

**IN THE COURT OF APPEAL OF ZAMBIA**  
**HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**APPEAL NO. 313/2022**

**BETWEEN:**

**BETTY KULOFWA MAILOSI MAKALU**

**APPELLANT**

*(Suing as the administratrix of the Estate  
of the late Collins Makalu)*

**AND**

**EDWARD MUKELABAI MATE**

**1<sup>ST</sup> RESPONDENT**

*(Sued as a Co-administrator of the Estate  
of the Late Elias Libanda Mate)*

**PAUL BENZU MATE**

**2<sup>ND</sup> RESPONDENT**

*(Sued as a co-administrator of the Estate of  
the late Elias Libanda Mate)*



**Coram: Chashi, Makungu and Sichinga, JJA**

**On the 18<sup>th</sup> day of August and on the 30<sup>th</sup> October, 2024**

*For the appellant: Mrs. L.B. Macha from E.K Mutale & Co*

*For the respondents: Mr. A.C. Nkausu of A.C Nkausu & Co*

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**JUDGMENT**

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**MAKUNGU JA**, delivered the Judgment of the Court.

**Cases referred to:**

1. *Muliwana Muliwana v. Lusaka City Council and Christopher Mulala – SCZ Appeal No.1 of 2001*
2. *Choongo Hamanyati Mweemba & Another v. Pumulo (HP 1322 of 2019 ZMHC 284)*
3. *Steadman v. Steadman (1974) 2 ALL ER 977*

4. *Mpashi v. Avondale Housing Project Limited – SCZ Judgment No. 12 of 1992*
5. *Centrovincial Estates v. Merchant Investors Assurance (1983) Com LR 15*
6. *Colgate Palmolive Zambia Inc v. Able Shemu Chuka and 10 Others – SCZ 181 of 2005.*
7. *Wesley Mulungushi v. Catherine Bwale Mizi Chomba – SCZ Judgment No. 11 of 2004*
8. *Jane Mwenya and Jason Randee v. Paul Kaping'a – SCZ Judgment No. 4 of 1998*
9. *Laston Phiri v. Tropical Diseases Research Center – SCZ Judgment No. 055 of 2014*

**Legislation referred to:**

1. *The Rent Act, Chapter 206 of the Laws of Zambia.*
2. *The Statute of Frauds, 1677*

## **1.0 INTRODUCTION**

1.1 This is an appeal against the decision of W. Sinyangwe J, of the High Court dated 16<sup>th</sup> August 2022, concerning ownership of property No. 25/2644 Ellaine Brittel in Livingstone District of the Southern Province of the Republic of Zambia.

## **2.0 BACKGROUND**

In this segment of the judgment, we shall refer to parties by their designations in the Court below. It should be noted that

all the amounts of money referred to herein are in unrebased  
Zambian Kwacha.

2.1 On 8<sup>th</sup> February 2022, the 1<sup>st</sup> and 2<sup>nd</sup> respondents as 1<sup>st</sup> and  
2<sup>nd</sup> applicants commenced this matter by way of originating  
notice of motion against the appellant (respondent). The  
application was made under **Section 13 (1) (a) of the Rent  
Act Rules.**<sup>1</sup> They sought the following reliefs:

- 1. Rent arrears due to the estate of the late Elias  
Libanda Mate from the estate of the late Collins  
Makalu for property No. 25/2644 Ellaine Brittel to  
be assessed.*
- 2. Vacant possession of the said property.*
- 3. Interest and Costs.*

### **3.0 AFFIDAVIT IN SUPPORT OF THE MOTION**

The applicants' case is detailed in the affidavit supporting  
the originating notice of motion dated 8<sup>th</sup> February 2022,  
which was jointly sworn by the 1<sup>st</sup> and 2<sup>nd</sup> applicants as co-  
administrators of their late father, Elias Libanda Mate's  
estate.

