evidence that Mr. N'gona as infact since requested for the refund of his money of K23, 000, 000 leaving the sum of K3, 000, 000 as the only money received from the Plaintiff. She concluded by praying for reliefs of:

- (i) *Rescission of the 2002 contract;*
- (ii) *Mesne profits;*
- (iii) *Vacant possession;*
- (iv) *Removal of caveat; and*
- (v) *Costs.*

Cross examined by Learned Senior Counsel Mr. Mwenya and in so far as the answers were not repetitive the witness testified she conceded that the names Annie Mwiinga Mapala refer to her though her name is Annie Mwiinga. She was indeed a matron at the wedding of Mr. and Mrs. Chewe.

She did not have a lease agreement before the agreement to sell the house. It was her evidence that Mr. Musonda had agreed to pay the purchase price as reflected in document No. 9 by mention of word uncle. She denied existence of offer letter of 29<sup>th</sup> November, 2002 and acceptance of the offer by letter dated 4<sup>th</sup> December, 2002.

It was her evidence that a sum of K3, 000, 000 received from the Plaintiff was towards rentals. It was her further evidence that she wanted to evict the Plaintiff in 2003 but did not put that in writing. She admitted being in possession of the certificate but did not avail it to the Plaintiff.

At the conclusion of the case, both Learned senior Counsel for the parties made written submissions. The gist of the Plaintiffs submissions were as follows:-

(1) VALIDITY OF CONTRACT OF SALE

It was submitted that on the basis of the offer letter dated 29<sup>th</sup> November, 2002 written by the Defendant offering the sale of House No. 27, Pemba Road Chilenje South, Lusaka (herein this Judgment to be referred to as the property) at a consideration of K45, 000, 000 (unrebased) and on the basis of an acceptance letter dated 4<sup>th</sup> December, 2002 written by the Plaintiff the late Mr. Alex Chewa there was a valid and legally binding contract.

In support of his submission Learned Counsel cited many relevant authorities notably the case of **Wesley Mulungushi v. Catherine Bwale Mizi Chomba**<sup>1</sup> wherein the Court of final resort held inter alia that:

*“(iv) The appellant and respondent by their conduct or deed intended to be bound by a contract of sale which the respondent offered and the appellant accepted”*

It was submitted that time was not of essence in the contract and there was no evidence to support the Defendant that a Mr. N’gona had undertaken to pay the balance of K30, 000, 000 due on the purchase within 3 months by March 2003.

(2) DEDUCTION OF TITLE

It was submitted that the Defendant had failed to deduce title and that was the reason for failure to complete. In any event it was

argued the purported notice to complete was issued after 5 years without reference or effort to deduce title.

### (3) NOTICE TO COMPLETE

It was reechoed that the failure to complete was traceable directly and attributed to the default on the part of the Defendant.

### (4) FRAUD ALLEGATION

This allegation by the Defendant was strongly countered. It was pointed out that fraud had not been specifically pleaded which is a requirement in pleadings. Reliance was made on the case of ***Sable – hand Zambia Limited v. Zambia Revenue Authority***<sup>2</sup>.

It was further submitted that the burden of proof lies on the one alleging fraud, and the standard of proof is greater than on the simple balance of probabilities. Reliance was placed on the case of ***Robert Chaswe Musengule v. Attorney General***<sup>3</sup>. The challenge was premised on the ground that the Defendant had not objected to the production of document number 9 which was the acclaimed summary of payments made towards the purchase price contrary to Order 19 of the High Court Rules,<sup>1</sup> and Order 38 Rule (1) (i) of the Rules of the Supreme Court of England<sup>2</sup>.

Reference was also made to the proposition that it is the Courts duty to construe such documents as the one in question fairly and broadly without being too astute or subtle in finding defects. The Learned Counsel called in aid the case of ***Jonas Amon Banda v. Dickson Machiya Tembo***<sup>4</sup>.

(5) CLAIM FOR RENT AND MEISNE PROFITS

It was submitted that on the authority of *Muliwana v. Lusaka City Council and Christopher Mulala*<sup>5</sup>, the position at law is that once an offer is accepted, the status of Landlord and Tenant changes to that of vendor and purchaser. That in the absence of express terms in the contract the defendant was not entitled to meisne profits and interest.

Counsel buttressed his submission by calling in aid the case of *Peter Militis v. Wilson K. Chiwala*<sup>6</sup>.

