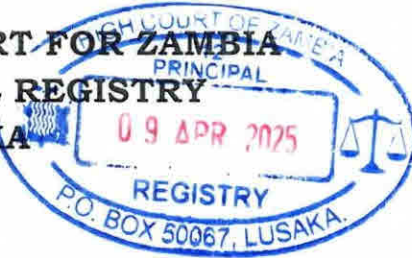


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
LUSAKA
(Civil Jurisdiction)



2019/HP/0108

BETWEEN:

LI ZHOGCHENG

PLAINTIFF

AND

AHMED FARAH GURE

DEFENDANT

Before the Hon. Mr. Justice M.D. Bowa on 9th of April 2025

For the Plaintiff: Miss W Chirwa of J&M Advocates

For the Defendant: Miss Z Seketi of Chalwe & Kabalata Legal Practitioners.

JUDGMENT

Cases referred to:

1. *Elsheikeh Elsaed and Misr Enterprises Limited vs Mwangala Beatrice Kamuwanga*– Supreme Court Appeal No. 122 of 2001
2. *Baxter Sichone and Baxget Auto Services Limited vs Scooner Investments Limited.* (2019) Appeal No. 112/2016 SCZ 8/55/2016.
3. *Rosser vs Miller* (1878) 3 App Cas 1124 at 1151
4. *Augustine Kapembwa vs Danny Maimbolwa and Attorney General*4 (1981) ZR 127 SC
5. *Nelson vs Lachold*5 (1947) of ALL ER 751
6. *Zambia National Commercial Building Society vs Ernest Mukwamatamba Nayonda* (1993) SJ 33
7. *Miyanda vs Attorney General* (1985) ZR 185
8. *Brogden vs Metropolitan Railway Company* (1877)2 App (as 666)
9. *Cavmont Merchant Bank vs Amaka Agricultural Holdings Limited* SCZ Judgment No. 2 of 2001
10. *Garmac Grain Company vs HMF Faure and Fanclaush* (1967) 2 ALL ER353 HL at 358
11. *Smith vs Hughes* (1871) LR 6 Q13 597
12. *Perry vs Sunfiled Limited* CS 12 (1916)
13. *Galaunia Farms Limited vs National Milling* (2002) ZR 135
14. *Hussey vs Horne Payne*(1879) 4 App Cas 311
15. *May and Burcher Ltd vs the King* 1934 2 KB 17

Other works referred to:

1. *McGregor on Damages 17R Edition paragraph 23-003*
2. *Halsbury Laws of England 4th Edition Reissue volume 27 and paragraph 57,226 & 261.*
3. *Michel Furmton Law of contract*
4. *Trietel G H Trietel, The Law of Contract Seventh edition London Steven & Sons 1997 at page 47*
5. *McKendrick E, Contract Law Text, Cases and Materials, Oxford University Press New York 2003*

1. Background

1.1 The Plaintiff commenced this action by Writ of Summons and Statement of Claim dated 23rd January 2019 seeking the following reliefs: -

- i. *Refund of the sum of USD20,000 (Twenty Thousand United States Dollars) the same being the amount advanced to the Defendant for rental and security deposit.*
- ii. *Damages for loss of use of funds.*
- iii. *Damages for inconvenience*
- iv. *Interest on all sums due and owing from the Defendant to the Plaintiff.*
- v. *Any other Order that the Court may deem fit and just in the circumstances.*
- vi. *Costs.*

1.2 The Defendant entered conditional appearance on the 5th March 2019. The application brought challenging the mode

of service was heard and dismissed by the District Registrar on the 4th June 2019. The Defendant filed his defence disputing the claims and counter claimed: -

- i. The sum of USD8000.00 being two months' notice of breach of contract.*
- ii. Damages for repudiation of the said lease Agreement.*
- iii. Any other relief this honourable Court deems fit.*
- iv. Costs.*

1.3 The Plaintiff's reply and defence to counterclaim was filed into Court on 26th June 2019. This was followed by the Defendant's reply to the Plaintiff's defence to counterclaim dated 25th July 2019.

1.4 The matter was referred to mediation and not settled. After numerous adjournments the matter was finally set down for trial on the 9th February 2022 and concluded on 12th April 2022.

2. The Plaintiff's case

2.1 PW1 was Atima Jussa a business woman by occupation. Her evidence was that the Plaintiff is a client of her real estate company. She described the Defendant as also a

client that was leasing out a property in Lusaka's Mass Media area.

2.2 She testified that the Plaintiff was looking for a property to rent and PW1's company proposed the Defendant's property that was available. The two parties met and discussed terms for a lease agreement. The Defendant's property was however, incomplete. It needed some work to be done on the existing structures. The parties agreed that the Plaintiff would provide the financing to complete the buildings. The Plaintiff engaged two contractors who provided quotations and a lease agreement was drafted.

2.3 It was her testimony that in the process of finalising the agreement, the Defendant changed certain clauses in the lease and did not approve the quotation from the contractors. He further left the country upon receiving the rent. When the parties finally agreed on the contractor to be used, the Defendant later said he wanted the quotation to be cheaper than it was. This, she explained, was not possible as the property needed a lot of work to be done. This included fixing of some cracks and wall repairs as the

property had not been completed for a while. She knew this as she had viewed the property.

2.4 She testified further that the Plaintiff also engaged a company to do some assessments to clarify the work that needed to be done. This assessment was done by Jomach Ingenuity Company Ltd around May 2018. The report on the assessment was presented to be on page 38 of the Plaintiff's bundle of documents.