3.1 They stated that they discovered a Certificate of Title in their  
father's name, for the property in issue which is in the

respondent's possession. The respondent claimed to have bought the property from the applicants' for K18,000,000.00 under a Sale Agreement dated 9<sup>th</sup> September 2003. However, there was no evidence of a transfer of ownership of the property. Therefore, the respondent is liable to pay them rentals until the property is vacated, the same to be assessed by the Court.

#### **4.0 AFFIDAVIT IN OPPOSITION**

4.1 In opposition, the respondent filed an affidavit dated 30<sup>th</sup> May 2022, claiming that her late father, Collins Makalu, had paid K40,050,000.00 as the full purchase price for the property in issue. The payment was acknowledged by the vendor Elias Mate in a letter dated 27<sup>th</sup> July 2006. She stated that her father continued to pay rent until the final installment of the purchase price was made in 2004. However, the vendor increased the purchase price unilaterally and continued demanding rent.

4.2 The respondent maintained that the property belongs to the estate of the late Collins Makalu but the applicants' refused to process the change of ownership or hand over the Certificate of Title.

## **5.0 DECISION OF THE LOWER COURT**

5.1 Upon reviewing the evidence on record, the trial Judge concluded that no contract of sale existed between the parties. The respondent relied on a sale agreement that did not meet the requirements outlined in **Section 4 of the Statute of Frauds.**<sup>2</sup> Given that the Certificate of Title remained in the name of Elias Mate, the Judge determined that the property in question belongs to the estate of Elias Libanda Mate. Consequently, the Judge ordered the respondent to pay the applicants rental arrears with interest and costs. Additionally, the respondent was directed to yield vacant possession of the property to the applicants.

## **6.0 GROUNDS OF APPEAL**

6.1 The appellant advanced the following grounds of appeal;

***1. The learned Judge in the Court below erred in both law and fact when he held and found the appellant herein liable to pay rental arrears as he did not address his mind to the fact that the reason why the appellant was not paying rent is that the property was already purchased. Paying rent ended the moment the last installment of K4,000,000.00 was***

*paid to the vendor in 2004. Further, the revised price of K120,000,000.00 was only brought in by the vendor (the late father to the respondents herein) after the purchaser, the late Collins M Makalu had paid the price, they both agreed on K40,050,000.00.*

*2. "The learned Judge in the Court below erred in law and fact when he held that the appellant vacates the property in issue property No.25/2644 Ellain Brittel, Livingstone as it belonged to the respondents herein, when in fact it did not even if the names that are on the Certificate of Title are that of the late father to the respondents it is because he acted dishonestly by not wanting to hand over the Certificate of Title and process change of ownership even after paying him K40,050,000.00 which he had accepted as a counter offer in the presence of witnesses."*

*3. The learned Judge in the Court below erred in both law and fact when he held that exhibit BKMM2, falls short of the requirements of section 4 of the Statute of Frauds when the exhibit did meet the requirements as the parties were described, the*

*property and the consideration and witnesses who can speak to the material fact.*

4. *“The learned Judge in the Court below erred in law and fact when he did not address his mind to the fact that the late Mr. Elias Libanda Mate did accept the counter offer from Mr. Collins Mate when he accepted the payment of K40,050,000.00 and thereby entering into a contract and further witnesses were there who can attest to the acceptance.”*

5. *“The learned Judge in the Court below erred in law and fact when he did not address his mind and further appreciate the evidence contained in the letter of the late Mr. Elias Libanda Mate’s lawyer dated 27<sup>th</sup> July 2006 where they did acknowledge the payment of the purchase price of K40,050,000.00 but further brought in a new issue of the revised purchase price which both parties never agreed on and because they did not agree on the time frame within which to pay the purchase price.”*

## 7.0 APPELLANTS HEADS OF ARGUMENT

Henceforth we shall refer to the parties according to their designation in this Court.

