IN THE HIGH COURT FOR ZAMBIA **2014/HP/082**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ALEXANDER NG'ANDU **PLAINTIFF**

AND

JOYCE ASSAN BANDA **DEFENDANT**

Before the Honourable Lady Justice F.M Chisanga on the 29th day of March 2018

For the Plaintiff: *Mrs. F. M. Chani, Messrs Chongo Manda & Associates*
For the Defendant: *Mr. L. Zulu, Messrs Tembo Ngulube & Associates*

J U D G M E N T

Cases referred to:

1. ***Holmes Limited v. Buildwell Construction Company Limited (1973) Z.R. 97 (H.C.)***
2. ***Mercantile Bank of Sydney v. Taylor (1893) A. C. 317***
3. ***Colgate Palmolive (Z) Inc v. Able Shemu Chuka and 110 Others Appeal No. 181 of 2005***
4. ***Printing and Numerical Registering Company v Simpson (1875) LR 19 EQ 462***
5. ***Hulme v. Brigham [1943] 1 ALL E R 204***
6. ***Spyer v Phillipson [1931] 2 CH 183***
7. ***Namung'andu v Lusaka City Council (1978) ZR 358***
8. ***Hellawell v. Eastwood [1851] 6 ExCh 295 at 312***
9. ***Philips v Lamdin (1949) 1 All ER 770***
10. ***Clifford v Turrell (1845) 14 LJCh 390***
11. ***Frith v. Frith (1906) AC 254***

12. ***Turner v. Forwood and Another (1951) 1 All ER***

Other works referred to:

1. ***Cheshire, Fifoot and Furmstone's Laws of Contract 14th Edition***
2. ***Powell's Principles and Practice of the Law of Evidence, Tenth Edition 1921, London, Butterworth & Co***
3. ***Fry on Specific Performance of Contracts, 6th Edition***

By writ of summons, the plaintiff claims from the defendant a sum of K33,000.00 being the balance of the purchase price of Stand Number 34333 Lusaka, interest on the amount, any other reliefs the Court may deem fit and costs of this action.

The statement of claim exemplifies the plaintiff's claim. It is averred therein that in March, 2014, the plaintiff advertised his property for sale in the Post Newspaper at the price of K350,000.00, but was ready to sell it at K330,000.00. In response to the said advert, the defendant inspected the property and was interested. She indicated to the Plaintiff that she was entitled to a loan of K300,000.00 from ZANACO, her employer, but that she was ready to purchase the property at K330,000.00. She then instructed the Plaintiff to prepare two offer letters, one indicating K330,000.00 and the other K300,000.00, the latter being for her employer's consideration. The balance of K30,000.00, it was agreed, would be paid by the defendant in three instalments to be agreed.

On 1st April, 2014, the defendant informed the plaintiff that the Bank would only pay K292,000.00 of the purchase price. She requested the plaintiff to prepare another

offer letter and assured him that the balance of K8,000.00 would be paid the following day. When, collecting the said letter, the Defendant's husband made a payment of K5,000.00 with a promise to clear the balance the following day.

By 6th June, 2014, the Bank had paid the purchase price of K292,000.00 and title passed to the defendant but the balances of K30,000.00 and K3,000.00 were still outstanding. That upon being reminded of the balance, the defendant became hostile and further claimed a refund of K5,000.00 as an overpayment. To date the balance of the purchase price remains outstanding, thus the claim.

In her defence and counter claim, the defendant avers that the advertisement to which she responded advertised the property at K330,000.00. After negotiations, the defendant accepted her offer of K292,000.00 and the same was reduced into a contract of sale. It is averred that no private arrangements were made between the parties.

It is the defendant's further defence that the plaintiff requested a payment of K8,000.00 as commitment fee so as to reserve the property for the defendant. A sum of K5,000.00 was paid, leaving a balance of K3,000.00. The understanding between the parties was that the same would be refunded once the transaction was completed.

