

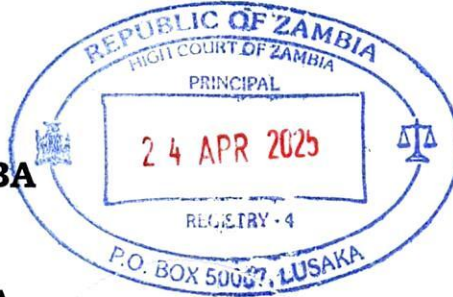
**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2019/HP/1842

(Civil Jurisdiction)

BETWEEN:

**MLONYENI ZIMBA
AND
PAPA MUTEMWA**



PLAINTIFF

DEFENDANT

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN
OPEN COURT, ON 24TH DAY OF APRIL, 2025.**

For the Plaintiff: Mr. W. Mwandila – Messrs. OMM Banda and Company.

For the Defendant: Mrs. E. C. Banda-Kainga – Legal Aid Board.

JUDGMENT

CASES REFERRED TO:

1. *Mwenya and Another v Kapinga* (1998) ZMHC 12;
2. *Rodgers Chama Ponde and Others v Zambia State Insurance Corporation Limited* (2004) ZMSC 113;
3. *Gideon Mundanda v Timothy Mulwani and 2 Others* (1987) Z.R. 28 (SC);
4. *Zambia Railways v Pauline S. Mundia and Another* (2008) Z.R. Vol 1;
5. *Trans-Continental Limited and Andrew Robb v Donald McIntosh and Eric Routledge* – SCZ Appeal No. 126 of 2012;
6. *Wesley Mulungushi v Catherine Bwale Mizi Chomba* – SCZ Judgment No. 11 of 2004;
7. *Attorney General v Kakoma* (1975) Z.R.212;
8. *J.Z. Car Hire Limited v Malvin Chala and another* – SCZ Judgment No. 26 of 2002; and
9. *Miyanda v the Attorney General* - SCZ Judgment No. 21 of 1985.

LEGISLATION REFERRED TO:

1. *The Statute of Frauds of 1677; and*
2. *The Rules of the Supreme Court of England, 1999 edition, London Sweet & Maxwell.*

OTHER WORKS REFERRED TO:

1. *Bryan A. Garner, Black's Law Dictionary, 9th Edition, West;*
2. *Phipson on Evidence, 17th Edition, London Sweet and Maxwell (2009);*
3. *Chitty on Contract - General Principles, 13th Edition, (Sweet and Maxwell, 2024);*
4. *J.G. Starke, M.P. Furmston, Cheshire and Fifoot, Law of Contract, 10th Edition, (Butterworths & Co Publishers, 1981);*
5. *Halsbury's Laws of England, Volume 9(1), 4th Edition reissue, Butterworths; and*
6. *Ngambi, S.P. and Chungu, Contract law in Zambia, 2nd Edition, (Juta, 2021).*

1. INTRODUCTION

1.1 The Record herein was reallocated to this Court on 7th March, 2024, following Justice T. I. Katanekwa's departure from the Judiciary. A perusal of the Record revealed that trial had concluded and the matter adjourned for Judgment on 3rd June, 2022. There was no trace of the Judgment on Record. Accordingly, I called the Parties for a status conference, where we agreed to start the matter *de novo*.

1.2 Trial was held on 3rd October, 2024, and this is the Judgment, which is in respect of claims for Specific Performance and Damages made by the Plaintiff, Mlonyeni Zimba, against the Defendant, Papa Mutemwa. It is alleged by the Plaintiff that the Parties herein entered into an agreement for the sale of Plot No. 42, Lundazi, ("Subject Property"), which the Defendant claims to have rescinded, without the Plaintiff's knowledge.

2. BACKGROUND

2.1 The genesis of this matter, as ascertained from the evidence on Record, is that the Parties herein entered into a Contract of Sale of the Subject Property at an agreed sum of K200,000.00, on 16th October, 2016. The Plaintiff is alleged to have paid the sum of K135,000.00 towards the said purchase price, leaving a balance of K65,000.00, which he offered to liquidate by giving the Defendant a Toyota Corolla Motor Vehicle, whose market value was allegedly above K65,000.00. The offer to liquidate in kind was turned down by the Defendant.

2.2 Sometime in June, 2019, the Plaintiff endeavoured to liquidate the whole sum of K65,000.00, but was informed by the Defendant that he had rescinded the Contract of Sale. It is against this backdrop that the Plaintiff launched this Action against the Defendant, by way of Writ of Summons, seeking the following: -

- (i) Specific Performance;*
- (ii) Damages for Inconvenience;*
- (iii) Interest on all sums found due to the Plaintiff;*
- (iv) Costs and any other relief the Court may deem fit.*

3. PLEADINGS

3.1 The Statement of Claim reveals that the Plaintiff is the purchaser of the Subject Property, which is situated in

Lundazi District, while the Defendant is the vendor. It has been asserted that on or about 16th October, 2016, the Defendant and the Plaintiff entered into a written Contract for the Subject Property at the price of K200,000.00, and between 31st January, 2017 and 28th December, 2018, and at the request of the Defendant, the Plaintiff made different payments on various dates, to the Defendant and his servants or agents, amounting to K135,000.00, thereby leaving a balance of K65,000.00.

