

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

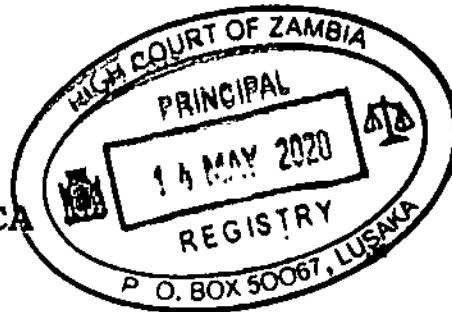
2018/HP/0750

BETWEEN:

CHEWE CHANDA PRISCA

AND

FR. BENJAMIN CHISULO



PLAINTIFF

DEFENDANT

CORAM: HONORABLE MR. JUSTICE MWILA CHITABO, SC

For the Plaintiff:

Prisca Chewe Chanda (In person)

For the Defendant:

Ms C. Banda of Messrs Tembo Ngulube & Associates

JUDGMENT

Cases referred to

1. *Khalid Mohamed v. The Attorney General* (1982) ZR 49
2. *Kankomba & others v. Chilanga Cement Plc*, (2002) ZR 129
3. *Carill v. Carbolic Snowball*, 1 QB 256 CA
4. *Rosemary Bwalya Chibwe v. Austin Musubila Chibwe* (2001) ZR 1
5. *Kearney and Company Limited v. AGIP Zambia Limited and another* (1985) ZR 7

Learned Authors

1. *Chitty on Contracts vol. 1 General Principles. Sweet & Maxwell (2004)*
2. *Black's Law Dictionary 8th Edition, Brian A. Garner*

The Plaintiff's claim against the Defendant launched on 16th April, 2018 are for

- (i) an order that vehicle Surf Hilux, Black in colour registration No. BAC 818 be repossessed to the Plaintiff or payment of K39, 500 being the sum borrowed towards the purchase of the said motor vehicle;
- (ii) compensation for stress and trauma suffered;
- (iii) loss of profits on the sum of 39, 500 paid out of the plaintiff's business;
- (iv) interest at present bank rate;
- (v) costs of and incidental to these proceedings;
- (vi) Any other relief the Court may deem fit.

The Defendant denied all the claims.

The Plaintiff marshaled 3 witnesses inclusive of herself.

PW1 was the Plaintiff herself.

The essence of her evidence was that between May, 2015 to 6th May, 2017, she was a nurse by profession and sole proprietor of Life Saves Medical Centre. She had an intimate relationship with the Defendant which broke down due to the Defendant's conduct. The Defendant was a suspended Catholic Priest who was working as a teacher at Kamwala Secondary School.

At the time she met the Defendant, she owned two cars namely Toyota Cresta registration number ABL 6518 pearl in colour and a Honda registration number ALG 6518 yellow in colour.

The Defendant informed her that apart from being a teacher, he ran a company namely Chibulakanwa General Dealers, and he dealt in buying of vehicles. He cited examples of some people he had assisted in this regard to include Father Simon Phiri; Father Kalenga and Mrs. Mwanza. He proposed that they could do business together and she agreed.

The Defendant then poured out to her and confided in her the challenges the man of God was going through. She donated her Cresta car to him to ease his mobility.

On 6th April, 2015, the Defendant borrowed a sum of K500 from the Plaintiff as shown at page 2 of the Plaintiff's bundles of documents.

On 10th April, 2015, the Plaintiff lent the Defendant another sum of K5, 000.00 as shown at page 2 of her bundle of documents to the

Defendant's account number 0592 3901 00133 by mode of Xapit Deposit Funds Transfer. The money was for the Defendant to paint his house situate in Mpika which is just next to the house of Hon. Minister Mr. Maloze Sichone. He undertook to make good upon getting rent from the tenant.

On 10th May, 2015, the Plaintiff paid a further sum of K150.00 to the Defendant via Xapit on her same account held at ZANACO as shown at page 3 of her bundles of documents. Defendant said he had not yet found a tenant.

On 17th June, 2015, a further sum of K1000.00 was paid to the Defendant at his request. Plaintiff then started pressing the Defendant for payment of K6, 760.00 since she was having certain challenges.

