

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 145/2022

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

QUEENS CASH FINANCE LIMITED

AND

KRESTAH HANONGO MUCHINDU KANENE

RESPONDENT



CORAM: KONDOLO SC, MAJULA, BANDA-BOBO JJA

On: May, 2024 and 21st June, 2024

For the Appellant: Not in attendance

For the Respondent: Not in attendance

J U D G M E N T

KONDOLO SC JA, delivered the Judgment of the Court.

CASES REFERRED TO:

- 1. Khalid Mohamed v The Attorney General (1984) ZR 49
S.C**
- 2. Royal British Bank v Turquand (1856) 6 E&B 327**
- 3. National Airports Corporation Limited v Reggie Zimba
& Saviour Konie (2000) ZR 154**

4. **Kasote Singogo v Lafarge Zambia Plc
SCZ/Appeal/33/2012**
5. **Examinations Council of Zambia v Reliance
Technology Ltd SCZ/46/2014;**
6. **Nkongolo Farms Limited v Zambia National
Commercial Bank Limited, Kent Choice Limited (In
Receivership) and Charles Haruperi (2007) ZR 149.**
7. **Tebuho Yeta v Africa Banking Corporation ABC
(Zambia) Limited SCZ/117/2013**

1.0 INTRODUCTION

- 1.1 This is an appeal against the Judgment of Hon. C.B. Maka delivered on 23rd March, 2022 in which she granted the Plaintiff's claims and dismissed the Defendant's counterclaim.
- 1.2 In the High Court, the Appellant was the Defendant and the Respondent was the Plaintiff.

2.0 BACKGROUND

- 2.1 The Plaintiff alleged that he obtained a loan from the Defendant in the sum of K150,000 comprising of a principal sum of K120,000 plus interest of K30,000 and he surrendered the title deeds for his property as security.

- 2.2 The Plaintiff claimed that he had paid back the loan in full but was surprised when the Defendant's lawyers wrote to him demanding payment of loan arrears. The Defendant later claimed that it had purchased the house from the Plaintiff and on that basis refused to release the title deeds.
- 2.3 The Plaintiff reacted by commencing legal proceedings by Writ of Summons claiming, *inter alia*, the following relief;

1. An order directing the defendant to release the certificate of title for Stand No. 2613/535, Livingstone. An order declaring that the Defendants decision of refusing to release the Plaintiffs certificate of title besides having settled the loan in full is unlawful; and directing that the Defendant herein do release the said certificate of title to the Plaintiff.

2. Damages for mental anguish and inconvenience.

2.4 **PLAINTIFF'S CASE**

- 2.5 The Plaintiff settled a statement of claim averring that he obtained a loan of K120,000 from the Defendant for a tenor of 6 months which was to be repaid with interest of K30,000.

- 2.6 That over and above surrendering the title deed, the Defendant required him to execute a letter of sale and assignment so that in the event that he defaulted, the Defendant would proceed to enforce the contract of sale and assignment by lodging them at the Lands and Deeds Registry.
- 2.7 The Plaintiff averred that he was told to be making payments through the Defendant's loan officer, one Mubiana Samutumwa.
- 2.8 The Plaintiff stated that he had paid back the loan of K120,00 in full together with interest in the sum of K30,000 plus penal interest in the sum of K22,500.
- 2.9 That despite having paid in full the Defendant's Branch Manager Mr. Yang, phoned the Plaintiff accusing him of not servicing the loan. The Plaintiff visited the Defendant's office and showed Mr. Yang proof of payments made to the loans officer but he was advised that the Defendant's records showed that he had paid back only K17,000 and that the loans officer was on leave.
- 2.10 That the Defendant's lawyers Mac Partners wrote to the Plaintiff demanding payment of loan arrears of K229,000 and he availed the lawyers with proof of payment and asked that he be availed his title deeds.

2.11 That the Defendant's lawyers later wrote to the Plaintiff's lawyers stating that the title deeds would not be released because the Defendant had paid for the house and also demanded that the Plaintiff yields vacant possession to the Defendant.

2.12 That on account of the Defendant's refusal to release his title deeds he has been unable to use it to obtain and renew his transit bond and has thus suffered damage or loss.

2.13 He thus sought the reliefs stated in his writ of summons.

3.0 DEFENDANTS CASE

3.1 The Defendant filed a defence stating that it had loaned the Plaintiff the sum of K150,000 on condition that he signs a letter of sale and assignment.