- 3.2 It was averred that later in June, 2019, the Plaintiff offered to liquidate the remaining balance of K65,000.00 by giving the Defendant a Toyota Corolla Motor Vehicle whose market value was way above K65,000.00, but it was turned down by the Defendant. Subsequently, the Plaintiff endeavoured to liquidate the whole sum of K65,000.00, but was informed that the Defendant had long rescinded the Contract of Sale, without following due legal procedure on repossession of the Contract of Sale, and had immediately repossessed the Subject Property, which he then offered to sell to other interested persons.
- 3.3 It is affirmed by the Plaintiff that by reason of the foregoing, he has suffered inconvenience, loss and damages.
- 3.4 The Defendant's Defence and Counter-Claim reveals, *inter alia*, that the Parties entered into a Sale Agreement of the Subject Property on 16th October, 2016, at a price of K200,000.00. In the same month of October, 2016, the

Plaintiff paid K120,000.00 toward the purchase price and made an undertaking to pay the balance of K80,000.00, upon harvesting and selling his crops in 2017. It has been averred by the Defendant that the Plaintiff begun collecting rentals for the Subject Property at K3,000.00 per month, but failed and or neglected to pay the balance of K80,000.00 as undertaken. It is further averred by the Defendant that on 8th May, 2018, the Plaintiff made an undertaking to pay the balance of K80,000.00, on 30th July, 2018, failure to which the Defendant would be at liberty to sell the property to another person as the property was and is still in the Defendant's name. However, the Plaintiff again failed to pay the K80,000.00 as undertaken.

3.5 The Defendant admits that the Plaintiff brought a Corolla to the Defendant, but vied that the balance that was outstanding at the time was K80,000.00. He asserted that the agreement between the Plaintiff and Defendant was for payment in form of cash and that therefore, the Plaintiff was to sell the vehicle and pay the Defendant, but to no avail.

3.6 The Defendant affirmed that the Plaintiff is in breach of the Contract of Sale dated October, 2016, and the subsequent Agreement dated 8th May, 2018. He stated that the Plaintiff made promises to pay in instalments, much to the detriment of the Defendant, which resulted in the

Defendant taking over the collection of rentals for the Subject Property from the Plaintiff in June, 2019. He further stated that at that point, the Plaintiff had collected rentals from the Subject Property for 32 months, at K3,000.00 monthly, totalling K96,000.00.

3.7 The Defendant averred that the Plaintiff has failed to pay the outstanding balance of K80,000.00 from October, 2016, and had been benefiting from rentals for the Subject Property to the detriment of the Defendant. He further averred that he has been denied the use of K80,000.00 whose value is now less. He also averred that no loss has been suffered by the Plaintiff, who is not entitled to any relief sought.

3.8 By the Defendant's Counter-Claim, the Defendant claims for the following: -

- i. An Order for rescission of the Contract of Sale between the Defendant and Plaintiff due to the breach on the part of the Plaintiff;*
- ii. The payment of K42,000.00 being rentals unjustly collected by the Plaintiff;*
- iii. Interest on (ii) above;*
- iv. Damages for inconvenience;*
- v. Any other relief the Court may deem fit; and*
- vi. Costs.*

3.9 The Defendant reiterated the contents of the Defence and averred that the Plaintiff failed to pay the balance of the purchase price for the Subject Property totalling K80,000.00, which balance was due in 2017, in accordance with the Contract of Sale of October, 2016, and that despite undertaking in the form of an Agreement of 8th May, 2018, to pay the balance of K80,000.00 that was due by 30th July, 2018, the Plaintiff failed to honour his undertaking.

3.10 The Defendant asserted that the Plaintiff unjustly enriched himself by collecting rentals from the Subject Property despite being in breach of the Contract of Sale and received rentals totalling fourteen (14) months, which translate to K42,000.00. It was asserted that as a result of the unjust enrichment by the Plaintiff, the Defendant suffered loss of income from the rentals totalling K42,000.00.

3.11 It was averred that the Subject Property has always been in the name of the Defendant and the Defendant in mitigating his losses, begun collecting rentals for the Subject Property and has not sold it as alleged by the Plaintiff.

3.12 The Defendant affirmed that he has been put through great inconvenience and loss by the Plaintiff as the result of the Plaintiff's failure to pay the outstanding balance from October, 2016. He further affirmed that he is no longer desirous of entering into another agreement with

the Plaintiff for the payment of the balance and is instead willing to refund the Plaintiff the sum of K120,000.00.

3.13 In reply to the Defence and Counter-Claim, the Plaintiff denied having ever failed to settle the balance of K80,000.00 in 2017 as alleged. He asserted that the purported Contract of Sale of October 2016 never had any date within which to settle the purchase price as the Defendant had deliberately left that out, and that therefore, there is no alleged breach by the Plaintiff.

3.14 The Plaintiff vied that the Defendant ambushed the Plaintiff's agent, who is his wife, and made her sign the said Contract of Sale of 2016, in the Plaintiff's absence, as the Defendant was so desperate for money. It was further vied that the Defendant had earlier collected K120,000.00 from the Plaintiff as deposit on the purchase of the Subject Property.

3.15 The Plaintiff asserted that he did not make any undertaking on 8th May, 2018, to pay the balance of the K80,000.00 on 30th July, 2018, and nor did he fail to pay the balance on that date. He further asserted that in fact, on or around June, 2019, the Plaintiff endeavoured to liquidate the whole sum of K65,000.00, but was shocked to be informed that the Defendant had long rescinded the Contract of Sale.

