

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

2021/HP/0887

BETWEEN:

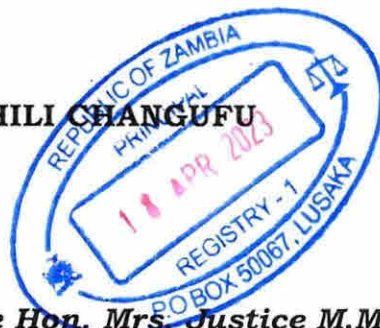
CHIDONGO W. M'SICHILI CHANGUFU

PLAINTIFF

AND

JULIA MALEMBEKA

DEFENDANT



**Before the Hon. Mrs. Justice M.M. Bah- Matandala,
On the 18th day of April, 2023.**

For the Plaintiff: Ms. C. K. Puta - Messrs. Robson Malupenga & Company

For the Defendant: Mr. F. Malambo – Messrs Shepande &. Company

JUDGMENT

List of Authorities referred to:

1. Chitty on Contracts General principles, Vol.1, 20th edition

Legislation Referred to:

1. The Misrepresentation Act Chapter 69 of the Laws of Zambia

Case Law

1. *Derry v Peek* (1889) 14 APP CAS 337
2. *Mpika District Council v Jameson Musongo T/A Durban Bar and Restaurant and Attorney General Appeal No. 10 of 2014 SCZ/123/2014*
3. *Colgate Palmolive (Z) Inc v Abel Shemu Chika and 110 Others Appeal No. 181 of 2005*
4. *Printing and Numerical Registering Company v Sampson* (1875) CA 19 EQ 462

5. *Development Bank of Zambia V Mangolo Farms Limited (1995) S.J. (S.C.)*
6. *Galaunia Farms Limited v National Milling (2004) ZR1*

1.0 **INRODUCTION**

1.1 By an Amended Writ of Summons dated 17th January, 2022 the Plaintiff claimed against the defendant the following:

- 1) *Payment of the sum of ZMW162,900 for land purchase price and Survey diagrams*
- 2) *Payment of the sum of ZMW66,239.77 renovations done in the house*
- 3) *Payment of the sum of ZMW 16,000.00 for Sewing Machines*
- 4) *Damages*
- 5) *Interest*
- 6) *Costs*
- 7) *Any other reliefs the Court may deem fit*

2.0 **STATEMENT OF CLAIM**

2.1 In the accompanying Statement of Claim it was averred by the Plaintiff that in the year 2014 he bought land from the

Defendant measuring approximately 150 square meters.

That the land which the Plaintiff bought was near the Defendants house where the Plaintiff was renting.

2.2 The Defendant purported to own the said land which the Plaintiff purchased for ZMW 70,000.00. The sum which is equivalent to ZMW 146,300 as per Central Statistics Office as of 2021 report.

2.3 It was further averred that the Defendant took two Sewing Machines worth ZMW16,000 from the Plaintiff with an undertaking that she will pay for them, which she has failed.

2.4 It was stated that the Defendant also requested for ZMW16, 000 for Survey Diagrams which the Plaintiff did pay.

2.5 Further that the Plaintiff had come to know that the land which was sold to her by the Defendant was in fact held under a common leasehold and therefore the Defendant could not legally and individually transfer title.

- 2.6 Further that the Plaintiff made renovations to the Defendants house which amounted to ZMW 66,239.77 which was agreed by the parties.
- 2.7 Additionally, it was discovered that the Plaintiff had mortgaged the house and it was also agreed that the Plaintiff pays the mortgage payment. The amounts were agreed to be deducted as rentals on the Plaintiff's part.
- 2.8 He averred that for over five years the Plaintiff has demanded for refund from the Defendant but to no avail and also that the Plaintiff has requested the Defendant to deduct from what she owes the Plaintiff for rental arrears but to no avail.
- 2.9 The Plaintiff was later served with an eviction notice after which she eventually vacated the house.

3.0 Defence

- 3.1 In the Amended Defence, the Defendant averred that the Plaintiff attempted to induce the Defendant to sale her the property she was at the time occupying on an understanding that she will build her another house in Kabanana but the Defendant refused.