2.5 She testified that the company observed cracks on the walls and that some floors were not straight. There were also observed leakages in some areas of the structure. That on pages 33-37 of the Plaintiff's bundle of documents are pictures of what she had seen when she viewed the property. She testified that the pictures accurately depict the state of the property.

2.6 It was her further evidence that the parties to the lease agreement were the Plaintiff and the Defendant as shown on page 2 of the Plaintiff's bundle. She testified further that as will be observed on page 4 of the Plaintiff's bundle, the Defendant made changes to the lease by which he was demanding rentals in advance and without any deduction.

Further that it will also be noted that on page 8 of the lease, the Defendant wanted the renewal of the lease to be at his sole discretion.

2.7 After the Defendant made those changes he signed the lease agreement without concluding it with the Plaintiff. It was PW1's evidence that the Plaintiff then refused to sign the contract because not only did the Defendant change the terms of the lease, he also did not approve in writing the contractor's quotation.

2.8 She added that the Plaintiff did not then go on to occupy the premises or commence construction based on the terms referred to. He instead proceeded to demand for the refund of the 4 months' rent and the security deposit that had been paid to the Defendant.

2.9 It was her further evidence that the Defendant then left the country and when she contacted him to conclude the refund, the Defendant stated he would be willing to approve the quotation proposed by the Plaintiff if he reduced it. When asked, the Plaintiff did not accept the proposal.

2.10 PW1 explained that she was the real estate agent acting on behalf of both the parties. She testified further that the

payment to the Defendant was made at the point when the lease agreement was drafted and sent to the Plaintiff. However, she qualified that the lease agreement was never signed. The Plaintiff nonetheless went ahead and made a payment of USD20,000.00 inclusive of the security deposit.

2.11 When cross-examined, she testified that both parties were her clients. She had known the Plaintiff before she met the Defendant. She was present during the meeting when the parties met to agree on the terms of the agreement. This was sometime in May 2018 on a date she could not recall. She added that both parties had viewed the property at that point.

2.12 She was not involved in the engagement of the contractors by the Plaintiff although she was present when they presented their quotations to the Plaintiff. She agreed that there was nothing wrong with the Defendant's decision to reject the quotations.

2.13 Questioned further, it was PW1's evidence that she was with the Plaintiff on the day he went to the bank to make the payment. She confirmed that a copy of the signed agreement by the Defendant was passed on to the Plaintiff. She was

present when Jomach Limited was doing the assessment. She agreed that she did recommend the company to her client.

2.14 She did not see the Defendant sign any document prior to the signing of the lease. She further confirmed that the Plaintiff did not produce a cheaper quotation than the one passed on to the Defendant. She confirmed that she was not paid by either of the parties for the transaction. She was not present when the pictures at pages 33-34 of the Plaintiff's bundle were taken.

2.15 PW2 was Li Zhong Cheng the Plaintiff in this matter. He testified that he had given the Defendant USD20,000.00 that he has since refused to pay back to him. The intention was to rent one of the Defendant's properties. When the Plaintiff went to view the property, he discovered that it needed some works to be done. Afterwards the Defendant gave him an agreement which he went through.

2.16 The Defendant insisted that USD 20,000.00 be paid to him which was to be deducted from the rentals although there was no such clause in the proposed agreement. The

Defendant intimated that he was low on cash and needed the money.

2.17 He added that later at the time they were supposed to sign the agreement, he noted that the document he was given was different from the earlier one presented to him. Because he did not agree with the terms of the new agreement, he told the Defendant to pay him back the money that he had given to him.

2.18 It was earlier agreed that the Plaintiff would buy some material to renovate the property. He gave the Defendant a quotation for the material. He could not recall the value attached. He confirmed the quotation to be on page 1 of the Plaintiff's bundle of documents. He testified that the Defendant however, insisted that the materials included in the quotation were too expensive and therefore that he had no interest to purchase them.

2.19 He explained that he had wanted to rent the house but it was in a very bad state. Other persons that included his friends that viewed it expressed the same sentiments. He added that he had gone to view the house with PW1. He did

so thoroughly and was able to see the extent of the damage which he concluded was extensive.

2.20 He testified that on page 27 of the Plaintiff's bundle of document is a report which was prepared at his request. That on pages 33-37 are pictures of the house. He further referred the Court to the unsigned agreement between him and the Defendant on page 2 of the Plaintiff's bundle of documents. He added that the requested refund from the Defendant was not paid to him. That the Defendant instead insisted on the money being deducted from the rentals every month.

2.21 However, the Plaintiff did not agree with this as he did not sign the agreement. He further did not commence any construction works on the site as he had not signed the agreement. In addition, that he did not occupy the property because the parties did not come up with an agreement. He prayed for the grant of the reliefs set out in his originating process.

2.22 When cross-examined, the Plaintiff testified that he was claiming the sum of USD20,000.00 with interest. He stated that he transferred that amount of money to the Defendant's

account. He did not know the Defendant before this transaction. He first encountered him when PW1 took him to view the property.

2.23 He testified further that the Defendant did avail him an account number to make payment. He denied the suggestion that he had sent the money for safekeeping. He insisted that he advanced the money to the Defendant which was to be deducted from the payable monthly rental once in occupation.

2.24 He testified that after he gave the Defendant the money, he was given a second lease agreement that he observed was different from the first one. Therefore, that he decided not to go for the contract. He agreed that he did not sign any lease agreement. He did not agree with the terms indicated in the second document.

