

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

2022/HPC/0410

BETWEEN:

MWICHE CHASAYA

AND

**PM REAL ESTATE AND PROPERTY
MANAGEMENT LIMITED**

DAYOW BEEF COMPANY LIMITED



PLAINTIFF

DEFENDANT

INTERESTED PARTY

Before the Honourable Mr Justice K. Chenda on 25th August 2023

For the Plaintiff : Ms M. Bwalya of Shepande & Company
For the Defendant : Mr S. Nyirongo of Paul Mulenga Advocates
For the Interested Party: : Mr M. Chitundu and Mr M. Khunga of Barnaby, Chitundu & Khunga Advocates

JUDGMENT

Primary legislation referred to:

1. The Statute of Frauds, 1677
2. The Lands and Deeds Registry Act, Cap. 185 of the Laws of Zambia
3. The Money-Lenders Act, Cap. 398 of the Laws of Zambia
4. The High Court Act, Cap. 27 of the Laws of Zambia

Rules of Court:

1. The High Court Rules, created under Cap. 27 of the Laws of Zambia

Case law:

1. *Richwell Siamunene v Sialubalo Gift* - Vol. 3 (2017) ZR 335 at 354
2. *Chazya Silwamba v Lamba Simpito* - Vol. 1 (2010) Z.R 475 at page 482
3. *Tresford Chali v Bwalya Emmanuel Kanyanta Ng'andu* - Appeal No. 84/2014 at p.J32-33
4. *Anti-Corruption Commission v Barnett Development Corporation Limited* - Vol 1 (2008) ZR 69
5. *GE Capital Bank Ltd v Rushton & Anr.* (2006) 3 All ER 856 at 858
6. *National Employers Mutual General Insurance Association Ltd v Jones* (1987) 3 All ER 385 at 394
7. *Rajan Patel v AG* (2002) ZR 59 at p.62
8. *Dina Management Ltd. v County Government of Mombasa & Ors.* - Petition No. 8(E010) of 2021 at p.38
9. *Friday Mwamba v Sylvester Nthenge & 2 Ors* - SCZ Judgment No. 5 of 2013 (Appeal No. 174/2010) at p. J19
10. *National Drug Co. Ltd. & ZPA v Mary Katongo* - SCZ Appeal 79/2001
11. *Neighbours City Estates Limited v Mark Mushili* - Appeal No. 47/2013 at p. J13-14
12. *Edman Banda v Charles Lungu* - Selected Judgment No. 22 of 2017 at p. J33, 37, 38 and 39
13. *Afrop Zambia Limited v Anthony Chate & Ors* - Appeal No. 160/2013 at p.J16

Authoritative texts:

1. *Halsbury's Laws of England* - 5th Edition (2012), Vol. 22, London: Lexis Nexis, at p.506, para. 517
2. *Phipson on Evidence* 17th Edition (2009) Sweet & Maxwell: London at p.152, para 6-07

3. John Hatchard with O'Brien Kaaba, (2022), *Principles of the Law of Evidence in Zambia*, Cape Town: Juta and Company (Pty) Ltd, p.106 at para. 1

1 INTRODUCTION AND BACKGROUND

1.1 This matter centres around a leasehold property known as F/441a/138, Lusaka (the “**property**”). The Plaintiff’s complaint is that he paid the Defendant the sum of K2,100,000 for the purchase of the property but that the Defendant has not acted on the conveyance. The Plaintiff accordingly sought specific performance and the following other reliefs in a writ of summons and statement of claim filed on 15th July 2022:

- (i) damages for inconvenience;
- (ii) interest;
- (iii) costs; and
- (iv) any other relief the Court will deem fit and just.

1.2 The Defendant’s position is that there was no conveyance but simply a secured lending of K700,000 by the Plaintiff to the Defendant with the property being pledged as collateral.

1.3 The Interested Party laid claim to ownership of the property and accused the Defendant of wrongfully re-registering it in the Defendant's own name. The Interested Party sought, in the main, cancellation of the Defendant's title to the property, removal of the Plaintiff's caveat (as purchaser) and a declaration of itself as owner.

1.4 All of these complaints and cross complaints were laid out in:

- (i) the Plaintiff's originating process filed on 15th July, 2022 comprising a writ of summons and statement of claim;
- (ii) the Defendant's defence of 4th August, 2022;
- (iii) the Plaintiff's reply of 9th August, 2022;
- (iv) the Interested Party's points of claim of 23rd December, 2022;
- (v) the Plaintiff's and Defendant's respective points of defence to the points of claim, both filed on 25th January, 2023; and
- (vi) the Interested Party's reply filed on 14th February, 2023 to points of defence.

1.5 After all the said pleadings were on record the matter progressed as set out below.

2 COMMON GROUND AND ISSUES FROM PLEADINGS

- 2.1 The Plaintiff pleaded that by contract of sale dated 8th December 2021 (the “**contract of sale**”) he agreed to purchase the property from the Defendant for K2,100,000. The Plaintiff averred that he caveated the property and paid the Defendant in full but that the Defendant has not fulfilled its post signing obligations for the conveyance.
- 2.2 The Defendant refuted the conveyance, the entry into the contract of sale and payment of K2,100,000. The Defendant instead cross-alleged that the Plaintiff was simply a lender and it was the borrower of K700,000 secured by the property. The Defendant ceded that the Plaintiff is entitled to payment of the K700,000 with interest.
- 2.3 The Interested Party averred that whilst it continued to hold a certificate of title to the property, an outsider called Stoken Phiri fraudulently acquired a parallel title and conveyed the property to the Defendant.
- 2.4 The Defendant responded that it genuinely acquired title to the property from Stoken Phiri. The Plaintiff for his part pleaded that it is a *bona fide* purchaser for value from the Defendant.

2.5 It is common ground that -

- (i) there was a contractual relationship between the Plaintiff and Defendant in pursuance of which the Defendant received some monies from the Plaintiff;
- (ii) the Defendant claims an interest in the property; and
- (iii) the Interested Party claims an interest in the property.

2.6 After joinder of the Interested Party, the initial trial dates were vacated and a reconvened scheduling conference was held on 7th February 2023. The characteristic Bar-Bench consultation yielded fruit in form of the following core issues agreed upon for determination as per Order for Directions No. 2:

- (i) what was the nature of the transaction between Plaintiff and Defendant (sale of land or secured lending);
- (ii) how much did the Plaintiff pay to Defendant in furtherance of the transaction in i) and why;
- (iii) whether the Defendant fraudulently obtained title to property;
- (iv) whether the Interested Party is entitled to any relief in relation to the property and/or against the Plaintiff and Defendant; and
- (v) whether the Plaintiff is entitled to any relief against the Defendant.