- 3.2 She also averred that the Plaintiff was still occupying the Defendant's house illegally following the termination of the Tenancy Agreement.
- 3.3 The Defendant denied having collected two sewing machines from the Plaintiff. The Defendant denied the claim by the Plaintiff that she sold her the property in question.
- 3.4 It was her assertion that the transaction never materialized on the basis that the chairperson in charge of the property which is under a Common Leasehold Scheme Plan promptly guided that the portion in question could not be sold as desired due to the existing laws governing the said Leasehold Scheme Plan.
- 3.5 The Defendant further denied having received ZMW 16,000.00 from the Plaintiff for the alleged Survey Diagrams.
- 3.6 The Defendant also denied owing the Plaintiff the sum of ZMW 66,239.77.00 for renovations and that it's the Defendant who spent so much money renovating the house upon the departure of the Plaintiff from the house.

3.7 She further averred that the Plaintiff and the Defendant agreed that a portion of the money meant for rentals be channeled to the liquidation of the Loan Facility. The other portion was to be paid to the Defendant by the Plaintiff but the Plaintiff completely stopped paying to the Defendant despite not remitting full rent due towards payment of the Loan facility.

3.8 The Defendant further denied owing the Plaintiff but that it was the Plaintiff who owes her ZMW 109,570.00 as at August, 2021 being unpaid arrears from 2nd January, 2018.

3.9 Further that the Plaintiff took 21 months to repay a loan payable to a lending institution when her monthly rental payable to the Defendant was ZMW4,000.00

3.10 It was further stated that the Defendant is not entitled to any relief sought

4.0 Reply

4.1 In the Reply to Defence, the Plaintiff reiterated that the Defendant got sewing machines which were brand new

- 4.2 As regards the Defendants denial to having sold the property to the Plaintiff, it was submitted that the Defendant sold the property to the Plaintiff in 2014 and only gave her an offer letter in 2018 which was signed by her son after the final payment.
- 4.3 The Plaintiff further reiterated that the renovations were done as the house was in a deplorable state. It was further averred that the electrical wiring in the house was outdated and did cause damage to the Plaintiffs appliances which included the TV and Refrigerator.
- 4.4 It was further averred that the Plaintiff used to send money for the repayment of the loan to the Defendant's mobile money accounts and the said amounts accumulated to the sum of ZMW54,570.00
- 4.5 It was further averred that contrary to the Defendant's assertion, the Plaintiff started servicing the Defendant's loan in May 2017 and the money that was paid to the lending institution accumulated monthly as it was calculated on an interest basis and this made the Plaintiff pay more than what was required.

5.0 TRIAL

5.1 PW1

5.1.1 At the trial hearing of the matter, PW1 was **Chidongo Wise M'Sichili Changufu** relied on the filed witness statement admitted into evidence.

5.2 Cross examination

5.2.1 In cross examination she confirmed that she had a land transaction with the Defendant but that she did not know the size of the plot.

5.2.2 Further, she stated that although she did not know the size of the land, the Defendant went with a person from Council who surveyed the land and did the diagrams.

5.2.3 In further cross examination, the Plaintiff was referred to an offer letter at page 2 of the supplementary bundle of documents, which she confirmed to have been signed by her son who had the power of attorney.

5.2.4 She further confirmed that she bought the plot with an unknown size at K70, 000.00 which money she paid through bank transfer, mobile money and cash.

5.2.5 However, when asked about the proof of payment, she said he had none.

5.2.6 Further she said that the amount she paid for the survey diagrams was K1, 600. She stated that the Defendant took two brand new sewing machines at K16, 000 which she failed to pay.

5.2.7 As regards rentals she reiterated that she paid everything. She said that she made payments to EFC that came to a total of K54,570.

5.3 **Reexamination**

5.3.1 In Reexamination, she stated that the Defendant offered her the property and she was not approached by any other person.

5.3.2 Further that the Defendant offered her land from the common premises; outside the corner plot where there is a semi-detached house and told her that she would bring a surveyor to confirm the size of the plot.

5.3.3As regards the amount for the surveyor she said it was K1, 600 and K16, 000 appearing in the Statement of Claim was an error.

5.3.4Further that there was an agreement with the Defendant for her to renovate the house as it was dilapidated.

