

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

**2017/HP/0229**

**BETWEEN:**

**BARBRA MUSUNGU**

**PLAINTIFF**

**AND**

**CHRISTOPHER TEMBO  
VICTORIA NKHOMA**

**1st DEFENDANT  
2nd DEFENDANT**



***Before the Hon. Mr. Justice M.D. Bowa on 2nd of April 2025***

*For the Plaintiff: Mr A Chileshe with Mr S Muchula of Kasama Chambers.*

*For the Defendant: Mr. B Banda Legal Aid Counsel from Legal Aid Board..*

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## **JUDGMENT**

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### **Cases referred to**

1. *Seddon v Sociate* (1810) 13 East 63-74
2. *Day Morns Associates vs Voyce* (2003) EWCA CIV 189
3. *Smith v Hughes* (1871) CR 6QB 597
4. *Rating Valuation Consortium, DW Zyambo & Associates (suing as a firm) vs Lusaka City Council, Zambia National Tender Board* (2004) ZR 109
5. *Galunia Farms Limited vs National Milling Company Limited* (2004) ZR 1
6. *Zambia Building and Civil Engineering and Construction Limited vs Georgopoullous* 1977 ZR
7. *Mwenya vs Kapinga* (1988) SJ 12 (SC)
8. *Steadman vs Steadman* 1974 2 ALL ER

**Legislation referred to:**

1. *Statute of Frauds 1677.s 4*
2. *The English Law Extent of Application Act Cap 72 of the Laws of Zambia*

**Other authorities referred to**

1. *Cheshire, Fifoot and Furmston's law of contract, 13<sup>th</sup> Edition*
2. *Chitty On contracts General Principles 25<sup>th</sup> edition at page 157*
3. *Julton and Shannon on contracts, 7<sup>th</sup> edition Butterworths (London) at page 252*
4. *Halsbury's Laws of England and paragraph 561 Halsbury's Laws of England and paragraph 561*
5. *Phipson on Evidence, Seventeenth Edition, (Thomson Reuters Legal Limited 2010) paragraph 12 – 36 at P. 365*
6. *Land Law in Zambia Cases and Materials Unza Press 2007*
7. *Cheshire and Fifoot's Law of Contract 9th Edition at p186*

**1. Background**

1.1 The Plaintiff commenced this action by writ of summons and statement of claim dated 14<sup>th</sup> February 2017 seeking the following reliefs:

- i. *An order for an interim injunction restraining the Defendants either by themselves, agents, servants or whosoever from trespassing interfering and or harassing the Plaintiff's tenants on the property known as plot number 04/51 John Laing compound, Lusaka pending the*

*final determination of the matter by the honourable court or until such further order of the Honourable court.*

- ii. A declaration that the Plaintiff herein is the rightful owner of the property known as plot number 04/51 John Laing Compound, Lusaka having bought the same from the Defendants.*
- iii. Costs and any other relief the court may deem fit.*

## **2. The Trial.**

2.1 The matter was set down for trial after attempts by the parties to settle the matter by consent and through mediation failed. Trial started on the 3<sup>rd</sup> of August 2021 and was concluded on the 22<sup>nd</sup> of September 2023.

## **3. The Plaintiff's case**

3.1 PW1 was Barbara Musungu, a business woman and the Plaintiff in this matter. It was her evidence that it was in the year 2016 when she received a call from one Victoria Nkoma the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant informed her that she was selling a plot in John Laing compound and inquired if she would be interested. The Plaintiff then met

with her at John Laing bus stop and took her to view the plot that she was selling.

3.2 They measured the size of the plot and established that it was 20x40 meters. The Plaintiff further noted, that the plot had a 1 roomed house constructed on it and a tenant was renting the property. Afterward, the Plaintiff and The 2nd Defendant proceeded to the Plaintiff's home and agreed on the sale price. The plot was to go for K37,000.

3.3 The Plaintiff informed the 2nd Defendant that she did not have that amount of money readily available. According to the Plaintiff, the 2nd Defendant told her she needed that sum as she had a matter at court that involved her children that she needed to sort out. The following morning, the Plaintiff gave the 2nd Defendant K7000. Present when she handled over the money was a lady whose first name was Betty. She could not recall her surname.

3.4 After a few days, the 2nd Defendant called the Plaintiff and asked her to follow her to Nampundwe area. The Plaintiff obliged the request. She picked up her mother Violent Mweenda and proceeded to see the 2nd Defendant. When

they met with her, the 2nd Defendant stated that the K7000 that the Plaintiff had paid her would be used for land in Nampundwe. Further that the papers for the land were to be signed by the Chairman for the area. The Plaintiff in response told the 2nd Defendant that as her mother was based in Nampundwe, she could complete the transaction and formalities on her behalf.

3.5 A few days later, the 2nd Defendant called the Plaintiff and told her that she had changed her mind and that they could proceed with the sale of the original plot in John Laing. When the Plaintiff was ready to make the next payment, she invited the 2nd Defendant to her house. The Plaintiff asked a lady she named as Phyllis Matenda to witness the handover of the money. She counted K30,000 which she handed over to her witness to go through.

3.6 The Plaintiff then passed on the money to the 2nd Defendant. She prepared a document for the 2nd Defendant to acknowledge receipt of the money. However, the 2nd Defendant stated that she was rushing to court for the matter involving her children that was coming up on that

day. The Plaintiff insisted that she signs. It was then that the 2nd Defendant revealed that in fact the plot was not in her names but that of the 1st Defendant Mr. Christopher Tembo, her husband.