2.7 Following the conclusion of all preparatory steps, the matter was set down for trial.

3 SUMMARY OF EVIDENCE

3.1 Trial was held on 9th and 10th May 2023 with the Plaintiff and Interested Party each calling two witnesses while the Defendant called one witness.

3.2 **The Plaintiff, Mr. Mwiche Chasaya** testified as the first witness on his own behalf. **His testimony in Chief** was embodied in a witness statement filed on 21st September 2022.

3.3 He confirmed having been introduced to the Defendant by PW2 and that it resulted in the contract of sale (appearing at p.1-3 of his bundle).

3.4 He also stated that he paid the Defendant in full for the property in the sum of K2,100,000 as evidenced by an acknowledgement (at p.14 of his bundle).

3.5 The Plaintiff complained that the Defendant did not thereafter progress the conveyance as a result of which he enlisted PW2 to assist upon which a remark against the transactions was discovered at the Ministry of Lands.

3.6 **When cross-examined** by Mr. Nyirongo for the Defendant, the Plaintiff testified:

- (i) the contract of sale between him and the Defendant appears at p.1 of his bundle and is dated 8th December 2021 as per verbal agreement to date it with the date of payment of the purchase price;
- (ii) a caveat was registered on his behalf on 7th December 2021 by his agent (PW2);
- (iii) despite special condition 10 of the contract of sale only K700,000 was paid to the Defendant by transfer and the rest in cash;
- (iv) the K2,100,000 was paid on 8th December 2021 at Stanbic Bank Quoram Branch and though he was relying on a written acknowledgment to prove it, he agreed that a bank statement would have added more weight to prove the transaction;
- (v) the K700,000 was transferred to the Defendant from his company Brathweit Investments Limited, not from his personal account;
- (vi) he has not involved himself in money lending;
- (vii) there is a letter from the Defendant's lawyers to Spotlight Innovations Incorporated at p.2 of the Defendant's bundle speaking about a loan transaction and making reference to the property in issue herein; and

(viii) he denied that the transaction with the Defendant was actually a loan of K700,000 unpaid which increased through interest.

3.7 **The Plaintiff was also cross-examined** by Mr. Chitundu during which he testified:

- (i) he had bought property prior to the matter before Court and was familiar with the processes and procedures;
- (ii) he went to the property prior to purchase and found it developed with a structure, boundary wall and a caretaker but he did not interact with the caretaker;
- (iii) he conducted an official search on the property at the Ministry of Lands as shown by the printout on p 16 of his bundle which he conceded that it was not signed and sealed by the Chief Registrar;
- (iv) he is aware that the Police were investigating transactions on the property and that there was a remark on the lands register;
- (v) during the search on the property, he discovered that the Interested Party had owned the property at some point then it moved to Stoken Phiri and from him to Defendant;

- (vi) he testified that he got the original title from the Defendant for purposes of the conveyance and agreed that if the Interested Party still held on to the original title, then Stoken Phiri could not get title and the Defendant would not get title from Stoken Phiri;
- (vii) he knew that the Defendant disputed having received K2,100,000 and agreed that he had ample time to bring all evidence to Court to show that he paid it;
- (viii) he also conceded that it would have been prudent to produce bank statements to reflect the transfer and withdrawals but that he did not;
- (ix) he also stated that if the Defendant refunded him, he would have no claims on the property;
- (x) in the conveyance with the Defendant, he was represented by Spotlight Real Estate and his witness in the contract of sale was Chanje Makayi who worked there;
- (xi) the witness part on the contract does not state that Chanje worked for Spotlight but that she was a civil servant;
- (xii) he has produced a board resolution said to be by the Defendant and it was given to him by the Defendant;
- (xiii) the payment of the K2,100,000 in the bank was witnessed by him, Chanje Makayi, DW1, and Ruth Katongo;
- (xiv) the acknowledgment appears at p.14 of the Plaintiff's bundle and it was not signed by the two witnesses;

(xv) there is no bank statement confirming the transactions; and

(xvi) there were no witnesses to the acknowledgment.

3.8 **When cross-examined** by Mr. Khunga, the Plaintiff testified:

(i) that he did not in his witness statement make any reference to registering a caveat, despite it being a key issue and that his failure to do so was a grave omission;

(ii) he denied that he and PW2 had concurrent transactions relating to the property in the form of a loan between Defendant and PW2's company and sale between him and Defendant;

(iii) he did a search at Ministry of Lands but did not check the green physical file and does not recall whether it was before the contract of sale of 8th December 2021;

(iv) he conceded that other than the lands register printout of 9th December 2021 there is nothing to show that a due diligence exercise was done on the property;

(v) he also conceded that the printout of 9th February 2021 at p.16 of his bundle was after the contract of sale;

(vi) there was no lodgment schedule before Court to prove the date when the caveat was presented at Ministry of Lands or at all;

- (vii) he met the Defendant in December 2021 at its office, represented by DW1, and also present was Mr. Nyirongo, Counsel for the Defendant; and
- (viii) the conveyancing paperwork was handled jointly between him and his agent company Spotlight represented by PW2 and Chanje Makayi.

3.9 **Mr. Chasaya was re-examined** by Ms. Bwalya during which he clarified that he said he did not interact with the caretaker on the property because he did not understand the question.

3.10 He also stated that he did not fully understand the Interested Party's claim as he had never met with it and also because he had the original title in his possession.

3.11 **The Plaintiff's Second witness (PW2) was Mandla Immanuel Nkhosi – Nathi Temwani.** His testimony in Chief was embodied in a witness statement dated 21st September, 2022.

3.12 Mr. Nkosi stated that he is the one that introduced the Plaintiff to the Defendant and that the latter was represented by DW1.