5.3.5In further reexamination she said that she was paying rentals to the Defendant but in 2017 she was told to start paying to EFC due to the Loan the Defendant got from them and had defaulted.

5.3.6She said that she was the one staying in the house as a tenant but she was not the one who got the loan.

5.4 **PW2**

5.4.1PW2 was **Collins Knight Chilando** who also relied on the filed witness statement admitted in evidence

5.5 **Cross examination**

5.5.1In cross examination, PW2 confirmed that as a husband to the Plaintiff, sometime in 2016 he went with the Plaintiff to the Defendants' and the Plaintiff therein paid the balance of K17, 000 on the purchase

of the property. He also said that the money they took was different from the rent money.

5.5.2 As regards rentals, he confirmed that they used to pay to the Defendant via airtel money and some money was paid to EFC where they were given receipts.

5.5.3 He further said that they only came to find out that the property did not belong to the Plaintiff upon making a follow up on the documents.

5.6 **Reexamination**

5.6.1 In Reexamination, he said that he was involved in the transaction of the sale of property when people from the Council went to measure the land and also that he witnessed the payment stated above.

5.6.2 In further re-examination he stated that there were no receipts because of the relationship that subsists between the parties was as mother and daughter.

5.6.3 He also said that when the Defendant got the Sewing Machines, he, PW2 was there.

5.6.4 As regards the claim for damages for mental anguish, he stated that he would see the Plaintiff crying as she did not know what to tell her children because she sold a property on the copperbelt to purchase the property herein.

5.7 **PW3**

5.7.1 PW3 was **Taonga Abraham Changufu** who also relied on the filed witness statement admitted in evidence.

5.8 **Cross examination**

5.8.1 In cross examination, she said that she was present when the Defendant asked for money for the survey diagrams and that K1, 600 was given to her the same day.

5.8.2 She also stated that the Defendant made an undertaking to pay for the Sewing Machines when she collected them.

5.8.3 In further cross examination she stated that she had signed some documents on behalf of the Plaintiff when the Plaintiff was on the copperbelt.

5.9 **Reexamination**

5.9.1 There was no re- examination for this witness.

5.10 **DW1**

5.10.1 DW1 was **Mrs. Julia Malembeka** who also relied on the witness statement admitted in evidence

5.11 **Cross examination**

5.11.1 In cross examination, she said that there was a tenancy agreement between her and the Plaintiff but the Plaintiff did not pay any security deposit.

5.11.2 She acknowledged that there was a contract between herself and Entrepreneurs Financial Centre (EFC) and that the Plaintiff was neither aware nor part of it.

5.11.3 In further cross examination she stated that she used rent as collateral for the loan from EFC. She acknowledged that document on page two of the Defendant's bundle of documents was her title under Common Leasehold Scheme.

5.11.4 She stated that she was aware that under common leasehold, she was only entitled to the flat and that she was aware that any other land was owned in common with other tenants.

5.12 **Reexamination**

5.12.1 In Reexamination she stated that she did not sale the land to the Plaintiff as the transaction was stopped.

5.12.2 She agreed that the Plaintiff paid off what was owed to EFC and was supposed to pay the Defendant

5.12.3 rentals owed from October, 2020.

5.13 **DW2**

5.13.1 DW2 Kama Malembeka who also relied on the witness statement admitted in evidence.

5.14 **Cross examination**

5.14.1 In cross examination, he said that he co-owned the property in question with the Defendant as joint tenants with equal shares.

5.14.2 Further that he was informed by the Defendant and he approved that the Defendant rents the property.

5.14.3 He also acknowledged that he signed on the tenancy agreement between the Defendant and the Plaintiff as a witness. He however, stated that the Defendant did not inform him that the Plaintiff wanted to buy the property.

5.14.4 When referred to page 42 of the Defendants Bundle of documents, he confirmed that the signature on that document was his and that it was the Plaintiff who wanted to extend the house. However, he acknowledged that there was no agreement to extend the house by the Plaintiff.

5.14.5 He also acknowledged that he was aware of the application under page 43 of the Defendants Bundle of Documents, to erect a building.

5.14.6 He stated that at no point did he learn that the Plaintiff wanted to buy the land. He however

acknowledged that he was informed by the Defendant that she was obtaining a loan from EFC.

