

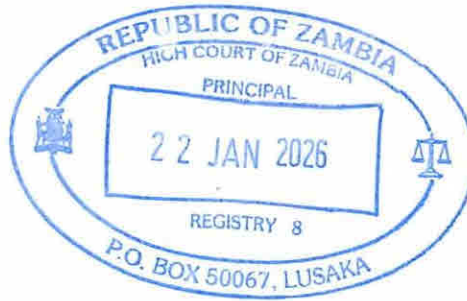
**IN THE HIGH COURT FOR ZAMBIA**

**2023/HP/0080**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(CIVIL JURISDICTION)*



**BETWEEN:**

**KELVIN MOONO**

**PLAINTIFF**

**AND**

**BILLY NKUNIKA**

**1<sup>ST</sup> DEFENDANT**

**ANDREW NKUNIKA**

**2<sup>ND</sup> DEFENDANT**

**BEFORE THE HONOURABLE MR. JUSTICE I. M. MABBOLOBOLO IN CHAMBERS ON THE 22<sup>ND</sup> DAY OF JANUARY, 2026.**

**For the Plaintiff:** *Ms. M. Mushipe, Mr. B. Mwanza, Ms. E. Sikombwa – Mesdames Mushipe and Associates.*

**For the Defendant:** *Mr. Robert Chipeta – Messrs Nkunika and Chipeta Legal Practitioners.*

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**JUDGMENT**

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**A. CASES REFERRED TO:**

1. *Ringford Habwanda v Zambia Breweries Limited (2012) 3ZR 77;*
2. *Suisse Atlantique Societe D'armament Maritime S. A. A. V. Rotterdamsche Kolen Centrale (1967) 1AC 361;*
3. *Chitambala v Chitambala (1989) ZR 32;*
4. *Kajimanga v Chilemya Appeal No. 50 f 2014 (2016) ZMSC 189;*

5. *Young v Smith* (1998) No. 30530 – CA;
6. *Lazarous Estate Ltd v Bearsley* (1956) 1 QB 702;
7. *Standard Chattered Bank v Wotela and Other Appeal No. 1 of 2014*;
8. *Attorney General v Aboubavar Tall and Zambia Airways Corporation Limited* (1995-1997) ZR 54;
9. *Masauso Zulu v Avondale Housing Project Limited* (1982) ZR 171;
10. *Anderson K. Mazoka and Others v Levy Patrick Mwanawasa* (2005) ZR 138; and
11. *Lincoln v Daniels* (1962) 1 QB 237.

**B. LEGISLATION REFERRED TO:**

1. *The Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia*; and
2. *The Rules of the Supreme Court*.

**C. OTHER WORKS REFERRED TO:**

1. 'Mark Thomson in *Barnsley's Conveyancing Law and Practice*' 1996, Butterworths, London; and
2. Bryan A Garner. *Black's Law Dictionary, 10<sup>th</sup> Edition*, 1995.

**1.0. INTRODUCTION AND BACKGROUND**

- 1.1. This is a Judgment on the Plaintiff's action commenced by way of Writ of Summons and Statement of Claim filed on 20<sup>th</sup> January, 2023.
- 1.2. The Defendant's filed a Memorandum of Appearance and Defence and Counterclaim on 3<sup>rd</sup> February, 2023,
- 1.3. The Court granted an Order of interim injunction on 14<sup>th</sup> March, 2023.
- 1.4. The Plaintiff filed its Amended Writ of Summons and Statement of Claim on 25<sup>th</sup> November, 2024.

- 1.5. The Defendants filed their Amended Appearance and Defence and Counterclaim on 31<sup>st</sup> December, 2024.
- 1.6. The Plaintiff filed his Reply to Defence and Counterclaim on 14<sup>th</sup> January, 2025.

## **2.0. PLEADINGS.**

- 2.1. The Plaintiff claimed that on 13<sup>th</sup> March, 2021, he entered into a Contract of Sale with the Defendants for a piece of land being a Subdivision of sub 9 of Farm 288a under Property Number F/288a/A/9, Makeni, Lusaka (The Property). That the agreed Purchase Price of the property was Nine Hundred Thousand Kwacha (ZMW900,000.00) subject to the accompanying terms and conditions of the said Contract of sale.
- 2.2. It was stated that according to Special Condition No. 7 of the Contract of Sale, the Purchase price was to be paid in two instalments as follows: -
  - i. First instalment in the sum of Four Hundred and Fifty Thousand Kwacha (K 450, 000.00) on the signing of the Contract; and
  - ii. Second instalment in the sum of Four Hundred and Fifty Thousand Kwacha K 450, 000.00 on Completion.
- 2.3. It was also stated that pursuant to a Special Condition in the Contract of Sale, the Plaintiff proceeded to make the first instalment payment in the sum of Four Hundred and Fifty Thousand Kwacha (ZMW450,000.00) in cash to the Defendants

and the same was paid at Cosmopolitan Mall in Makeni, Lusaka on 13<sup>th</sup> March, 2021.