In her counter claim, the defendant avers that the parties agreed that commitment fee was refundable but the plaintiff has since neglected to refund the same. It is also

averred that the defendant contracted to purchase the property with a working borehole and a chicken run. However, at the time of delivering vacant possession, the borehole was not in a working condition and the chicken run had been uprooted. It cost the defendant K13,000.00 to repair the borehole and K10,000.00 to fix the chicken run. There was also an outstanding ZESCO bill of K2,500.00. The defendant claims for the above sums and a further K8,000.00 for two months' rents and an additional K2,170 being lodging fees at Cosmic Lodge and Amaka Lodge. It is averred that when the plaintiff refused to complete the contract by surrendering vacant possession of the property, the defendant was forced find alternative accommodation.

The defendant therefore claims a total sum of K35,670.00, interest on the sum, costs and any other relief the court may deem fit.

The plaintiff in response to the counterclaim, avers that the defendant's claim for a refund of the commitment fee came after the plaintiff asked for the balance of the purchase price. It is contended that the chicken run was not advertised as part of the property as it was a ram shackle which did not make part of the valuation report. It is stated that the defendant was aware that the borehole was defective and the drilling company had always been ready to correct the defects. The plaintiff had been willing to settle the ZESCO bill upon payment of the outstanding balance of the purchase price. It was due to this balance that the plaintiff delayed to give the defendant vacant possession.

At trial, the plaintiff testified that in March, 2014 he advertised his property for sale in the post newspaper at K350,000.00. When no one contacted him towards the end of that month, he re-advertised for K330,000.00. On the 31st of April, 2014, a Mr. Jere phoned him requesting to view the property which he did in the presence of the plaintiff's nephew. Mr. Jere was interested in the property and sought to negotiate with the plaintiff, who however, was not willing to negotiate because he had initially advertised the property at K350,000.00. After a telephone conversation with his wife, Mr. Jere agreed to the purchase price of K330,000.00. He explained to the plaintiff that his wife was entitled to a loan of K300,000.00 from her employer and that she was the purchaser. He then requested the plaintiff to prepare two offer letters in the two sums; one for the defendant's employers and the other for the defendant.

The plaintiff testified that the following day, he gave Mr. Jere the two offer letters, a copy of the title deed and a copy of his National Registration Card. That afternoon, Mr. Jere informed the plaintiff that his wife was only entitled to a loan of K292,000.00. and requested for another offer letter in that amount with a promise to pay the K8,000.00 balance on that very day. He then paid K5,000.00 and assured the plaintiff that he would settle K3,000.00 the following week. He also requested for a valuation report and it was availed to him by the plaintiff. That report was rejected by the bank and another one done, in which the value of the property was placed at K370,000.00.

The plaintiff testified that from time to time, he reminded Mr. Jere to settle both the K3,000.00 and K30,000.00. Eventually the bank paid K292,000.00 and title passed to the defendant but the balance of K33,000.00 was still outstanding. Mr. Jere then became hostile and stopped picking the plaintiff's phone calls. When Mr. Jere claimed ignorance of the entire gentleman's arrangement, the plaintiff informed his lawyers about it. He refused to give vacant possession due to the fact that there was a balance that was to be paid. He told the Court that from the said balance, he was to settle the ZESCO bill of K2,500.00 as well as repair the borehole at a cost of about K7,000.00.

Concerning the defendant's counterclaim, the plaintiff testified that he was shocked to hear that they incurred rental expenses. He did not see any tenancy agreement nor receipts from lodges. Moreover, the many times he went to demand his balance, he went to their residence at the time. As regards the chicken run, the plaintiff testified that it was a ramshackle where he used to keep pigs.

In cross examination, the plaintiff testified that he wrote two offer letters and a third one the following day for the amount of K292,000.00. When editing the amount of the offer, he did not adjust the dates as instructed by the defendant's husband. He never consulted his lawyers on the meaning of offer. As far as he was concerned he had a private agreement with the defendant. The offer that the defendant accepted was for K292,000.00. A contract was subsequently prepared by his lawyers which he signed, and he understood his obligations. The gentleman's agreement was not written down.