2.25 He agreed that page 3 of the Plaintiff's bundle bears a date of 27th April 2018. He did not agree that the implication of this was that the payment of the USD 20,000.00 was a payment for rentals having been made on 28th April 2018.

2.26 Questioned further, he agreed that the anticipated relationship was to be that of landlord and tenant and the

lease agreement was for that purpose. He agreed that there were 4 apartments at the site that he visited. He however did not agree that the rentals were USD 1,000.00 for each apartment payable 4 months in advance. This, he insisted, is not an issue that was discussed.

2.27 When referred to page 25 of the Plaintiff's bundle of documents, he agreed that there was an amount quoted in dollars and reflected as payable upon signing the lease. He testified that his agent PW1 gave him the lease and explained the contents.

2.28 He disputed the suggestion put to him that he was offered USD12,000.00 by the Defendant. He however, accepted that he did receive a USD 3,000.00 which was deposited into his FNB account. This he confirmed, is as per deposit slip dated 21st September 2018 on page 42 of his bundle of documents.

2.29 He did not know the second deposit slip dated 26th November 2018. He insisted that he was not informed about the money having being paid and only found out after the matter was in Court. He was not aware that the Defendant attempted to make a payment of USD 3,000.00 which

bounced back to his account. He was aware that the Defendant made another payment of USD 6,000.00 into Court but he had not collected the money.

2.30 Questioned further, he agreed that the sum total of the amounts mentioned as having been paid worked out to USD 12,000.00 He confirmed that the only money he gave the Defendant was USD20,000.00 He agreed that he did view the premises before paying the money. He explained when asked that he was uncomfortable with the Defendant's decision to purchase material for the renovation of a very low standard. This was why he refused to sign the lease. The witness was not re-examined.

3. The Defendant's case

- 3.1 DW1 was Ahmed Farah Gure the Defendant in this matter. He testified that he met the Plaintiff through his agent Miss Fatima Guzza (PW1). He met her through his caretaker. She had come through to his Mass Media houses and asked to view the premises. His caretaker called him to ask if it was ok to let her in and he gave the go ahead.
- 3.2 He then eventually met PW1 at Central Mall in Kabulonga. She expressed interest in renting the apartments as houses

for her clients. She referred to a Chinese Company that was dealing in repairing of Casino equipment as the potential tenant. He explained to her that the houses were not complete except for one that needed some slight touches.

3.3 To be specific, that he had 4 properties that were on the plot, 3 were incomplete. She then told him that her client was willing to complete the houses. He asked her to go and have a closer look and determine whether her client would be able to complete the work. He asked her to revert to him afterwards.

3.4 He testified further that PW1 proceeded to do her inspection and due diligence and after a week or so told him that the 3 houses needed a lot of work to be done. She inquired if she could bring in her own contractor and he accepted that she could. Her client inquired through her whether he would be open to sell the property. Upon hearing what the Plaintiff's offer was, the Defendant declined to accept it for being too low.

3.5 He left the country and returned after two weeks. This was after PW2's preferred contractor had done the assessment of what needed to be done. She presented a list of things the

houses required. They proceeded to discuss the quality of the things the would-be tenant proposed to put in the houses. The Defendant found the proposed costings to be too high. Also discussed was the amount of money he was to be paid.

3.6 The Plaintiff's agent proposed that the Defendant was to be paid upon completion of the works and after a period of 3-4 years of free occupancy. He refused to accept that offer. He told her that he wanted to be paid 4 months rental at 1000 USD per house. He also demanded a month's rental security deposit on each house payable upon exchange of contract.

3.7 The terms were agreed and the Defendant then asked the agent to draw up the contract. She asked for a commission which he refused to pay explaining that the commission should have come from her clients. PW1 then drew up the contract that she passed on to the Defendant. He consulted his lawyers and met PW1 again at Central Mall to sign the contract.

3.8 PW1 left with the signed contract afterward. She later returned with the contract and informed the Defendant that

her client wanted to meet him. She repeated her inquiry on whether he could consider selling the property altogether.

3.9 The Defendant eventually met the Plaintiff at the houses and told him that he was not going to sell the property. It was the Defendant's further evidence that the Plaintiff wanted to change the terms of the contract and delay the commencement of payments. He repeated that the agreement was that he was to receive the 1,000 USD on each house for 4 months in advance and suspend rent from June 2018 to February of 2020 to cover the period of construction work.

3.10 It was the Defendant's further testimony that PW1 and the Plaintiff returned and asked for an extended period from 3 to 4 years. He declined to accept this request.

3.11 He refused to sign the contract and when they tried to re-negotiate he maintained his position. He was asked for his account number by the agent which he availed to her and the money he had demanded for was deposited. He testified that he did not get a copy of the contract as he was travelling. He was referred to pages 1-22 of the Defendant's bundle which he stated was the contract that he had signed.

3.12 Whilst he was away, he was assured that the Plaintiff had started working on the property. He called his caretaker after a month and was informed that no-one had been to commence works. After about 2 months and whilst in Dubai, the Plaintiff called him and complained about the anticipated works being too demanding. The Plaintiff proceeded to demand for a refund of the money paid stating that he would not be taking up the houses.

3.13 The Defendant returned to Zambia and consulted his lawyers on the turn of events. He had received a letter of demand by then. He explained that there was a clause in the contract that required a 2 months' notice to be given for termination of the contract. He believed this to be clause 25. He told PW1 that he was waiting for them to give him the signed contract which was not availed to him in spite of the money having been deposited.