3.2 That if the Plaintiff defaulted on the loan, the secured property would immediately transfer to the Defendant.

3.3 The Defendant averred that the Plaintiff had defaulted on the loan and that is why it had held onto the title deeds.

3.4 That its loan officer had not received any of the alleged payments from the Plaintiff and counterclaimed, *inter alia*, as follows;

1. An order of specific performance of the contract of sale dated 6th May, 2019, signed between the Plaintiff and the Defendant;

2. An order of vacant possession of plot no. 2613/535, off Airport Road Livingstone.

4.0 HIGH COURT DECISION

4.1 The Defendant did not appear for the trial and for that reason the lower Court did not consider the evidence in the witness statement earlier filed by Mr. Jiang Guan Gao. She however noted that a Plaintiff cannot always succeed simply because the opponents defence has failed. See **Khalid Mohamed v The Attorney General**⁽¹⁾.

4.2 The trial Judge found that the agreement entered into between the parties did not create an equitable mortgage as argued by the Plaintiff but was a forward purchase agreement contingent upon the happening of a future event which in this case was an event of default by the Plaintiff.

4.3 The learned trial Judge noted that the Plaintiff had signed the agreement freely and not alleged any kind of duress and is therefore bound by it.

4.4 That the parties were bound by the terms of the agreement and the only issue for determination was whether or not the Plaintiff liquidated the loan together with the agreed interest.

4.5 The learned trial Judge found that the Plaintiff had paid back the total sum of K171,000 which she described as way more than the loaned sum of K120,000 plus interest of K30,000 due to the Defendant from the Plaintiff. That the K171,000 paid by the Plaintiff comprised the following sums;

1. 10th June 2019	-	K24,000
2. 4th August, 2019	-	K5,000
3. 6th August, 2019	-	K10,000
4. 19th September, 2019 (17th)	-	K50,000
5. 22nd September, 2019 (20th)	-	K10,000
6. 30th September, 2019	-	K5,000
7. Sum acknowledged by the Defendant	-	K17,000

4.6 According to the learned trial Judge the tabulated sums amounted to K171,000 and she found that the unchallenged evidence of the Plaintiff was that the monies were received by Mr. Mubiana Samutumwa on behalf of the Defendant. The Court applied the principal in **Royal British Bank v Turquand** ⁽²⁾ in which the Defendant was deemed to be liable on the basis that an outsider dealing with a company is entitled to assume that there has been

necessary compliance with regards to the internal management of the company. See also the case of **National Airports Corporation Limited v Reggie Zimba & Saviour Konie** ⁽³⁾.

4.7 She found that the Defendant was illegally holding onto the Plaintiff's title deeds and she ordered they be released immediately.

4.8 She considered the Plaintiff's claims of inconvenience and mental anguish and dismissed them as in her view there were no exceptional circumstances to grant such a claim. See the case of **Chilanga Cement Plc v Kasote Singogo** ⁽⁴⁾.

4.9 The lower Court dismissed the Defendant's counterclaim after finding that there was no evidence upon which to grant the reliefs sought.

5.0 APPEAL

5.1 Dissatisfied with the Judgment, the Defendant, now the Appellant, appealed initially advancing three grounds but the filed heads of argument indicate that ground 2 has been abandoned leaving the following two grounds;

- 1. The learned Court below erred in both law and fact when it stated that the total sum that was paid after calculation of the amounts paid by the Plaintiff to the Defendant was K171,000.00 which**

is more than the amount borrowed when in fact it was less than the loaned sum of K150,000.

2. The learned Court below erred in both law and fact when it concluded that the Plaintiff had paid all the monies owed to the Defendant and ordered a return of the Title Deed to the Plaintiff.

6.0 APPELLANT'S ARGUMENTS

- 6.1 The Appellant argued the two grounds together, in which this Court was urged to interfere with the trial Court's finding of fact that in settling the loan, the Respondent had paid the Appellant the sum of K171,000.
- 6.2 The Appellant's argument is simply that when the figures which the Judge found as constituting the sums paid to the Appellant by the Respondent are added up, they do not amount to K171,000.
- 6.3 That when the figures are added, the total is actually K121,000, meaning that the learned trial Judge's finding that the total is K171,000 was perverse.
- 6.4 The Appellant submitted that this Court has power to reverse findings of fact made by the lower Court and cited several authorities to support its submission including **Examinations Council of Zambia v Reliance Technology Ltd** ⁽⁵⁾ and **Nkongolo**

**Farms Limited v Zambia National Commercial Bank Limited,
Kent Choice Limited (In Receivership) and Charles Haruperi ⁽⁶⁾**

- 6.5 The cited cases state that an appellate Court can reverse findings of fact where the trial Judge erred in accepting evidence or in assessing and evaluating the evidence.
- 6.6 It was submitted that when one considers that the Respondent only paid the Appellant the sum of K121,000, the Respondent was still indebted in the sum of K29,000 and prayed that we set aside the Judgment of the lower Court and order the Respondent to liquidate the amount owing to the Appellant with Costs.