- 3.16 The Plaintiff denies owing the Defendant the sum of K80,000.00 and averred that the Defendant handed over the Subject Property to the Plaintiff on 12th October, 2016, after the Plaintiff paid him more than half the purchase price as per their Agreement.
- 3.17 The Plaintiff denies that he has been collecting rentals from the Subject Property or at all, and asserted that the Subject Property was not in a habitable condition, and lacked toilets, thus, no one rented it. It was also asserted that the Plaintiff has never collected any rentals in the sum of K42,000.00 for the purported 14 months or at all.
- 3.18 The Plaintiff denies that the Defendant has suffered any great inconvenience and loss or at all, as the Defendant was always collecting money from the Plaintiff, which totalled to K135,000.00, as opposed to the alleged sum of K120,000.00, thereby leaving a balance of K65,000.00.
- 3.19 The Plaintiff affirmed that the Defendant has been in possession of the Subject Property from which he has been getting rentals from June, 2019, as per the contents of his Counter-Claim, as such, the Defendant has not suffered any loss as alleged. It was further affirmed that it is the Plaintiff herein who has suffered loss and inconvenience, and that if he had invested the K135,000.00, he would have made huge profits from the same.

4. EVIDENCE AT TRIAL

- 4.1 At trial, **PW1** was **Mlonyeni Zimba**, the Plaintiff herein, who relied on his Witness Statement filed on 28th June, 2021. By his Witness Statement, PW1 testified, *inter alia*, that sometime in October, 2016, the Plaintiff and Defendant went to sell the Subject Property to a Mr. Aribu, who refused to purchase it and therefore, PW1 asked the Defendant to sell the Subject Property to him.
- 4.2 PW1 avowed that he resisted the idea of purchasing of the Subject Property initially, as he did not have the K250,000.00 that was proposed for it. However, PW1 discussed the purchase of the Subject Property with his family and they agreed to purchase it from the Defendant. The Parties herein then agreed that the purchase price for the Subject Property would be K200,000.00.
- 4.3 PW1 vied that he paid the Defendant the sum of K120,000.00, leaving a balance of K80,000.00 and at that point, the Defendant gave PW1 access to the Subject Property. Soon thereafter, PW1 travelled to Lusaka and a few days later, he learnt that the Defendant visited PW1's wife with a Terms and Agreement Form, wherein it was stated that any form of development on the Subject Property would be repossessed if PW1 failed to pay the balance on the agreed date. It further read that failure to pay would lead to the Subject Property being sold to someone else to raise money to pay back the first deposit.

- 4.4 PW1 avowed that the Defendant requested his wife to sign on behalf of PW1 and Mr. Laizyo Mtonga was her witness. When PW1 returned to Lundazi he was informed of what had transpired, and he decided with his wife that they would start paying off the debt in order to help the Defendant financially and so that Subject Property could be fully paid for, especially considering the huge amount that was paid as deposit.
- 4.5 PW1 vied that sometime later, the Defendant lost his wife and travelled to Kafue for the funeral, during which period, his brother Mr. Gershom Mpundu collected a sum of K2,000.00 from PW1's wife. Later, the Defendant called PW1 and told him that he had not received any amount of money for the funeral, thus, PW1 sent him a sum of K3,000.00. When PW1 approached the Defendant's brother to ask him why he had not transferred the Defendant the amount of money he had collected from PW1's wife to his brother, the Defendant's bother stated that the Defendant had not given him anything from the amount of money PW1 had paid for the Subject Property, hence his decision to keep the money for himself.
- 4.6 PW1 added that he decided to let that go and sent a sum of K3,000.00 to the Defendant in order for him to issue the Title Deed for the Subject Property in PW1's name, but the Defendant did not. PW1 further vied that he later gave the Defendant a sum of K5,000.00 to enable him start up a

poultry business and the Defendant begun to sleep in Room 6 of a guest house that PW1 owned.

- 4.7 It was PW1's testimony that the Defendant later drafted a document wherein he forged the Plaintiff's signature and handwriting, to the effect that if PW1 failed to pay on time, he would allow the Defendant to resale the property and that in turn, the Defendant would refund PW1 the first instalment. It was PW1's further testimony that the Defendant forgot that PW1 did not know how to write in English as he was uneducated.
- 4.8 PW1 avowed that due to the Defendant's presence at PW1's Guest House in an intoxicated state, and his failure to pay his debts, PW1 decided to give the Defendant their family vehicle in order to settle the outstanding balance on the purchase price of K65,000.00. However, the Defendant refused the offer of the vehicle and stated that he wanted cash instead.
- 4.9 PW1 further avowed that he sold the said vehicle within a week and together with his wife, they presented the money to the Defendant, but the Defendant was very angry and refused to receive the money, stating that the instalment that PW1 had initially paid had depreciated in value as the Subject Property's value had increased. The Defendant also stated that he would rather resale the Subject Property and refund PW1 the initial deposit that PW1 had

paid. PW1 vied that a quarrel ensued between him and the Defendant and that is why he launched this action.

4.10 In cross examination, PW1 testified, *inter alia*, that in October, 2016, he entered into an Agreement with the Defendant for the sale of the Subject Property at the purchase price of K200,000.00. He stated that he paid the Defendant K120,000.00 in October, 2016, towards the purchase price, leaving a balance of K80,000.00.

4.11 It was his testimony that there was no date that was stated in the Agreement for payment of the balance on the purchase price, since the Defendant knew that PW1 was a farmer. He denied ever agreeing with the Defendant in 2018 for payment of the balance and asserted that the Agreement of 2018 is forged.

4.12 PW1 conceded that he did not lodge any complaint with the relevant authorities on the forged document, but stated that he had informed his lawyer. PW1 vied that there are contracts that have no completion date and stated that the Parties' Agreement made in 2016, did not provide for when completion would take place. PW1 asserted that even the further payments that his and wife made to the Defendant were not indicated on paper.