He informed his lawyers about it after he had already prepared the offer letters but before the contract was drawn. He stated that property transfer tax was paid on the amount in the contract. He did not intend to pay the tax on K300,000.00. When referred to the receipt on page 13 of the Plaintiff's bundle of documents, the plaintiff testified that his secretary prepared the receipt and it mistakenly read commitment fee. It was supposed to cover part of the purchase price and not commitment. That to date, he has not refunded the commitment fee. The plaintiff was also referred to page 17 of his bundles and he testified that the letter was confidential and without prejudice.

He stated in further cross examination that the last payment towards the purchase price was made on 9th June, 2014. Vacant possession was not given because there were tenants in the house, and the defendant was disputing the balance. The property was surrendered a month after completion on 9th July, 2014. He was not aware that the defendant contracted to move out of the property they were residing in after purchasing the plaintiff's property. He was not aware they incurred accommodation expenses as they did not exhibit receipts, nor a tenancy agreement.

He testified further that there was a borehole on the property which needed to be flushed. There was no chicken run on the property, but a small structure in which he used to keep pigs. It was not in the valuation report. He stated that he thought he was clearing the property when he broke it down. He disputed that the piggery could be rebuilt at a cost of K10,000.00, as it cost him less than K500.00 to put up. He

also said the ZESCO bill was his responsibility, and he would settle it after the balance had been settled by the defendant.

In re-examination, the plaintiff testified that he received a total of K292,000.00 of the purchase price and paid property transfer tax on that amount.

PW2 was Elias Bwalya. He testified that he accompanied Mr. Jere to view the subject property after the latter had responded to an advert run by the plaintiff. After viewing the property, Mr. Jere met with the plaintiff, and was informed that the property was being sold at K330,000.00. The two then discussed how the payment was going to be made.

In cross examination, PW2 testified that Mr. Jere viewed the house, the borehole and the poultry which had a capacity of about 50 chickens and in fact housed chickens at the time. He showed interest in the property. This was the only witness called by the plaintiff.

At the close of the plaintiff's case, the defendant gave evidence on oath. She testified that in March, 2014, her employer gave her, as an employee, the opportunity to purchase a house under a staff mortgage policy. On 30th March, 2014, her husband saw an advert in the paper and informed her. They contacted the numbers and got in touch with the plaintiff. PW2 then accompanied them to view the house. The property had a two bedroomed house, a chicken run, borehole and a water tank as advertised. They did not test the borehole as there was no power. The plaintiff and her husband

liked the property and began negotiating with the plaintiff. The defendant testified further that from the onset, she made it clear to the plaintiff that she was only entitled to K292,000.00 under the staff mortgage scheme. After negotiations, the plaintiff reduced the purchase price from K330,000.00 to K292,000.00. He also asked for a commitment fee of K8,000.00

The defendant went on to testify that the following day, the plaintiff gave her an offer letter of K292,000.00 and a copy of the certificate of title. A valuation report prepared by one Mr. Banda was also availed to the defendant. Thereafter, the plaintiff and the defendant signed the contract of sale which stated the consideration as K292,000.00. By 9th June, 2014, the full purchase price had been paid to the plaintiff. The defendant testified that she was not aware of any gentleman's agreement. She stated that the purchase was a straight forward transaction.

As regards her counterclaim, the defendant testified that upon taking vacant possession, she discovered that the borehole was not functional. It cost her K13,000.00 to have it repaired. She also stated that the chicken run was one of the structures that enticed her to buy the property. According to her, it was large enough to house chickens, pigs and goats but to her surprise the structure had been demolished before vacant possession was rendered. Hence her claim for K10,000.00 to rebuild the structure. She also found an outstanding ZESCO bill of K2,500.00 which had not been cleared by the vendor. The defendant explained to the Court that when she contracted to purchase the property from the plaintiff, she gave her

landlord notice to vacate the residence she was occupying. When the plaintiff delayed to deliver vacant possession, she extended her stay at the mercy of her landlord for one month. After that month, the defendant found alternative accommodation for a further month, at K4,000.00. Thereafter, she and her family lodged in two separate lodges.