5.14.7 As regards termination of tenancy he said that he was aware of the termination of Tenancy.

5.14.8 In further cross examination, he said that he was aware that the loan was paid and was not aware of any default on the rentals.

5.15 **Reexamination**

5.15.1 In Re-examination, he stated that he was aware that the Plaintiff wanted to extend the property.

5.16 **DW3**

5.16.1 DW3 **Micheal Ngulube** who also relied on the witness statement admitted in evidence

5.17 Cross examination

5.18.1 In cross examination, he said that he was the owner of Flat six of the Common Block of Flats. He said that he took care of sewerage issues, garbage collection and anything that may arise at the Common Leasehold Property.

5.18.2 He stated that in 2018 he was approached by the Plaintiff who asked him to sign a document agreeing that the Defendant sales the common leasehold to her.

5.18.3 He stated that upon the Plaintiff seeking that consent, he consulted the chairperson and only wrote the response letter on behalf of the chairperson.

5.18.4 In further cross-examination, he said that he was not aware that there was an application that the land could be sold and that the Plaintiff had made a payment to the Defendant. He said that he was aware that the owners of the flats were all required to sign on the consent.

5.19 Reexamination

5.19.1 In Re-examination, he said that he was vested with the power to sign on behalf of all the other tenants.

6.0 Final Submissions for the Plaintiff

6.1 In the final submissions for the Plaintiff, it was submitted that the Defendant did make a misrepresentation by the offer letter signed by the Defendant, when she offered to sell the land next to her house to the Plaintiff at K70,000.00.

- 6.2 And further asked the Plaintiff to pay for the survey diagrams amounting to the sum of K1,600 while knowing the fact that the said land was held under a common lease title and therefore the Defendant could not legally and individually transfer title without the consent of the other lease holders.
- 6.3 Reference was made to the case of ***Derry v Peek (1889)*** ***14 APP CAS 337⁽¹⁾*** where a misrepresentation was defined as;
- “A false statement which is made knowingly or without belief in its truth or recklessly or careless whether it be true or false”*
- 6.4 Further reference was made to the ***Section 3 (1) of the Misrepresentation Act Chapter 69 of the Laws of Zambia.***
- 6.5 As regards the question whether the Plaintiff is entitled to a refund of the sum of ZMW 66,239.77 for renovations done to the house, it was submitted that the Plaintiff made renovations to the Defendant’s house to the tune of the

above stated amount based on the agreement by both parties because the house was in a dilapidated state.

- 6.6 Further that it was agreed that the said amount would be deducted from the rentals. Reference was made to the case of ***Mpika District Council v Jameson Musongo T/A Durban Bar and Restaurant and Attorney General Appeal No. 10 of 2014 SCZ/123/2014⁽²⁾***.
- 6.7 It was further submitted that the Plaintiff is entitled to a refund of K16,000.00 for the Sewing Machines as the Defendant herein has made admissions both in the pleadings and in cross examinations, that she is indebted to the Plaintiff for the Sewing Machines.
- 6.8 Counsel referred to a number of authorities on the guidelines governing the entering of Judgment on Admission which I shall not recite here for obvious reasons.
- 6.9 Needless, to state that while this court is taking note of the submission that the Defendant made admissions to that effect, I am not here to deal with a particular application to enter Judgment on admission.

7.0 ***Defendant's Submissions***

- 7.1 The gist of the Defendant's submissions in Opposition was that the Plaintiffs case must be dismissed with costs for lack of evidence.
- 7.2 It was submitted that the alleged Contract of Sale was never signed by both parties showing that the parties never reached an agreement.
- 7.3 Further that the Plaintiff has not proved that she renovated the house.
- 7.4 It was submitted that the amount of K162,900 appearing in the pleadings has no basis upon which it can be considered as the claim is different from the amount alleged to have been paid and there was no evidence that the alleged agreement was ever reached and perfected by the parties.
- 7.5 It was submitted that the burden of proof lies upon the party who substantially asserts the affirmative of the issue.