4.13 PW1 avowed that in January, 2017, the Defendant told him that he had a funeral and needed some money. PW1 paid him K5,000.00 though mobile money. He further

avowed that he was not collecting rentals from the building on the Subject Property for the period between 2016 to 2019 as the building was inhabitable and did not have tenants for that period.

4.14 It was PW1's testimony that he made an attempt to settle the outstanding balance on the purchase price in 2019 in the form of a Toyota Corolla, but conceded that it was not part of the Agreement that he would settle the outstanding balance in such a manner.

4.15 In re-examination, PW1 vied that aside from the K120,000.00 that he had paid the Defendant, there were other payments that he paid to him. A copy of the proof of payment made by PW1's wife was produced at page 2 of the Plaintiff's Bundle of Documents. He reiterated that there were other payments that he made to the Defendant, but these were not reflected in writing.

4.16 PW2 was **Ethel Nyoni**, who is the wife to the Plaintiff, whose Witness Statement was admitted into evidence. By her Witness Statement, PW2 testified, *inter alia*, that PW1 and herself own Musa Matchisa Guest House, which is a family business.

4.17 PW2 avowed that PW1 purchased the Subject Property from the Defendant sometime in 2016 at the purchase price of K200,000.00 and that PW1 paid the Defendant the sum of K120,000.00 as an initial deposit.

4.18 PW2 further avowed that a week later after PW1 had travelled to Lusaka, the Defendant went to the said Guest House and gave her a Sales Terms and Conditions Agreement, which stated that the Subject Property would be repossessed if PW1 did not pay on the agreed date and that failure to pay on the agreed date, the property would be sold to someone else in order to raise money to pay the first instalment. She stated that the Defendant instructed her and a Mr. Laizyo Mtonga to sign the document on behalf of PW1.

4.19 PW2 vied that since PW1 and herself found it difficult to come up with the whole outstanding amount at once, they decided to start helping out the Plaintiff financially and his family. She stated that the Defendant's brother, Mr. Gershom Mpundu, went to collect money on behalf of the Defendant. She further stated that PW1 continued to help the Defendant financially, but the Defendant became irritating due to his drunkenness.

4.20 PW2 asserted that she spoke to PW1 and suggested that they sell their Toyota vehicle, which was worth K65,000.00, in order to pay the Defendant, the outstanding amount on the purchase price and PW1 agreed. She further asserted that when the said vehicle was presented to the Defendant, he refused to take it, stating that he wanted money instead.

4.21 It was PW2's testimony that when she and her witnesses returned to the Defendant the following week with the money, the Defendant who was furious and very drunk, refused to accept payment of the said money, stating that the value of the kwacha had depreciated and that PW1 should start making payments all over again. She also stated that a quarrel ensued between PW1 and the Defendant, thus they left and PW1 was advised to take the matter to Court.

4.22 In cross examination, PW2 testified that there was a written Sale Agreement between PW1 and the Defendant and that the purchase price was K200,000.00. She stated that after PW1 paid the initial deposit of K120,000.00, the balance that remained was K80,000.00. She denied that they started collecting rentals after the payment of the initial deposit and stated that in 2019, PW1 attempted to pay the outstanding balance.

4.23 In re-examination, PW2 vied that there was a payment of K2,000.00 made by PW1 to the Defendant in 2017, which payment was collected from her by the Defendant's brother, Gershom, as shown at page 2 of the Plaintiff's Bundle of Documents. She further vied that there were other payments made to the Defendant by PW1, which were not reduced in writing.

4.24 This marked the close of the Plaintiff's case.

4.25 The Record will show that the Defendant or his witnesses were not present on the trial date. However, the Defendant's lawyers were present at trial and informed the Court that the Defendant would rely on the documents on Record. Accordingly, the Court deemed the case closed and directed the Parties to file their written submissions within a specified time frame.

5. SUBMISSIONS

5.1 At the time of writing this Judgment, only the Plaintiff's Advocates had filed the written submissions as directed by the Court.

5.2 By submissions filed on behalf of the Plaintiff, on 29th October, 2024, the Plaintiff's Counsel identified the following legal issues as requiring determination by this Court: -

- i. Whether there was a valid and enforceable Contract of Sale between the Plaintiff and the Defendant;*
- ii. Whether the Agreement of Sale could be varied by the terms of the purported agreement dated 8th May, 2018; and*
- iii. Whether an award of Specific Performance can be ordered to remedy the breach of contract.*

5.3 In addressing the first issue identified above, Counsel referred to the case of ***Mwenya and Another v Kapinga***¹,

which he submitted that it aptly discusses the import of **Section 4** of **The Statute of Frauds 1677**¹. **Section 4** is couched 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 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 authorised.”

5.4 Counsel contended that as the Sale Agreement was drafted and signed by the Defendant on one hand and the Plaintiff's agent, his wife, on the other hand, the Plaintiff and Defendant were brought into legal relations, which were expected to be performed by the Parties. It was further contended that the conditions of **Section 4** of **The Statute of Frauds 1677**¹ were met as the Agreement and Conditions for Sale adequately identifies the Parties, the description of the Subject Property and the consideration price of which K120,000.00 was paid.

5.5 On the second issue of whether the sale could be varied by the terms of the purported Agreement dated 8th May, 2018, Counsel submitted that it is well settled law that the contractual principle known as parol evidence rule states that once an agreement has been reduced to writing, extrinsic evidence shall not be admissible to vary, alter or add to or contradict the terms of a written agreement. The

case of ***Rodgers Chama Ponde and Others v Zambia State Insurance Corporation Limited***² was cited in support of the foregoing submission.