- 7.1 During the hearing of the appeal, learned counsel for the appellant, Mrs. Macha, relied entirely on the appellant's heads of argument dated 20<sup>th</sup> December 2022.
- 7.2 In support of the first ground of appeal, Mrs. Macha cited the case of **Muliwana Muliwana v. Lusaka City Council and Christopher Mulala**,<sup>1</sup> to argue that the relationship between the parties changed from that of landlord and tenant to vendor and purchaser when the respondents offered the property in question for sale. Consequently, the issue of the appellant owing rental arrears does not arise.
- 7.3 That the initial contract of sale between the parties was not revoked. The vendor merely attempted to introduce a new purchase price after agreeing to the initial amount of K40,050,000.00, which had been fully paid. The lower court's decision requiring the appellant to pay rental arrears to the respondent should be reversed, as the property was duly sold to the appellant.



- 7.4 In support of the second ground of appeal, it was argued that once the full purchase price of K40,050,000.00 was paid, the property belonged to the appellant.
- 7.5 The third and fourth grounds of appeal were argued together as they are interrelated. Mrs. Macha referred to several cases, including **Choongo Hamanyati Mweemba & Another v. Pumulo**,<sup>2</sup> which discusses the Statute of Frauds, and **Steadman v. Steadman**<sup>3</sup> and **Mpashi v. Avondale Housing Project Limited**,<sup>4</sup> on the doctrine of part performance being an exception to the strict rule in **Section 4 of the Statute of Frauds 1677**.<sup>2</sup> Mrs. Macha argued that oral evidence is permissible to establish part performance, as claimed by the appellant, who not only paid the full purchase price but also maintained possession of the property.
- 7.6 It was contended that the trial Judge erred in finding that the sale agreement failed to meet the requirements of **Section 4 of the Statute of Frauds**<sup>2</sup> given that there was proof of part performance by the appellant.
- 7.7 Regarding the fifth ground of appeal, it was argued that once an offer is accepted, it cannot be revoked. Reference was made to the case of **Centrovincial Estates v. Merchant**

**Investors Assurance**,<sup>5</sup> where it was held that a landlord could not revoke an offer after it had been accepted by the tenant, even if the offer was made in error. Based on this principle, counsel contended that the respondents' attempt to alter the original purchase price from K40,050,000.00 to K120,000,000.00 was an unlawful attempt to revoke the initial contract, which this Court should not entertain, in line with the doctrine of promissory estoppel.

7.8 Mrs. Macha further submitted that both parties were adults and willingly entered into the contract of sale. Therefore, this Court should not allow the respondent to deny the validity of the initial contract. The case of **Colgate Palmolive Zambia Inc v. Able Shemu Chuka and 10 Others**,<sup>6</sup> was cited in support of this submission.

## **8.0 RESPONDENT'S HEADS OF ARGUMENT**

8.1 During the hearing of the appeal, learned counsel for the respondent, Mr. Nkausu, relied entirely on the respondent's heads of argument dated 17<sup>th</sup> April 2023.

8.2 In opposing the first ground of appeal, Mr. Nkausu argued that the case of **Muliwana Muliwana v. Lusaka City Council and Christopher Mulala**<sup>1</sup> is distinguishable from the present

case because there was no dispute regarding the existence of the contract of sale in the former, whereas such a dispute exists in this case. He contended that in the present case, the vendor's offer of K45,000,000.00 was nullified by the purchaser's counter-offer of K40,000,000.00, and the purchaser could not revive the original offer by later accepting it.

- 8.3 In response to the second ground of appeal, Mr. Nkausu submitted that the lower Court was on firm ground in ordering the appellant to vacate the property, as the alleged payment of K40,050,000 may have been made either at the time or after the original offer of K45,000,000.00 was rejected, and the purchaser could not revive the original offer.
- 8.4 In countering the third and fourth grounds of appeal, Mr. Nkausu noted that the sale agreement '**exhibit BKMM2**' does not specify the agreed sum; it merely refers to the cash received.
- 8.5 The arguments on the fifth ground of appeal were essentially a repetition of the arguments made in grounds 1 to 4, and thus, they will not be rehashed.