3.7 The 2nd Defendant requested that she be allowed to go to court to attend to the matter involving her children and thereafter that they could all go together to Nampundwe where the 1st Defendant was to sign the document.

3.8 The 2nd Defendant left with the money and did not return on that day. It was the Plaintiff's further testimony that she called the 2nd Defendant to inquire where she was. The 2nd Defendant stated that she was on a bus. Further, that things did not go well at court as her children had been convicted and sent to jail. She therefore requested that the Plaintiff follow her to Nampundwe. The Plaintiff in the company of her witness Phyllis Matenda then went to Nampundwe as requested but arrived there quite late.

3.9 The following morning she picked up her mother and the 3 of them went to the 2nd Defendant's home. The 2nd Defendant introduced them to her husband Christopher

Tembo The 1st Defendant, as being the owner of the plot in John laing. He went into the house and came out with an envelope which he handed over to her.

3.10 He told her that John Laing was an industrial area and there were no title deeds for the property . Further that they only had papers obtained when they bought land from the Chairman. She opened the envelope and found 3 documents in it. There was a sale agreement from John Laing Development Committee; a National Registration Card for the 1st Defendant and ground rates demand from the Council. The documents are paged 1-3 in the Plaintiff's bundle of documents.

3.11 She told the Defendants that there was need for a letter of sale of the property to her to be signed. The 1st Defendant's response was he needed to go to the Council and change the names on the document. The Plaintiff's mother who was present, insisted that a letter of sale should be signed to show that the Plaintiff had bought the land. However the 1st Defendant also maintained his position that this was not necessary as there were no title deeds and all that was

required was to have the ownership documents changed from his name to hers.

3.12 Both Defendants were asked when they would be in Lusaka to have the documents changed. They stated that they would come in on any day. In the interim the Plaintiff was told that she could go ahead and develop the land. It was the Plaintiff's further testimony that she then returned to Lusaka and engaged a bricklayer to start building at the plot. A two roomed structure was constructed.

3.13 However, what followed was that whenever the Plaintiff called the 2nd Defendant thereafter concerning the issue of facilitating the change of ownership at the Council, she would not turn up in spite of repeated assurances of her availability.

3.14 At some point after she completed the building, the Plaintiff received a callout from the Council to pay ground rent. She went to pay using the documents the 1st Defendant gave her. After she paid, she noted that the printout produced was not in Mr. Tembo's names but a neighbour's. She called the 1st Defendant to let him know about this

development. His response was that he would pass through to see her but did not do so.

3.15 In January 2017, the 2nd Defendant informed her that the 1st Defendant had changed his mind about the sale and that they would be refunding her money. Disgruntled with the turn of events, the Plaintiff decided to file a complaint at John Laing Police Station. She in the company of officers from that station set off for the Defendant's home in Nampande. Also present on that trip was her witness Phyllis Matenda and a driver. Only the 2nd Defendant was found at her home.

3.16 One of the police officers brought her to the vehicle that the Plaintiff was in and was asked if she was in a position to identify any of the people in the vehicle. In response the 2nd Defendant stated that she knew the Plaintiff and confirmed that she had sold her a plot. The 2nd Defendant was then taken to Kanyama police.

3.17 It was the Plaintiff's further testimony that proceedings commenced in the Subordinate court over the matter and the 2nd Defendant was convicted and jailed. The 1st

Defendant then started harassing the Plaintiff's tenant at the John Laing property insisting that he did not sell the plot. She commenced this action and applied for an injunction to restrain the 1st Defendant from further interfering with the tenants she had leased out the property to. It was her evidence that she still has possession of the property.

3.18 She added that the person in whose name the receipt came out after she paid ground rent was a Mr. Phiri who is a neighbour at the plot. She testified that he had not claimed that the land is his. She explained that the ground rent call out that Mr. Tembo gave her was for the neighbour's plot whereas the plot she was sold was plot 04/51.

3.19 She went with the sale agreement on page 2 of the Plaintiff's bundle of documents to the Council. The Council officials clarified that the correct plot number is 04/51 and not 04/57 on page 3 meant for Mr. Phiri.

3.20 When cross examined the Plaintiff testified that she did not enter into an oral tenancy agreement with the 2nd Defendant as suggested to her. She confirmed that she told

the court that the property was sold to her by the 2nd Defendant. Further, that the property was sold to her in March 2016.

3.21 She testified that she did have a sale agreement in her bundle of documents. She insisted that the property was sold to her for K37,000 and the money was received by the 2nd Defendant. That the agreement was between her and the 2nd Defendant. She agreed that the second Defendant did not sign any document acknowledging receipt of the money.

3.22 Questioned further, she testified that the proof that she was sold the house are the documents that she was given by the Defendants. The sale agreement in her bundle that she was referring to was between Mr. Tembo and the person he bought the land from. To that extent she agreed it had nothing to do with her.

3.23 She disputed that she was ever a tenant of the property in issue as suggested to her. She maintained that she was given the clear to build and paid the ground rates. She never rented the property.

3.24 When re-examined, she clarified that the sale agreement that she had was between the 1st Defendant and another person. She was given this document and the NRC to show ownership as she was informed the property was not on title.

3.25 PW2 was Violet Mweenda of Nampundwe site and service. She testified that the Plaintiff in this matter is her daughter. She recalled that on 1st March 2016, she went to the market in Nampundwe. Whilst there, the 2nd Defendant saw her and called her. She asked PW2 whether her daughter would be interested in buying a plot. PW2 in response told her that her daughter was actually looking for a plot to buy. PW2 gave her the Plaintiff's number which the 2nd Defendant saved on her phone and they parted company.