8.0 ***The Law and Analysis***

- 8.1 I have critically considered the evidence in this matter and the eloquent submissions of the parties before me.
- 8.2 It is common cause that the Plaintiff and the Defendant entered into a Tenancy Agreement on 1st January, 2014 with a rental monthly payment of K3, 500.00.
- 8.3 There was a second agreement which was entered into on 1st January, 2016 adjusting the rental monthly payment to K4, 000.00.
- 8.4 It is also not in dispute that the Defendant pledged rentals from the demised premises as part of collateral for her loan from Entrepreneur Financial Centre as evidenced by a letter dated 17th August, 2018 at page 9 of the Plaintiff's Bundle of Documents.
- 8.5 It is further not in dispute that Plaintiff was later served with an eviction notice.
- 8.6 It is also not in dispute that the Plaintiff was offered Plot No. F377A/G/51/CL/1(extension) Sable Road Kabulonga Lusaka at the price of K70, 000.00 as evidenced by a letter

of offer dated 19th December, 2016 signed by the Defendant and DW2. The Plaintiff accepted the offer as evidenced by a letter dated 25th December, 2016.

8.7 The Plaintiff claims that she bought the aforementioned piece of land near the Defendants house where the Plaintiff was renting and that she paid K70, 000.00 for the same plus K1600 for survey diagrams.

8.8 On the other hand, the Defendant alleges in her Defence that she never sold the alleged property to the Plaintiff but that the Plaintiff attempted to induce the Defendant to sale her the house she was occupying on a claim that she would build her another house in Kabanana.

8.9 The Plaintiff further claims money for the said purchase of land and survey diagrams which claims have both been denied by the Defendant.

8.10 The Plaintiff also claims for payment of money spent on the renovations of the house and damages; both claims have also been denied by the Defendant.

8.11 The last claim is for payment of sewing machines allegedly collected by the Defendant.

8.12 Having established that there was a tenancy agreement that subsisted between the parties herein and further that there was offer and acceptance for the sale of Plot No. F377A/G/51/CL/1(extension) Sable Road Kabulonga Lusaka at the price of K70, 000.0 in the main claim herein, my questions for determination are whether:

- 1) The Plaintiff is entitled to Payment of the sum of ZMW162,900 for land purchase price and Survey Diagrams,
- 2) Payment of the sum of ZMW66,239.77 renovations done in the house,
- 3) Payment of the sum of ZMW 16,000.00 for Sewing Machines, Damages,
- 4) Interest and Costs.

8.13 First and foremost, it is trite that when dealing with cases of breach of contract, the starting point is the contract itself. The authors of **Chitty on Contracts General principles, Vol.1, 20th edition** had this to say on the contractual principles:

“the cardinal presumption is that the parties have intended what they in fact said, so that their words must be

construed as they stand. That is to say, the meaning of the document or part of it is to be sought in the document itself: one must consider the meaning of the words used, not what one may guess to be the intention of the parties.”

8.14 In the case of **Colgate Palmolive (Z) Inc v Abel Shemu Chika and 110 Others Appeal No. 181 of 2005**³ the Supreme Court adopted a passage from **Printing and Numerical Registering Company v Sampson (1875) CA 19 EQ 462**⁴ Where it was held that:

“If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracts and that contracts when entered into freely and voluntarily, shall be sacred and shall be enforced by the Courts of justice...”

8.15 I shall now address the claims in the main claim herein seriatim.

Payment of the sum of ZMW162, 900 for land purchase price and Survey Diagrams

8.16 I have perused the evidence on record and as already noted above, the Plaintiff was offered Plot No. F377A/G/51/CL/1(extension) Sable Road Kabulonga Lusaka at the price of K70, 000.00 as evidenced by a letter of offer dated 19th December, 2016 signed by the Defendant and DW2.

8.17 The Plaintiff accepted the offer as evidenced by a letter dated 25th December, 2016. However, there is no evidence to prove that the Defendant was paid K70, 000.00 towards the purchase of the said land as per the letters above.

8.18 The Plaintiff attributes the lack of evidence of payment of the monies to the Defendant, to the relationship that subsisted between the parties of like mother and daughter.

8.19 However, through the evidence of PW2, the Plaintiff has demonstrated that an amount of K17, 000.00 was paid as part of the purchase price of the land in question.

8.20 Although PW2 says that the money was a last installment for the payment of the land; there is no evidence to demonstrate that previous payments were made to the Defendant.