In cross examination the defendant testified that the chicken run was not advertised in the newspaper. She got the offer letter after visiting the site. The property was advertised for K330,000.00 and the defendant negotiated downwards, to K292,000.00. She only received one offer letter. The commitment fee of K8,000.00 was refundable even though the receipt did not so indicate. She did not have receipts for the borehole expenses. When asked about the chicken run, the defendant stated that the structure she saw would cost about K10,000.00 to rebuild. She testified that it was built on a slab with blocks and was partially covered by iron sheets. She also stated that a human being could not enter the structure standing upright but that it could house pigs, goats and chickens.

The defendant testified in further cross examination that the plaintiff gave vacant possession on 3rd August, 2014 and she incurred rentals and other expenses to ensure her family had accommodation during the period from June to August. When referred to a letter on page 18 of the plaintiff's bundle of documents, the defendant testified that she received that letter on 9th of June and at that time, the property was

in her hands. She stated that between 30th June to 6th August, they lodged in two lodges.

In re-examination, the defendant clarified that when the plaintiff failed to render vacant possession, she paid her landlord K4,000.00 for a further one month. After that month, her family was accommodated in two separate lodges. She secured another house at a rental of K4,000.00. She did not have receipts for these expenses as it did not occur to her to keep receipts.

In her written submissions, learned counsel for the defendant contends that the contract of sale for the sum of K292,000.00 concluded on the 1st April, 2014 is the only binding contract concluded between the parties. Therefore, any other terms introduced for purposes of adding, varying, subtracting from or contradicting the terms of the aforesaid contract amounts to extrinsic evidence and is superseded by the written agreement. He has cited **Cheshire, Fifoot and Furmstone's Laws of Contract 14th** Edition where the learned authors state at page 134 that:

> ***"If the Contract is wholly in writing, the discovery of what was written normally presents no difficulty, and its interpretation is a matter exclusively within the Jurisdiction of the Judge. But on this hypothesis the Courts have long insisted that the parties are to be confined within the four corners of the document in which they have chosen to enshrine their agreement."***

The cases of ***Holmes Limited v. Buildwell Construction Company Limited***[1] and ***Mercantile Bank of Sydney v. Taylor***[2] have also been cited on the same point.

It is argued, based on the principle in the case of ***Mercantile Bank of Sydney v Taylor***[2], that the exception to the rule on extrinsic evidence does not apply. In that case it was stated that:

> ***"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."***

To emphasise the point, learned counsel placed reliance on the case of ***Colgate Palmolive (Z) Inc v. Able Shemu Chuka and 110 Others***[3] where the Supreme Court cited the dicta ***Printing and Numerical Registering Company v Simpson***[4] with approval as follows:

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

On the defendant's counterclaim, learned counsel submits that as a result of the plaintiff's failure to yield vacant possession of the property, the defendant was subjected to special loss and damages. Counsel has defined land to mean not only the ground but also subsoil and all structures and objects such as buildings, trees and minerals standing or lying beneath it. He quotes the latin maxim *"quic quid plantatur solo, solo cedit,"* which means that whatever is annexed to the land becomes part of the land.

In determining whether the chicken run was part of the property sold to the defendant, counsel has drawn the Court's attention to **Land Law in Zambia; Cases and Materials** on page 43, where F. Mudenda observes that in determining whether a chattel has become a fixture, one has to ascertain the degree and purpose of annexation. Relying on the case of ***Hulme v. Brigham,***[5] it is submitted that the test often applied to determine the degree of annexation is whether the item can be removed without causing damage or injury to land. In the case of ***Spyer v Phillipson***[6] the court held that the more securely an object is affixed and the more damage that would be caused by its removal, the more likely it is that the object was intended to form a permanent party of the land.

The case of ***Namung'andu v Lusaka City Council***[7] has also been relied upon where Ngulube J, as he then was, stated that:

> ***"First, the commonest fixture is a house. A house is built into the land, so the house, in law is regarded as part of the land; the house and the land are one thing. Anything which is an integral part of the house, such as for instance, lead pipes, will also be a fixture and will be attached to or form part of the land."***

It is submitted that generally, for an article to be considered a fixture, some substantial connection with the land or a building must be shown.

Counsel further submits relying on the case of ***Hellawell v. Eastwood***[8] that if the intention was to effect a permanent improvement of the land or building as such then the chattel is a fixture and if the intention was merely to effect a temporary improvement then the chattel is a fitting. It is the defendant's contention that the

borehole and chicken run are part of the property as there was no agreement to the contrary.