3.26 It was her further testimony that her daughter later came to her house and told her that she had given the 2nd Defendant K7000 for a plot. They then went together to the 2nd Defendant's house and PW2 asked for signed documents to confirm that there was a sale agreement. The

2nd Defendant stated that this was not necessary as she knew the Plaintiff who was as good as her own daughter and would not be causing her any problems. They parted company and the Plaintiff left PW2 with instructions to conclude the matter on her behalf as she was rushing to attend to her child at home.

3.27 Thereafter, she received a call from the Plaintiff who informed her that she was on her way to see her. When she arrived they went to the 2nd Defendant's home and the Plaintiff was given some documents for the property in John Laing. She explained that when the Plaintiff called her earlier, she informed her mother that the 2nd Defendant had changed her mind about the sale of the Nampundwe property but that they could proceed with the one in John Laing. In addition, that she had made a further payment of K30,000 and would thus be travelling to Nampundwe to pick up the documents. That this was the purpose of that visit.

3.28 It was PW2's further evidence that the documents the 1st Defendant produced were in a yellow envelope. She

explained that she knew the Defendants as husband and wife . Further that she had known them for several years as they lived in the same compound in Nampundwe.

3.29 When cross examined, it was her testimony that she was not present when the property was being sold. She testified that she was not aware that the Plaintiff was renting the John Laing property. As far as she was aware, the property was sold to her daughter by the 2nd Defendant.

3.30 She was aware that there is no letter of sale that was given to her daughter. She disputed the suggestion that her daughter was just a tenant of the property.

She was not re-examined.

3.31 PW3 was Thomson Banda a block maker resident in Msimi Compound in Lusaka. It was his evidence that the Plaintiff owned a plot in John Laing. He met her when he was going about his work making blocks in between June and July of the year 2016. She told him that she needed 1200 blocks that he stated was going for K250 a block at the time. The total bill for that number of blocks was therefore K3000.

3.32 She also bought 12 bags of cement from him valued at K55 and paid K600. Further, that she also bought 5 tons of building sand which translated into 5 wheelbarrows and cost about K315. It was his further evidence that he booked a vehicle from his friend and paid 200 to ferry the material to the Plaintiff's plot. The total spend therefore come to K4175.

3.33 He testified further that there was a one roomed structure at the plot which the Plaintiff said she wanted to extend by adding a two roomed structure.

3.34 In cross examination, the witness testified that as far as he was aware the property in issue belonged to the Plaintiff although he had not seen any document confirming this position. He based his conclusion on what the Plaintiff told him when she bought the blocks from him.

3.35 When re-examined, he testified that the Plaintiff approached him and started she wanted to buy blocks from him to build a house.

3.36 PW4 was John Mwanza of B24 Chawama. His evidence was that he is a bricklayer by profession. He was approached by

the Plaintiff whilst he was building a house for someone sometime in June 2016 . She told him she wanted him to build a house for her on her plot. She further informed PW4 that her plot was in John Laing.

3.37 They went to her plot and found it had a one(1) room structure built on it. The Plaintiff told PW4 that she wanted to extend it by another 2 rooms. She asked him what material would be required. He told her she needed 1200 blocks, 5 tons of building sand and 5 tons of quarry dust.

3.38 He testified that he built the 2 rooms in 7 days and the Plaintiff paid him K2000 unrebased for his labour. As far as he was aware, the property belonged to the Plaintiff.

3.39 In cross examination, it was his testimony that he had no knowledge about the sale of the property. He did not know if the Plaintiff bought the property from the named Christopher Tembo. He was not present at the time of the sale transaction. He extended the one room structure that was on the plot by building 2 rooms. He did not know if the property was on rent or not.

#### **4. The Defendant's case**

4.1 DW1 was Christopher Tembo the 1st Defendant herein. He testified that he is a businessman by occupation. His response to the Plaintiff's claim was that she did not buy the plot in issue in John Laing. She was merely renting it. That he used to work for Nampundwe Mine. When he stopped work he moved to Lusaka and lived with an Aunt. She escorted him to look for a plot in John Laing. He found plot 04/51 in 1997.

4.2 He talked to the owner who was offering it for sale. The owner was Mr. Aulenano Phiri. They agreed on terms for the sale of the plot. The plot was then sold to him for K570 at the time. After the sale, he looked for a bricklayer to build on the property. He added that he has a sale agreement that proves that he bought the property from' the said Mr. Phiri at K570 on page 1 of the Defendants' bundle of documents.

4.3 He explained that at the time of the sale, the plot was house No. C13/006. That it then changed to plot 04/51. He added that the change is shown on the receipt from the Lusaka City Council on page 2 of the Defendant's bundle of documents.

4.4 He testified further that the bricklayer he found to build the house put up a 4 roomed house. He then proceeded to put some tenants in the house. 2 families rented the units of 2 rooms each. He could not recall the names of the tenants. According to the witness, the tenants occupied the rooms for a long time and for up to about 2 years. He testified that different tenants occupied the property.

4.5 It was his further testimony that in March 2016, his wife the 2nd Defendant, went to Lusaka with her friend. They used to live in Nampundwe at the time. The purpose of that trip was to show the Plaintiff the property or units that were on rent. She agreed to occupy the property as a tenant. This was the report he received from his wife.

4.6 In July 2016, the Plaintiff in the company of her mother (PW2) came through to his house in the early hours of the morning. The Plaintiff introduced herself to him as a tenant of their John Laing property. She further told him that she had agreed with the 2nd Defendant that she could plaster the house and then not pay the house rental upon occupation of the house.