3.13 It was his testimony that DW1 was interested in obtaining financing aid to secure it with the property.

- 3.14 Mr. Nkosi testified that the Plaintiff was a property developer with finances but was interested in an outright purchase of the property not a secured lending.
- 3.15 He stated that eventually the contract of sale was entered into between the Plaintiff and the Defendant for the property.
- 3.16 It was his evidence that the Defendant however defaulted on progressing the conveyance and through his efforts to assist the Plaintiff he (PW2) discovered a remark at the Ministry of Lands restricting further transactions on the property.
- 3.17 **Mr. Nkhosi was cross-examined** firstly by Mr. Nyirongo during which his demeanour was most unimpressive as he kept facing away from the Court before answering and pausing as if to think. He was also evasive in answering. He nonetheless testified:
- (i) he was present when the contract of sale at p.1 of the Plaintiff's bundle was signed albeit in his capacity as personal assistant to the Plaintiff;
 - (ii) he was present when the purchase price of K2,100,000 was paid in two parts, firstly a transfer of K700,000 and the rest in cash;
 - (iii) the Plaintiff's caveat was lodged by Chanje Makayi;

- (iv) he agreed that the contract of sale was dated 8th December 2021 while the caveat by the Plaintiff was dated 7th December 2021;
- (v) he also agreed that it was fraudulent to present a caveat to the Ministry of Lands with a future-dated contract of sale but stated that he was only part of the fraud in terms of agreeing to post-date it, not in presentation to Ministry of Lands;
- (vi) he stated that the letter at p.2 of the Defendant's bundle was a plea from the Defendant's lawyers to Spotlight Innovation Incorporation to halt interest accrual on the Defendant's loan;
- (vii) Spotlight was a company in which he was interested as a director and shareholder;
- (viii) the Plaintiff paid the Defendant the purchase price for the property;
- (ix) the bank statement at p.1 of the Defendant's bundle shows the Defendant receiving a transfer of K700,000 on 8th December 2021 from Brathweit Investments Zambia Limited and according to him it was a payment from the Plaintiff through that company which he owned 95% of; and
- (x) he was aware that the Defendant disputes the contract and acknowledgment of payment calling them forgeries and his proof that he was not part of the forgeries is the caveat at p.15 of the Plaintiff's bundle which shows that the registration of the caveat was only approved on 9th December 2021.

3.18 **When cross-examined by** Mr. Chitundu, Mr. Nkhosi testified:

- (i) he was very familiar with the transaction between the Plaintiff and the Defendant in his capacity as a business partner and personal assistant for the Plaintiff;
- (ii) the Plaintiff and the Defendant were introduced to each other by him and first met on 7th December 2021 at DW1's office during which he (PW2) was also in attendance;
- (iii) the contract of sale and assignment were drawn up by Chanje Makayi and executed at the Defendant's office on 7th December 2021;
- (iv) Chanje Makayi was not present in the meeting of 7th December 2021 but she signed as a witness for the Plaintiff;
- (v) he agreed that it was very irregular and improper for Chanje Makayi to sign the contract as a witness when she was not present at the time of execution;
- (vi) he agreed that it was deception for the contract to be dated 8th December 2021 and yet executed on 7th December 2021;
- (vii) he said he was present in the bank when the Plaintiff paid the Defendant K2,100,000 but agreed that no one signed the acknowledgment as witness to the payment;

- (viii) he accepted that it was the Plaintiff's duty to bring evidence of payment in form of a bank statement showing the transfer and cash withdrawal;
- (ix) he accepted that at p.1 of the Defendant's bundle is a bank statement evidencing the transfer of K700,000 but that there is no statement to show the withdrawal of the balance of the disputed K2,100,000;
- (x) when the Defendant approached him, it wanted an outright sale of the property, and even in the first meeting between Plaintiff and Defendant he does not recall a loan being discussed; and
- (xi) in another breath, when shown paragraph 4 of his witness statement he testified that the initial request from the Defendant was for a loan.

3.19 **When cross-examined** by Mr. Khunga, Mr. Nkhosi testified:

- (i) he was very close to the Plaintiff who he had known for 3 years;
- (ii) he engaged with the Defendant professionally after DW1 approached him (PW2) to help sell the property;
- (iii) he was involved in most of the Plaintiff's transaction with the Defendant except the lodgment of the caveat;
- (iv) at p.4 of the Plaintiff's bundle is a resolution of the Defendant over sale of the property and it and the contract of sale were given to him (PW2) by either Defendant's counsel or DW1 but does not remember whether it was under a cover letter; and

(v) the company referred to in the letter at p.3 of the Defendant's bundle is one in which he has an interest.

3.20 Mr. Nkosi was re-examined by Ms Bwalya during which he clarified that his 95% involvement related to the initial land registry search, verifications of coordinates and beacons and visiting the property.

3.21 On that note the Plaintiff closed his case.

3.22 **The Defendant's witness (DW1) was Joe Kangwanda**, its managing director. **His testimony in Chief** was embodied in a witness statement dated 17th October, 2022.

3.23 He stated that the Defendant had obtained a loan of K700,000 from a company called Spotlight Innovation Incorporated Limited ("**Spotlight IIL**"), secured by a property belonging to the Defendant. He did not, however, describe the property other than stating that it was in Roma area.

3.24 Mr. Kangwanda stated that he was introduced to Spotlight IIL by its agent and employee, Temwani and that loan documentation was executed but no copies were availed.

- 3.25 It was his testimony that the said agent registered a caveat on the property.
- 3.26 He testified that the Defendant found buyers for the property and in the process of trying to clear the loan:
- (i) the agent asked him (DW1) to pay to the Plaintiff;
 - (ii) a contract of sale and acknowledgement of receipt of purchase price were discovered bearing a forgery of his signature.
- 3.27 He stated that he also discovered that there was a remark at the Ministry of Lands against further transaction.
- 3.28 Mr. Kangwanda testified that he was shocked to see that the Defendant had been sued by the Plaintiff instead of Spotlight IIL and for a conveyance instead of a loan.
- 3.29 **Mr. Kangwanda was cross-examined** firstly by Ms. Bwalya during which he testified:
- (i) the Defendant was looking for a loan and was referred to a company called Spotlight Innovations Limited;
 - (ii) he conceded that what he said in paragraph 1 of his witness statement that the Plaintiff was a director therein is incorrect;

- (iii) he also admitted that paragraph 2 of his witness statement referred to a Twamwani instead of Temwani;
- (iv) a due diligence exercise was done on the property at the instance of Temwani and on 6th December 2021 the component of a search at Ministry of Lands was done;
- (v) the only contract he referred to at page 2 of his witness statement was the loan agreement and that is all that was signed by the Defendant;
- (vi) he was aware of the Plaintiff's caveat and the reference in his witness statement to a related contract was to the loan agreement;
- (vii) the Defendant applied for a loan of K1,000,000 but was given K700,000 on 8th December 2021 and according to the loan agreement was supposed to repay it by 30th March 2022 with interest at 25% per month;
- (viii) on 29th March 2022 the Defendant requested that interest be halted on account of the restriction placed on the property but he conceded that the lender had no obligation to halt it;
- (ix) he also admitted that the loan agreement was not before Court;

- (x) the signatures on the contract of sale and acknowledgment of payment are not his and when he discovered about them last year, he reported to the Drug Enforcement Commission (DEC) but has no proof of the reporting; and
- (xi) he confirmed that on 8th December 2021, the Defendant had intentions of selling the property.