On 5th July, 2015, the Defendant advised her that he had found a London based client who was presently in Zambia undertaking certain projects. Her name was Sister Chola. She needed to hire a motor vehicle for her mobility.

An agreement was entered into for a hire fee of the Plaintiff's motor vehicle registration number ALG 6518 at K10, 000 for a period of one month from 6th July, 2015 to 8th August, 2015. The agreement was between the Plaintiff and Sister Chola and was witnessed by one Judith C. Mwanza as appears at page 7 of the Plaintiff's bundles.

The effect of hiring the car was that she had no vehicle since the other car was being used by the defendant. According to her, it was then that the Defendant suggested that she buys a car for her use. They agreed to purchase a Toyota Hilux Surf. An order was made using the Defendant's e-mail and not hers because she had forgotten the password. The cost was K18, 000.00 by then.

There was intimation that car hire period would be extended for a month. She said she gave K10, 000, the proceeds of the car hire to the Defendant in addition she gave the later a sum of US\$ shown at page 6 of her bundles and a sum of £40 (pounds).

She requested the Defendant to deposit the said sums. The latter said the money was short by K5000.00 which she sent to him through Xapit as shown at page 8 of bundles. Duty was pegged at K33, 000.00. She was advised by the Defendant that the vehicle would be shipped on 30th September, 2015 and expected to reach Dares-salaam on 3rd October, 2015.

They had opted to use the Post office to deal with the shipment transactions at a charge of K10, 000.00 which she borrowed K5, 000 from her father Mr. Winstone Chewe **DW3**. The duo then travelled together to Nakonde to collect the vehicle. Defendant gave her K21, 500 towards clearance. The Defendant promised her father to reimburse the K5, 000.00. Upon collection of the vehicle, she entrusted it to Defendant who then gave her back the Cresta car.

On 28th October, 2015, Defendant was on her to lend him K700.00 which she did send. It was agreed vehicle would be registered in her name. Defendant however registered it in his name. She did not report matter to police. It was agreed that Defendant pays her K39, 500 for purchase of the vehicle. He said he would start paying the money when he finishes servicing his houses.

On 17th February, 2016, Defendant approached Plaintiff to borrow K1, 000.00, she gave him K50.00 under duress. On 11th March, 2016, she sent him K200. Defendant pleaded for further funds and she gave him K250.00.

On 12th March, 2016 she sent him K200.00 as appears at page 13. On the same day she sent him K150.00.

On 6th April, 2016, he borrowed K700.00 as shown at page 14, page 15 shows her ATM card was in constantly.

It was her evidence that she had lost her card (ATM). Record shows she used her card on 26th April, 2016, paid for electricity on 28th April, 2016. She used card also on 24th June, 2016 and 8th July, 2016 as shown at page 20.

Defendant then borrowed K2000 to secure hire contract of vehicle from ECZ. On 11th July, 2016 he requested for K1,000. She gave him K700 and K900 totaling K1, 600 as appears at page 21. On 18th July, 2016 Defendant requested for K500; see pages 23 and 24. She got fed up and she called him and demanded that he reimburses the sum of K5, 000 she had borrowed from her relative.

Defendant advised that vehicle suspension was required, he needed K5000. He said vehicle had been subcontracted at a rate of K1, 000 per day as shown at page 26. She paid through one of his accounts at ZANACO the sum of K5000.00.

On 21st January, 2017, Defendant requested for K1000; see page 38. On 6th May, 2017, she went to Defendant's sister's place Barbara Chisulo to discuss how the money owing could be made. She reported to police and was harassed.

On 24th July, 2017, she received letter from the Health Professional Council of Zambia as at page 41 that she cancels services for life Savior Medical Centre. She as at one time approached by Mrs. Grace Kalanda, a previous nun who volunteered to mediate the issue involving a Priest.

On 9th October, 2016, there was an item in the media that the Defendant had taken a school girl to his residence. Defendant then started threatening her through an officer. She engaged Defendant on excuria resolution of the recovery of K65, 000. He reacted saying she had only contributed a small amount as shown by exchanges at pages 44 – 48 of her bundle of documents.

She had a relationship with the Defendant but that had nothing to do with her business.

On 14th January, 2018, she was informed by some members of the public that the Defendant was being beaten by a mob near the

priests' house. She rushed there and took a video recording, y then the Priest had fled leaving his slipper and vehicle behind.