- 4.7 He testified further that at the time the Plaintiff occupied 2 of the rooms because the other rooms were taken by a different tenant. He explained that the agreement was that it was after the recovery of the cost for plastering of the house that she would commence paying the house rentals. When he asked the Plaintiff about the receipts for the cement used, she told him that she had forgotten them at her home and promised to bring them on her next visit.
- 4.8 It was his further testimony that the Plaintiff requested for a copy of the sale agreement between him and Mr. Phiri to pay rates at the Council as its officers had been to the property to demand for the rates. She therefore wanted the ownership documents for that purpose. He refused to give her the document and told her he would go to the Council himself. He added that she insisted that he could trust her with the documents and it was on that premise that he gave her a copy of the receipt for rates on the understanding that she was to pay the next rates.
- 4.9 It was the 1st Defendant's further evidence that he passed on a reminder from the Council to her for the payment of

ground rents. She insisted that she wanted the letter of sale as well. He therefore gave her both the sale agreement, a photocopy of his NRC and the reminder he alluded to earlier. She then left the Defendants home with her mother.

4.10 In January 2017, the Plaintiff arrived at their home in the company of police officers. The officers apprehend his wife at the market. Although he was not present, he was informed about the apprehension. Upon receipt of this news, he called his wife who told him she was on a vehicle headed to Lusaka. That the Plaintiff had come with police officers and she was eventually locked up at Kanyama police station.

4.11 He went to the police station to establish what was on the ground. Upon further inquiry from the police, he was informed that his wife had borrowed some money from the Plaintiff which she disputed. The matter was taken to the Magistrates court where she was tried for the offence of obtaining money by false pretences. She was convicted and

sentenced to six months simple imprisonment and served the sentence.

4.12 The Plaintiff then sued the Defendants in the High Court claiming that the house he build was hers. His reaction to the claim was it was not true that the 2nd Defendant sold her the house. He maintained that the Plaintiff was renting it. He disputed the narrative that the Plaintiff had extended the structure on the plot that he had build. According to the 1st Defendant, the structure that is on the plot is the same 4 roomed building that he had put up.

4.13 He testified that the Plaintiff has possession of the property and has put tenants in the house and collects the rentals. He testified that she was paying rentals to him of K200 per month.

4.14 When cross examined and referred to the sale agreement on page 1 of the Defendants bundle, he agreed that the property described was not plot 04/51. Further that he did not sign the document. He insisted that his NRC number and name are on the document thus making it valid. He accepted he did not have a tenancy agreement in spite his

claim that the Plaintiff was a tenant. He agreed that the tenants obligation was to pay rent and not the land rates. He agreed that land rates are supposed to be cleared before property is sold.

4.15 It was not true that he and his wife were desperately looking for money to secure the release of their son from cells as suggested to him. It was further not true that his wife had offered the Plaintiff a property in Nampundwe for K7000. It was further untrue that his wife was paid this money. It was not true that the Plaintiff visited the Defendants for the purpose the checking on the property that had been sold to her.

4.16 He testified further that it was not true that the 2nd Defendant was paid K30,000 after the initial K7000 as alleged. On no occasion did the Plaintiff visit with a view of getting a contract of sale signed for the John Laing property.

4.17 Questioned further, he accepted handing over documents relating to the John Laing property to the Plaintiff. He maintained that this was not for purposes of the sale of the

property. There was to him, nothing strange or odd about his handing over the documents he did to a tenant. It was not true that he refused to sign the contract of sale when the Plaintiff visited and that he opted to only hand over the documents alluded to.

4.18 He further disputed the suggestion that the Plaintiff had paid the land rates and maintained this position in spite of page 5 of the Plaintiff's bundle suggested to be a receipt of a payment made by the Plaintiff for that purpose. Cross examined further, it was the 1st Defendant's testimony that he was not aware that the Plaintiff reported the matter to the police as a consequence of the alleged failed cooperation by them and that the 2nd Defendant in particular obtained money from her.

4.19 He was further not aware that his wife had been arrested in connection with obtaining money in relation to the same plot. He further was unaware that his wife was convicted for obtaining money by false pretences and sentenced over the same plot in issue. He agreed that the last document in the

Plaintiff's bundle of documents is the judgment of the Subordinate Court over the said matter.

4.20 DW2 was Victoria Nkhoma the 2nd Defendant in this case.

It was her evidence that she categorically denies that she sold the property to the Plaintiff. The property belonged to the 1st Defendant. She testified that sometime in June 2016 she was at her stand in the market when the Plaintiff's mother (PW2) approached her at her stand. As they were chatting, she mentioned that she had gone to visit her daughter, the Plaintiff in John Laing. The 2nd Defendant then told her they actually had a property in John Laing and had trouble finding tenants there. Further that it was their preference to find people that they knew to occupy the house.

4.21 PW2 then gave the 2nd Defendant her daughter's number.

She called the Plaintiff and they agreed to meet to discuss the proposed lease. The 2nd Defendant was with a friend at the time. When the Plaintiff saw the property which was a 4 roomed house, she told her that she liked the house but complained that it was not plastered.

4.22 It was her further evidence that 2 rooms were occupied whilst the other 2 were taken by tenants that had proven to be difficult in paying rentals. The Plaintiff then offered to have the house plastered and that she was in turn not pay rentals for between 3-4 months.