8.21 The Plaintiff has not demonstrated that there were other amounts paid to the Defendant towards the purchase of the said land.

8.22 I am therefore inclined to conclude that the Plaintiff is only entitled to a refund of K17, 000.00 as money paid towards the purchase of the land.

8.23 As regards the question whether there was a sale of the said land, there is evidence on record to show that the common leasehold holders declined to give consent and therefore the Defendant could not conclude the transaction.

8.24 However, I must mention here that it is clear from the pleadings and the Defendant's evidence during cross examination; that she was aware from the onset that the property was held under common lease and that she could not sale the said property without the consent of the other common lease holders yet still she went ahead and offered the said land to the Plaintiff without disclosing that fact and further applied for building permission.

8.25 The Plaintiff has further demonstrated through the testimony of PW3 and circumstances on record that K1600 was given to the Defendant for survey diagrams and that an amount of K16,000 appearing in the pleadings for this claim is an error.

8.26 The Defendant has argued that an amendment cannot be made at this stage for the said amount, however, I am of the considered view that there is evidence that only K1600 was given to the Defendant for survey diagrams and therefore the Plaintiff is entitled to a refund of K1600 and not K16,000.00

Payment of the sum of ZMW 16,000.00 for Sewing Machines

8.27 As regards the payment of the sewing machines, a perusal of the evidence on record shows that it is not in dispute that the Defendant collected the said sewing machines and that she did not pay for them.

8.28 The Defendant has admitted in her Defence and during cross examination that she collected the sewing machines

and that she owes the Plaintiff to that effect. This claim therefore succeeds.

Payment of the sum of ZMW66, 239.77 renovations done in the house,

8.29 The Plaintiff's other claim is for payment of an amount of K66,239.77 as the money she used to make renovations to the house. The Plaintiff has not produced any evidence to confirm that indeed the renovations were made arguing that these payments were made on trust without any proof.

8.30 I opine that, even though she could further not produce proof of any agreement with the Defendant for the renovations to take place, at the very least she could have produced proof of the renovations made that is materials bought and perhaps even evidence of the works done. This claim therefore also fails for lack of evidence.

9.0 Damages

9.1 As regards the claim for Damages for the inconvenience suffered as a result of the Defendants conduct. A perusal of the evidence on record indicates that in the pleadings

and witness statement for the Plaintiff, the Plaintiff attributes the suffering of loss and damages to the conduct of the Defendant who did not pay her all the amounts in question and eventually evicted her from the house.

9.2 Further on the claim for damages, it has been argued that the Defendant misrepresented herself that she had land for sale when she knew that it was held under a Common Leasehold Scheme.

9.3 Furthermore, **Section 3 (1) of the Misrepresentation Act Chapter 69 of the Laws of Zambia** provides that:

“1) Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto, and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable grounds to believe and did believe up to the time the contract was made that the facts as represented were true.”

- 9.4 To determine whether there was a misrepresentation made by the Defendant or not, I have perused the evidence of the parties on record and further had sight of the offer and acceptance letter as exhibited in the Plaintiffs Supplementary Bundle of Documents.
- 9.5 The said letter of sale dated 19th December, 2016 refers to Plot No. F377A/G/51/CL/1 (extension) Sable Road Kabulonga Lusaka. Also, during cross examination, the Defendant agreed that she was aware that the land in question was held under a Common Leasehold Scheme and that she could not do anything on it without the consent of all the common lease title holders.
- 9.6 The offer letter was written to the Plaintiff and signed by the Defendant while the Defendant had knowledge that the land was not hers.
- 9.7 I therefore find that there was a misrepresentation, she also further went on to request for money for survey diagrams while knowing that she did not have that right to sale without the consent of others.

9.8 Although the Plaintiff has only proved making a payment of K17000 towards the purchase of the land, it is my considered view that she has demonstrated that she was inconvenienced and has suffered damage as the result of the misrepresentation of the Defendant.

9.9 I shall therefore award her nominal damages of K6,000.00

9.10 In sum, the Plaintiff succeeds only for the refund of K17,000 as money paid towards the purchase of the land, K1600 as money purportedly paid for survey diagrams, K16,000 for the sewing machine and K6000 damages suffered by the Plaintiff as a result of the Defendants conduct; a total of K46,000.