- 5.6 Counsel contended that the Defendant herein attempted to adduce some very questionable extrinsic evidence through what was termed as an “Agreement Paper”, supposedly executed on 8th May, 2018, which flies through the teeth of the parol evidence rule, which seeks to protect the integrity of written agreements by preventing parties from sneaking in contradictory terms such as the terms which the Defendant attempted to introduce through the said Agreement Paper.
- 5.7 On the third issue of whether an Award of Specific Performance can be ordered to remedy the breach of contract, Counsel referred to the definition of breach of contract in ***Black’s Law Dictionary***¹ and submitted that the purpose of law of contractual relation is to offer the injured party a remedy when there is a breach of contract.
- 5.8 Counsel further submitted that the right to sue for damages from breach of contact does not preclude a party from pursuing other legal and or equitable remedies. To fortify his submission, Counsel invited the Court to the case of ***Gideon Mundanda v Timothy Mulwani and 2 Others***³, wherein the Court held that damages cannot adequately compensate a party for breach of a contract for the sale of an interest in land.

5.9 Counsel argued that since the Plaintiff and Defendant entered into a Contract of Sale of the Subject Property, they were bound by the terms of the Agreement. He asserted that the Defendant acted *mala fide* by refusing to obtain Consent to Assign and to process the title deeds despite having been paid the sum of K120,000.00, and a further total sum of K15,000.00, which brought the whole amount paid by the Plaintiff to K135,000.00. Counsel further argued that the Defendant opted to illegally and unfairly repossess the Subject Property without issuing any Notice to Complete, thus preventing the Plaintiff from completing the payment as can be seen by his refusal to accept all forms of payment attempted.

6. CONSIDERATION AND DECISION OF THE COURT

6.1 I have considered the Pleadings and evidence adduced before me. I have further considered the Submissions by the Plaintiff's Counsel, and List of Authorities cited, for which I am grateful.

6.2 As earlier indicated, the Defendant and his Witnesses were absent at trial and the Defendant's Lawyers opted to rely on the documents on Record. I note from the Record that other than the Defence and Counter-Claim, the Defendant filed three Witness Statements on 13th May, 2021. The first Witness Statement was for Papa Mutemwa, the Defendant herein; the second was for Ganizani Mvula; and the third was for Moses Nyirenda. It is settled law that a

party who wishes to rely on his or her filed Witness Statement ought to appear at trial in order to rely on the said Witness Statement and seek for it to be admitted into evidence. In this case, none of the authors of the said Witness Statements appeared at trial and as such, their Witness Statements shall not be considered in the determination of this Matter.

6.3 My position is fortified by **Order 38, Rule 2A (6)** of **The Rules of the Supreme Court**², which is couched as follows: -

“If a party who has served a statement does not call the witness to whom it relates, then no other party may put the statement of that witness in evidence.”

6.4 The Plaintiff claims for an Order for Specific Performance; Damages for inconvenience; interest on all sums found due to the Plaintiff; costs; and any other relief the Court may deem fit.

6.5 The Defence reveals that the Defendant denies the Plaintiff’s claim and has Counter-Claimed for an Order for Rescission of the Contract of Sale between the Defendant and the Plaintiff due to the breach on the part of the Plaintiff; the payment of K42,000.00, being rentals unjustly collected by the Plaintiff, plus interest thereon; Damages for inconvenience; any other relief the Court may deem fit; and Costs.

6.6 It is settled law that a person who commences a civil action must prove his case against the Defendant in order to succeed in his claim. To that effect, the learned authors of ***Phipson on Evidence***², in **paragraph 6-06**, at **page 151**, state the following regarding the burden of proof in civil cases: -

“So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when the evidence is adduced by all parties, the party who has the burden has not discharged it, the decision must be against him.”

6.7 Additionally, the standard to which a Plaintiff should prove his case was discussed by the Supreme Court in ***Zambia Railways Limited v Pauline S Mundia, Brian Sialumba***⁴ as follows: -

“The standard of proof in a civil case is not as rigorous as the one obtaining in a criminal case. Simply stated, the proof required is on a balance of probability as opposed to beyond all reasonable doubt in a criminal case. The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable...”

6.8 It is important to note here that a Counter-Claim is in its nature a cross suit, an independent cause of action from that of the Plaintiff. The same expectation of the Plaintiff to prove its claim against the Defendant becomes the

position and expectation of the Defendant to prove the Counter-Claim against the Plaintiff.

- 6.9 The facts in this case are that on or about 16th October, 2016, the Plaintiff and the Defendant executed a Contract of Sale of the Subject Property for the sum of K200,000.00. In pursuance of the said Agreement, the Plaintiff had made an initial payment of K120,000.00 to the Defendant in October, 2016, leaving a balance of K80,000.00.
- 6.10 The Plaintiff alleges that on various dates between 31st January, 2017 and 28th December, 2018, the Plaintiff made various payments to the Defendant, at his request, towards the outstanding balance on the purchase price of the Subject Property, which were not reduced in writing, save for one payment that is shown at page 2 of the Plaintiff's Bundle of Documents. It was further alleged that in June, 2019, the Plaintiff offered to liquidate the remaining balance on the purchase price in the form of a Toyota Corolla Vehicle but that the Defendant turned it down.
- 6.11 It was also alleged that when the Plaintiff later attempted to liquidate the said sum within the month of June, 2019, the Defendant informed him that he had already rescinded the Contract of Sale and immediately repossessed the Subject Property, which he offered to sell to interested persons, without following the legal procedure. It is on the

basis of the foregoing that the Plaintiff is seeking the reliefs as set out above.