Cross examined by Ms. K. Sakhajila and in so far as the answers were not repetitive, the Plaintiff testified that s was claiming K39, 500 in respect of payments towards purchase of motor vehicle, the Honda CRV. The K10, 000 realised from the hire of the vehicle was used towards the purchase of the vehicle now subject to these proceedings. The vehicle was for herself. The plan however changed when the Defendant registered the Surf Hilux registration BAC 818 in his name.

She did not report Defendant to police. The parties reached on a consensus. She could not make an order on her own account firstly because she had no transport to run around and secondly her email address is on her phone and she had lost the password.

She had no documentary evidence to show that she had contributed K39, 500 towards purchase of the motor vehicle. Neither is there any written evidence that she gave K39, 500 to the Defendant for purchase of a motor vehicle.

It was put to the witness that whereas in chief she had referred to a sum of K6, 750 in respect of 3 figures, but the said 3 figures only totaled K6, 150. There was no documentary evidence sums of K5,000 and K3,000 were for the personal account and us by the Defendant. The K5,000 was for a named sister Barbara Chisulo

then at UNZA and K1, 000 for Defendant's niece Ruth for her school fees.

Referred to document at page 38, a deposit in the sum of K1, 000, the witness conceded that a depositor is not necessarily the source of the money.

PW2 was **Wilson Chewe**, a brother to the Plaintiff and teacher by profession. He knows father Chisulo well. He recalled that way back in 2015, the Plaintiff and Defendant were friends. He came to know the Defendant on account of business. He used to do errands for Defendant that included electrical wiring at a shop Kangwa's at Kamwala. All bills were settled through the Defendant. He also worked as a builder and there were other people who were helping him. Payments were made by the Defendant who used to have his sisters' ATM for NATSAVE.

He recalled going to Lotus Club with Defendant who was driving his sister's car. Defendant drew money from Lotus Club and later at Finance Bank which was sent by his sister. Transactions by the Plaintiff were being handled by Defendant. The Defendant informed her that she wanted to buy a vehicle. The Plaintiff and Defendant travelled to Nakonde and collected a car.

The Plaintiff asked for K5, 000 from him and K5, 000 from their father Mr. Chewe which was paid by payment to Zampost who were the clearing agents. The said amount was given to the Defendant with assurance from his sister that she will pay back.

Earlier on the sister had informed him that she will hire a Cresta car to some people from UK through the Defendant. His father (Mr. Chewe) had informed him that he had met the Plaintiff and Defendant and he observed that the Defendant was an honest man. It was his evidence that he trusted the Defendant as they used to be together; he is a trusted person.

Father Chisulo, the Defendant was like a family friend. He did not see any document relating to the purchase of the vehicle. He relied on what the sister (the Plaintiff) told him. He recalled that his sister had 2 cars at the time she hired out the Cresta. It is at that point that he lent the Defendant his vehicle Chaser registration ALK 383 at no fee.

Cross examined by Ms. C. Banda and in so far as the evidence was not repetitive, the witness testified that the Plaintiff would send money to the Defendant for fuel and for the Plaintiff's project at Kamwala. He was not forced to lend his vehicle to Defendant; nor did he charge him anything.

He was not sure if the hired vehicle was a Honda. The proceeds of the hire went to his sister. He was not in possession of any document to suggest that the Defendant was an agent in the hire agreement. The Defendant did not sign the hire agreement. He denied having sight of any dollars or pounds. The sister was to repay the K10, 000 (i.e K5, 000 to him and K5,000 to Mr. Chewe their father).

Re-examined by the Plaintiff, the witness attested that the hire agreement was between the hirer and the hiree. He trusted the Defendant even at the time of the witness giving evidence.

PW3 was **Greenwell Chewe** the biological father to the Plaintiff (**PW1**) and **PW2**.

It was his testimony that he knew the Defendant as a servant of God who had worked in Chinsali and Mpika. He had also worked at Mulilansolo as a Priest. He recalled that the Plaintiff had called him on phone asking for assistance to top up funds to buy a new vehicle. He informed her that he could only afford to send her a sum of K5, 000.00. The same was given to Plaintiff's young sister who happened to be travelling from Nakonde to Lusaka. He rode to Nambuluma turn off in Chinsali. The Plaintiff and Defendant later travelled to Nakonde to pick the ordered vehicle from Nakonde port of entry.