3.30 **When cross-examined** by Mr. Chitundu, Mr. Kangwanda testified **with a very unconvincing demeanour pausing as if to think, was evasive, and looked away from the Court. He stated:**

- (i) he is very familiar with procedures for buying and selling land having had prior transactions since it is his business to do so;
- (ii) the property is located in Roma and it is falsely stated at p 1 of his witness statement that its in Chaisa;
- (iii) he first went to the property in August 2021;
- (iv) he found a boundary wall, dwelling house and caretaker there, Stoken Phiri (IPW1);
- (v) he interacted with Stoken Phiri and found him fluent in English but never saw him write English;
- (vi) the property was between 1.5-2 acres in extent with an estimated value of between K1,500,000 to K2,000,000;
- (vii) he stated that IPW1 appeared to him to be a person of means capable of owning the property;

- (viii) when he met Stoken Phiri, the property was owned by Stoken Phiri who said he acquired it from the Interested Party by way of purchase;
- (ix) he (DW1) got a copy of Stoken Phiri's National Registration Card (NRC) for the purposes of buying the property;
- (x) he never took any surveyors to the property;
- (xi) he (DW1) drafted all the conveyancing documents between Stoken Phiri and the Defendant and made Stoken Phiri sign them before he (DW1) attended to all the processes at Ministry of Lands including applying for consent to assign;
- (xii) he (DW1) also drafted the contract of sale;
- (xiii) Stoken Phiri paid Property Transfer Tax (PTT);
- (xiv) Defendant paid Stoken Phiri K600,000 for the property but had no proof of it before Court;
- (xv) he is aware of the Interested Party's claim that it never sold the property to Stoken Phiri;
- (xvi) he agreed that the Defendant has not brought any document to show that it genuinely bought the property from Stoken Phiri;
- (xvii) he (DW1) said there was a duplicate certificate of title used in the transaction between the Interested Party and Stoken Phiri and that he saw it;
- (xviii) he, however, conceded that the lands register printout at p.36 of the Interested Party's bundle did not show that there was any duplicate title issued prior to the Stoken Phiri transaction;

- (xix) he confirmed that the said printout related to F/441a/138 which the Defendant bought from Stoken Phiri and which (according to entry 17 at p.34 of the Interested Party's bundle) was under title issued to the Interested Party on 1st November, 2010;
- (xx) he agreed that for the Interested Party to sell to Stoken Phiri the former needed to surrender the original title to the latter without which Stoken Phiri could not get his title to the property;
- (xxi) he also agreed that if the Interested Party proved to Court that they had the original title then Stoken Phiri could not get title;
- (xxii) he denied playing any role in the acquisition of the property by Stoken Phiri;
- (xxiii) there were no Advocates involved for the Defendant or Stoken Phiri in the conveyance between them;
- (xxiv) he was called by Police over that transaction and gave a statement;
- (xxv) the Defendant firstly met the Plaintiff in November 2021 at the Defendant's offices in the presence of Temwani, himself (DW1) and Clive and there was no Advocate present; and
- (xxvi) the Defendant never passed any resolution to sell the property to Plaintiff.

3.31 **Mr. Kangwanda was also cross-examined** by Mr. Khunga during which he testified:

- (i) he and Ruth Katongo are the only directors of Defendant who participated in the purchase of the property from Stoken Phiri;
- (ii) he met Stoken Phiri in August, 2021 for the first time at the Defendant's office;
- (iii) he (DW1) was aware that transactions of more than K500,000 value require a valuation report before PTT clearance can be done but there was no valuation done in the transaction between Defendant and Stoken Phiri yet the transaction went ahead;
- (iv) the Defendant's conveyancing documents were being prepared at the Defendant's office but he did not know where Stoken Phiri prepared his conveyancing documents;
- (v) the Defendant acted as both buyer and estate agent in the transaction with Stoken Phiri but it was not registered with the Zambia Institute of Estate Agents;
- (vi) the Defendant is into buying and selling of other people's land;
- (vii) the Defendant did a due diligence exercise on the property on 6th December 2021 because the buyer requested for a Ministry of Lands printout;
- (viii) he agreed that a loan agreement and sale agreement are different and also that there is only a record of a sale agreement in Court;

- (ix) he also agreed that the documents at p.15 and 17 of the Plaintiff's bundle show that the Plaintiff's caveat was placed on the basis of a contract of sale; and
- (x) he did not sign the contract of sale and acknowledgment and was just impersonated by the Plaintiff, which he reported to DEC between August and September 2022.

3.32 **Mr. Kangwanda was re-examined** by Mr. Nyirongo during which he clarified that Stoken Phiri can read and write because when Defendant drafted the contract of sale, Stoken Phiri went through it and understood it before signing.

3.33 He also stated that the signatures on the contract of sale and acknowledgment of payment are different from his.

3.34 Mr. Kangwanda clarified that as at 8th December 2021 the Defendant intended to sell the property to an Indian man and not the Plaintiff and that the Defendant concurrently borrowed money for a project and advertised for sale of the property.