4.23 The offer made by the Plaintiff was accepted and the 2nd Defendant then left for Nampundwe. The Plaintiff later came to the market with some people about 6 in number from her recollection. One of them had a firearm. The 2nd Defendant was apprehended up and remanded in police custody. It was her evidence that she was 5 months pregnant at the time.

4.24 The police told her she had borrowed some money from the Plaintiff and that was the reason she had been arrested. The allegation was that she had obtained K37,000-00. Upon arrival at the police station she was shown a photocopy of the 1st Defendant's NRC and receipt from the Council for money paid to it. According to the witness, the Plaintiff had gone to her home to get these documents on the pretext of using them to pay rates at the Council so that she would

not be chased from the house. She maintained that the owner of the house in dispute is her husband.

4.25 When cross examined, it was her testimony that the Plaintiff was her tenant. That the tenancy agreement was verbal and as such she did not have any document to confirm that the Plaintiff was a tenant. Further that she was paying K200 per month in March 2016. She further maintained that her husband had proof to show the ownership of the property at page 2 of the Plaintiffs bundle.

4.26 Questioned further, she agreed that the document on page 2 of the Plaintiff's bundle of documents was presented to be a sale agreement. She agreed that plot no 04/51 does not appear in the exhibited sale agreement. She did not agree that the landlord has the responsibility of paying land rates. That it is the tenant who is responsible for this as far as she was concerned. She testified further that it was Mr. Tembo who had been paying the land rates.

4.27 The Plaintiff did not settle the entire amount due on the rates. She acknowledged that the document on page 5 of the Plaintiff's bundle of documents is a receipt from the

Council for the payment of rates and that although it was in her husband's names, was not paid by him.

4.28 She testified further that she did not initiate the sale of stand 04/51 in John Laing to the Plaintiff as suggested to her. She maintained that she did not sell the house to the Plaintiff but rented it out to her. It was not true that she told the Plaintiff she had financial challenges when they met.

4.29 She confirmed that she was arrested and prosecuted for the offence of obtaining money by false pretences. She agreed that it was in relation to the same stand. She agreed it was true that she was convicted and has not appealed against the decision. She accepted that she has not paid back the money she received. She stated she was convicted over K7000 and not K37, 000.

4.30 She agreed that she was aware the Plaintiff has been collecting money in rentals from the tenants from 2016 and continues to do so to date.

4.31 In re-examination, the 2nd Defendant asserted it was supposed to be her husband collecting the rentals from the

tenants as owner of the house. She maintained she had put the Plaintiff in the house as tenant. According to her, it was the rent money that she collected that led to her prosecution as the Plaintiff had claimed the money was for the sale of the house. She clarified further that the land rates were being paid by the tenant who occupied the house and feared would be chased by the Council. The Plaintiff was therefore given the papers for this purpose only.

4.32 DW3 was Sara Chishala Kaputula of house number 04/54 in Lusaka. She testified that the 1st Defendant is her neighbour. Her family came to know him when he bought his plot in 1997. After he bought the plot, the 1st Defendant would visit their home and draw water from the well at their house when he started building.

4.33 The 1st Defendant started with a structure which was 2x2 rooms with 2 doors. There were therefore 4 rooms at his plot. She testified further that after he had finished building, he rented out the rooms. He completed the building in less than a year.

4.34 It was DW3's further testimony that the 1st Defendant used to come through to collect rentals and greeted her family on his visits to see his tenants. She added that different people would come in and out to take up the tenancy. Further that the 1st Defendant was living in Nampundwe during this period.

4.35 Sometime in 2016, DW3 saw a lady by the name of Barbara staying in one of the 2 rooms. She rented the one on the right. She testified further that the said Barbara later occupied 3 rooms and blocked out 1 room thereafter. Modifications were done and she made the rooms bigger. According to the witness, the 3 rooms have presently been turned into 2 rooms leaving only one room from the original 4 roomed structure.

4.36 The Plaintiff being the Barbara she was referring to, invited DW3 to her house to see what she had done. As far as she was aware, the Plaintiff was a tenant of Christopher Tembo. She was aware that the Plaintiff had assumed the tenancy after people had moved out of the units. It was DW3's

further testimony that she was called by the 1st Defendant to be his witness to the tenancy agreement in 2022.

4.37 After sometime, she noted that the 1st Defendant stopped coming to the plot. She maintained her position that what she knows is that the property belongs to the 1st Defendant. He is the one who built the structure from foundation and the property documents that she had seen are in his name. She testified that she did not witness the 2nd Defendant selling the property to the Plaintiff nor did she see any advert for the sale of the property in the compound as the people are accustomed to seeing when there is such sale.

4.38 When cross examined DW3 testified that the 1st Defendant would not tell her everything pertaining to the property. She nonetheless insisted he would have told her if he was selling the property and asked her family to help look for a customer. She believed this based on the relationship that they had. Questioned further, she stated she was not aware that he had sold the property as alleged or that it was sold for K37,000. She was not aware that the 1st Defendant

had in pursuance of the sale given a copy of his NRC and further surrendered documents relating to the property to the Plaintiff.

4.39 She agreed that she was aware that the Plaintiff had made adjustments to the structure. She testified that the 1st Defendant did complain about the alteration to her. She maintained her position that the Plaintiff was renting the property although she agreed she did not see the lease agreement between the 1st Defendant and the Plaintiff. She was further not aware that the property had arrears in ground rent. She further did not know who paid the ground rent.