On their way back from Nakonde they visited him at his Mwembe farm. Plaintiff said that was the car she had bought. His wife and himself were delighted. Shortly thereafter the Plaintiff and Defendant bid them farewell and they left saying they will send the K5, 000 top up upon reaching Lusaka. Plaintiff said she would give the money to her brother Mwape Chewe who would be travelling to Nakonde. He in due course collected the sum in question from Mwape Chewe and he rode back to his farm.

Cross examined by Ms C. Banda, the witness testified that Defendant was an agent to the Plaintiff. According to him an agent was helper.

He had sent K5, 000 to the Plaintiff. He was however not there to confirm that the K5, 000 was used for topping up for purchase of vehicle. He sent money between September and October, 2018. It was the Plaintiff who had received the money and who was to repay.

Re-examined by the Plaintiff the witness said he was not sure about the year when he sent the K5, 000 as time had passed.

The Plaintiff rested.

DW1 was the Defendant himself, a lecturer and Catholic Priest. He recalled that he met the Plaintiff in January, 2015 and they developed a mutual relationship for 2 years when it came to an end. There was no business relationship between the duo.

He explained that when they met, plaintiff informed him that she had a daughter at Lutwikila Girls Secondary School. He then informed the Plaintiff that he was the immediate past Chaplain and he would shortly travel there for a visit. She introduced him to her uncle who stays in Mpika. Upon his return he briefed her. It was then that she invited him to her residence and introduced him to her family, 2 children, her brother and a sister.

She said she had misplaced her ZANACO ATM card. Whenever she wanted to withdraw her own money she would send the money to

his account through Xapit and withdraw the money for herself for her own use. This is what he did in most of the transactions as her own brother **PW2** testified. The Xapit transactions was neither money borrowed or lent.

When he realized that she was making many transactions, he entrusted her with his ATM card so that when she sends she can immediately go and withdraw.

He owned a vehicle; Honda CRV registration 5506 as appears at page 2 of Defendants bundles which he sold with plans to buy another car. He said he had capacity to buy a vehicle (1) apart from the vehicle he had sold, he is a civil salaried servant who is entitled to loan with any lending institution. (2) He is a property owner in Mpika, which for many years was being rented by DERBS District Education Secretary.

He ordered his vehicle in 2015 and it came in October, 2015 and was registered BAC 818, a Toyota Surf as shown at page 1 of Defendant's bundles.

When she was selling her vehicle registration ABL 6518 on 14th November, 2015, his car was already in and was actually parked outside her house. Refer to document at page 9 in the Plaintiff's bundles. His vehicle was not bought in 2018 as claimed by **PW3**. Defendant flatly denied borrowing sums of K9, 000.00. He also denied borrowing a sum of K27, 802 from Plaintiff through Xapit from Plaintiff's bank account.

It was pointed out that

- (1) Documentation at page 3 – 7 of the defendant's bundles;
- (2) Transfer application at page 8; and
- (3) All document in respect of his motor vehicle BAC 818 are in his name.

He travelled to Nakonde with Plaintiff by bus; she had her own business to purchase some goods. She was merely given a lift. On the way back she suggested they visit her parents in Chinsali at her father's farm. He left her there and proceeded to Mungulube to visit his parents and picked the Plaintiff on his return and they proceeded back to Lusaka.

He had no idea about the K5, 000 from PW3. He denied ever hiring his vehicle to ECZ.

In respect of K1, 000 cash deposit at page 38, it was him who gave the money to the Plaintiff for her to deposit on his behalf for the benefit of her niece Ruth Chisulo. There was no need for him to borrow from the Plaintiff as he was salaried.

In his view, he was dragged to court on account of the failed relationship. That caused the Plaintiff to spread scandalous falsehoods on social media. She started going to his place of work claiming that he was her husband. At one time whilst he was teaching, Plaintiff went to his house and collected all her clothes from the bedroom and took them to the deputy Headmaster of

Kamwala Secondary School. He denied to collect them. She is still keeping them.