6.12 On the other hand, the Defendant in his Defence and Counter-Claim asserted that after the Plaintiff made the payment of K120,000.00 towards the purchase price in October, 2016, he made an undertaking to pay the balance of K80,000.00 upon harvesting and selling his crops in 2017. It was further asserted that the Plaintiff began collecting rentals from the Subject Property at the rate of K3,000.00 per month.

6.13 It was also asserted that the Plaintiff failed to pay the balance on the purchase price in 2017, as agreed and on 8th May, 2018, the Plaintiff made another undertaking to liquidate the outstanding balance on 30th July, 2018, failure to which the Defendant would sell the Subject Property to another person. The Defendant alleged that the Plaintiff failed to make payment as per that agreement, thus the Defendant took over the collection of rentals from the Subject Property in 2019 and that at that time, the Plaintiff had collected rentals for 32 months totalling K96,000.00.

6.14 It is on the basis of the foregoing that the Defendant has Counter-Claimed for the reliefs as set out above.

6.15 On my analysis of the foregoing, I find that the following are the issues for determination: -

- i. Whether the Plaintiff is entitled to an Order for Specific Performance;
- ii. Whether the Plaintiff is entitled to Damages for inconvenience;
- iii. Whether the Defendant is entitled to an Order for Rescission of Contract of Sale;
- iv. Whether the Defendant is entitled to K42,000.00 being rentals unjustly collected by the Plaintiff; and
- v. Whether the Defendant is entitled to Damages for inconvenience

6.16 I shall determine the legal issues in the manner I have identified them starting with whether the Plaintiff has proved that he is entitled to an Order of Specific Performance of the Contract of Sale of the Subject Property.

6.17 The relief of Specific Performance, whenever granted, compels the Party in breach of a term of the Contract to fulfil it so that the Contract is carried out to the satisfaction of the Parties' intended objectives.

6.18 In the case of ***Trans-Continental Limited and Andrew Robb v Donald McIntosh and Eric Routledge***⁵, Specific Performance was defined as follows: -

“...Specific performance is equitable relief, given by the Court, to enforce against a defendant the duty of doing what he agreed by contract to do...”

6.19 The instances where Specific Performance will be granted have been expounded in ***Chitty on Contract - General Principles***³ as follows: -

“The jurisdiction to order specific performance is based on the existence of a valid, enforceable contract... it is not to be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable.”

6.20 This therefore means that for one to successfully invoke the remedy of Specific Performance, he must demonstrate that he entered into a legally binding contract with the person against whom he seeks the remedy.

6.21 Further, in the case of ***Wesley Mulungushi v Catherine Bwale Mizi Chimba***⁶, the Supreme Court held that: -

“The court will decree specific performance only if it will do more perfect and complete justice than the award of damages.”

6.22 Based on the foregoing authorities, I shall proceed to consider whether the Plaintiff herein has demonstrated that there was a valid Contract of Sale of the Subject Property between him and the Defendant. The requirements of an enforceable contract for the sale of land

were adequately addressed in the case cited by Counsel for the Plaintiff of *Mwenya and another v Kapinga*¹ 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 of 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 the consideration.” (Court’s emphasis)

6.23 Based on the foregoing authority and my analysis of the evidence on Record, it is clear that a document termed “Agreement Terms and Condition of Sale of Plot 42 Lundazi District” was executed by the Parties herein. The said document also indicates the names of the Parties, description of the Subject Property, and the nature of the consideration by indicating that the Plaintiff made the initial payment of K120,000.00 on 12th October, 2016.

6.24 I wish to state here that the document does not state the full purchase price of K200,000.00 as consideration for the Subject Property nor when it was executed. However, since the Pleadings and evidence adduced by the Plaintiff reveal that the nature of the consideration, the purchase price and the date of execution of the Agreement are not in dispute, I am satisfied that the Plaintiff has demonstrated that there was indeed a valid written Contract for the Sale

of the Subject Property at a consideration price of K200,000.00, which was executed on 16th October, 2016.

6.25 In support of the claim for Specific Performance, the Plaintiff has asserted that in breach of the Agreement, the Defendant has refused to receive the balance of the purchase price of K65,000.00 and has offered the Subject Property for sale to other interested parties, despite there being no agreement on the due date for completion. The Plaintiff has further asserted that the Defendant has breached the Contract. It is on this basis that the Plaintiff's claim for an Order for Specific Performance is based.

6.26 On the other hand, the Defendant, by his Defence has asserted that the balance due on the Contract is K80,000.00 and has denied receiving any payment towards the balance on the purchase price. The Defendant has alleged that the Plaintiff made an undertaking to pay the balance after he had harvested and sold his crops in 2017, but has failed to do so despite several requests and as such, he alleges that the Plaintiff is in breach of the Contract of Sale.

6.27 From the foregoing, it is evident that there is a discrepancy in the amount forming the balance of the purchase price as the Plaintiff has alleged that the sum is K65,000.00 whilst the Defendant asserts that it is K80,000.00. In the

case of the ***Attorney General v Kakoma***⁷, the Supreme Court guided as follows: -

“A court is entitled to make findings of fact where the parties advance directly conflicting stories, and the court must make those findings on the evidence before it having seen and heard the witnesses giving that evidence.”

6.28 I note from the evidence on Record, that though the Plaintiff has alleged that he and his wife started offering financial assistance to the Defendant as a means of liquidating the balance on the purchase price for the Subject Property, they have not produced any cogent evidence to support this assertion nor demonstrated that the Parties varied their Agreement and opted for the liquidation of the balance on the purchase price by means of offering the Defendant financial assistance.