3.35 On that note the Defendant closed its case.

- 3.36 **The Interested Party's first witness (IPW1) was Stoken Phiri. His testimony in Chief** was embodied in a witness statement filed on 17th March 2023.
- 3.37 Mr. Phiri testified that he was employed by the Interested Party as a caretaker of the property on 3rd June 2020 and lived thereon.
- 3.38 It was his evidence that on 1st April 2021, he was approached by DW1 over the property.
- 3.39 He testified that DW1 got him to sign against his name on several documents which he did not understand and that he did so.
- 3.40 Mr. Phiri stated that DW1 later paid him K70,000 and asked him to move out and facilitated his movement to Chipata and later Malawi to avoid being apprehended by the police.
- 3.41 He testified that DW1 was the one who handed the transaction relating to the property and that the Interested Party was not involved at any stage.
- 3.42 **Stoken Phiri (IPW1) was cross-examined** firstly by Ms. Bwalya during which he testified, **with unconvincing demeanour and shying away from facing the Court that:**

- (i) he was employed by the Defendant as caretaker of the property on 3rd June 2020 and was stopped from working in March 2022 after being arrested but later reinstated in February 2023 and re-designated as a security guard;
- (ii) he was approached by DW1 on 1st April 2021, representing the Defendant and after a second meeting DW1 proposed that Stoken Phiri transfers the title of the property into his name and thereafter to the Defendant, he also asked for Stoken Phiri's NRC;
- (iii) Stoken Phiri accepted that proposal after DW1's third visit and did not tell his employer, the Interested Party about it since DW1 stopped him;
- (iv) he opted to follow the instruction of DW1 who he had only previously met twice over that of his employer;
- (v) he was not always at the property and it is possible that people would go there in his absence;
- (vi) he said he could not read and write in English but he admitted that the letter at p.3 of the Plaintiff's supplementary bundle bore his name at the foot written by him;
- (vii) he stated that the document was prepared by DW1 and given to him to sign; and
- (viii) he has never been to Court after his arrest and never been called back to the police.

3.43 **When cross-examined** by Mr. Nyirongo, Stoken Phiri testified:

- (i) he did not consult anyone literate to help him understand the documents from DW1 before he signed;
- (ii) he did not ask the Interested Party if it was aware of the Defendant's proposal over the property;
- (iii) he used to receive his salary from a secretary from the Interested Party's office; and
- (iv) he did not tell the Interested Party that the Defendant paid him K70,000 for the transaction over the property.

3.44 **Mr. Phiri was not re-examined.**

3.45 **The Interested Party's Second witness (IPW2) was Abdiaziz Mustafa. His testimony in Chief** was embodied in a witness statement filed on 17th March 2023.

3.46 He testified that the Interested Party was the registered owner of the property after purchasing it around 16th April 2009 and evidenced by title (appearing at p.1-6 its bundle).

3.47 It was his evidence that the Interested Party built a caretaker's residence on the property and employed Stoken Phiri (IPW1) as caretaker.

3.48 Mr. Mustafa stated that IPW1 was later coerced by the Defendant to fraudulently acquire title in his name to the property and from there to have it fraudulently re-registered in the Defendant's name 40 days later. All of this he complained was without the involvement or even knowledge of the Interested Party, which has still remained with its original certificate of title.

3.49 It was his evidence that when discovered IPW1 eventually fled to Malawi with the Defendant's help but was apprehended upon the complaint of the Interested Party to law enforcement agencies.

3.50 **Mr. Mustafa was cross-examined** firstly by Ms. Bwalya during which he testified:

- (i) the Interested Party owns the property and that IPW1 with the help of the Defendant fraudulently changed ownership into the name of IPW1;
- (ii) evidence of that fraudulent change was the Police Report at p.8 of the Interested Party's bundle;
- (iii) since according to him IPW1 could hardly read or write he did not believe that IPW1 authored the letter at p.3 of the Plaintiff's supplementary bundle;
- (iv) he discovered in end of February 2022 that title had changed to IPW1;
- (v) he went to the property and found a different caretaker who said DW1 put him there;

- (vi) he got the telephone number for DW1 and called him upon which DW1 said he was sold the land by IPW1;
- (vii) he reported the matter to the Police on 2nd March 2022 against both IPW1 and DW1 after which IPW1 was arrested and charged;
- (viii) he also wrote to the Ministry of Lands to caveat the property and cancel the titles for IPW1 and the Defendant and to reinstate that for the Interested Party;
- (ix) he asked the Police to write to Ministry of Lands to place a restriction on the property;
- (x) he requested the Ministry of Lands to explain how they issued two titles to the same land but never received an answer but has not produced that request in Court;
- (xi) he heard IPW1 tell the Police that he was coerced under threats to his life to change ownership of the Interested Party's property;
- (xii) he believed IPW1 on the point, IPW1 was not fired but ran away on his own;
- (xiii) he did not trust IPW1 but reinstated him in February 2023 as a security guard;
- (xiv) IPW1 never said he received money from the Defendant and he (IPW2) would be surprised if he did;

- (xv) he (IPW2) has not tendered copies of the conveyancing documents which he alleges the Defendant signed in the name of IPW1;
- (xvi) he engaged an expert to confirm that the survey diagram in the Defendant's title was forged but has not produced that evidence in Court;
- (xvii) entry 28 at p.38 of the Interested Party's bundle shows that the restriction was placed on 9th March 2022;
- (xviii) he agreed that before the remark was put it was not possible for someone who did a search to know that the property was under Police investigations;
- (xix) he would not be surprised to hear that the Plaintiff found no encumbrances on the property during searches at Ministry of Lands on 6th December 2021 and 9th December 2021;
- (xx) even though he stated that the Plaintiff did not do a due diligence exercise he (IPW2) did not live on the property and it is very possible that the Plaintiff visited it without his knowledge;
- (xxi) he maintained that IPW1's title was issued by fraud;
- (xxii) the Police report at p.23 of the Interested Party's bundle was evidence that the title of IPW1 was issued by fraud and mistake; and
- (xxiii) the same Police report was also evidence that the Defendant's title was issued by mistake and fraudulently.

3.51 **When cross-examined** by Mr. Nyirongo, **Mr. Mustafa** testified:

- (i) the immediate supervisor of IPW1 was Helen Lungu and was not informed of him being approached by DW1;
- (ii) IPW1 has no capacity to access the Interested Party's certificate of incorporation and seal and has never had custody of them;
- (iii) the Police report shows that they never found any documents in the Ministry of Lands green file to show the change of ownership from Interested Party to IPW1;
- (iv) according to IPW1's explanation, the Defendant threatened him to move out of the property; and
- (v) he does not agree that the Plaintiff's reliefs should be granted.

3.52 **Mr. Mustafa was not re-examined** and that marked close of the Interested Party's case.

4 SUBMISSIONS FROM THE BAR

4.1 After the close of trial, the Plaintiff tendered final submissions on 31st May 2023 and so did the Interested Party on the same day.

4.2 There was no record of submissions from the Defendant at the time of writing this judgment as the last submissions were those of the Plaintiff filed on 14th June 2023 in relation to the Interested Party's cross claims.

4.3 The submissions received were well researched and of immense use in the determination of this case. Owing to the peculiar circumstances of the case, I propose to dispense with a copious reproduction of their content.

5 ANALYSIS AND FINDINGS

5.1 I have closely studied the material on record, evidence and submissions and after a careful consideration, my decision is as set out below.