Further, the Plaintiff wrote to the Defendant's Bishop in Mpika alleging that Defendant was building a house for her. That shocked the Bishop.

On one occasion, the Plaintiff rammed in his stationary vehicle. The car was extensively damaged. He did not file complaint with police. On the second occasion he found the windscreen of his car broken. He reported incidence to police. On third occasion someone rammed in his vehicle from behind. It was at this moment that it dawned on him that his life was in danger. He was sure it was her.

The Plaintiff started claiming that he owed her in March, 2018.

Cross examined by the Plaintiff and in so far as it is not verb use or repetitive, the Defendant testified that it was the Plaintiff who told him she had lost her ATM card.

Paragraph 5 of the pleadings (Defence) states that materials were for project at Kamwenda but Plaintiffs own witness **PW2** emphatically said it was for Kamwala. Plaintiff was willingly sending money to him.

He gave her is ATM card to facilitate her drawing her money and only took it back in April, 2017. He denied suggestions that he was

demoted from priesthood. He conceded there was no evidence on record that he sold Toyota CRV 5506. He sold his car at K25, 000.

The love between the parties was mutual. He denied chasing her man friend Hon. Mwansa Mbulakulima at Winter Kabimba's complex. He denied hovering around her workshop. He denied having kept her ATM card. He denied having told her he was going to leave priesthood. He was still a priest.

When texted that "you just contributed a small amount", he was reacting or referring to the response or demand that she needed K65, 000. Love cannot be quantified. He denied that he was a crook.

Plaintiff pointed out that her husband died on 1st June, 2018 and her business has gone. He denied assisting Father Kalenga and Father Simon Phiri to buy vehicles. He admitted selling his vehicle during the proceedings.

Page 8 of Defendants bundles shows that he paid SBT Company Ltd from his account on 14th July, 2015 leaving a balance of K517.00 in the account.

The Defence rested after re-examination.

The Plaintiff and the Defendant's Learned Counsel filed in their submissions. They were helpful and I am indebted to the parties. I will however not replicate the same but I assure the parties that the same have been factored in my Judgment as will be seen.

From the outset, I have disclosed my mind to the onus and burden of proof in civil cases like this one, it's on the Plaintiff and the standard of proof is on the preponderance on balance of probability. The leading authority amongst a plethora of authorities is ***Khalid Mohamed v. The Attorney General***¹ wherein Ngulube DCJ (as he then was) delivering the Judgment of the Court of last resort at page 51 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 a judgment. I would not accept a proposition that even if a plaintiff's case has collapsed of its inanity or for some other, judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need a defence"

On the evidence on record, I find the following issues as not in dispute by the parties and I therefore make the following findings of fact.

1. The Plaintiff and the Defendant met in January, 2015 and the duo developed an intimate relation until on or before the 6th May, 2017 when the Plaintiff was summoned by Chilenje Police to assist them with investigations. This followed the Plaintiff's visit to the Defendant's sister's residence where the

Plaintiff went to inquire about settlement of alleged moneys owed by the defendant and due to the Plaintiff.

2. Documentary evidence reveal that Defendant had ordered a motor vehicle Surf Hilux and subsequently registered it in Zambia in his name with the Roads Traffic Safety Agency as BAC 816 on 17th November, 2015.
3. That the said motor vehicle Surf Hilux registration number BAC 816 was sold by the Defendant during the subsistence of the proceedings.

I will now deal with the relevant issues as raised by the parties.

- 1) **Immediate payment of the sum of K9, 500 being the sum borrowed towards the purchase of motor vehicle Toyota Hilux registration BAC 818**

- (i) **White Book not conclusive evidence of ownership**

I have found as a fact that the motor vehicle BAC 818 was registered in the name of the Defendant as evidenced by the white book in document No. 1 of the Defendants' bundles of documents.

It is trite law however that a "Blue Book" presently a White Book for a motor vehicle is not conclusive evidence of ownership. It is only an item of evidence in the determination of ownership.

The apex court had occasion to pronounce itself on the subject matter in the case of ***Kearney and Company Limited v. Agip Zambia Limited***. It was held that:-

“A blue book is not a document of title, at most it is some evidence to be taken into account when investigating question of ownership”

The burden of proof that the white Book is not owned by the registered person lies on he who is asserting to impeach the ownership. In casu, it is the Plaintiff to demonstrate that vehicle BAC 818 is not duly owned by the Defendant.