(6) UNJUST ENRICHMENT

As a follow up submission, it was pointed out that granting the remedy of recovery of meisne profits would be unjust enrichment more so that the failure to complete was due to the default on the part of the defendant.

(7) SPECIFIC PERFORMANCE

In conclusion it was submitted that there was a proper case to order specific performance.

Learned Counsel for the Defendant filed their submissions; the gist of which was as follows:-

(i) Agreement on period in which to pay purchase price

It was submitted that indeed there was a valid contract of sale as evidenced by the offer and acceptance letters. However, the evidence of Defendant showed that the purchase price was to be

paid by March 2003 following payment of deposit of K15, 000, 000 by a Mr. N'gona uncle to the Plaintiff Mr. Chewe.

It was argued that the Plaintiff only paid a sum of K8, 000, 000 and abandoned the transaction.

(ii) Rescission of the contract / time of essence

It was submitted that on account of the Plaintiff's failure to settle the full purchase price by March, 2003, the Defendant was entitled to rescind this contract of sale since time was of essence. Reliance was placed on the case of **Wesley Mulungushi v. Catherine Bwale Mizi Chomba<sup>1</sup>**.

(iii) Specific performance

It was submitted that the remedy of specific performance was not available to the Plaintiff on account of the fact that such remedy was an equitable one. That the failure to complete payment of purchase price or paying money into Court or making efforts to settle the same means the Plaintiff ad not come to Court with clean hands.

(iv) Wrongful fraudulent conversion

It was submitted that the Defendant being the registered owner had every right to mortgage the property as full purchase price had not been paid. In any event, Counsel submitted the mortgage from the bank was obtained with the full knowledge of the Plaintiffs.



Reliance was placed on passages from the Learned Authors **Phillip S. James; General Principals of Torts**<sup>1</sup> at page 96 to the effect that the tort of conversion is dealing with goods in a manner inconsistent with the right of the owner provided that it is also established that there is also an intention on the part of the Defendant to assert a right which is inconsistent with the owners rights and that it is essential that the Plaintiff must be entitled to immediate possession of goods.

It was a further submission that on the authority of **Nkongolo Farms Limited v. Zambia National Commercial Bank Plc**<sup>7</sup>, the Plaintiff was under a duty to supply the precise necessary particulars of allegations of fraud in the pleadings which fraud had to be strictly proved. That in the case in casu the Plaintiff had failed to do so and so the claim on this limb must fail.

He lastly invited the Court to dismiss the action with costs and to uphold the counterclaim with costs to the Defendant.

I am indebted on the researchful industry of the Learned Counsel for both parties. The submissions were relevant and useful. Having said this, I confess I did not take into account the submissions in reply by the Plaintiff which were filed outside the agreed time frame.

The starting point is that I have disclosed my mind to the legal requirement that the burden of proving a case lies on the Plaintiff or who is claiming and the standard is ordinarily on the balance of probabilities.

Ngulube, DCJ (as he then was) had occasion to pronounce himself on the subject matter in the case of ***Khalid Mohamed v. the Attorney General***<sup>8</sup>, where he instructively and authoritatively succinctly restated the law. He put it this way:-

*“An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to Judgment. I would not accept a proposition that even if a Plaintiffs case has collapsed of his inanition or for some reason or other, judgment should nevertheless be given to him on the ground that the defence set up by the opponent has collapsed. Quite clearly a Defendant in such circumstances would not even need a defence”*

His Lordship had a further occasion to pronounce himself further on the subject. This was in the case of ***Wilson Masauso v. Avondale Housing Project Limited***<sup>9</sup>. He artfully crafted it this way:-

*“I think it is accepted that where a Plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case, where he makes any allegation, it is generally for him to prove those allegations. A Plaintiff who has failed to prove his case cannot be entitled to Judgment whatever may be said of the opponents’ case. As we said in *Khalid Mohamed v. the Attorney General* (i)*

*Quite clearly a Defendant in such circumstances would not even need a defence”*

Upon perusal of the pleadings and upon consideration of the parties evidence the following facts are common cause or are not in contention. I therefore make the following facts:

1. The parties entered into a valid contract of sale for the Defendant (vendor) to sell to the Plaintiff (Purchaser) agreed to purchase House No. 27, Pemba Road Chilenje south Lusaka as evidence by offer letter dated 29<sup>th</sup> November, 2002 and acceptance letter dated 4<sup>th</sup> December, 2002.
2. The agreed purchase price was K45, 000, 000 (unrebased).