6.29 Further, I find that the document on page 2 of the Plaintiff’s Bundle of Documents, containing an acknowledgment of Gershom Mpundu’s receipt of the sum of K2,000.00, which the Plaintiff has produced to prove that a payment was made towards the liquidation of the outstanding balance, does not in any way prove that the said sum of money so received was for that purpose.

6.30 Accordingly, I find that the Plaintiff’s assertion that he offered financial assistance to the Defendant as a means of liquidating the balance on the purchase price, lacks merit and is dismissed. It follows therefore, that following

the initial payment of K120,000.00 towards the purchase price of K200,000.00, the Plaintiff having not made any further payments towards the liquidation of the purchase price, owes the Defendant the sum of K80,000.00.

6.31 I now turn to consider the Plaintiff assertion that the Contract had not stipulated a due date for payment of the balance and as such, he had not breached the Contract by not paying the balance as alleged by the Defendant.

6.32 On the issue of delay in Contracts, the Supreme Court in the case of ***Mwenya and Randee v Kapinga***¹, cited with approval the learned authors of ***Cheshire and Fifoot's Law of Contract***⁴ as follows: -

“By way of summary, it may be said that time is essential firstly, if the parties expressly stipulate in the contract that it shall be so; 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 reasonable time, the contract will be regarded as at end; and lastly, if the nature of the surrounding circumstances or of the subject makes it imperative that the agreed date should be precisely observed.”

6.33 Based on the foregoing authority and my analysis of the evidence on Record, I note that though the Contract of Sale of the Subject Property refers to an agreed date for payment of the balance, it does not state what the agreed date is. However, the Agreement states that *“Any form of*

development will be repossessed when you fail to pay at the agreed date. Failure to pay on the agree date will lead to the property be sold to some body else to raise money to pay back first payment (sic)". This clearly shows that although the date for payment of the outstanding balance on the purchase price was not indicated in the Agreement, both Parties were aware of the due date.

6.34 Further, I note that page 1 of the Defendant's Bundle of Documents shows that on 8th May, 2018, a subsequent Agreement was drawn, which reveals that the Plaintiff agreed to pay the balance of K80,000.00 in the month of July, 2018, failure of which the Defendant would sell the Subject Property to another person. Although the Plaintiff in cross-examination alleged that this subsequent Agreement was forged, he did not plead fraud. It is trite law that allegations of fraud must be clearly and expressly pleaded. It is not enough to make vague or general allegations of fraud.

6.35 I also note that the said subsequent Agreement is appended with the Plaintiff's signature which is similar to the signature on his Witness Statement filed on 28th June, 2021. I am satisfied, therefore, that upon a proper construction of the Contract of Sale and subsequent Agreement, time was of the essence because the Plaintiff was notified to pay the balance of K80,000.00 and by appending his signature to the said Agreement, he

undertook to pay the said balance within the month of July, 2018, failure of which the Subject Property would be sold to another person, thus, the second ingredient spelt in the authorities referred to in paragraph 6.32 has been met.

6.36 The view that I hold is fortified by the learned authors of ***Halsbury's Laws of England***⁵, who state at **paragraph 485**, at **page 340**, that: -

“In cases where time is not originally of the essence of the contract, or where a stipulation making time of the essence has been waived, time may be made of essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for performance within the time so fixed, he intends to treat the contract as broken. The time so fixed must be reasonable having regard to the state of things at time when the notice is given.”

6.37 Additionally, I note from the Plaintiff's Pleadings that he alleges that between 31st January, 2017, and 28th December, 2018, the Defendant started requesting for payments towards the balance of the purchase price. This, in my view, is an indication on a balance of probabilities that the balance on the purchase price was due from 31st January, 2017. I also note that the Plaintiff only made an offer to pay the said balance in June, 2019. I am, therefore, of the view that there was unreasonable delay to pay the balance on the purchase price by the Plaintiff.

6.38 Further, as it was a term of the Contract of Sale that the Subject Property would be offered to someone else in the event of failure to pay on the agreed date, the Defendant did not breach the Contract when he offered the Subject Property for sale to other interested parties.

6.39 In my view, it is the Plaintiff who was in breach of the Contract and the Defendant simply exercised his contractual right to rescind the Contract. The Plaintiff being the Party in breach cannot, therefore, be a beneficiary of his own default, and as such, is not entitled to an Order of Specific Performance. Accordingly, the Plaintiff's claim for an Order for Specific Performance of the Contract of Sale of the Subject Property, lacks merit and is consequently dismissed.

6.40 I now turn to consider the second legal issue of whether the Plaintiff is entitled to damages for inconvenience. In the case of **J.Z. Car Hire Limited v Malvin Chala and another**⁸ the Supreme Court held as follows: -

“It is for the party claiming any damages to prove the damages.”

6.41 The import of the foregoing authority is that to succeed in a claim for damages for inconvenience, the Plaintiff is required to lead evidence to prove that he is entitled to the said damages.

6.42 Further, in the case of *Miyanda v the Attorney General*⁹, the Supreme Court stated as follows on damages for inconvenience: -

“Of course, these damages should not be awarded unless the distress, hardship or inconvenience, as the case may be, results from some act, or omission on the part of the Defendant (either in his conduct or in the manner of effecting the wrongful breach or if such result must have been in the contemplation of the parties as likely to bring undue suffering) which does occasion suffering which goes beyond the normal consequences of wrongful breach.”

6.43 On my analysis of the evidence on Record and my finding that the Defendant herein did not breach the Contract of Sale, I find that the Plaintiff’s claim for damages for inconvenience lacks merit and is accordingly dismissed.

6.44 I now turn to consider the third legal issue of whether the Defendant is entitled to an Order of Rescission of the Contract of Sale.