The contention of the nature of the transaction between Plaintiff and Defendant

5.2 The Plaintiff and Defendant are poles apart on this issue with the former insisting that there was a contract of sale between them over the property while the latter insists that there was a secured lending.

5.3 The Plaintiff has produced three key documents to substantiate its claim that there was a conveyance:

- (i) a resolution (appearing at p.4 of the Plaintiff's bundle of documents);
- (ii) the contract of sale (appearing at p.1 of the Plaintiff's bundle of documents); and
- (iii) the acknowledgment of receipt (appearing at p. 14 of the Plaintiff's bundle of documents).

5.4 The Defendant has disowned the said documents and DW1 in his testimony has labelled them as forgeries. I will analyse them in sequence.

5.5 I note from the wording of the resolution that though it is expressed as being a product of an extraordinary general meeting, it is expressed as having been signed by directors.

5.6 On the premise that it was actually a board resolution, I note that the resolution does not actually make reference to the alleged conveyance of the property to the Plaintiff nor does it even refer to the Plaintiff.

- 5.7 Therefore, (its authenticity or otherwise aside) I find it not useful as evidence to ascertain the nature of the transaction between the two. It is not the province of this Court to speculate and fill in the blanks through assumptions where the evidence is deficient. I am fortified in this regard by the decision of the Constitutional Court in ***Richwell Siamunene v Sialubalo Gift***⁽¹⁾.
- 5.8 Moving on to the contract of sale, the Plaintiff testified that its execution was witnessed by Chanje Makayi while PW2 contradicted that by testifying that Chanje Makayi was not present at the meeting where it was executed.
- 5.9 Further, the Plaintiff did not call Chanje Makayi to testify and prove that the contract of sale was actually executed by the parties.
- 5.10 There is also the issue of the Plaintiff testifying that a caveat was filed on 7th December 2021 for registration over the property, purportedly on the basis of the contract which for its part was dated 8th December 2021. PW2 admitted that there was some deception around the registration of the caveat and dating of the contract but was quick to distance himself from it.

5.11 Given this background of absence of testimony from the alleged witness of the contract of sale and admitted deception, I am not convinced that it is an authentic document, duly executed by those who it purports to have been by.

5.12 Coming to the acknowledgment of receipt, the learned authors of **Halsbury's Laws of England**⁽¹⁾ posit:

***"A payment may be proved either by the production of a receipt or by any other evidence from which the fact of payment may be inferred;** and a payment may be presumed from the length of time which has elapsed since the debt became due, even though it may not be barred by the lapse of time, in the absence of any explanation of the delay.*

***At common law, a receipt may be in any form so long as its intention is clear.**" (Emphasis added)*

5.13 In the case at hand the acknowledgment produced by the Plaintiff is by its wording expressed as DW1 receiving money from the Plaintiff. There is no mention that the alleged receipt was on behalf of the Defendant, leaving it unclear on the point.

5.14 The preclusion against this Court speculating and filling in the blanks through assumptions is thus again applicable, on the strength of the ***Richwell Siamunene v Sialubalo Gift***⁽¹⁾ case alluded to earlier.

5.15 All of this can be contrasted with the evidence of the Defendant whereby DW1 was unshaken in cross examination on there being a lending by the Plaintiff to the Defendant, described by him as follows-

- (i) a loan sum of K700,000;
- (ii) disbursed on 8th December 2021;
- (iii) interest rate agreed at 25% per month; and
- (iv) to be repaid by 30th March 2022.

5.16 I am mindful however that there was no evidence led by the Defendant (such as from a handwriting expert) to show that the resolution, contract and acknowledgment were actually forgeries as alleged.

5.17 The end result is that it is not clear to me where the balance of probabilities is tilted in terms of whether the Plaintiff and Defendant actually entered into the contract of sale or not.

5.18 The learned authors of **Phipson on Evidence**⁽²⁾ posit:

“While a judge or tribunal of fact should make findings of fact if it can, in exceptional cases it may be forced to the conclusion that it cannot say that either version of events satisfies the balance of probabilities. In such a case the burden of proof may determine which party succeeds.” (Emphasis added)

5.19 I accordingly find that the Plaintiff (who bore the burden to do so) has failed to prove the allegation that he entered into the contract of sale with the Defendant for the purchase of the property from the latter.

5.20 There being no **Statute of Frauds**⁽¹⁾ or other requirement that a loan agreement must be evidenced in writing, I instead accept the Defendant's version (supported by the unwavered evidence of DW1 on the point) that it entered into a loan agreement with the Plaintiff, secured by the property.

The contention of how much the Plaintiff paid the Defendant in furtherance of the transaction in i) and why

5.21 The Plaintiff has categorically alleged that he paid the Defendant the sum of K2,100,000.

5.22 I have already made a finding that the acknowledgment presented by the Plaintiff as proof of the alleged payment of K2,100,000 makes no reference to the Defendant and is unsatisfactory as proof of payment by the Plaintiff to the Defendant.

5.23 To add to that, the Plaintiff did concede in cross examination that while he alleges that the source of the said funds was his bank account, he did not produce any bank statement or records to show that he actually had K2,100,000 and that his account was debited with such a sum on 8th December 2021, being the day of alleged payment to the Defendant.

5.24 Therefore, I am not persuaded that the Plaintiff paid the Defendant the sum of K2,100,000 on 8th December 2021 or at all.

5.25 Turning now to the Defendant, it pleaded as follows in paragraphs 3, 4, 6 and 11 of the defence:

“ 3. *The contents of paragraph 2 are admitted only to the extent that the Defendant is and has always been the title holder in respect of the subject property; but denies that the Defendant was the vendor, on the contrary, the Defendant was a borrower of a sum of K700,000 that was lent out by the Plaintiff.*

4. *The contents of paragraph 3 are denied as the Defendant merely borrowed the sum of K700,000 from the Plaintiff which loan was secured by the subject property; and shall further aver at trial that the Plaintiff has never shared a copy of the said contract with the Defendant despite numerous and several reminders sent to the Plaintiff.*

6. *Further to paragraph 4 above, that any document alleging acknowledgment of receipt on the part of the Defendant is a forgery, as the only money received by the Defendant as a loan from the Plaintiff is a sum of K700,000 and the Defendant has documentary proof by way of a document to that effect.*

11. *The Defendant shall further aver at trial that the Plaintiff is not entitled to any of the demands set out under the endorsement to the Writ, except for repayment of the principal sum of K700,000 and interest at the rate applicable under the Money Lender's Act.” (Emphasis added)*

5.26 Authorities are abound that express admissions can be made in pleadings after commencement of an action. see ***Chazyia Silwamba v Lamba Simpito***⁽²⁾.