9.11 As regards the claim for Payment of the sum of ZMW66, 239.77 renovations done in the house, the Plaintiff has not demonstrated that such renovations were carried out and as a result the claim fails for lack of merit.

9.12 I further order that the Applicant be paid the monies due with interest at Bank of Zambia short-term deposit rate, from date of filing the Writ till judgment and thereafter at lending rate, till full payment.

9.13 Each party to bear their own costs.

10.0 Parties are informed of the right to appeal to the Court of Appeal within thirty (30) days.

11.0 Counterclaim

11.1 In the Counterclaim, the Defendant claims for

1. *An Order for immediate payment of ZMW109,570.00 being unpaid rental arrears owed to the Defendant by the Plaintiff*
2. *An Order for payment of ZMW14,215.00 being the expense on renovations done on the house by the Defendant for the damages occasioned by the Plaintiff*
3. *Damages for breach of written contract*
4. *Damages for loss of use of money*
5. *Damages for inconvenience and mental anguish*
6. *Costs*
7. *Interest on the amount due*
8. Any other relief this honorable Court may deem fit

11.2 The gist of the Defendant's claim in the counterclaim is that the Plaintiff owes the Defendant sum of ZMW 109,570.00 for non-payment of rentals from January, 2018 to August 2021.

11.3 It was further averred that the Plaintiff took about 21 months from January 2018 to September, 2020 to repay a loan of ZMW34, 570.00 when her monthly rental payable was ZMW4000.00.

11.4 It was further averred that upon departure of the Plaintiff the Defendant spent money renovating the property in question.

12.0 Defence

12.1 In the Defence to counterclaim, the Plaintiff argued that she used to pay the loan repayment as agreed between the parties and the Plaintiff used to pay directly into the Defendant's mobile money account and only started to pay directly to the lending institution after receiving an eviction notice from them.

12.2 The Plaintiff denied the claim by the Defendant for a payment relating to renovations. It was argued that it was the Plaintiff who made renovations to the house as it was in a bad state.

12.3 The Plaintiff further denied the claim by the Defendant that she was entitled to Damages for breach of contract, Damages for inconvenience and mental anguish and

damages for loss of money as stipulated in the Counterclaim.

12.4 Further it was averred that it was the Plaintiff who suffered mental anguish and inconvenience after discovering that the land she was sold by the Defendant was in fact held on a common lease title and has not been refunded for the same.

14.0 Reply to Defence

14.1 In Reply to the Defence to counterclaim, it was averred that the total amount which was owed to the lending institution was ZMW 27, 096.05 outstanding and another ZMW 2, 631 .46 on overdue charges which would not have taken the Plaintiff two years to service the loan when the rent as pegged at ZMW4,000.00 per month.

14.2 She denied all the other assertions in the Defence to counterclaim and prayed that the Court grants the reliefs sought in the counterclaim.

15.0 The Law and Analysis

15.1 In the counterclaim, my role is to establish whether the Plaintiff breached the contract and also whether the Defendant is entitled to the damages stipulated.

- 15.2 The Defendant claims for payment of ZMW 109,570.00 being unpaid rental arrears from January 2018 to August 2021.
- 15.3 However, the Defendant has also stated in the Defence that it took the Plaintiff from January, 2018 to September 2020 to clear an amount of ZMW34,570 when her monthly rental payable to the Defendant was K4,000.00 per month.
- 15.4 What is surprising is that part of the period the Defendant is claiming for rental arrears from the Plaintiff is the period the Defendant has acknowledged that the Plaintiff was servicing the Defendants loan.
- 15.5 On the other hand, the Plaintiff argues that it took her long to clear the loan because there was interest that she serviced on it.
- 15.6 Moreover, the Defendant asserts in her pleadings at paragraph 6 that the Plaintiff and the Defendant agreed that a portion of the money meant for rentals to be channeled towards the liquidation of the loan while the other portion was to be paid to the Defendant by the Plaintiff.

15.7 As a result, it's very difficult for me to hold that the Plaintiff was remitting less to EFC when there was an agreement that the other portion would be paid directly to the Defendant, and all the amounts paid via mobile account have no proof. The Defendant needed to bring something more to convince me that indeed the Plaintiff did not remit to her mobile account during that period.