7.0 RESPONDENT'S ARGUMENTS

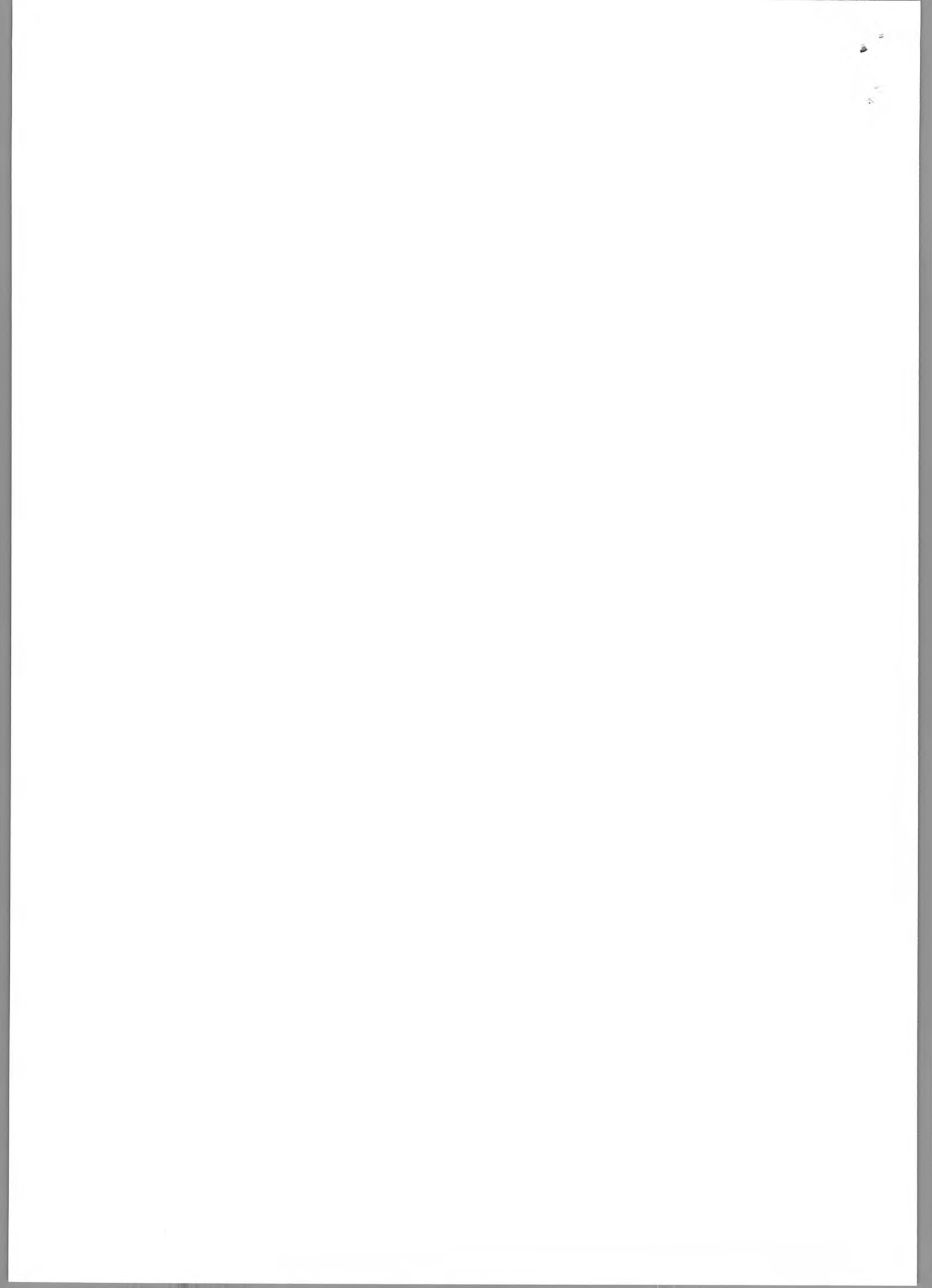
- 7.1 The record shows that the Respondent did not file its heads of argument in opposition.