## 9.0 OUR ANALYSIS AND DETERMINATION

9.1 We have thoroughly examined the evidence on record and the heads of argument filed by both parties. Before we start analyzing the issues, it is imperative that we discuss the manner in which the grounds of appeal are drawn up.

9.2 The central issue is whether there was a valid contract of sale of the property number 25/2644 Ellaine Brittel in Livingstone, between the parties.

9.3 The purpose of a memorandum of appeal is to define the issues presented for the appellate court's consideration.

**Order X rule 9(2) of the Court of Appeal Rules** provides that:

***“A memorandum of appeal shall set forth concisely and under distinct heads without argument or narrative, the grounds of objection to the judgment appealed against and shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively.”***

9.4 During the hearing of the appeal, we did bring it to the attention of the appellant's counsel that all the grounds of appeal contain narratives and arguments contrary to **Order**

**X rule 9 (2) of the Court of Appeal Rules.** Counsel conceded and requested for our indulgence.

- 9.5 In the case of **Laston Phiri v. Tropical Diseases Research Center,**<sup>9</sup> although the Supreme Court proceeded to determine the appeal on merit, it observed that *“the grounds of appeal filed before Court when the appellant was acting in person were improperly drafted. When the appellant’s counsel adopted the grounds without modification, it altered the nature of the appeal.”* The Court emphasized that the appellant’s counsel had a duty to provide proper input both for the benefit of the appellant and the Court.
- 9.6 This Court will only overlook improperly drafted grounds of appeal under special circumstances. Appeals may be dismissed for incompetence where the grounds of appeal are couched contrary to the Court’s rules.
- 9.7 In the present case, considering that there was no objection to the grounds of appeal by the respondent’s counsel and that this matter involves land ownership, we take the view that both parties would be prejudiced if we proceeded to dismiss the appeal on a technicality. It is therefore in the interest of justice for us to determine the appeal on its merits. However,

we warn counsel to carefully draft grounds of appeal in accordance with the court rules to avert dismissal of appeals.

9.8 Counsel for the appellant challenges the lower court's decision that the contract of sale fell short of the requirements of **section 4 of the Statute of Frauds**.

9.9 As noted by the trial Judge, for a contract of sale of immovable property to be binding, there must be a written contract or ample memoranda thereof. The main ingredients of a valid contract being offer, acceptance and consideration.

9.10 The letter dated 16<sup>th</sup> August 2002, found on page 40 of the record of appeal, indicates that the late Collins Makalu proposed to purchase the property in issue at K40,000,000.00. By letter dated 6<sup>th</sup> September 2002 appearing on page 41 of the record of appeal, the late Elias Libanda Mate confirmed that he was selling the house to Mr. Collins Makalu for K45,000,000.00.

9.11 According to paragraph 13 of the appellant's affidavit in opposition to the originating notice of motion filed in the Court below on 30<sup>th</sup> May 2022, the appellant averred that Mr. Elias Mate's first offer was K45,000,000.00, and then Mr. Collins Makalu counter-offered K40,000,000.00, which was paid in full. We do not agree with her because our

understanding is that the purchaser initially proposed to buy the property in question for K40,000,000.00. Subsequently, the vendor countered with an offer to sell the property for K45,000,000.00. We hold that this effectively meant the purchaser's proposal was rejected and the vendor's offer was final and accepted. Firstly, we assert this because it is the owner's prerogative to set the price of their property. Secondly, the record indicates that three days after the vendor's letter of offer, on 9<sup>th</sup> September 2003, the parties proceeded to execute the 'Sale Agreement' found on page 35 of the record of appeal, marked exhibit **'BKMM2.'**

9.12 It follows that the lower court's finding that the vendor first made an offer and then the purchaser counter-offered was not based on the evidence on record and is therefore set aside.