4.40 That was the close of the case for the Defendants.

## **5. Submissions**

### The Plaintiff's submissions

5.1 The Plaintiff filed her final submissions into court submissions on 6<sup>th</sup> October 2023. It was submitted that the issue for determination by the court is whether or not the

Plaintiff did purchase plot No. 04/51 John Laing compound, Lusaka and has a right of ownership.

5.2 It was argued that there is evidence that the 2nd Defendant received the money which she did not pay back and was in fact prosecuted for. That the 1st Defendant on his part by conduct accepted the offer when he surrendered his NRC and property document to the Plaintiff for purposes of settling the land rates. **Cheshire, Fifoot and Furmston's law of contract, 13<sup>th</sup> Edition at page 29** states:

*“An agreement is not a mental state but an act and as act it is a matter of inference from conduct. The parties are to be judged not by what is in their minds but what they have said or done.”*

5.3 It was further contended that a contract can be validly entered into either orally or in writing. Resort was had to the learned authors of **Chitty on Contracts General Principles 25<sup>th</sup> edition at page 157** who opine that:

*“The General rule of English law is that contracts can be made quite informally; no writing or other form is necessary.”*

5.4 That at page 420 the authors go on to state that the rules which govern the construction of contracts are the same at law and in equity for simple contracts and those under seal.

5.5 It was argued that the case of **Seddon v Sociate**<sup>1</sup> puts it aptly wherein it was held that:

*“Where the contract does not depend solely on written documents, the question as to character of contract is property one of fact.”*

5.6 It was argued that there is also evidence that consideration was provided in the sum of K37,000 and paid through the 2nd Defendant. It was argued that the 1st Defendant availed property documents to the Plaintiff signaling that he had accepted to sell the property to be the Plaintiff.

5.7 Reliance was placed on the authors of **Julton and Shannon on Contracts, 7<sup>th</sup> edition Butterworths (London) at page 252** in which the authors opine:

*“A party cannot of course, be made to enter into a contract against his express will and without his consent but he must be careful not to conduct himself so as to give the appearance of consent for then he will be bound. It is clear that this is the only principle on which the courts could act, for to admit any other*

*would produce the result that a contract would be obligating if one of the parties had mental reservation.”*

5.8 It was submitted that the money was paid by the Plaintiff through the 2nd Defendant and accepted by the 1st Defendant who availed his NRC and property documents to have the land rates settled. **Day Morns Associates vs Voyce** <sup>2</sup> was cited in aid in which the court held that “*the test for determining whether an agreement had been formed is objective; that a reasonable person observing the conduct of the parties would assume that v had accepted DMA’s offer through conduct*”.

5.9 Further reliance was placed on **Smith v Hughes** <sup>3</sup> wherein Blackburn J stated that:

*“If whatever a man’s real intention maybe, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the others party’s terms”*

5.10 Reliance was also placed on the case of the case of **Rating Valuation Consortium, DW Zyambo & Associates (suing**

as a firm) vs Lusaka City Council, Zambia National Tender Board<sup>4</sup> in which the court observed:

*“There is a growing school of thought supported by a plethora of authorities indicating that analysis of putting labels to the process of reaching agreement as offer and acceptance is to simplify the issues and thus being unrealistic. The proper approach according to these developments in the law is that the court has to, in a given case, take an objective approach. In other words, what should guide the court in analyzing business relationship should be whether or not the parties conduct and communication between them amounted to offer and acceptance.”*

5.11 It was submitted that the 1st Defendant should be estopped from reneging on the sale of the property when in fact the Plaintiff had provided consideration and settled the land rates.

5.12 **Galunia Farms Limited vs National Milling Company Limited<sup>5</sup>** was cited in which it was held that the basis of estoppel is to stop a man who so conducts himself as to lead another into believing that a certain state of affairs exists, from departing from the position he has represented.

It was submitted further that it would be unfair to let the Defendants benefit from the K37,000 and improvements made to the property by the Plaintiff.

5.13 It was argued further that this court is enjoined to administer law and equity concurrently pursuant to section 13 of the High Court Act. Reliance was placed on the Authors of **Halsbury's Laws of England** and paragraph **561** wherein it is observed that:

*“Equity looks on that as one which ought to be done or which is agreed to be done, but this maxim does not extend to things which might have been done, nor will equity apply in favour of everybody, but only of those who had a right to pray that the thing should be done. Thus where the obligation arises from contract, that which ought to be done is treated as done only in favour of some person entitled to enforce the contract as against the person liable to perform it. The true meaning of the maxim is that equity will treat the subject matter as collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been done exactly as they ought to have been but the contract itself is not varied. The doctrine does not make for the parties contracts different from those they have made for themselves.”*

5.14 No specific reference was made to why or how equity is being called upon in the circumstances of this case or the significance of the passage.

5.15 The Plaintiff concluded the submissions by arguing that she had demonstrated that the 1st Defendant used his wife the 2nd Defendant to sell the property, that the 1st Defendant validated the sale by availing his documents pertaining to the property and allowing the Plaintiff to settle the land rates at Lusaka City Council.

5.16 That the ingredients of an enforceable contract are present in the matter and alternatively that the 1st Defendant should not be allowed to be unjustly enriched from the money paid by the Plaintiff and for renovations made to the property.

The Defendants submissions

5.17 The Defendants did not file any submissions by date of writing this judgment.

**6. Court's consideration**

6.1 I have carefully considered the evidence before me and the only filed submissions on record. The dispute in my

considered view, centers on one question – Notably, whether or not there was an enforceable contract for the sale of plot 45/01 John Laing Compound Lusaka entered into between the Defendants and the Plaintiff.