This had not been done.

(ii) **Xapit transfers from Plaintiff's Account to that of the Defendant**

Xapit transfer was explained to be a mobile service which is a ZANACO Bank product which allows a person to transfer money from one individual's account to another account electronically through a mobile phone without having to do a physical deposit.

The Defendant acknowledges having received such transfers, which he contends were for the benefit of the plaintiff on some of her projects. The plaintiff on the other hand contends those transfers were moneys requested for and lent to the defendant as debts which were recoverable from the defendant.

There is evidence from the plaintiff's own brother **PW2 Wilson Chewe** who testified that the Defendant was accessing funds for the use and benefit of the Plaintiff on her projects. There is no evidence to show that a sum of K39, 500.00 was given nor received a transfer in that amount from the Plaintiff.

I agree with the Defendant's Advocates submission that "he who alleges must prove" as pronounced by the apex court in the case of ***Kankomba and others v. Chilanga Cement Plc***².

(iii) **Oral Contracts**

It was the Plaintiffs submission that a contract can be made orally. She relied on the Learned Author Chitty on Contracts at page 135 par. 2 - 28¹. She submitted an acceptance can be made by conduct.

I agree that this is a correct statement of the law. The issue is proof of such oral agreement. It was her contention that the Plaintiff in this matter had pleaded that there was an oral agreement between herself and the Defendant to borrow money for a multitude of reasons and to buy a vehicle.

In her view the acceptance of the contract was proved by her selling her motor vehicle to raise the funds to lend to the Defendant to buy a vehicle. It is not sufficient merely to plead and proclaim that there exists an oral contract. There must be some evidence tending to support such assertions.

In this matter, the Defendant vehemently denied having received the sum of K39, 500 as alleged. This is the Defendant who was described as a trusted honest person by the Plaintiffs' own witnesses **PW2** and **PW3**.

There is evidence on record from the Defendant that at the time the Plaintiff sold her motor vehicle, his vehicle BAC 818 was already in the country and parked at the Plaintiffs house.

I do not accept the Plaintiff's assertion that the fact that the Defendant was present or was witness at time Plaintiff sold her motor vehicle is not in itself evidence of proof of an alleged oral contract wherein the Defendant agreed to borrow money to purchase motor vehicle BAC 818. This is in the backdrop of the fact that the parties were in an intimate or mutual relationship.

The Plaintiff made reference to the case of **Carill v. Carbollic Snowball³** in support of her contention of an oral agreement. In the cited case, the manufacturers had made a written offer in advertisements to anyone who would contract flu after using their smoke ball. The Plaintiff in that case accepted the offer by buying and using the product and yet developed flu. This is clearly distinguishable from the case in casu where there was no written offer. This case least assists or is of no assistance to the Plaintiff.

On the foregoing, I find no merit in the Plaintiff's claim under this limb.

2) **Immediate payment of K9, 000**

There is no direct or documentary evidence that the Plaintiff transferred a sum of K9, 000 at a given instance to the Defendant's account. Nor is there evidence that the Plaintiff gave a sum of K9,000 personally to the Defendant.

There is however evidence that a sum of K1, 000 was deposited for the benefit of the Defendant's niece who was at Lwitikila Girls Secondary School. The Defendant contends that he had given the said sum to the Plaintiff to send the money on his behalf.

The Defendants' Advocates had opportunity to verify the source of the K1, 000 at time of discovery and indeed to subpoena the transacting bank to clarify the issue.

The burden of proof rests on he who alleges. The evidence on this item tilts in favor of the Plaintiff on the limb she is entitled to recover a sum of K1, 000.00.

3) **Payment of the sum of K27, 802 monies borrowed through Xapit transactions from the Plaintiffs account**

Learned Counsel for the Defendant submitted that it is trite law that the elements of a contract of offer, acceptance and consideration. In support of this proposition he referred to the Learned Author Chitty on Contracts¹ at page 122 where it is stated as follows:

“The offer is an expression of willingness to contract made with the intention (actual or apparent) to become binding on the person making it as soon as it is accepted by the person to whom it is addressed”

I agree this is a correct statement of the law. I can only emphatically add that the 2 minds should meet and know that they intend to create legal relations.