9.13 As regards the question of whether the sale agreement met the requirements of **section 4 of the Statute of Frauds**, we note that the agreement was made between the purchaser, Mr. Collins Makalu, and the vendors' Mr. Elias Mate and Mrs. Nellie Mate. The agreement states that cash received K18,000,000.00 plus K18,000,000.00. The description of the property is house No. 25/2644 Ellaine Brittel, Livingstone.

The names and signatures of the vendors, buyer, and their witnesses also appear on this document. The dates against the signatures are 9<sup>th</sup> September 2003 and 9<sup>th</sup> December 2003.

9.14 Page 36 of the record of appeal shows a payment of K4,000,000.00 to Prismatic Electrical Limited. We are certain that the vendor had the benefit of the K36,000,000.00 plus the K4,000,000.00 as evidenced by the letter dated 27<sup>th</sup> July 2006 from the respondent's advocates to the seller, found on page 37 of the record of appeal. He acknowledged payment of the sum of K40,050,000.00. We are uncertain as to when the additional K50,000.00 was paid.

9.15 **Section 4 of the Statute of Frauds** <sup>2</sup> states as follows:

***“No action shall be brought ... whereby to charge the defendants upon any special promise to answer for the debt, default, or miscarriages of another person ... unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.”***



9.16 In the case of **Wesley Mulungushi v. Catherine Bwale Mizi Chomba**,<sup>7</sup> the Supreme Court observed:

*“Where real property is the subject of a sale, there is a need for strict observance of the legal requirements attending to the conveyance. One of the legal requirements ... is the need for the sale to be evidenced by a contract of sale.*

*The provision of Section 4 of the Statute of Frauds, 1677, requires that a contract affecting the transfer or sale of land ought to be evidenced in writing and must be signed. From the explanatory notes to Section 4, it is the position of the law under the said Act that before a seller of land can be held liable on the contract, there must be an agreement contained in a note or memorandum; the memorandum or note must be signed by the person to be charged, and a written proposal accepted orally is sufficient.”*

9.17 In the case of **Jane Mwenya and Jason Randee v. Paul Kaping’a**,<sup>8</sup> the Supreme Court held that:

***“It seems to us that it is now settled that for a note or memorandum to satisfy section 4 of the Statute of Frauds, the agreement itself need not be in writing. A note or memorandum of it is sufficient provided that it contains all the material terms of the contract, such as names or adequate identification of the parties, the description of the subject matter, and the nature of consideration.”***

9.18 We note that the written sale agreement does not indicate the total consideration payable. It also lacks conditions of the sale making it seem like an open-ended contract. Interestingly, there is another document, marked exhibit **‘EMMPBM5’** on page 56 of the record of appeal, which relates to rent payment addressed to Mr. Mbwanga to be passed on to Collins Makalu (the purchaser). This document suggests that the purchase price kept increasing by K5,000,000.00 per year. We hold that this document is insignificant as it is undated and was not signed by the vendor and purchaser. It does not form a valid agreement between the parties.

- 9.19 It is unfortunate that such a case with glaring continuous issues did not proceed to trial and was determined on affidavit basis.
- 9.20 Considering the cases of **Wesley Mulungushi v. Catherine Bwale Mizi Chomba** and **Jane Mwenya and Jason Randee v. Paul Kapin'ga** *supra* and the various documents we have referred to in this judgment, we hold that there was a valid contract of sale as **section 4 of the Statute of Frauds** was complied with in that the parties, property description and purchase price were clearly indicated in the documents as read together. Further, we hold that the parties' intentions were to be bound by the contract of sale as there was part performance of the contract.
- 9.21 Coming to the issue of the vendor's purported increment of the purchase price by letter dated 27<sup>th</sup> July 2006. We note that the purchase price was purportedly increased by K79,950,000.00, and rent arrears were demanded.
- 9.22 In the **Wesley Mulungushi** case *supra*, the respondent, through her estate agents, offered to sell a property to the appellant for K120,000,000.00. The appellant accepted this offer and made a part payment of K20,000,000.00, which was acknowledged by the respondent's son. Later, when the

appellant raised the remaining K100,000,000.00 and attempted to complete the payment, he was informed that the respondent had purportedly rescinded the contract and increased the purchase price to K300,000,000.00.