6.2 The Plaintiff's position is simply that she was initially shown and offered the property in issue by the 2nd Defendant whom she paid a deposit of K7000 for it. The 2nd Defendant shortly afterward advised that an alternative piece of land could be sourced for her in Nampundwe area as the John Laing property was no longer available.

6.3 The Plaintiff went to meet with the 2nd Defendant to conclude that transaction whereupon the 2nd Defendant then advised that the John Laing property she had been shown earlier was back on the market. She paid an additional K30,000 being the balance of the agreed purchase price of K37,000 for the property.

6.4 Trouble started when the Plaintiff later asked for a contract of sale to be endorsed as the Defendant became cagey and then revealed that the property was actually in the 1st Defendant's name. That it was therefore only he that

would execute the agreement. The 1st Defendant when approached did not contest the sale but said there was no need for a signed agreement.

6.5 He thus handed over to her documents which he contended evidenced his ownership of the property that included a contract of sale to him, his National Registration Card and copy of demand for council land rates that he said would be sufficient to facilitate the change of ownership to her name.

6.6 She was granted vacant possession and has since built a 2 roomed structure on the property that she has leased out to some tenants. She maintains that the 1st Defendant by his conduct is estopped from denying there was a valid agreement entered into for the sale of the property to her when he handed over the documents to her and that she is thus the rightful owner of the property.

6.7 On their part, the Defendants vehemently deny that there was ever any sale agreement. The Plaintiff was offered a tenancy agreement wherein she was to occupancy 2 of the 4 roomed structure that the 1st Defendant had built. That she offered to plaster the property and that the cost of such

works could then he knocked off from the rentals she was expected to pay. These were the terms agreed to and the basis on which the Plaintiff went on to have possession of the property.

6.8 It was the Defendants further position that the documents availed to the Plaintiff were merely, to facilitate the Plaintiff's payment of ground rates as she had been threatened with eviction.

6.9 Both parties called witnesses to support their respective positions. The question then turns on which account I accept and why. The assessment of the witnesses credibility comes into play in this equation to be determined by amongst other things, the consistency of their evidence, how they measure up during cross examination; and their sincerity and demeanor as they present their testimony.

6.10 According to **Phipson on Evidence, Seventeenth Edition, (Thomson Reuters Legal Limited 2010) paragraph 12 – 36 at P. 365:**

*“The credibility of a witness depends on his knowledge of the facts, his intelligence, his interestedness, his integrity, his*

*veracity. Proportionate to these is the degree of credit his testimony deserves from the court or jury. Amongst the obvious matters affecting the weight of a witness's evidence may be classed his means of knowledge, opportunities of observation, reasons for recollection or belief, experience, powers of memory and perception, and any special circumstances affecting his competency to speak to the particular case inquired into either in direct examination to enhance or in cross - examination to impeach the volume of his testimony. So, all questions may be asked in cross examination which tend to expose the errors, omissions, inconsistencies, exaggerations, or improbabilities of the witnesses' testimony"*

6.11 Having had the opportunity to hear the evidence of the witness therefore, I found the Plaintiff's witnesses to be truthful and credible on all accounts. I accept the evidence of the Plaintiff (PW1) that she was approached by the 2nd Defendant and asked if she was interested in purchasing a property that she had for sale in John Laing. I accept that she was shown the property and agreed to purchase it for K37,000.

6.12 She did not have all the cash needed but paid the K7000 initial payment upon the 2nd Defendant's insistence having disclosed that she had a pressing financial issue in court involving her children. I accept her evidence of her subsequent trips to Nampundwe the first of which she was to be shown a plot when it was first communicated that the John Laing plot was unavailable. The subsequent visit was to pursue the issue of a contract of sale after she had made full payment for the John Laing property that she was later advised was available after all.

6.13 I also accept the evidence of her interaction with the 1st Defendant and the handover of the documents that he did. Her evidence was not shaken at all in cross examination, she had an impressive demeanor and was not shifty in answer to questions put to her. I entertain no doubt that the agreement was entered into and that she made the total payment of K37,000 to the 2nd Defendant.

6.14 I would further accept the evidence of PW2 who corroborated the account given by the Plaintiff. She knew the Defendants having lived with them in the same

community in Nampundwe. She met the 2nd Defendant at the market and their conversation drifted to the subject of a piece of land that the Defendants were selling in John Laing. Would PW2's daughter possibly be interested in the property was the direction the conversation turned to. PW2 thought her daughter might be as she had expressed her desire to secure some land and she passed on her number to the 2nd Defendant.

6.15 I accept that PW2 accompanied her daughter to meet with the Defendants and that both Mother and daughter insisted that the Defendants avail a written contract for the sale. She witnessed the 1st Defendant hand over the documents that he did in an envelope. I am satisfied that the subject matter discussed was always the sale of property and not at any point the alleged rental of the property to the Plaintiff.

6.16 PW3 and PW4 were the persons that the Plaintiff engaged to supply the material and to build the 2 roomed extension on the property respectively. Whereas they did not dispute not conclusively knowing who owned the property, the evidence

on record confirms that the Plaintiff did carry out the improvements on the property that she asserts she was sold.

6.17 I do not accept the evidence of the Defendant that suggests that what was at play was a tenancy agreement. I find unlikely the 1st Defendant's explanation that he availed the documents that he gave to the Plaintiff in order to facilitate her payment of the ground rates. It is a landlord's responsibility to pay ground rates and not a tenant.