I will now proceed to the matters in contention item by item.

- (i) Time in which to pay purchase price / whether time was of essence

The position taken by the Plaintiff is that time was not of essence. She points to the acceptance letter in which her late husband had requested for the processing the contract of sale as soon as possible. However the Defendant did not draw up any contract of sale. Plaintiff alleges that the relationship between her and the Defendant at the time was very harmonious as the latter was a matron at the wedding of the Plaintiffs.

The Plaintiff alleged a payment of deposit of K15, 000, 000 and subsequent payments which brought the total sum paid to K39,

200, 000 leaving a balance of K5, 800, 000. On the other hand, the Defendant contends that the Plaintiff's uncle Mr. N'gona paid on behalf of the Plaintiff a sum of K15, 000, 000 and the Plaintiff only paid a sum of K8, 000, 000 and thereafter abandoned the contract. That the balance on the purchase price was to be completed within 3 months by the end of March, 2003.

According to her the said Mr. N'gona is claiming his money back and as such the Plaintiff only paid a sum of K8, 000, 000 towards the purchase.

There was no contract of sale draw up by the Plaintiff tabulating the conditions and special conditions. The Plaintiff had requested the Defendant to expediently draw up the same, but she did not comply. The contention that the Plaintiffs uncle had undertaken to pay the balance on the purchase price of K30, 000, 000 (unrebated) within 3 months by March 2003 is unsupported by any documentary evidence.

In any event, the Defendants evidence on this aspect was hearsay as the said Mr. N'gona was not called to testify.

In the letters of offer and acceptance there was mention of time in which to pay the purchase price. It trite law that a document is conclusive and exclusive of what it talks about itself and no parole or extrinsic evidence is admissible which may tend to contradict the terms of a written document.

The Court of last resort had occasion to consider this subject in the case of **Premesh Bhai Megan Patel v. Rephidim Institute Limited**<sup>10</sup> where her Ladyship Chibomba, JS held in holding number 4 as follows:-

*“The position of the law however is that a term will not be implied so as to contradict any express term, and that a term might not be implied unless on considering the whole matter in a reasonable manner, it is clear that the parties intend that there should be the suggested stipulation.*

*Holding 3 Extrinsic evidence can be admitted to prove any terms which were expressly or impliedly agreed by the parties, before or after the execution of the contract, where it shown the agreement was not intended to incorporate all terms and conditions of the contract”*

In the case in casu, there was no contract. Further the purported notice to complete was issued on 2<sup>nd</sup> October, 2007 almost 5 years after the acceptance of the offer to buy the property. I do not accept the Defendants unsupported evidence that she stopped pursuing payment of balance on the purchase price because Mr. Chewe was uncooperative and getting increasingly hostile.

A prudent vendor would have written to the purchaser either to rescind the contract, issue notice to complete or make such demands as might be appropriate to follow up perfecting the sale since the plaintiffs were in possession and occupation of the property.

In the purported letter and notice to complete dated 2<sup>nd</sup> October, 2007, the Defendants Advocates did not specify how much the balance on the purchase price was. There was also no indication if the vendor had applied and obtained the necessary consent from the State to assign.

I therefore agree with the Plaintiffs position that time in which to pay the balance on the purchase price was not agreed on. Put differently, time was not of essence

(ii) Deduction of Title

The position taken by the Plaintiff is that the Defendant has failed to deduce title which could have enabled her to pay the balance on the purchase price. The Defendant contends that she could not deduce title when the Plaintiff had not paid the full purchase price as there was a balance which she placed at k26, 000, 000 (unrebased).

The advocates for the Plaintiff had on 11<sup>th</sup> October, 2007 written to the Defendants Advocates requesting that a certificate of Title be forwarded to them so that completion could be done. On 27<sup>th</sup> May, 2009, the Defendants Advocates wrote to the Plaintiffs Advocates requesting for a contract of sale. This is surprising because it was their client who was supposed to prepare the contract of sale.

Three days later on 30<sup>th</sup> May, 2008, the vendors Attorneys communicated that the balance due on the purchase price was

K19, 000, 000 which had attracted interest at 33% aggregating K37, 104, 656.59 over a period of 6 years.