5.27 Thus, based on its own admissions in paragraphs 3, 4, 6 and 11 of the defence and based on the unchallenged testimony of DW1 (already alluded to), I find that the Plaintiff advanced the Defendant the sum of K700,000 on 8th December 2021 in furtherance of the loan agreement between the two.

5.28 Further, based on the unchallenged evidence of DW1 in cross examination on the point, I find that the reason why the Defendant was advanced only K700,000 is because despite requesting for K1,000,000 from the Plaintiff, the latter only agreed to lend K700,000.

The contention of whether the Defendant fraudulently obtained title to the property

- 5.29 In *Tresford Chali v Bwalya Emmanuel Kanyanta Ng'andu*⁽³⁾, Mambilima, CJ gave the following apt guidance on the discourse of fraud:

“The law regarding the pleading and proving of fraud is well settled. It is trite that fraud must be distinctly alleged and proved. This is evident from Order 18/8/16 of the RULES OF THE SUPREME COURT, 1999, which states that ‘ Any charge of fraud or misrepresentation must be pleaded with the utmost particularity....’ Order 18/12/18 of the RULES OF THE SUPREME COURT, 1999, is also couched in similar terms. It provides that ‘Fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.’

*In addition, **the standard of proof for an allegation of fraud is higher than proof on a balance of probabilities, but lower than proof beyond reasonable doubt.** A case on point in this regard is our decision in the case of SITHOLE V. THE STATE LOTTERIES BOARD where we held that if a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities.”*
(Emphasis added)

- 5.30 In the case before Court the evidence of DW1 was that he was the primary officer involved in the Defendant’s acquisition of the property.

- 5.31 He conceded in cross examination by Mr Chitundu that he first went to the property in August 2021 and found it developed and inhabited by Mr Stoken Phiri.
- 5.32 He also testified that he was very familiar with processes of buying and selling land since it was his business to do so. He also testified that he prepared all the documents for the conveyance between the Defendant and Stonken Phiri.
- 5.33 Perusal of the lands register (exhibited in the Interested Party's bundle at p.35-37) shows that at the time that the Defendant through DW1 began to interact with Stoken Phiri over the property in August 2021, the Interested Party was still reflected as the registered proprietor. A fact easily ascertainable by a simple search at the Ministry of Lands as all parties before Court have shown they actually did at some point, including the Defendant (in paragraph 6 of its defence to the Interested Party's points of claim).
- 5.34 Secondly considering that:
- (i) the lands register shows that Stoken Phiri's acquisition of the property took place (October 2021) after his interaction with the Defendant;

- (ii) the acquisition of the property by the Defendant followed a short while after (November 2021);
- (iii) DW1 is on record that the Defendant handled the paperwork for (ii) and attendance for its processing, including State consent to assign; and
- (iv) Stoken Phiri testified and maintained in cross examination that he acquired title to the property and parceled it to the Defendant whilst working with DW1 and without the involvement of the Interested Party,

I find that to be very cogent evidence that the Defendant was part and parcel of the fraudulent acquisition of the property whilst the title of the Interested Party was still subsisting in parallel.

5.35 Further, in the case before Court, the Defendant did more than a bare denial of the Interested Party's claim and asserted:

- (i) it never participated in change of ownership of the property from the Interested Party;
- (ii) it conducted a due diligence exercise on the property which revealed that Stoken Phiri was the *bona fide* owner; and
- (iii) it acquired good title to the property.

5.36 The learned authors of **Principles of the Law of Evidence in Zambia**⁽³⁾, armed with jurisprudence from the Court of Appeal, give a useful discussion on the discourse of burden of proof:

*“In civil cases the general rule is that ‘they who assert must prove’. In most cases the legal burden of proof lies on the plaintiff although in some situations, both parties may assume the legal burden on an issue(s). This recognizes that civil cases do not involve a criminal conviction nor punishment. **In Hitech Logistics Limited v Ugondo Italian Style Limited, Chishimba JA referred to the placing of the burden of proof as follows:***

The legal burden of proof as to any fact in issue in a civil case lies upon the party who affirmatively asserts that fact in issue and to whose claim or defence proof of the fact in issue is essential.... If the plaintiff fails to prove any essential element of his claim, the defendant will be entitled to judgment. The position of the defendant is somewhat different. **Since the plaintiff affirmatively asserts his claim, the plaintiff bears the burden of proving the claim and the defendant assumes no legal burden of proof by merely denying the claim. However, if the defendant asserts a defence which goes beyond a mere denial (sometimes referred to as an affirmative defence) the defendant must assume the legal burden of proving such defence.** An affirmative defence is most easily recognised by the fact that it raises facts in issue which do not form part of the plaintiff’s claim.” (Emphasis added)

5.37 In the case before Court, the Interested Party's targeted grievances have been known as far back as December 2022 when the points of claim were filed and despite the leeway given in Order for Directions No. 2 of 7th February 2023, the Defendant:

- (i) did not produce a single document before Court to show that it legitimately acquired the property; and
- (ii) did not tender any witness statement to otherwise explain how it acquired the property.

5.38 Thus, in the absence of concrete evidence to prove the Defendant's affirmative defence alluded to, I have no basis to discount the Interested Party's uncontroverted evidence that the Defendant was complicit in the fraudulent change of ownership to the property in parallel to the existence of the Interested Party's title.

5.39 Accordingly, I find it proven by the Interested Party beyond a simple balance of probabilities that the acquisition of the property by the Defendant was fraudulent.

5.40 I also accept Stoken Phiri's admission that the preceding acquisition of the property by him was also fraudulent.

The contention of whether the Interested Party is entitled to any relief in relation to the property and / or against the Plaintiff and Defendant

- 5.41 Following my finding that the transaction between the Plaintiff and Defendant was a lending not a sale, there is no basis for the caveat placed by the Plaintiff on the property to remain in place as he does not hold the requisite interest of intending purchaser under s.76 of the **Lands and Deeds Registry Act**⁽²⁾ as eligible for caveat protection. Entry no. 27 on the Lands Register for the property must thus be reversed to rectify the position.
- 5.42 Section 34 of the **Lands and Deeds Registry Act**⁽²⁾ provides that a certificate of title can be challenged on grounds of *inter alia* fraud and impropriety in its acquisition. See **Anti-Corruption Commission v Barnett Development Corporation Limited**⁽⁴⁾ cited by the Interested Party.
- 5.43 Given the findings of fraud in the acquisition of title to the property by Stoken Phiri and thereafter by the Defendant, there is no basis for the Defendant's parallel certificate of title to remain in force in terms of s.33 of the **Lands and Deeds Registry Act**.⁽²⁾ Entries no. 23, 24, 25 and 26 on the Lands Register for the property must thus be reversed to rectify the position.