3.14 He continued to ask for the contract upon his return. It was not given to him. At the Plaintiff's behest, officers from Woodlands Police went to his house but did not find him. He reported himself to the police station and explained what

had transpired upon learning of allegations that he had taken some money and ran away.

3.15 He testified that he was harassed and went to report the matter to Central Police. PW1 and the Plaintiff were summoned to appear. The Defendant was also present. The police advised that no intervention could be made as the matter was in Court. He added that he has since paid back USD12,000.00 in total and there was a balance of USD 8,060.00 that he did not pay back.

3.16 He testified further that the Plaintiff only did some work in the garden but nothing on the construction site. That no work at all was done at the site. He testified further that at the time that he met with PW1 and the Plaintiff , the premises had 3 incomplete structures. One was almost complete. That only the lighting and geysers were left to be installed. It also needed to have a reservoir tank installed. He added that the whole house was tiled and had a Kitchen Unit.

3.17 He testified further that it was less than a week after the Mass Media meeting that the USD 20,000.00 was deposited into his account. His response to the suggestion that the

Plaintiff refused to sign the contract as it had been allegedly altered from what was earlier agreed, was that it was actually the Plaintiff's agent that had drawn up the contract. He did not do so. In addition, that he did not change anything in the contract and had no access to do any such thing.

3.18 He told PW1 and the Plaintiff that his interest was in the quality and not the cost of the anticipated works He did not raise any issue with the cost .It was the Defendant's further evidence that he ended up completing works on the apartments by himself and rented them out. He prayed for a declaration that the Plaintiff breached the contract. He argued that the Plaintiff would not have deposited the money into his account if they did not agree on the terms of the contract. He also prayed for costs.

3.19 When cross-examined and referred to paragraph 1 of his counterclaim, the Defendant testified that he did not agree to build the apartments but to rent it out. He did not collect any quotations for the fittings. He did not know if the Plaintiff bought any materials. As far as he was aware, there

was never any construction that took place and the Plaintiff did not occupy the premises.

3.20 It was The Defendant's contention that the Plaintiff by his conduct of depositing the money into his account executed the lease agreement. He acknowledged that in paragraph 2 of his counterclaim he does aver that USD20,000.00 was deposited on the 28th April 2018. He agreed that he signed the lease on page 25 of the Plaintiff's bundle and that it is not signed by the Plaintiff. He confirmed that on page 34 of the Defendant's bundle is a Notice of payment into Court of USD5,940.00

3.21 He maintained that he did not make any changes to the contract. When referred to the lease in the Plaintiff's bundle of documents, he agreed that paragraph 5 of the lease does show some changes.

3.22 In further cross-examination, the Defendant agreed that the core agreement was for the Plaintiff to finish the structures and subsequently to rent them. He agreed that he did state he was scheduled to leave the country at the time of negotiations. That he left about the month of May and a week after he had signed the contract. He agreed that on

page 3 of the Plaintiff's bundle is the contract dated 27th April 2018. Further that his signature appears on page 25 and is dated 1st May 2018.

3.23 He contended that the document has 2 dates because the agent initially brought a contract that he signed and which she took with her to present to the Plaintiff. She then later returned with an alteration and that he signed it for the second time. Cross examined further, he contended he could not remember what was changed though he thought it might be the period of time in which the suspension of payment would apply.

3.24 Questioned further to show where the clause on deferment of payment was, the Defendant contended that it was done verbally. He did not know if the clause was in the agreement. He did consult his lawyer after the contract was given to him by PW1. He accepted that the change at clause 5 in the Plaintiff's bundle was made by him. He therefore agreed that it was after making this change that he signed the agreement.

3.25 He disputed that he did not accept the quotation given to him for being too high and that he wanted it reduced. He did

not recall having a discussion with PW1 over the quotations. He had no recollection telling the Court that it was the agent (PW1) that obtained the quotations. He confirmed that the pictures on page 33-37 depict the state of the property at the material time.

3.26 Questioned further, the Defendant accepted that he did not have proof before the Court that there was a house that was complete. He agreed that he did testify that he paid USD6,000.00 However, that the document on page 34 of the Defendant's bundle shows that he paid USD 5,940.00 He nonetheless insisted he had paid back a total USD 12,000.00 through his lawyers. When referred to clause 29.1 of the agreement, he agreed that the clause does state that no changes can be made unless both parties agree and sign.

3.27 He agreed that it was only his initial that is at the bottom of the page on page 20 of the Plaintiff's bundle on which clause 29.1 appears. He accepted that the Plaintiff did not sign the agreement. Questioned further, he confirmed that the premises are currently occupied. That 2 of them have tenants. Therefore, that he is receiving revenue and as a

consequence in a position to complete the construction. He confirmed that the Plaintiff never occupied the premises or commence construction works.

3.28 He agreed that there was no proof before Court that the Plaintiff did any gardening. He agreed that PW1 did communicate about the refund before he heard from the lawyers. He accepted that he received the letter of demand from the Plaintiff's lawyers on the 29th of May 2018. He agreed based on this, that this was not more him 3 months from the date that he signed the contract.

3.29 In response to the Court's question in clarification, the Defendant confirmed that he received the USD 20,000.00 sometime in April before he had left the country.

3.30 When re-examined, he testified that he did not remember when he received the letter of demand. He was not in the country between May and June of 2018. The picture on page 27 of the Plaintiff's bundle of documents is of one of the properties. He claimed that the pictures on page 33-37 are not depicting a picture of all the flats.