It will be recalled that by letter dated 2<sup>nd</sup> October, 2007 the Defendants previous Advocates had communicated 40% per annum as the interest rate accruing on the unstated balance. The letter of 30<sup>th</sup> May, 2005 whilst making reference to completion made no mention of deduction of title.

In the circumstances, I have to agree and I hereby agree with the Plaintiffs submissions that the Defendant had failed, neglected or refused to deduce title. I am fortified in this view by the fact that the Defendant had at one time mortgaged the property to the Indo Zambia Bank Ltd which the later confirmed had been paid in full by the 10<sup>th</sup> December, 2007.

The Defendant contends that the Plaintiff was aware about the pledging of the property on a Bank loan or mortgage. There was no independent evidence tending to prove this point documentary or otherwise. Thus the Defendants spoken word remains hers alone. I had earlier on alluded to the legal position the he who alleges must prove. I do not therefore accept the Defendants version on this account.

(iii) Notice to complete

The evidence on record is that the Defendant purported to give notice to complete on 2<sup>nd</sup> October, 2007 almost 5 years after the offer was accepted. The purported notice did not compute the

balance sum required to be paid at completion. I therefore find and rule that time in which to complete was not of essence in the absence of any express provision in the contract, which in this case was not drawn up by the Defendant.

The case of **Wesley Mulungushi v. Catherine Bwale Chomba**<sup>1</sup> is instructive. In that case it held that:-

*“In a contract, time can be of essence if firstly, it is stipulated in the contract that it shall be so, and secondly, if in case when one party has been guilty of undue delay he is notified by the other that unless performance is completed within a reasonable time, the contract will be regarded as at an end”*

- (iv) Damages for wrongful fraudulent conversion of property and or breach of contract

There was no evidence to support and sustain this claim by the Plaintiff other than that the Defendant had obtained a mortgage facility over the property from Indo Zambia Bank Limited without the Plaintiffs knowledge. The evidence is that the loan obtained thereon has since been paid off and the property is free from encumbrance and the Defendant is holding on to the certificate of Title.

The Learned author Phillip S. Jones in General Principles of Law of Torts<sup>1</sup>Second Edition, 1964 at page 96, states that

*“The tort of conversion has been judicially defined as dealing with goods in manner inconsistent with the right of the owner*



*provided that it is also established that there is also an intention on the part of the defendant to assert a right which is inconsistent with the owner's rights"*

The Learned author states at page 97:-

*"In an action for conversion, the cardinal rule is that at the time of the conversion the Plaintiff must be entitled to immediate possession of the goods. This right is essential to his claim so that if he has never had it, or if having it he loses it, his claim must fail"*

The evidence on record is that the Plaintiff was in occupation of the property at the time the property was offered for sale, offer accepted and a deposit of K15, 000, 000 (unrebased) paid. The fact of accessing a short bank loan facility over the property by the Defendant albeit without the consent of the intended purchase in itself cannot be the sole factor to prove fraud.

His Lordship Mwanamwambwa, J (as he then was) had occasion to pronounce himself on the subject matter in the case of ***Lt. General Geojago Robert Chaswe Musengule v. Attorney General*** 3. He held as follows:-

*"(i) At law, he who alleges fraud carries the burden to prove it, and the standard of proof is greater than the simple balance of probabilities;*

- (ii) *The legal position is that the party that alleges a fact must prove it and generally except for fraud must prove it on the balance of probabilities.*

I respectfully agree that this the correct position of law and I am bound by the pronouncement since no reasons exist to justify this Court to depart from the correct edit of the law. Similar views were also expressed in the case of ***Sable – hand Zambia Limited v. Zambia Revenue Authority***<sup>2</sup>. It is also a legal requirement that fraud must be specifically pleaded and there must be sufficient evidence to support the claim. This is provided for in Order 18 Rule (i) of the Supreme Court Rules of England<sup>2</sup>.

- (v) Allegation of fraud in respect of document number 9

The Defendant sought to impeach document number 9 which is an alleged record of payments made towards the purchase price of the property. She testified that the document was fraudulent and was made by “cut and paste” strategy though she admitted signing against the last entry on the document. She denied authoring the document. On the other hand, the Plaintiff contended that it was the Defendant who authored the document.