- 5.44 The maxim ‘*nemo dat quod non habet*’ (the “***nemo dat rule***”) is a fundamental common law principle that a party cannot convey better title to property than that which they possess. See ***GE Capital Bank Ltd v Rushton & Anr.***⁽⁵⁾
- 5.45 In ***National Employers Mutual General Insurance Association Ltd v Jones***⁽⁶⁾, May LJ heeded the *nemo dat* rule and explicated that it is applicable in the absence of statutory provisions to the contrary.
- 5.46 Along these lines, the Interested Party has persuasively drawn my attention to local jurisprudence espoused in the decision in ***Rajan Patel v AG***⁽⁷⁾, albeit with reference to sale of goods.
- 5.47 That the rule extends to leasehold property is evident from other jurisprudence, notable of which is the decision of the Supreme Court of Kenya in the high profile case of ***Dina Management Ltd. v County Government of Mombasa & Ors.***⁽⁸⁾ wherein it was held *inter alia*:

“[110] **Indeed, the title or lease is an end product of a process.** If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. **The first allocation having been irregularly obtained, H.E.**

Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co. (1993) Ltd, who in turn could pass to the appellant. (Emphasis added)

5.48 Applying the rule to the case at hand, on account of the root fraud, Stoken Phiri had no valid title to the property to pass to the Defendant. It follows also that if it had been proven that the Plaintiff had contracted to buy the property from the Defendant, the Defendant would have had no valid interest to pass on to the Plaintiff.

The contention of whether the Plaintiff is entitled to any relief against the Defendant

5.49 In ***Friday Mwamba v Sylvester Nthenge & 2 Ors***⁽⁹⁾ Mumba Ag. DCJ observed as follows on behalf of the Supreme Court-

“The law of contract regarding contracts entered into voluntarily by legal persons has been honoured since time immemorial.”

5.50 The Plaintiff has cited the older case of ***National Drug Co. Ltd. & ZPA v Mary Katongo***⁽¹⁰⁾ to buttress the point.

- 5.51 I have already made a finding that the transaction between the Plaintiff and Defendant was not a sale but a lending agreed to attract interest at rate of 25% per month.
- 5.52 In ***Neighbours City Estates Limited v Mark Mushili***⁽¹¹⁾, the Supreme Court had occasion to interpret the **Money-Lenders Act**⁽³⁾, and conclude that maximum interest chargeable under its auspices was capped at 48% per annum.
- 5.53 However, the Supreme Court (through Musonda, DCJ, then JS) guided in the more recent case of ***Edman Banda v Charles Lungu***⁽¹²⁾ that a person can only be captured by the definition in s. 2 of the **Money-Lenders Act**⁽³⁾ and the requirement to be licensed if they:
- (i) are in the business of money-lending; or
 - (ii) advertise, announce or in any way hold themselves out as carrying on the business of money-lending.
- 5.54 The Supreme Court went on to endorse the upholding of the sanctity of a contract by the trial Court because *inter alia* none of the two criteria were present to impugn it for illegality.

5.55 In the case before Court, the Plaintiff stood firm when cross examined that he was not a money lender and not into the business of lending money. The Defendant's evidence for its part did not establish otherwise.

5.56 I thus see no basis to depart from the agreed terms for repayment as alluded to by the Defendant's own witness.

5.57 Accordingly, I find that the Plaintiff is entitled to repayment by the Defendant of the loan sum of K700,000 with interest thereon at rate of 25% per annum to run from 8th December 2021 to date of judgment and thereafter at the current lending rate as determined by Bank of Zambia from date of judgment to payment.

6 CONCLUSION AND ORDERS

The Plaintiff's Claim

6.1 Claims a. and b. in the statement of claim are unsuccessful. The Plaintiff is not entitled to specific performance nor to damages for alleged inconvenience.

6.2 Claims c. and d. succeed as pronounced in paragraph 5.57 above and pursuant to section 13 of the **High Court Act**⁽⁴⁾, judgment is entered accordingly.

6.3 I will deal with relief e. on costs in the concluding parts of this judgment.

The Interested Party's Cross-claim

6.4 The Interested Party's claims (i) - (vi) are successful and the lands register in relation to the property (F/441/138, Lusaka) should be rectified by:

- (i) cancellation of all entries relating to the title of Stoken Phiri and later the Defendant;
- (ii) cancellation of the entry relating to a caveat by the Plaintiff; and
- (iii) effecting of any registrations and / de-registrations required to actualise the preceding rectifications and the reflecting of the Interested Party as registered proprietor.

6.5 There is no basis for granting the Interested Party any other relief as prayed under head (vii) and I will deal with the issue of costs [claimed as head (viii)] in the concluding parts.

Costs of Claim and Cross-claim

6.6 Costs of litigation are a matter of discretion for the Court in terms of Order 40 Rule 6 of the **High Court Rules**.⁽¹⁾

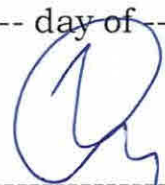
6.7 As for the guidance in the exercise of that discretion, I heed the Supreme Court's judgment in ***Afrope Zambia Limited v Anthony Chate & Ors***⁽¹³⁾, where Wood, JS aptly stated:

"It is a settled principle of law that a successful party will not normally be deprived of his costs unless there is something in the nature of the claim or in the conduct of the party which makes it improper for him to be granted costs."

6.8 In the case before Court, the Plaintiff has partially succeeded in its claim against the Defendant while the Interested Party has succeeded in its cross-claim against the Defendant and the property in which the Plaintiff claimed an interest.

6.9 Since the findings in this judgment make the Defendant blameworthy in the proven grievances of both the Plaintiff and Interested Party, I see it fair and just to condemn the Defendant to bear the costs of the Plaintiff and Interested Party. So it shall be and the said costs shall be taxed in default of agreement.

Dated at Lusaka this 25th day of August 2023



K. CHENDA
Judge of the High Court