

**IN THE SUBORDINATE COURT OF THE FIRST CLASS 2017/CRMP/LCA/130  
FOR THE LUSAKA DISTRICT  
HOLDEN AT LUSAKA**

**(Civil Jurisdiction)**

**BETWEEN:**

**TERENCE MUMBI**

**PLAINTIFF**

**AND**

**WILLIAM MULENGA**

**DEFENDANT**

**BEFORE:** MAGISTRATE L.K. MUSONDA (RESIDENT MAGISTRATE)

**For the Plaintiff** : In person

**For the Defendant** : In person

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**JUDGMENT**

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**Case referred to:**

**1. SAM AMOS MUMBA VS ZAMBIA FISHERIES AND FISH MARKETING  
CORPORATION LIMITED (1980) ZR 135 (HC)**

This is an action commenced by the Plaintiff by way of Writ of Summons. The Plaintiff sought the following reliefs from this court:

1. Restitution of the vehicle Mercedes Benz Fridge Van Registration No. ALH 6903, currently in possession of the Defendant which Motor Vehicle has not been paid for;
2. Damages for breach of contract and loss of use of the said vehicle or money from the date it was placed into the possession of the Defendant, until to date;



3. Damages for damaged vehicle, and payment of K6,500 for van fridge unit: and interest on all sums found due;
4. Preservation Order of the said motor vehicle;
5. Costs and any other relief the court may deem fit.

The gist of the Plaintiff's case can be summarized as per paragraphs 4 and 8 of his Statement of Claim in which the Plaintiff avers that he supplied a Motor Vehicle Mercedes Benz Fridge Van Registration No. ALH 6903 to the Defendant on 17<sup>th</sup> June, 2013 to be paid for by Defendant herein on terms agreed and contained in the letter of sale executed by both parties on the above mentioned date which letter of sale was produced by the Plaintiff in evidence and marked as **"TM 1(a)"**. The said letter of sale reveals that the purchase price for the said Motor vehicle was K20,000.00 and the Defendant was to make payment on the following terms:

1. K8,000.00 upon signing and delivery of Motor Vehicle;
2. K7,000.00 after one week; and
3. K5,000.00 during the month of July 2013.

The above are the payment terms that will among others fall for determination by this court as the Plaintiff avers that only K7,000.00 was paid to him leaving a balance of K13,000.00 while the Defendant denies this assertion and avers that he had complied with the first two payment terms and only the final installment of K5,000.00 remains unpaid for reasons he has given and will be later considered as the court examines the Defendant's evidence.





Furthermore, the Plaintiff avers that he had further supplied a Van Fridge to the Defendant in May 2013 for a value of K6,500.00 through invoice marked **"TM 3"** of the Plaintiff's evidence and that the said amount still remains outstanding to date.

The Plaintiff has also averred in his Statement of Claim under paragraph 5 that the parties agreed that the sale and purchase of the above mentioned Mercedes Benz Fridge Van Registration No. ALH 6903 would additionally include part exchange with a non-runner Mercedes Benz Sprinter Fridge Van Registration No. ALB 3954 in addition to the above mentioned purchase price of K20,000.00. There was no written agreement towards this claim but the Plaintiff adduced email correspondence marked as exhibit **"TM 2"** of his evidence. This too is a matter that will fall for the court's determination herein.

The Defendant, also acting in person as the Plaintiff, has filed a Defence wherein he has gone to counter-claim against the Plaintiff for the following reliefs:

1. Loss and damage suffered due to loss of use of the vehicle [in issue] or money from the last 4years to date;
2. Payment of K17,420 the outstanding balance on the vehicle supplied by the Plaintiff;
3. Interest;
4. Any other Order the Court may deem fit; and
5. Costs of and incidental to the action.



The Defendant in support of his Defence and counter-claim has averred in his filed Defence and supported by his Oral Evidence given on oath through examination in Chief and cross examination that he did not owe the Plaintiff K13,000.00 as claimed in the purchase of the Motor Vehicle in issue, but that he owed a balance of K5,000.00 which was supposed to be the final payment as per the sale agreement marked as Exhibit **"TM 1(a)"**. He has further argued that there was no way the Plaintiff could have appended his signature to the sale agreement if he only received K7,000.00 as first installment when the Sale Agreement stated that K8,000.00 would be first payment upon signing of such sale agreement and delivery of the Motor Vehicle in issue.