It is submitted that the act of removing the chicken run from the property as well as tempering with the borehole after the contract was concluded was a breach of contract. This resulted in the Defendant suffering damages in form of ZMW 13,000.00 being the cost of fixing the borehole and ZMW 10,000.00 to replace the chicken run. Counsel has also placed reliance on the case of ***Philips v Lamdin***[9] where the court held that all fixtures attached to the land at the time of the contract of sale must be left for the purchase unless otherwise agreed.

I have considered the evidence led by the parties. I should point out that the plaintiff averred that he advertised the property for K350,000, and the plaintiff responded to the advert. She inspected the property, and expressed interest in purchasing it. The plaintiff informed her that he was selling it at K350,000 but that he could sell it to her at K330,000 although her loan entitlement was K300,000. The statement of claim further avers that the defendant requested him to prepare two letters of offer, one for K300,000 and the other for K350,00, so that she could present the one with the lower figure to the Bank.

In his testimony however, he said he advertised the property for K350,000 and subsequently for K330,000 and this is the advert the defendant saw. Further, he said he was instructed to prepare two letters of offer, one for K330,000 and another for K300,000, to be submitted to the bank.

It will be noticed that the averments differ from the plaintiff's testimony. I note however that the letters at pages 1 of the defendant's bundle of documents, and pages 2 and 3 of the plaintiff's bundle of documents bear out the plaintiff's testimony. These letters were admitted as having passed between the parties, in terms of Order 27 Rules of the Supreme Court. It will also be noticed that paragraph 6 of the defence states in part, that any offers prepared by the plaintiff were at his own instance and volition, but the defendant only accepted the offer for K292,000. This averment is evasive, and impliedly confirms that other offers were prepared by the plaintiff, but states that this was at his own instance.

My considered view is that these letters must have passed after a discussion, as expressly indicated in all of them. They state that there was a conversation between the parties. As the defendant admits in terms of Order 18 Rules of the Supreme Court, that these documents were given to her, I accept the plaintiff's testimony accordingly, notwithstanding his indication that he also wrote an offer for K350,000.

According to the plaintiff, he was informed the defendant could only obtain the sum of K292,000.00 from her employers as a loan to purchase the property in question, as that was her qualification. This moved him to write the third letter of offer. This fact is undisputed. The parties also agreed on the payment of K8000.00. The defendant says it was a refundable commitment fee, while the plaintiff says it was not refundable. According to him, it was the shortfall on the agreed K300,000.00.

I have looked at the receipt issued to the defendant in this respect. The receipt is dated 2nd April 2014, a day after the letters of offer had been written. The description of the payment is that it was a commitment fee towards the purchase of Stand No. 34333 Shantumbu Road, Chalala. A balance of K3000.00 was indicated, to be paid within the same week.

Paragraph 9 of the statement of claim avers the defendant requested the plaintiff to prepare another offer letter in the sum of K292,000.00 and assured the plaintiff that the eight thousand kwacha difference would be paid the following day. The defendant denies this in paragraph 8 of the defence. However, I believe the plaintiff on this point, as it is borne out by the fact that the K5000.00 was paid the following day, while the balance of K3000.00, it was explained, could not be paid promptly but to be paid within the same week. I also note that the receipt does not state that the commitment fee was refundable. In addition to this, the commitment fee, and the sum of K292,000.00 add up to K300,000.00. It is very odd that the commitment fee agreed to be paid would be the shortfall of K300,000.00

This factor inclines me to accept the plaintiff's explanation as more probable than improbable. I thus find that the parties agreed that the offer letter to be shown to the bank should be in the sum of K300,000.00 Upon being informed that the plaintiff's mortgage entitlement was only K292,000.00, this was communicated to the plaintiff, who was assured that the shortfall on the K300,000 would be paid.