In cross examination, the Defendant when challenged to produce documentary evidence that Mr. N’gona the uncle to Lt. Chewe was involved in the transaction of payment of the purchase price she made reference to the same document where in item (1) is described as:-

*“Mr. Chewe and the uncle paid”*

In my view this item of evidence tends to confirm that the Defendant acknowledged the existence of the document. The authenticity of the document was not at any stage at the discovery stage as required by Order 19 of the High Court Rules<sup>1</sup> as read together with Order 38 Rule 1 (i) of the Supreme Court Rules of England<sup>2</sup>.

Litigants who seek to challenge the authenticity, admissibility or objection of any document should do so timeously at interrogatory or discovery instead of waiting until trial hour and start making panicky and desperate efforts to challenge documents which have passed discovery stage.

I agree with the Plaintiff's submission that the Defendant indeed overslept on her right to object. She wanted to raise the challenge too late in the day. I am fortified in this conclusion by the legal maxim that:-

*“equity assists the vigilant and not the indolent”*

I therefore hold that document number 9 is most probable than not generated by the Defendant where record of payments towards the purchase price were being recorded.

A helpful case on this point is the case of **Jonas Amon Banda v. Dickson Machiya Tembo**<sup>4</sup>, where it was held as follows:-

*“Businessmen often record the most important agreements in crude and summary fashion, modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete and precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute in finding defects”*

This instructive pronouncement aptly applies to the case in casu. Document No. 9 is an embodiment of the payments made by the plaintiff to the defendant towards the purchase price.

(vi) Claim for rent and mean profits by Plaintiff

The evidence on record is that the Defendant had offered to the property to the Plaintiff to purchase. Payments were made towards the purchase price awaiting drawing up the contract of sale by the Plaintiff, deduction of title and the final act of completion.

I therefore agree with the Plaintiffs submission that upon the late Lt. Chewe's acceptance of the offer, the position of the parties changed from Landlord and tenant to vendor and purchaser. A claim for rent and mesne profits is not tenable.

The Court of last resort had occasion to pronounce itself on the subject matter in the case of **Peter Militis v. Wilson Kafupa Chiwala**<sup>6</sup>, it said the following:-

*“What is mesne profits and when are they due? In Halsbury's Laws of England, volume 28, 3<sup>rd</sup> Edition at*

*page 561, paragraph 1230, the legal position is that the Landlord may recover in an action for mesne profits damages which he has suffered through being out of possession of the land. Mesne profits being damages for trespass can only be claimed from the date when the defendant ceased to hold the premises as a Tenant and become a trespasser. The action for mesne profits does not lie unless the Landlord has recovered possession or the tenants' interest in land has come to an end"*

In the case in casu, the Plaintiff as alluded to in one or two of the preceding paragraphs was in lawful occupation of the premises awaiting completion procedures. The defendants counterclaim on this limb has to inevitably fail and it fails.

(vii) Unjust enrichment

Having held that mesne profits are not available to the defendant, the issue of consideration of the doctrine of enrichment becomes irrelevant.

(viii) Specific performance

Having found as a fact that a valid contract of sale existed between the parties as epitomized in the offer and acceptance communication, I have no hesitation to agree and I have to agree that the equitable remedy of specific performance is available to the Plaintiff. Damages would not be sufficient recompense to loss of a piece of land.

- (ix) Declaration that the defendant is the beneficial owner of subdivision 769 of Stand Number 7417, Chilenje South, Lusaka

The ownership of the above property is not in dispute and is common cause to both parties, though the Defendant has not deduced title by making available a copy of the certificate of title to the Plaintiff. Her evidence is that she is keeping the original certificate of title. It will therefore be superfluous to make declarations on a subject matter which is not in dispute.

- (x) That Defendant be entitled to rescission of the contract

I have somewhere in one of the preceding paragraphs pointed out that time was not of essence. The Defendant has taken her time to draft the contract of sale and up to the time of writing the Judgment had not done so.

The Defendant took close to 5 years before issuing a purported notice to complete without specifying the conditionalities on the balance on the purchase price serve for a dictated interest of 40% from date of contract of 4<sup>th</sup> December, 2002.

I have held that that document number 9 epitomizes the payments made towards the purchase price aggregating K39, 200, 000 (unrebated). The delay in completion can be traced right at the door steps of the Defendant. I have no difficulty to find and hold as I do that the remedy of rescission of contract is not available to the Defendant.