3.31 He contended that the handwriting in the alteration on page 8 of the Plaintiff's bundle of documents was not his. He

vividly recalled that a period of 3 months had passed before the claim for the refund was made.

3.32 He reiterated that he was more concerned about the quality of fixtures to be placed than the cost. This is what he told PW1. He clarified further that the core agreement was not changed at any point which was essentially that the Plaintiff does the work and then rents the property from him.

That was the case for the Defendant

4. Submissions

4.1 Both parties filed in detailed submissions in respect of their respective positions.

The Plaintiff's submissions

The Plaintiff's position is that the Plaintiff and Defendant entered into negotiations in April 2018 wherein the Plaintiff was to complete the construction of four (4) flats at Plot No. 34711 that were about 80% complete. That in pursuance of the negotiations, the Plaintiff proceeded to obtain quotations for the construction to include labour charges and materials needed for the completion of the flats.

4.2 Further terms of the negotiations were that the Plaintiff upon completion of the construction of the flats was to

subsequently rent the 4 flats from the Defendant at USD1,000.00 A total sum of USD 4,000.00 was to be payable as rent upon occupation.

4.3 It was further the Plaintiff's position that during the negotiations, the parties agreed that the Plaintiff pay the Defendant a total sum of USD20,000.00 being advance rent for 4 months totalling USD 16,000.00 and a security deposit of USD 4,000.00 that was duly paid on 28th April 2018 into the Defendant's account.

4.4 The Plaintiff's contention is that the Defendant altered the terms of the agreement when he presented the printed lease agreement and further declined to approve the quotations presented to him for the cost of materials and construction that had to be undertaken.

4.5 That the Plaintiff thus declined to sign the lease agreement and demanded the refund of the monies paid. The Plaintiff invited the Court to note that the Defendant has paid back the Plaintiff a total of USD11,940.00 leaving a balance of USD8,060.00 The Plaintiff contends that the Defendant has no basis to hold on to this money and must pay damages for

breach of agreement, damages for inconvenience and loss use of property in the process.

- 4.6 Relied upon was the learned authors of **McGregor on Damages 17R Edition at P804 paragraph 23-003** that state: -

“Where the Lesser refuses to proceed with the contract in such circumstance as amount to a repudiation or discharging breach, a number of remedies are available to the Lessee. In the first place he may resort to the equitable remedy of specific performance or secondly, he may treat the breach as discharging the contract and recover back in an action of restitution any moneys paid by him at the same time restoring any benefits received. His third alternative is an action for damages”

- 4.7 Also referred to was the case of **Elsheikeh Elsaed and Misr Enterprises Limited vs Mwangala Beatrice Kamuwanga**¹

wherein the Supreme Court stated the following: -

“We can confirm that the Plaintiff was entitled to claim the refund of the money paid plus interest as an alternative to specific performance. She is taken to have opted for the refund of her money and there can therefore be no question of at the same time getting some land out of the Defendant, as she attempted to do. We repeat: The claims are in the alternative; it is either the facts specific performance for the sale of forty acres; or she gets a refund of her money plus interest, not both.

Quite apart from the refund, we will also confirm the Judgment awarding damages for breach of contract”

4.8 It was submitted that the Plaintiff neither constructed nor occupied the flats in light of the Defendant’s repudiation of the agreement. That the Plaintiff is thus entitled to the refund of the USD8,060.00

4.9 Another authority cited supporting the claim for the refund of the money was **Baxter Sichone and Baxget Auto Services Limited vs Scooner Investments Limited**². The Plaintiff further relied on a passage from the learned authors of **Halsburys Laws of England 4th Edition Reissue volume 27 and paragraph 57** in which the authors state the following on the essential terms of a lease agreement: -

“The essential terms of an agreement for a lease are: (1) the identification of the Lesser and Lessee; (2) the premises to be leased; (3) the commencement and duration of the term; and (4) the rent or other consideration to be paid.

If these matter are ascertained to be offered and accepted, it is sufficient, if any other terms are mentioned by one party, these also must be unconditionally accepted by the other party in order that there may be a concluded contract. As long as the necessary terms indicated above have not been agreed to, or any additional term has been mentioned on one side and not

unconditionally accepted on the other, the matter rests in negotiation and there is no concluded contract.”

4.10 Further relied upon was the case of **Rosser vs Miller**³ where Lord Blackburn in explaining the uses of the terms “conditional” and “essential” as regards lease agreement held that: -

“Though the parties have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remains to be settled afterwards, there is no contract. The parties are still only in negotiations”.

4.11 It was argued based on the above that there is no lease agreement nor contract subsisting between the Plaintiff and the Defendant as it was never signed by the Plaintiff due to the fact that he did not accept the changes that were made to the agreement evident on page 4 and 8 of the Plaintiff's bundle of documents.

4.12 Authority cited for the claim of damages for loss of use of the money included the case of **Augustine Kapembwa vs Danny Maimbolwa and Attorney General**⁴ in which the Supreme Court held:

“Where a man is deprived of the use of his property by the wrongful act of another, a claim in for damages in such a case

are real and not merely nominal even though no actual preliminary loss is proved”.

4.13 Another case cited was **Nelson vs Lachold**⁵ in which it was held that: -

“Man’s money is property which is protected by law and in that regard we submit that the Appellants should be compensated for having been deprived to use their property (money)”.

4.14 Other authorities cited for the claim in damages for inconvenience include **Zambia National Commercial Building Society vs Ernest Mukwamatamba Nayonda**⁶ and **Miyanda vs Attorney General**⁷.