I next approach the question as to what purchase price was agreed by the parties for the property in question. As earlier noted, the letters of offer written to the defendant were penned after discussions between the parties. I have found that the parties had agreed to avail the bank the offer in the sum of K300,000.00 These parties discussed the sale, before the various letters were written. The fact that both letters in the sums of K300,000.00 and K330,000.00 were written on the same date, after discussions, confirms that two figures were agreed upon. One was intended for the bank, while the other one was to be between the parties. True it is that the letter of offer in the sum of K330,000.00 was not accepted by the defendant. Be that as it may, there is evidence, leading to my finding, that the parties had agreed on a figure outside the one acted upon by the bank, in lending the defendant the funds with which to purchase the property.

The plaintiff wrote the defendant a letter dated 2nd July 2014, in which he demanded the balance of K33,000.00 No response was forthcoming to this demand. **Powell's Principles and Practice of the Law of Evidence, Tenth Edition 1921, London, Butterworth & Co** states the following:

> ***"The fact that no reply has been sent to a letter received is as a rule, not regarded as an admission that the statements in it are correct. To some letters the only possible reply is a dignified silence. But the circumstances or the relations between the parties may be such that a reply might probably be expected, and in such cases the failure to reply is some evidence that the statements in the letter are true. As soon as it is proved that a man has received a certain letter his subsequent words and conduct may amount to admissions."***

In the present case, the plaintiff wrote a letter dated 2nd July 2014 in which he reminded the defendant that she requested the plaintiff to issue two contracts, one to be presented to the bank, and the other one to be private between them. That when the bank returned the first contract, she requested that he issues an adjusted one in the amount approved by the bank, and she promised to pay the difference privately to him. I perceive that the plaintiff was referring to the letters of offer, and not contracts of sale, as the evidence before me points to the fact that the bank rejected the offer in the sum of K300,000.00 as the plaintiff's entitlement was K292,000.00. The defendant did not reply to this letter. One would think that a person reminded of the private arrangement would respond to the reminder. To keep silent in the face of these reminders amounts to acknowledgement that what was alleged in the letter was within the knowledge of the defendant. This was no mere letter of demand. It indicates the request of the defendant to the plaintiff on the settlement of the purchase price. No denial of this reminder was made by the defendants. I find the plaintiff's version more probable than the defendant's. It is thus my finding that the parties agreed that the sum of K30,000.00 would be paid outside the agreement.

Although the letter was referred to as confidential, it was discovered and produced as part of the documents passing between the parties in terms of Order 24 Rules of the Supreme Court. It was admitted as a true copy of what it purported to be in terms of Order 27 Rules of the Supreme Court. It should also be remembered that even a privileged document may be produced where the person who can claim the privilege has waived the privilege. Here, it is clear that the document in question was not

regarded as privileged, and any privilege that might have been attached to it was waived by discovery and inspection.

As rightly submitted by counsel for the defendant, where a contract is wholly in writing, parties of full age, having expressed themselves in that written document are bound by its terms, and extrinsic evidence cannot be admitted to vary such a contract. The case of ***Mercantile Bank of Sydney v. Taylor.***[2] is distinguishable from the present one as in that case their Lordships were not inclined to consider the previous verbal communications which had passed between one Griffin and the Appellant Bank because it appeared to them that no such foundation was laid at trial for the admission of any such evidence.

Indeed, the rule against parol evidence is not an absolute rule. The case of ***Clifford v Turrell***[10] lays down the principle that where there is a nominal consideration, evidence is always admissible to show that the true consideration was something more than the consideration stated in the written agreement be it under hand or seal. In that case, a deed had stated the nominal consideration of 10s and an action for specific performance was brought in which it was alleged by the plaintiff that, in fact, there had been a further consideration for his execution of the deed, namely, a promise by the defendant to pay him an annuity of £40 a year and give him a house worth £10 a year. In another case, ***Frith v. Frith,***[11] Lord Atkinson, who delivered the judgement of the House of Lords referred to ***Clifford v. Turrell***[10] and stated at page 259 that:

> ***'Parol evidence was admitted to prove that additional consideration was in fact given for the deed by which the plaintiff was induced to execute it, namely, an agreement by the defendant that he would pay to the plaintiff an annuity of £40 per annum during his life and give to him a house worth £10 a year to live in. Specific performance of that parol agreement was decreed. The Vice-Chancellor .....in delivering judgment in the case, lays down, in the opinion of their Lordships correctly, the rule of law upon this subject. He said 'Rules of law may exclude parol evidence where a written instrument stands in competition with it, but it has long been settled that it is not within any rule of this nature to adduce evidence of a consideration additional to what is stated in a written instrument.'***

He went on to state that:

> ***'The rule is, that where there is one consideration stated in the deed, you may prove any other consideration which existed, not in contradiction to the instrument; and it is not in contradiction to the instrument to prove a larger consideration than that which is stated.'***

That case was one of ejectment. At trial, the appellant tendered evidence to show that the deed that gave him power did not disclose the entire consideration given for it and that there was additional consideration, a personal guarantee, made between him and the respondent. Their Lordships held that that case fell within the rule, and that the evidence proposed to be given, which evidence was the personal guarantee, did not contradict the deed.

Both these cases were cited in a later case, **Turner v. Forwood and Another.**[12] The Court of Appeal held that where the consideration is stated in a deed, parol evidence to prove a larger consideration does not contradict the deed and is admissible.

The principles laid down in the cited cases are applicable to this case and I find that the parties' intention was to contract for the said property at the price of K330,000.00 and not K292,000.00 as stipulated by the contract. This finding is supported by the undisputed fact that the defendant was obtaining a loan from her employers to which she was only entitled to K292,000.00. The plaintiff's version of events, as earlier stated, is highly probable. I find that indeed, there was a gentleman's agreement for the difference.

There is a counterclaim by the defendant. The claims of the ZESCO bill and the defective borehole are not disputed by the plaintiff. Having found as stated above, the claim for the refund of K5,000 fails, as the K8,000.00 was the shortfall on the K300,000.00. It was the balance of the K300,000, thus, part of the consideration, and not refundable. As regards the chicken run, the defendant said he could rebuild it in the letter written by his advocates. I note however that it was a temporary structure, which was not even included in the valuation repot. I have seen no evidence that planning permission was obtained for the said structure. The court cannot order the defendant to rebuild a structure whose legality has not been established.

There is also a claim for accommodation expenses for the period the plaintiff refused to give vacant possession in accordance with the contract of sale. According to the contract of sale, the parties agreed that the date fixed for completion would be within four weeks from the date of obtaining consent to assign and the property transfer tax

clearance certificate. Consent to assign was obtained on 4th April, 2014 and the tax clearance certificate on 29th April, 2014. Strictly speaking, completion was to be by 20th May, 2014. I am of the opinion that time was not of the essence because even though the contract of sale stated as such, the last installment of the purchase price was made on 9th June, 2014. In order to render time essential, it must be clearly and expressly stipulated and must also have been really contemplated and intended by the parties that it should be so; it is not enough to merely mention a time during which something is to be done. See **Fry on Specific Performance of Contracts, 6th Edition, at page 502.**

Be that as it may, it was the parties' intention that vacant possession be rendered to the defendant after the purchase price is settled. In fact, the plaintiff withheld vacant possession in protest at the defendant's failure to settle the balance of the purchase price. However the contract stated that vacant possession was to be given on completion. Vacant possession should have been rendered on 9th June, 2014 but was only rendered on 9th July, 2014. The defendant is entitled to a month's rental, as she was kept out of possession for that one month. In the absence of a receipt, I will make an inspired guess in the sum of K3000.

On the foregoing, I find the plaintiff is entitled to the sum of K33,000.00. From this amount will be deducted the sum of K2,500.00 for the ZESCO bill and borehole expenses in the sum of K9,000.00. I make an inspired guess in this regard, as no receipts have been produced by the defendant. These sums will bear interest at

current bank rate from date of writ to date of judgment and thereafter at current bank rate till payment is full. The result is that from the sum awarded to the plaintiff, the defendant will deduct K14,500 with the stated interest. She will pay the balance to the plaintiff with the stated interest. Judgment is entered for each party accordingly in those terms. As both parties have partly succeeded and partly failed, each party will bear own costs.

Dated the 29th **day of** March **2018**

F. M. CHISANGA
HIGH COURT JUDGE