9.23 The Supreme Court determined that the letter of offer sufficiently detailed the particulars of the house, its location, and the purchase price. Based on the evidence, the Court concluded that both the appellant and the respondent intended to be bound by a contract of sale. The respondent offered, and the appellant accepted, to buy the house at Stand No. 4717, Tukuluh Road, Lusaka, for K120,000,000. The appellant's acceptance was demonstrated by a part payment of K20,000,000, which the respondent acknowledged. However, the mode and duration of the payment for the remaining purchase price were not agreed upon.

9.24 We note that the purported revision of the purchase price was due to the delayed completion of the transaction. The appellant was informed that if they did not hear from him within the next 21 days, the respondent would proceed to court for the recovery of the money and property.

9.25 Following the reasoning in the above case, we are of the firm view that the agreed purchase price of K45,000,000.00 could

not be revised as there was a valid contract of sale and possession of the property was given to the purchaser. Also, see the case of **Centrovincial Estates v. Merchant Investors Assurance**<sup>5</sup> *supra* which states that the landlord cannot revoke an offer after it has been accepted by the tenant.

9.26 The said letter from the vendor's advocates raises the issue of whether time was of the essence of the contract in issue. As noted from the record, the contract between the parties did not specify the terms of payment of the purchase price.

9.27 In the case of **Mwenya and Randee v. Kaping'a**,<sup>8</sup> *supra* the Supreme Court observed that:

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

9.28 In this case, we hold that time was not of the essence because the contract was open ended and the notice to complete was improper in that there was a purported increment of the purchase price, a demand for rental arrears and it was

generally controversial. This entails that the demand for payment of K79,950.000.00 was untenable because the balance of the purchase price was only K4,950,000.00 (45,000,000 minus K40,050,000 = K4,950,000.00). We are fortified by the case of **Wesley Mulungushi v. Chomba**, *supra*.

9.29 The demand for rent arrears was also untenable because the relationship between the parties had changed from that of landlord and tenant to that of vendor and purchaser. See **Muliwana Muliwana** *supra*.

9.30 In light of the above discourse, we find merit in the appeal.

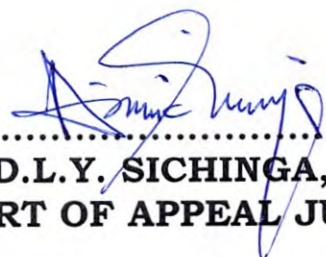
## **10.0 CONCLUSION**

10.1 In conclusion, the appeal succeeds. The orders of the lower court regarding rent arrears and for the appellant to vacate the property are hereby set aside. Instead, we order the appellant to pay the balance of the purchase price being K4,950,000.00 within thirty (30) days of this judgment, with interest at the average short-term deposit rate from the date of the originating notice of motion to the date of this judgment, and thereafter at the current bank of Zambia lending rate until full settlement.

10.2 The appellant shall continue to possess the property. The transfer of the property to the appellant must be completed within three months from the date of this judgment. Since the appellant is guilty of misconduct in the manner that the grounds of appeal were drawn up, and the transaction is not yet completed, we order that each party shall bear its own costs.



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**J. CHASHI**  
**COURT OF APPEAL JUDGE**

  
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**C. K. MAKUNGU**  
**COURT OF APPEAL JUDGE**  
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**D.L.Y. SICHINGA, SC**  
**COURT OF APPEAL JUDGE**