4.15 Other authorities were cited justifying the prayer for interest and costs of and incidental to the proceedings that I will not reproduce here. The Plaintiff prayed for the grant of all the reliefs sought accordingly’

The Defendant’s submissions

4.16 The Defendant’s submissions were filed into Court on 2nd August 2022. It was the Defendant’s position that the disputed agreement was actually prepared by the Plaintiff’s agent. That PW1 not only prepared the lease but effected changes to the lease agreement. She then brought it back

to the Defendant to sign a second time. This, it was argued, was with the blessings and knowledge of the Plaintiff.

4.17 It was submitted that the clause providing for an option to renew when considered closely is still available subject to the sub clause 5.11 and 5.13. It was agreed that the Plaintiff by conduct executed the agreement by firstly having PW1 effect the changes to the agreement and then proceeded to pay the Defendant the rentals as agreed in the lease agreement.

4.18 The Defendant referred to **Michel Furmton Law of contract** in which the author is quoted as stating the following: -

“Whether there has been an acceptance by one party of an offer made to him by the other may be accepted from the words or documents that have passed between them, or may be inferred from their conduct. The talk of inferring an asset and of fixing the precise moment at which it may be said to have emerged is one of obvious difficulty, particularly when the negotiations between the parties have covered a long period of time or are contained in protracted or desultory correspondence”.

4.19 That the author referred to the case of **Brogden vs Metropolitan Railway Company**⁸ in which the house of Lords considered the conduct of the parties and concluded

that it explicably showed an assumption that they mutually approved the terms of a draft agreement.

4.20 It was agreed that the Plaintiff in the present case clearly conducted himself in such a way that the Defendant understood that the agreement had been executed by both parties. It was argued that PW1 was acting as the Plaintiff's agent from the beginning of the transaction to its conclusion.

4.21 That it is clear in this case that the Plaintiff engaged PW1 to find premises for his use. The said PW1 in turn engaged the Defendant and was acting for the Plaintiff through the entire transaction down to drafting the lease agreement and bringing it to the Defendant for his execution. That PW1's further action of amending the agreement and giving it to the Defendant to sign and of payment being made to the Defendant in the exact amount agreed in the lease agreement bind the Plaintiff to the lease agreement and the terms.

4.22 It was further submitted that although the Plaintiff has denied having knowledge that his agent PW1, drafted the lease agreement, it was not in contention that he gave her

express instructions to act on his behalf and as such the Plaintiff is still bound by it. That this is because the Plaintiff conducted himself in such a manner as having approved the terms of the lease by making a deposit into the Defendants' account.

4.23 The case of **Cavmont Merchant Bank vs Amaka Agricultural Holdings Limited**⁹ was cited in aid wherein the Supreme Court stated that: -

“Where an agent in making a contract discloses both the interest and names of the principal on whose behalf he purports to make a contract, the agent as a general rule is not liable on the contract to the other contracting party”.

4.24 Further reliance was placed on the case of **Garmac Grain Company vs HMF Faure and Fanclaush**¹⁰ where the Court observed:

4.25 *“The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be taken to have consented if they have agreed to what amounts in law to such a relationship even if they do not recognise it themselves and even if they have professed to disclaim it. An agent who has express authority to carry out a particular task may also have additional authority to do certain acts which are incidental to his assigned task”.*

- 4.26 It was submitted further that the Plaintiff breached the agreement by his failure to provide a month's notice of termination as per clause 25 of the agreement. That this was the basis of the Defendant's decision to hold on to the two month's rentals now being claimed in the present case.
- 4.27 It was submitted further that the Plaintiff failed to lead evidence to establish that the Defendant insisted on cheap labour and material. The Defendant further questions what was presented as a quotation for the cost of materials on page 1 of the Plaintiff's bundle of documents and the report by Jamach Ingenuity Company on pages 27-37 of the Plaintiff's bundle.
- 4.28 That no specific mention is made on who prepared the quotation and that it further did not show which property the quotation specifically related to. The reservations on the report expressed was that it was not signed and that no witness was called from the company to speak to what proposals on costs would be required to complete the houses.
- 4.29 In further support of the submission that the Plaintiff was bound by his conduct to the agreement, reliance was placed

on the case of **Smith vs Hughes**¹¹ in which Blackburn J held: -

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

4.30 To counter the Plaintiff’s submissions that there was no concluded agreement and that what was at play were negotiations, the Defendant cited the case of **Perry vs Sunfiled Limited CS**¹² in which the Court stated:

4.31 *“...once it is shown that there is a complete contract, further negotiations between the parties cannot without the consent of both get rid of the contract already arrived at”.*

4.32 Further reference was made to the High Court decision of **Galaunia Farms Limited vs National Milling**¹³ to argue that the Plaintiff is estopped from departing from the terms of the lease agreement which he concluded by conducting himself in such a way that the Defendant believed the Plaintiff had executed the agreement. It was submitted that the Plaintiff is the party that repudiated the contract by seeking a refund.

4.33 The Defendant concluded that he had demonstrated there was a valid agreement between the parties which the Plaintiff prematurely terminated without notice. Therefore, that the Defendant is entitled to withhold the sum of USD8,000.00 being 2 months rental for failure to notify the Defendant of the termination as per clause 25 of the lease agreement. Further that the Defendant should be awarded the claims set out in the counterclaim for the breach of the contract.