The Defendant further averred and testified to that effect, that he had made payment on the second installment as per the sale agreement through the Plaintiff's Stanbic Bank Account while the Plaintiff was in Namibia some time around June 2013 even though the Defendant could not provide the Deposit slip or evidence of such payment as he claims to have lost the said evidence due to passage of time.

The Defendant further goes to state that the reason why he has not been able to pay the balance of K5,000.00 is because the Plaintiff was owing him an amount of K17,420.00 from a previous transaction in which he had purchased another Motor Vehicle Mercedes Benz Sprinter Fridge Van Registration No. ALB 3954. The Defendant testified that this amount arose as a result of unforeseen expenses that were incurred in Namibia while the said motor vehicle was being





imported into Zambia from the UK where the Plaintiff had purchased it and sent it to the Defendant. The Defendant however admitted in cross examination that it was not the responsibility of the Plaintiff to transport the said vehicle from Namibia but his responsibility and his travel agent to ensure that the importation was compliant. He however further stated that expenses were still incurred and unavoidable as the Plaintiff had loaded the said vehicle with his personal goods which were not declared on the manifest thereby leading to the arrest of the Defendant's driver by Namibian authorities and subsequently the process of releasing him which cost the Defendant the amount stated.

The Defendant further testified that of the excess amount incurred in expenses in trying to release his driver and bring the initial motor vehicle [not subject of proceedings before court per se], the Plaintiff agreed to compensate for such loss by paying the Defendant £600.00 and this debt is supported by the Defendant's documentary evidence marked as exhibit **"WM 5"**. It is however silent on whether this letter of credit was to act as full and final settlement to the extent of the Plaintiff's responsibility for excess losses incurred in Namibia while importing the first vehicle or not. Nonetheless it would appear that for the Defendant to have relied on it, he must have agreed with the Plaintiff that such an amount would settle the Plaintiff's extent of liability for the excess losses incurred in Namibia and the Court will therefore treat it as the substantive debt outstanding and not the entire K17,420 as counter-claimed by the Defendant which is largely unsubstantiated by evidence.



Further to the above, the court is also of the view that the Defendant had found the second transaction involving the Motor Vehicle in issue as an avenue to recover his Counter-claimed amount of K17,420.00 without necessarily bringing it to the express awareness of the Plaintiff. The court is inclined to make this finding by alluding to the fact that the Defendant has repeatedly testified that he could only pay the balance of K5,000.00 outstanding debt to the Plaintiff upon being paid the sum he is counter-claiming. However, if such a claim was to be fully considered by this court, I am still left to wonder why The Defendant had to pay the K8,000.00 and subsequently K7,000.00 only to leave a small balance of K5,000.00 as testified by him and only to counter-claim it with such older credit to his favour of K17,420. This sequence of events and evidence fortifies the court's earlier conclusion that it would only hold the Plaintiff to the debt he committed to through his letter of credit to the amount of £600.00 in favour of the Defendant and not the counter-claimed amount of K17,420.00

As regards the issue of the amount outstanding on the purchase of the second Motor Vehicle being a Mercedes Benz Fridge Van Registration No. ALH 6903, the court has noted from the sale agreement signed by both parties that K8,000.00 was to be paid upon execution of the said contract, marked as exhibit **"TM 1(a)"** and the Plaintiff would not therefore sway the court through his oral evidence into believing that he had actually appended his signature to a document that stated that he was to be paid K8,000.00 and yet he only got K7,000.00. This is because the Plaintiff, was at liberty to



A handwritten signature in blue ink, consisting of a stylized 'S' followed by a horizontal line.





refuse to append his signature if a payment other than the stated K8,000.00 in a written agreement was what was paid to his disadvantage. This position of the court is well supported at law and the High Court has previously acknowledged the trite law as regards to treatment of extrinsic evidence in the face of a written contract as was stated in the case of **SAM AMOS MUMBA VS ZAMBIA FISHERIES AND FISH MARKETING CORPORATION LIMITED (1980) ZR 135 (HC)** where the court noted that:

*The general principle of law is that where parties have embodied the terms of their contract into a written document extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written document subject of course to certain exceptions. In the case of Mercantile Bank of Sydney v The Taylor (1) at p. 321 their Lordships had this to say:*

*"It had been proved that the whole terms of the agreement under which Griffin became entitled to his release were embodied in the bank's letter of the 5th April, 1889, which he accepted without reservation or qualification. On that assumption, it is plain that the previous verbal communications which had passed between him and the bank were completely superseded, and could not be legitimately referred to, either for the purpose of adding a term to their written agreement, or of altering its legal ordinary construction."*

As regards the second installment being paid to the Plaintiff, the onus to prove that such payment was made lies on the Defendant and he has not produced any evidence to that effect, except to testify that the said amount was deposited in the Plaintiff's Stanbic Account while the Plaintiff was in Namibia. On the other hand, the Plaintiff has denied ever receiving the second installment, which he in fact claims



should have been K8,000.00 after allegedly being short-changed on the first installment. For the reasons earlier given, the Court has concluded that K8,000 was paid upon signing of the sale agreement by the parties, the court is however of the view that the second installment was not paid by the Defendant as there is no evidence of such payment whatsoever save for oral evidence which has also been disputed by the Plaintiff.

I am further inclined to make the above finding as the Defendant had every reason not to honour his debt obligations to the Plaintiff on the second purchase as he believed that the Plaintiff was actually owing him an amount of K17,420.00 which he has counter-claimed.

In summary, the court's findings are that the Plaintiff owes the Defendant £600.00 as admitted in the letter of credit marked as exhibit **"WM 5"** and not the K17,420 as counter-claimed by the Defendant. The Court, based on the Defendant's evidence, finds that the second motor vehicle, subject of this litigation, being a Mercedes Benz Fridge Van Registration No. ALH 6903 is still under the possession and control of the Defendant and has not been sold to any third party, it is the court's further finding that the vehicle has been in a state of wear and tear due to passage of time and because the said vehicle was involved in an accident occasioned at the Defendant's instance resulting in the loss of a rear tyre and windscreen and also that the Plaintiff is aware of the current physical state of this vehicle as he has been accessing and viewing it from time to time.





It is further noted by the Court that an earlier ruling was made regarding the Van Fridge Unit valued at K6,500.00 in which the court ordered that it be returned to the Plaintiff and it was so returned, no further determination will be made in that regard.

As regards other claims and the Defendant's counter claim, the Court finds that the Defendant's counter-claim succeeds only to the extent that the Plaintiff owes the Defendant £600.00 and not the K17,420 which was being counter-claimed. As regards the Plaintiff's claim, the Court finds that the contract for the purchase of a Mercedes Benz Fridge Van Registration No. ALH 6903 had been breached by the Defendant through failure to pay full purchase price, further that the said vehicle was involved in an accident at the instance of the Defendant resulting into further loss in its value but that the Plaintiff was and is fully aware of the physical state of the said vehicle at the time he was commencing this action and prayed that the said motor vehicle be restituted back to him, the Court Orders and Directs that the said Motor Vehicle be surrendered back to the Plaintiff with immediate effect and the towing and/or transportation of the said motor vehicle to the Plaintiff's nearest location in Lusaka be borne by the Defendant.

The Court further Orders and directs that the damages in breach of contract and damage to the motor vehicle done by the Defendant and the amount of £600.00 which the Plaintiff owes the Defendant are hereby set-off against each other and no party owes the other any



amount in respect of the claim and counter-claim herein save for the above mentioned transportation and/or towing of the motor vehicle in issue. A report to be rendered to the clerk of court by the Defendant and the Plaintiff immediately upon delivery back of Motor Vehicle to the Plaintiff or the Sheriff's or Court Certified Bailiff in default hereof of the Order.

Each party to bear its own costs and out of pocket expenses.

Leave to appeal granted.

Delivered at Lusaka on the ..... day of ..... 2017



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**L. K. MUSONDA**  
**RESIDENT MAGISTRATE**