6.45 The learned authors of *Contract Law in Zambia*⁶ define rescission of contract as: -

“...an order of the Court returning the parties to their original pre-contract position.”

6.46 Thus, by seeking this remedy, the Defendant wishes that the parties be relieved of their duties and obligations under the Contract of Sale. The effect of this is that no Contract of Sale to buy the Subject Property was entered into and

any money paid towards the purchase price would be returned to the buyer.

6.47 Based on my findings and determination of the first legal issue above, I find that by the subsequent Agreement of 8th May, 2018, the Plaintiff was given a reasonable notice in writing to pay the outstanding balance of K80,000.00, and as the Plaintiff breached the Contract of Sale and that Rescission was a term of the Contract, the Defendant herein is entitled to an Order of Rescission. Accordingly, I Order the Rescission of the Contract of Sale of the Subject Property executed by the Parties on 16th October, 2016.

6.48 It follows, therefore, that the Plaintiff herein is entitled to a refund of the deposit of K120,000.00, which he had paid towards the purchase price at the time that the Defendant repudiated the Contract.

6.49 I wish to state at this point that although the right to the refund as set out in the Parties' Contract of Sale is intended to be enforceable after the Subject Property has been sold to another person, the same may be prejudicial to the Plaintiff. This is so, particularly, in the event that the Defendant does not sell the Subject Property or indeed no body offers to buy the Subject Property.

6.50 Such a situation will beg the question of whether the Defendant is entitled to keep both the deposit and the Subject Property. This will clearly not be in the best

interest of the Plaintiff especially that the evidence on Record shows that the Defendant has refused to consider the Plaintiff's offer to buy the Subject Property by paying the balance.

6.51 In the circumstances, I see no guarantee that the Subject Property will be sold soon and the Plaintiff will not only be prejudiced but greatly inconvenienced. In order to mitigate the prejudice and inconvenience to the Plaintiff, I Order that the Defendant refunds the Plaintiff the sum of K120,000.00 within 90 days of this Judgment or within 14 days of selling the Subject Property, whichever will be earlier. In default, the Plaintiff will be at liberty to seek enforcement of the Order. Interest on the sum is at current Bank of Zambia lending rate from the date of Judgment up to the date of payment.

6.52 I now turn to consider the Defendant's claim for the sum of K42,000.00, being the rentals that the Defendant alleges was unjustly collected by the Plaintiff from his possession of the Subject Property.

6.53 By the Defendant's Counter-Claim on Record, it is alleged that when the Plaintiff paid the initial deposit of K120,000.00, the Defendant gave him possession of the Subject Property and the Plaintiff started collecting rentals. He alleged that the Plaintiff collected rentals for 32 months at the rate of K3,000.00 per month totalling, K96,000.00.

- 6.54 The Defendant alleged that the Plaintiff unjustly enriched himself by collecting rentals from the Subject Property despite being in breach. Consequently, it was alleged that the Plaintiff suffered loss of income in the sum of K42,000.00
- 6.55 On the other hand, the Plaintiff denies collecting any rentals from the Subject Property despite being given possession of the Subject Property on the basis that the Subject Property was not habitable.
- 6.56 On my analysis of the Defendant's claim, I note that as the Defendant was absent at trial, no evidence was led to support this claim. As such, the Defendant failed to prove the allegation of loss of rental income in the sum of K42,000.00 and it is accordingly dismissed.
- 6.57 Similarly, on the final legal issue of whether the Defendant had led evidence to prove that he was entitled to damages for inconvenience, I find that the Defendant being absent at trial failed to lead any evidence to support his allegation of damages for inconvenience. Accordingly, the claim for damages for inconvenience is dismissed.

7. CONCLUSION

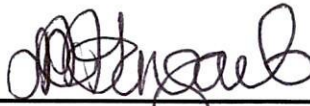
- 7.1 In conclusion, the Plaintiff having not made any further payments towards the liquidation of the purchase price, owes the Defendant the sum of K80,000.00.

- 7.2 The Plaintiff being the Party in breach cannot be a beneficiary of his own default and as such, is not entitled to an Order of Specific Performance. Accordingly, the Plaintiff's claim for an Order for Specific Performance of the Contract of Sale of the Subject Property, lacks merit and is accordingly dismissed.
- 7.3 As the Defendant herein did not breach the Contract of Sale, I find that the Plaintiff's claim for damages for inconvenience lacks merit and is accordingly dismissed.
- 7.4 I Order the Rescission of the Contract of Sale of the Subject Property. It follows, therefore, that the Plaintiff herein is entitled to a refund of the deposit of K120,000.00, which he had paid towards the purchase price at the time the Defendant repudiated the Contract.
- 7.5 I Order that the Defendant refunds the Plaintiff the sum of K120,000.00 within 90 days of this Judgment or within 14 days of selling the Subject Property, whichever will be earlier. In default, the Plaintiff will be at liberty to seek enforcement of the Order. Interest on the sum is at current Bank of Zambia lending rate from the date of Judgment up to the date of payment.
- 7.6 The Defendant failed to prove the allegation of loss of rental income in the sum of K42,000.00 and this claim is accordingly dismissed.

7.7 The Defendant being absent at trial failed to lead any evidence to support his allegation of damages for inconvenience. Accordingly, the Defendant's claim for damages for inconvenience is dismissed.

7.8 Each Party shall bear its own costs.

**SIGNED, SEALED AND DELIVERED AT LUSAKA, THIS 24TH DAY
OF APRIL, 2025.**



**P. K. YANGAILO
HIGH COURT JUDGE**