5. Court's consideration

5.1 I have carefully considered the evidence before me and the parties' respective submissions. This dispute as I see it, centers on and is to be resolved by addressing what are in my view, two fundamental questions. Notably, whether or not there was there was in existence a valid lease agreement or contract entered into between the parties; and secondly, what if any, was the nature of the agreement and which of the parties breached the agreement. The question of whether the Plaintiff or indeed the Defendant succeed in their claim and counterclaim respectively will invariably depend on the outcome of such determination.

- 5.2 In a nutshell, the Plaintiff's position is simply that there was no agreement concluded. The parties were in negotiations. The Defendant altered the terms of what were to be the terms of the lease and further declined to approve the quotations presented to him for the anticipated construction that included labour charges and materials needed for the completion of the flats to be leased to the Plaintiff as per negotiated terms.
- 5.3 That out of good will, the Plaintiff agreed to pay the Defendant the requested USD20,000.00 being advance rent for 4 months totalling USD 16,000.00 and a security deposit of USD 4,000.00 that was duly paid on 28th April 2018 into the Defendant's account.
- 5.4 Because of the unilateral variation of the terms and the Defendant's hard-line stance over the presented quotations, the Plaintiff declined to sign the lease agreement presented to him and demanded the refund of the monies that remain unpaid to him which he asserts is now at USD8,060.00 The Plaintiff contends that the Defendant has no basis to hold on to this money and invariably must pay the damages

claimed as he neither commenced construction works nor did he take occupancy of the units.

5.5 As far as the Defendant sees it, there was a completed and valid agreement subsisting. The lease was drawn up by the Plaintiff's agent who was acting on his behalf and instruction. That the Plaintiff went ahead and made payment on the exact terms and amount set out in the lease agreement. The Plaintiff is therefore by doctrine of promissory estoppel, estopped from denying the existence of the agreement. He further contends that the agreement required a two month notice before the termination of the lease. As none was offered by the Plaintiff, The Defendant is entitled to hold on to the USD 8,060.00 being the only money unpaid to the Plaintiff and seeks damages for what he argues was a clear breach of agreement on the part of the Plaintiff.

5.6 It is trite that to constitute a valid contract there has to be the fundamentals of contract formation of offer and acceptance, an intention to create a legal relationship and consideration flowing from promise to promisor.

5.7 The learned authors of **Halsbury's laws of England Fourth edition Volume 9 para 226** write that:

“ Agreement is usually reached by the process of offer and acceptance and where this is so , the law requires that there be an offer on ascertainable terms which receives an unqualified acceptance from the person to whom it is made. In the 19th Century, the popular theory was that there could be no contract without a meeting of the minds of parties, ‘a consensus ad idem’ This is still the general rule so that where the intended acceptance is not in accordance with the terms of the offer, the court may find that there is no binding contract even though both parties in the purported contract contend that there is a binding contract”

5.8 At paragraph 261 the authors go on to state that:

“To constitute a binding contract there must be a concluded bargain and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. This requirement may be expressed by way of a general rule that for the parties to be bound they must have finished reaching an agreement so that it is possible to infer an intention on the part of both of them to be bound immediately.”

5.9 The authors thus conclude that as per decision in **Hussey vs Horne Payne**,¹⁴ to decide whether or not an agreement is

complete it may be necessary to look beyond a simple offer and acceptance to the whole negotiations between the parties.

5.10 The above passages become material in the present case in settling how a court may then determine if there is defined on the facts before it, a meeting of the minds and a clear and unqualified acceptance of a certain offer to constitute an agreement. With that said, what are the facts before me and conclusions I draw?

5.11 I find as defined in the evidence 2 parties assisted by an agent in PW1 who went into negotiations for a lease of Plot No 34771 off Alick Nkata road Mass Media Lusaka subject to the construction works to be undertaken at a cost to be approved by the Defendant and borne by the Plaintiff. The lease agreement was tied to the successful completion of works of the property to be rented by the Plaintiff part of the cost of which was to be recovered from the rentals that would be charged.

5.12 Put differently, this was an agreement with a condition precedent. The Defendant offered to lease out the property but its commencement and validity was dependant on the

renovation and construction of the buildings to be leased based on a bill of quantities that was to be approved by the Defendant as landlord and funded by the Plaintiff.

5.13 The question is, were all the fundamental terms defined in such circumstances? I would think not. The cost for the works to be done was not settled and was subject to the approval of the Defendant. Without his approval, the Plaintiff could not begin works and without the works being done the lease could not start running.

5.14 I am thus inclined to accept that what was at play in the case before me was in fact negotiations in which a general framework or path leading to the execution of a lease agreement was defined. The issue of the cost of construction was always the subject of negotiation and thus not a settled issue.

5.15 The learned author of **Trietel the Law of Contract Seventh edition London Steven & Sons 1997 at page 47** writes that:

“In spite of dicta to the contrary, it has been held that a mere agreement to negotiate is not a contract because it is too uncertain to have any binding force, it therefore does not impose any obligations to negotiate, or to use best endeavours to reach

agreement or to accept proposals that 'with hindsight appear reasonable'. The position is different once the parties reached agreement on all essential points and so established a contract. The court may then imply a term that they are to negotiate in good faith so as to settle outstanding details which are to be incorporated in the formal document setting out the terms of the contract between them"

5.16 I find apt the case cited by the Plaintiff of Rosser V Miller (supra) in which it was held that:

"Though the parties have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remains to be settled afterwards, there is no contract. The parties are still only in negotiations".