I have already alluded to the fact that it is trite law that even a well proven oral contract is binding. The devil is in the proving of an oral contract where a dispute has arisen. This however does not shift the duty on he who is alleging.

Under this limb, the Plaintiff has not demonstrated that the Defendant was borrowing money from the Plaintiff by way of text messages or other mode of communication.

The Defendant has disputed the claim. He says the transfers on that Xapit account was for the benefit of the Plaintiff on account of certain projects. This view is echoed by and confirmed in the preceding paragraph by **PW2**.

The Learned Authors of Black’s Law Dictionary², defines the word borrow as follows:-

“To receive money with the understanding or agreement that it must be repaid”

There is not an iota of evidence to tie the hands of the Defendant that he had agreed to borrow and later on repay any money as alleged.

The Plaintiff's claim under this limb is destitute of merit and it fails.

4) **An order of interim preservation of property known as Toyota Hilux Surf registration No. BAC 818**

On 12th August, 2019, the Plaintiff informed this Court that the Defendant had sold the vehicle subject to these proceedings. The Defendant confirmed having sold the vehicle.

It has been submitted by the Defendant's Advocates that the sale was in line with a portion of my Ruling of 14th January, 2019 R7 at paragraph 4 where I observed as follows:-

"A vehicle registration No. BAC 818 was subsequently bought by defendant apparently from funds generously advanced by the Plaintiff. Therefore I have no difficulty at this stage to hold that it has not been demonstrated at this stage the motor vehicle is a subject matter of the main claims that is in respect determination of the precise quantum of money lent to the Defendant and truly and justly being owed by the Defendant to the Plaintiff"

It was submitted that there being no appeal against the Ruling when leave was granted to appeal.

Whereas I did pronounce myself on the subject matter in the Ruling of 14th June, 2019, I did not make an order that the said motor vehicle be sold during the subsistence of the proceedings.

In the celebrated case of ***Rosemary Bwalya Chibwe v. Austin Musubila Chibwe***⁴ at page 10 paragraphs 34 – 39 and up to 11, the Court of final resort proceeded to nullify all transactions relating to properties during the subsistence of the court proceedings.

It is inappropriate for litigants to dispose of properties real and personal during the subsistence of proceedings as that can result in the successful litigant failing to enjoy the fruits of his Judgment in the event that he succeeded, the unsuccessful litigant having disposed of the subject matter.

Having positioned and observed in one or more of the preceding paragraphs that there was no proven oral contract for purchase of vehicle BAC 818 from finances from the Plaintiff, the Plaintiff's claim under this limb is doomed to fail and it hereby fails.

5) **Claim for K5, 000 from PW2 and K5, 000 from PW3 in respect of ZAMPOS charges**

There is no evidence that sums of money received from PW2 and PW3 totaling K10, 000 given to the Plaintiff was in fact handed over to the Defendant. The evidence of the 2 witnesses was crystal clear that the money was given to the Plaintiff and she was the one to repay the said sums.

This claim fails.

Before I leave the subject, the record has revealed that the dispute arose following the breakdown of an intimate relationship between the parties.

The Court has neither the time nor the propensity to sit in Judgment deciphering clandestine intimate activities of parties. The evidence of the Plaintiff is that her husband passed on sometime in June, 2018.

In conclusion and upon traversing all the evidence evaluating the evidence and applying the law to the facts, the Plaintiff's claims are dismissed save for the recovery of K1, 000 being in respect of funds paid for the benefit of the Defendants' niece who was schooling at Chinsali Girls School.

As regards the interest, it was the Plaintiff's evidence that she was lending the Defendant money interest free.

I therefore order that

- (i) The said amount of K1, 000.00 carry no interest;
- (ii) The said amount be paid within 30 days from the date hereof and in default the Plaintiff be at liberty to levy execution.

(iii) The justice of this case is that each party bears its own costs.

The parties are granted leave to appeal to the superior Court of Appeal within 30 days from the date hereof.

Delivered under my hand and seal this 14th day of May, 2020

A handwritten signature in black ink, consisting of a large, stylized initial 'M' followed by a horizontal line that extends to the right and then curves slightly downwards.

Mwila Chitabo, SC
Judge