15.8 As regards the rental payment for the period after clearing the loan, I have perused the eviction notice dated 17th August 2018. The Plaintiff states that she started paying rentals direct to EFC after this eviction notice.

15.9 I have also perused the Account Statement from EFC from January 2018 to August 2021, which shows remittances of different amounts not standard to EFC. I have also looked at the receipts remitted from EFC.

15.10 The Defendant according to the demand letter she wrote to the Plaintiff, she is claiming rental arrears from November, 2020. A perusal of the pleadings will show that it is not disputed that the Plaintiff vacated the house in December, 2021

15.11 It is therefore clear from the evidence on record that the only period the Defendant did not pay for is the period for November, December, 2020 and from January to December 2021. I say so because when the demand letter was written to the lawyers for the Plaintiff, claiming for rent from November 2020, and now that the loan from EFC was finalized, the Plaintiff responded that she did not owe the Defendant but instead the Defendant owed her as per her claims in the main matter. There is evidence that she continued occupying the house after that.

15.12 Moreover, although the Plaintiff argued that prior to taking payment to EFC and during the time he was paying to EFC, some of the rentals going to the Defendant was paid via the Defendant's mobile money account, the Plaintiff has neither asserted that she continued paying via mobile money from the period after servicing EFC or paid the Defendant cash for the rentals; but has only stated that after servicing the loan she was evicted. The record shows that she only vacated in December 2021.

15.13 In view of the foregoing, I am inclined to draw a conclusion that the Plaintiff stopped remitting rentals after serving the loan.

15.14 The Defendant has therefore demonstrated that she was not paid rentals from November 2020 to December, 2021 the time the Plaintiff vacated the premises.

15.15 Which amount when calculated at ZMW4000 per month according to the second tenancy agreement gives us a total of ZMW 58,000.00

15.16 The Defendant has not demonstrated that the amount owed in rentals amounts to K109,570.00

15.17 I am further guided by the holding in the case of ***Development Bank of Zambia V Mangolo Farms Limited (1995) S.J. (S.C.)***⁽⁵⁾ Where the Supreme Court stated that:

“We agree that the respondent should not be unjustly enriched, there was nothing to guide the court below in this respect, and this another case where the parties have not assisted the court by calling the necessary evidence. We

shall have to do the best we can do to avoid the unjust enrichment of the respondent.”

15.18 To this extent the claim succeeds

15.19 The other claim is that of payment of ZMW 14,215.00 as expenses on renovations done on the house by the Defendant for the damages occasioned by the Plaintiff.

15.20 The perusal of the evidence on record will show that the Defendant has not produced any evidence to support this claim.

15.21 The Defendant simply states she did renovations and nothing further. She has not demonstrated that such renovations were actually carried out. The Plaintiff has not provided material against which to establish the said claim.

15.22 In the case of **Galaunia Farms Limited v National Milling (2004) ZR1**⁽⁶⁾ the Supreme Court guided that;
A plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to Judgment.

15.23 In the Counterclaim it is the responsibility of the Defendant to prove his case. It is therefore immaterial that the Plaintiff has failed on its defence to the counterclaim

15.24 She has not stipulated the actual loss suffered it is undue enrichment. This claim therefore fails for lack of merit.

15.25 As regards Damages for breach of written contract, Damages for loss of use of money and damages for inconvenience and mental anguish, the evidence on record will show that the Defendant also owed the Plaintiff sums of money for the sewing machines which she also expected her to clear.

15.26 I therefore find that the Defendant also contributed to the inconvenience suffered. Therefore, for the afore stated reasons I shall only allow nominal damages for this claim the Defendant is awarded K6000 as damages for failure to pay rentals.

15.27 To this extend the claim succeeds.

15.28 I further order that the Defendant be paid the monies due with interest at Bank of Zambia short-term deposit

rate, from date of filing the Counterclaim till judgment and thereafter at lending rate, till full payment.

16.0 Each party to bear their own costs

17.0 Informed of the right to appeal to the Court of Appeal within thirty (30) days.

Dated at Lusaka, this 18th day of April, 2023.



M.M. BAH-MATANDALA
HIGH COURT JUDGE.