I am fortified in my position by the pronouncement of the Court of last resort in the case of **Wesley Mulungushi v. Catherine Bwale Mizi Chomba**<sup>1</sup> in the following holdings:

**“Holding number (ii)**      *In a contract, time can be of essence, if firstly it is stipulated in the contract, that is shall be so and secondly if in case where one party has been guilty of inordinate delay, he is notified by the other that unless performance is completed within a reasonable time, the contract will be regarded as at end”*

**“Holding (iii)**      *Where real property is the subject of sale, there is need for the sale to be evidenced by a contract of sale”*

**“Holding (iv)**      .....

**“Holding (v)**      *The Court will decree specific performance only if it will do more perfect and complete justice than the award of damages”*

These holding aptly apply to the case in casu. The delay and default has been at the instance of the Defendant, she cannot rely on her default to rescind the contract and escape her contractual obligation to complete the sale.

I will decree as I do decree specific performance as it will do more perfect and complete justice than the award of damages.

Before I leave the subject, I found helpful observations in the case of ***Jane Mwenya and Jason Randee (1998) ZR 17*** where the apex Court put it this way

*“We are satisfied, therefore that upon a proper construction of the 1<sup>st</sup> Appellants letter dated 25<sup>th</sup> August, 1992 as at page 25 of the record, a sufficient note or memorandum existed of which time was not of essence. That there was no unreasonable delay and that no completion statement was issued. We would also hold as basis of rescission”.*

Indeed there was no basis of rescission in the matter in casu as narrated and analysed above. It is obvious by now that I have traversed, navigated, analysed and evaluated the evidence and applied the law to the facts of the case the Plaintiffs claim and the Defendants counterclaims have been dealt with and exhausted.

In conclusion and by way of summary, I make the following pronouncements:-

- (i) An order is hereby granted for specific performance of the contract of sale of House No. 27 Pemba Road, Chilenje South being Stand No. 759/7417 Lusaka for the sale of the said property to the Plaintiff by the Defendant anchored on the acceptance of offer of 4<sup>th</sup> December, 2002 at a consideration of K45, 000, 000 (unrebased);



- (ii) I direct that completion takes place within 30 days from the date;
- (iii) The necessary consent and statutory impositions inclusive of withholding tax to be Zambia Revenue Authority be paid at a consideration of K45, 000, 000;
- (iv) That the Plaintiff pays the Defendant a sum of K5, 800, 000 balance be paid during the time of completion without interest from 23<sup>rd</sup> June, 2008 when the action was commenced at the rate of 10% per annum simple interest;
- (v) Having granted the relief of specific performance, the relief for damages for wrongful fraudulent conversion of the property and or for breach of contract sought by the Plaintiff is declined;
- (vi) The claim for damages having failed the claim for interest falls away.

The costs are for the Plaintiff which costs are to be taxed in default of agreement.

In respect of the counterclaim the following pronouncements and orders are made:-

- (i) The Defendants prayer for a declaration that she is the beneficial owner of subdivision 769 of Stand Number 7417 Chilenje South Lusaka otherwise known as House No. 27

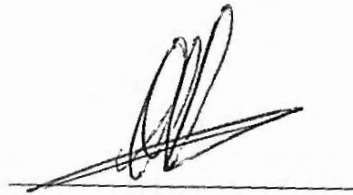
Pemba Road Lusaka is declined on account of the fact that the ownership of the property is not in contention and such a declaration will be academic, inconsequential and superfluous.

- (ii) The relief for rescission of the contract to sell the property to the Plaintiff by the Defendant is declined and dismissed since there exists no ground or grounds to justify rescission.
- (iii) Having granted the remedy of specific performance to the Plaintiff, the claim by the Defendant inviting the court to order the Defendant to refund a sum of K26, 000, 000 with interest fails and it is dismissed.
- (iv) The claim for mesne profits and rent from the time the Plaintiff took possession of the property is declined on account of the fact that once the agreement to sell was secured, the Plaintiff ceased to be a Landlady and the relationship of the parties became that of purchaser and vendor with rightful occupation of the premises until completion of formalities.
- (v) All the Defendants limbs of the counterclaim having collapsed, there is no substratum to entitle the Defendant to any relief of costs. On the converse, it is the Defendant who has to suffer the costs of the Plaintiff in defeating the

counterclaim. The counterclaim is dismissed in its entirety with costs.

Both parties are informed of their right of appeal to the Court of Appeal.

**Delivered under my hand and seal this 27<sup>th</sup> day of March, 2017**

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

**Mwila Chitabo, SC  
Judge**