5.17 Ewan McKendrick in his work titled "**Contract Law Text, Cases and Materials**" Oxford University Press New York 2003, observes that the House of Lords were quite unwilling to find the existence of a contract on inclusive terms in what for a while has been considered a leading English authority on the subject in **May and Butcher Ltd vs the King**.¹⁵ Unagreed in the present case, was the indispensable issue of the cost of the construction works and also the alteration of the option to renew clause of the lease agreement that was to be signed by both parties.

5.18 Assuming I were to accept the Defendant's evidence and submission that it was actually the Plaintiff's agent in PW1 that prepared the lease that the Plaintiff now takes issue with, it still remains apparent that the Defendant though having initially disputed have done the alterations to the draft admitted doing so during the pain of cross examination.

5.19 If the Plaintiff is taken to be the party that made the offer then the Defendant's alteration would amount to a counter offer. The implications of an acceptance by alteration of original terms of an offer to buy a certain quantity of wheat was the subject of consideration in the case of Galunia farms Ltd vs National Milling Company (supra). The court held that: ***"If the acceptance varies the terms of the offer it is a counter offer and not an acceptance of the original offer"***.

5.20 I find this would be true in the Defendant's case. The ultimate outcome would still be that there was no agreement reached in such circumstances.

5.21 I find as a fact that the Defendant who was the promisor in this equation, did unilaterally alter some clauses of what was negotiated on pages 4 and 8 of the Plaintiff's bundle of documents. I also accept as a fact that he refused to

sanction the quotations provided to him not out of his supposed concern for the quality of the material sourced than it was the cost of the material.

5.22 The Defendant also advanced an argument that the Plaintiff by conduct executed the agreement by firstly having PW1 effect the changes to the agreement and then proceeded to pay the Defendant the rentals as set out in the lease agreement. I have already determined that the changes were engineered by the Defendant. Those changes clearly tilted in favour of the Defendant and the Plaintiff stood to gain no benefit by championing the alterations.

5.23 I am inclined to accept the Plaintiff's position regarding the circumstances surrounding the payment of the money. Having observed the demeanour of the witnesses, I found his account more credible than the Defendant's version of the sequence of events. The Defendant during the course of negotiations requested the Plaintiff to make an advance payment for the rental and security deposit. He agreed to do so believing this to be an act of goodwill and money was to be deducted once the lease started running.

5.24 I do not accept the notion that the lease started running before any work was done at the premises. The photographs of the premises exhibited in the Plaintiff's bundle of documents clearly show the state of the premises at the time. It was never the intention of the parties for the lease to start running before the works were done. I therefore dismiss the argument that by his conduct the Plaintiff executed the contract and that he is therefore as such estopped from denying the existence of a contract.

5.25 The argument that the Plaintiff breached the agreement by his failure to provide a month's notice of termination as per clause 25 finds no persuasion as I conclude there was no agreement in the first place. It therefore follows that the the Defendant had no legal justification to hold on to the two month's rentals now being claimed in the present case.

5.26 The court was invited to delve into the specifics of the quotation provided and its perceived shortfalls. In light of my holding that this was all a part of negotiations with un finalised clear terms, no value can be attained from such exploration.

5.27 The position I therefore take is that there was no concluded enforceable agreement arrived at. It invariably follows that there can be no discussion of the second question I had proposed being, what terms were arrived at; and which of the parties breached the agreement as this is dependant on the existence of “an agreement” in the first place which as I have held, does not subsist in this case.

5.28 In light of the position I have taken, the only question would be whether the Plaintiff is entitled to damages to the extent prayed for. The Plaintiff referred me to the case of Elsheikeh Elsaeed and Misr Enterprises Limited vs Mwangala Beatrice Kamuwanga (supra) wherein the Supreme Court stated inter alia that: -

“We can confirm that the Plaintiff was entitled to claim the refund of the money paid plus interest as an alternative to specific performance... We repeat: The claims are in the alternative; it is either the facts specific performance for the sale of forty acres; or she gets a refund of her money plus interest, not both. Quite apart from the refund, we will also confirm the Judgment awarding damages for breach of contract”

5.29 As there was no concluded contract in the present case, specific performance cannot be a consideration and was in

any event not even prayed for. I find as a fact that the Defendant has since paid the Plaintiff a total of USD11,940.00 through bank deposits and a payment into court. I find that the Plaintiff is entitled to the balance of the refund unpaid being USD 8,040.00 plus interest on the dollar as guided in the case of **Attorney General vs Peter Sinkamba**¹⁶. I hold that the interest awarded should sufficiently atone for any claimed damage for loss of use of funds. I also find that the inconvenience claimed is tied to the damages associated with a contractual breach. There can be no damages for breach of contract in the present circumstances.

5.30 Granted the position I have taken in this matter, it follows that the Defendant's counterclaim cannot succeed as it was premised on a claimed breach of contract.

6. Conclusion

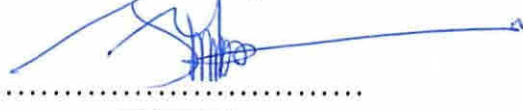
6.1 For the avoidance of doubt I hereby make the following orders:

1. I enter judgment in favour of the Plaintiff for the payment of USD8060.00 being the balance unpaid on the refund

of USD 20,000.00 advanced to the Defendant for rentals and security deposit to paid within 30 days of this Judgment.

2. The Judgment sum shall attract interest at 6% per annum from date of writ to date of final settlement.
3. The Defendant's counterclaim wholesomely fails and is dismissed.
4. Costs for this action are for the Plaintiff to be taxed in default of agreement.

Dated at Lusaka this.....²⁰ day of.....^{April}.....2025



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JUDGE