6.18 I am more likely to find as I now do that the 1st Defendant voluntarily gave away these documents being the only ones he had and believed evidenced his ownership of the property to facilitate the change of ownership into the Plaintiff's names having validated the sale earlier entered into between his wife and the Plaintiff.

6.19 If he had any reservations about the agreement or indeed was not a part of it he would not have parted with his documents. I quite agree that he is therefore estopped by the doctrine of promissory estoppel from denying the

existence of the agreement as by his conduct the Plaintiff was made to believe the sale had his blessings.

6.20 I am prepared to find the Defendants did have some financial stress which was communicated by the 2nd Defendant to the Plaintiff as they were negotiating the sale and that they desperately needed the money. Having then received the money and presumably resolved the problem that they had, the Defendants chose to rescind the contract entered into without justification.

6.21 I do not accept the evidence of DW3 to be truthful. This was a witness who testified more out of total allegiance to a neighbour that she was quite undoubtedly close to than any conviction of duty to tell the truth of what she actually witnessed. She supported the 1st Defendant's assertion that he had put up a 4 roomed structure that he had rented out to tenants that included the Plaintiff.

6.22 To account for the 2 rooms she knows to be what is on the site and reconcile this with the 4 room narrative advanced by the 1st Defendant, she testified that the Plaintiff made

alterations to the existing rooms put up by the Defendants to make bigger 2 roomed units.

6.23 This was not the evidence given by the Defendants and I find it to be untruthful. DW3 went on to testify that she even witnessed the tenancy agreement but acknowledged to a question in cross examination that she did not have sight of any tenancy agreement. I do not accept her account to be truthful for these reasons.

6.24 I also take into account the evidence on record given by the Plaintiff that due to the evasiveness of the 2nd Defendant to complete the conveyance of the property after the Plaintiff had paid the money, the Plaintiff resorted to report the matter to the police. That complaint as confirmed by the 1st Defendant in his evidence in chief led to the subsequent arrest, prosecution and conviction of the 2nd Defendant. The Judgment of the Subordinate Court to this effect is on record. This fact supports the Plaintiff's position of the payment having been made for the property.

6.25 I therefore have no hesitation in finding that the Defendants sold the property to the Plaintiff who paid the full purchase

price agreed on. The only question that needs to be explored further that was not addressed by the parties is whether this would be an enforceable agreement.

6.26 It is not in dispute that there was no written contract of sale between the parties and that the subject matter pertains to the sale of real property.

6.27 The English Statute of Frauds 1677 which is applicable to Zambia by virtue of the English Law Extent of Application Act Cap 72 of the Laws of Zambia provides that:

*“No action shall be brought upon any contract for the sale of other disposition of land or an interest in land 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 there unto by him lawfully authorized.”*

6.28 The learned authors of **Cheshire and Fifoot’s Law of Contract 9<sup>th</sup> Edition at p186** state that:

*“A note or memorandum of a contract 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 nature of the consideration.”*

6.29 In **Zambia Building and Civil Engineering and Construction Limited vs Georgopoullous**<sup>6</sup> it was held that that it is well settled that the memorandum required by the Statute of Frauds need not be in a particular form and may be constituted by two or more documents which are clearly connected by reasonable inference.

6.30 In **Mwenya vs Kapinga**<sup>7</sup> the Supreme Court held as follows:

*“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 nature of the consideration.”*

6.31 Coming to the case before me there is no suggestion that there was any document or memorandum whatsoever that would fit in the requirements discussed by the authorities. There is needless to say, a complete failure to meet the requirements of section 4 of the statute of frauds.

6.32 In the cases where there has been such failure, Mudenda Fredrick in his **Land Law in Zambia Cases and Materials Unza Press 2007** writes that the effect of section 4 of the Statute of Frauds is that although a contract may be valid it may not be enforceable by an action at law.

6.33 Equity intervenes following the decision in **Steadman vs Steadman**<sup>8</sup> to introduce the doctrine of part performance in which a contract can still be rendered enforceable notwithstanding the failure to meet the conditions in section 4 of the Statute of Frauds. Thus Mudenda F (supra) observes at page 272 inter alia that part performance has been upheld in cases where a purchaser took possession with a vendors consent or where there has been payment of money.

6.34 I have already found on the facts that the Plaintiff paid the purchase price in full. It is not in dispute that she has been granted possession of the property and proceeded to make improvements to the property. There are presently tenants that have occupied the rooms and she has been collecting rentals from the year 2016. There is no question that these

facts fall well within the doctrine of part performance settled in Steadman vs Steadman (supra).

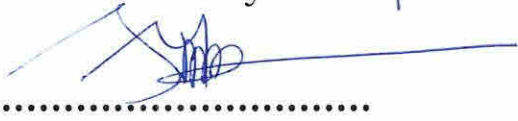
## **7. Conclusion**

7.1 For the avoidance of doubt therefore I enter judgment in favour of the Plaintiff and make the following declaration and orders:

1. I declare that the Plaintiff is the rightful owner of the property known as Plot Number 04/51 John Laing Compound Lusaka having duly bought the property from the Defendants.
2. I order specific performance of the contract by the Defendants who are directed to prepare and execute the necessary assignment and or deed conveying the ownership of the property to the Plaintiff within 30 days from date of this judgment.
3. The Plaintiff will be at liberty to apply for a vesting order pursuant to Section 14 of the High Court Act in the event of failure by the Defendants to comply with the court's judgment.

4. I award the Plaintiff costs for this action to be taxed in default of agreement.

Dated at Lusaka this.....<sup>2<sup>nd</sup></sup>.....day of <sup>April</sup>.....2025

  
.....

**JUDGE**