8.0 THE HEARING

- 8.1 Neither of the parties were present at the hearing. Our records indicate that they were both aware of today's sitting but both of them are absent without notice.
- 8.2 We decided that this appeal shall be determined on the basis of the record of appeal and the arguments filed by the Appellant.

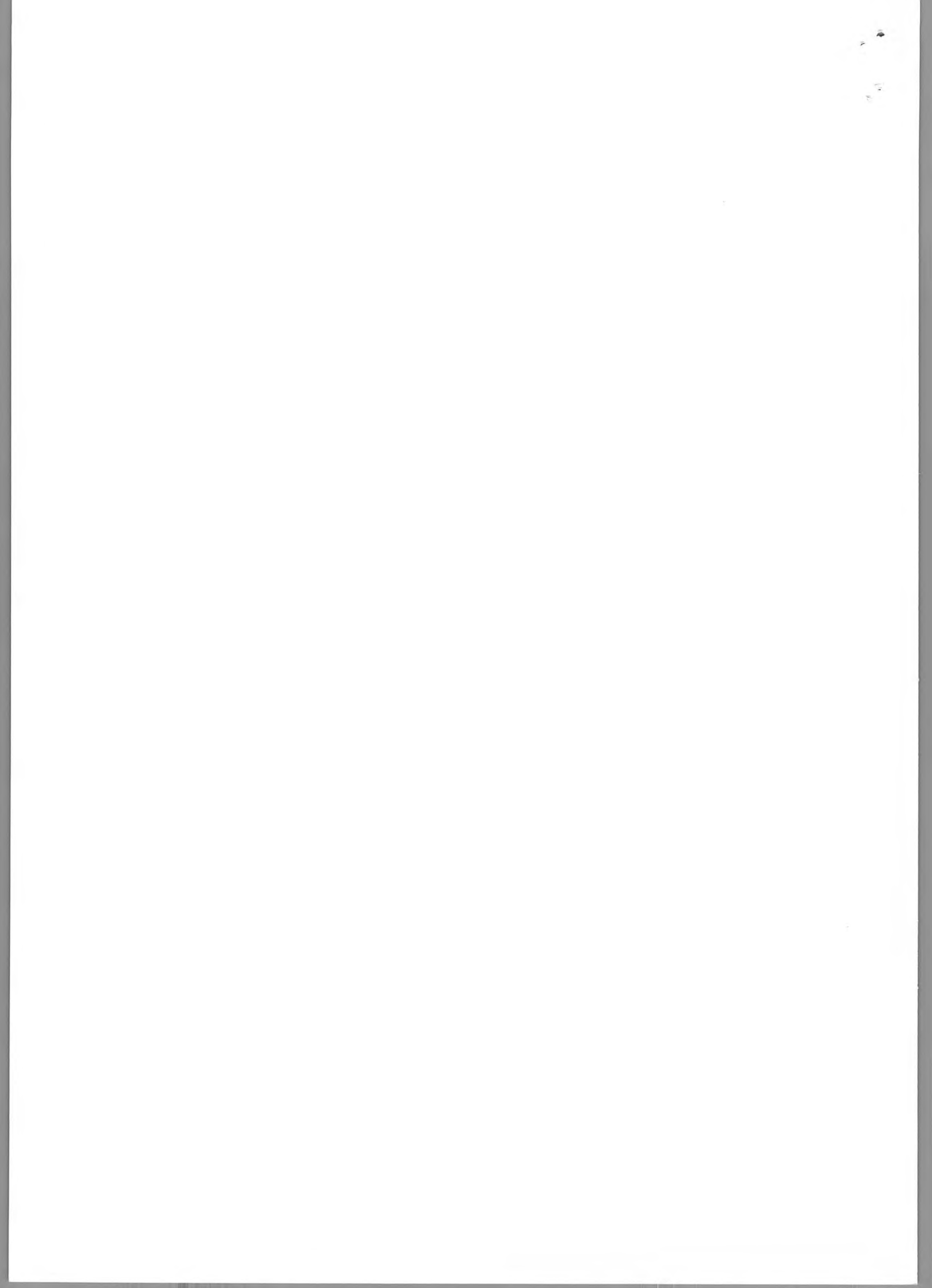
9.0 ANALYSIS AND DECISION

- 9.1 We have considered the record of appeal and the arguments advanced by the Appellant. The two grounds of appeal are actually subsets of each other and we shall therefore consider them as one.
- 9.2 The Appellant has only appealed against the trial Judge's finding that the Respondent had paid back the loan in-full and had in fact paid way more than the amounts agreed by the parties.
- 9.3 The trial Judge did not consider any evidence from the Appellant because he failed to appear at the hearing. The entire Judgment is founded on the evidence presented by the Respondent with regard to a transaction the learned trial Judge described as a forward purchase agreement.
- 9.4 Having considered the Respondent's evidence, the trial Judge tabulated the payments paid to the Appellants in respect of the subject loan, and which we have reproduced in paragraph 4.5 and which, according to the learned trial Judge, amounted to K171,000 as against a total commitment of K150,000.
- 9.5 In paragraph 7 of the statement of claim (*page 130 record of appeal*), the Respondent alleged that he had paid the Appellant the principal sum of K120,000 plus interest at K30,000 as well as penal interest in the sum of K22,500. This is repeated in paragraph 6 of the Respondent's witness statement (*see page 130 record of*



appeal). When these sums are added together they give us a total of K172,500.

- 9.6 In paragraph 10, the Respondent avers that he availed to the Appellant and its lawyers proof that he had repaid the loan in full. This is also repeated in paragraph 6 of his witness statement where he went further and indicated that proof of the repayments was located at pages 13 to 34 of the Plaintiff's bundle of documents (*page 156-199 of the record of appeal*).
- 9.7 The Respondent's testimony appears at p336 – p339 of the record of appeal.
- 9.8 It is notable that nowhere in his evidence does the Respondent tabulate the amount and dates when specific instalments were allegedly paid to Mr. Mubiana. He simply stated that the information could be found at pages 13 to 34 of the Plaintiff's bundle of documents.
- 9.9 It appears that just as we have had to do, the trial Judge also had to comb through the stated pages to pin-point where the said payments were reflected. We embarked on a similar exercise and confirmed the figures tabulated by the learned trial Judge as accurate save for errors on the payments for the K50,000 which was made on the 17th September, 2019 and not on the 19th and the



payment of K10,000 which was made on the 20th September and not on the 22nd.

9.10 The Respondent claims that he paid the Appellant a total of K172,500 but he did not prove payment of any sums other than those tabulated by the learned trial Judge. We have added up the said sums and agree with the Appellant that the sums add up to K121,000 and not K171,000.

9.11 The last sum tabulated by the learned trial Judge was the K5,000 paid on 30th September, 2019 (*see page 179 record of appeal*).

9.12 It is interesting to note that according to the phone transcript from which the instalments were gleaned, the Respondent was still indebted to the Appellant by February 2020, 5 months later. It appears that the learned trial Judge missed this point and nowhere on the record does it show that the Respondent ever paid the sums he had undertaken to pay in February, 2020.

9.13 It is also odd that the Respondent appears to not have demanded for receipts and none appear to have been issued for the payments allegedly made to Mr. Samutumwa by the Respondent. Perhaps that is a story for another day.

9.14 It is clear to us that the learned trial Judge's finding that the Respondent had overpaid the Appellant was borne of a mathematical error as the sums she tabulated only add up to



K121,000 against the loan amount of K150,000. We would have to agree with the Appellant that the Respondent is still indebted to the Appellant for the difference in the sum of K29,000.

9.15 It has long been the position that appellate Courts very rarely interfere with findings of fact made by trial Courts. The Appellant has cited numerous authorities in that regard.

9.16 In the case of **Tebuho Yeta v Africa Banking Corporation ABC (Zambia) Limited** ⁽⁷⁾ the Supreme Court stated as follows;

“The appellate court will only reverse findings of fact made by a trial judge if it is satisfied that the findings of fact in question were either perverse or made in the absence of any relevant evidence or upon a misappropriation of the facts.”

9.17 It is clear that the trial Judge misapprehended the facts on account of a mathematical error resulting in a factual anomaly. Under such circumstances an appellate Court is called upon to interfere with findings that are factually wrong.

9.18 We therefore allow this appeal and make the following orders;

- 1. The Respondent is indebted to the Appellant in the sum of K29,000 which monies should be paid within the next 30 days upon which the Title Deeds should be immediately returned to the Respondent.**

2. Should the Respondent fail to pay the owed sum within the next 30 days as ordered, the Appellant shall be at liberty to proceed with the conveyance as agreed by the parties in the forward purchase agreement.
3. We award costs both in this Court and the lower Court to the Appellant.

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M.M. KONDOLO SC
COURT OF APPEAL JUDGE

.....
B.M. MAJULA
COURT OF APPEAL JUDGE

.....
A.M. BANDA-BOBO
COURT OF APPEAL JUDGE