- 2.4. It was the Plaintiff's claim that a balance of Four Hundred and Fifty Thousand Kwacha (ZMW450,000.00) remained outstanding pending payment at Completion stage which was anticipated to be within five (5) weeks from the date of the Contract of Sale as per Special Condition No.7 of the Contract of Sale. That the Contract and Conditions of Sale Special Condition No.2 mandated the Defendants to obtain State's Consent and any other necessary licence to assign within six (6) weeks from the 13th March, 2021 and this was estimated not to be later than 30th April, 2021. Further that, the Defendants had failed to apply for State Consent and that this is a direct breach of the Special Condition No. 2 of the Contract of Sale.
- 2.5. It was claimed that Special Condition No.12 of the Contract of Sale placed the responsibility of paying for State's Consent to Assign, Subdivision and Marking Off and any pending ground rent on the Defendants. That however, the Defendants had refused or neglected to avail to the Plaintiff proof of payment for State's Consent or indeed proof of an application for State's Consent. Further, that despite repeated requests, the Defendants had refused or neglected to avail the Plaintiff of any Marking Off Diagrams.
- 2.6. That a search at the Lands Register conducted on 10<sup>th</sup> November, 2022, did not reveal anything to the effect that the Defendants either applied for State's Consent or indeed lodged

any application for Subdivisions and Marking Off in respect of the Contract of Sale with the Plaintiff and that the record showed activity relating to other transactions during the same period. That the Defendants knowing very well that the balance of the Purchase Price was only payable upon completion started making demands for payment of the balance in the sum of Four Hundred and Fifty Thousand Kwacha (ZMW 450, 000.00). That the Plaintiff declined to yield to their demands and later, on compassionate grounds and on the Defendant's assurance to release the documentation for the conveyance transaction, the Plaintiff started to release funds.

2.7. The Plaintiff would at trial aver that towards the second instalment payment, the Plaintiff made payments amounting to Three Hundred Thousand Kwacha (ZMW300, 000.00) as follows:

- i. 22/07/2021 – ZMW20, 000.00;
- ii. 24/07/2021 – ZMW100.000.00;
- iii. 28/01/2022 – ZMW 50,000.00;
- iv. 14/ 01/ 2022 – ZMW 50, 000.00; and
- v. 14/12/2022 – ZMW80, 000.00.

That the outstanding balance for the Purchase Price after all the payments stood at One Hundred and Fifty Kwacha (ZMW150, 000.00).

2.8. That on 14<sup>th</sup> December, 2022, the 1<sup>st</sup> Defendant sent a document through WhatsApp Messenger, an internationally available freeware, cross platform, centralized instant

messaging and voice-over-internet protocol application, wherein the 1<sup>st</sup> Defendant purported to rescind the Contract of Sale by issuing a Rescission Notice dated 13<sup>th</sup> December, 2022, where the Defendants were alleging that the Plaintiff had willfully failed and refused to complete the transaction in accordance with the Contract of Sale when in fact not.

2.9. That the rescission of the Contract of Sale was of no consequence as the Defendants could not take such an action on account of their own default. That it was in fact a clear breach of the contract together with the other several breaches that were on account of the Defendants.

2.10. The Plaintiff would aver at trial that he declined to pay the outstanding balance due to the fact that the Defendants neglected to honour part of their obligations under the Special Conditions No.2 and No.12 in the Contract of Sale and as a consequence completion envisaged in the Contract of Sale had been impossible as a result of the Defendants conduct and actions of failing to apply for State Consent to Assign which was the second step after executing a Contract of Sale in any Conveyance Transaction.

2.11. It was the Plaintiff's claim that his action in declining to complete paying before all the Special Conditions were satisfied was simply an exercise of caution by insisting on proof of the Defendants' authority to sell or consent from the State before finishing paying the purchase price. That the Defendants have not made such an application.

2.12. That although the Property was still registered in the initial Defendants' names as Billy Simon Clement Nkunika and Maria Dimuna Nkunika (Now Deceased), there is an addition of one Andrew Nkunika to the Certificate of Title endorsed on 9th November, 2022. He is an Advocate of Messrs. Nkunika & Chipeta Legal Practitioners. That the Defendants' action to change the names as they appeared when entering the Contract of Sale was suspicious especially with the subsequent act of the purported rescission of the Contract of Sale under their new names. That as such, the aforementioned act was fraudulent.

2.13. Further that, The Deed of Moiety executed by the 1<sup>st</sup> Defendant in favour of the 2<sup>nd</sup> Defendant granted an interest of joint ownership of the property to the 2<sup>nd</sup> Defendant. That as a consequence of the 2<sup>nd</sup> Defendants interest in the property, the Plaintiff through an application before this Honourable Court joined the 2<sup>nd</sup> Defendant to the proceedings. That 2<sup>nd</sup> Defendant's interest as a joint tenant or tenant in common in the property grants him rights and obligations with regards to the property. Furthermore, that as a consequence of the interest stated above, the 2<sup>nd</sup> Defendant possesses rights and obligations on the land, which rights and obligations existed prior to the execution of the Deed of Moiety.

2.14. Particulars of Fraud claimed are that:

*2.14.1. On 9<sup>th</sup> November, 2022, the Defendants entered into a Deed of Moiety with one Andrew Nkunika making the same as a beneficiary to the property herein*

*Sub 9 of Subdivision A of Farm 288a which was already under a Contract of Sale dated 13<sup>th</sup> March, 2021, with the Plaintiff. Therefore, such dishonest conduct on the part of the Defendants was intended to mislead and deceive, for the purposes of securing an Unfair or unlawful gain.*

- 2.15. It was claimed by the Plaintiff that the said Andrew Nkunika who is a son to the 1<sup>st</sup> Defendant and was also an Advocate in Messrs. Nkunika & Chipeta Legal Practitioners called the Plaintiff on or about November, 2022, to demand for the balance of the purchase price. That the said Andrew Nkunika informed the Plaintiff that the 1<sup>st</sup> Defendant, had complained to him that the Plaintiff was not paying the balance and the Plaintiff requested for documents relating to the transaction but Andrew Nkunika informed the Plaintiff that the same would be availed once he had finished paying and that they were pushing for the documentation.
- 2.16. It was stated that notwithstanding the said promises, no documents had been received and no record was there at the Lands Registry to show proof that the Defendants had lodged any documents relating to the transaction with the Plaintiff. That the Defendants were obliged to ensure that the Plaintiff's Title to the property whose consideration they had received and accepted was perfected.
- 2.17. That the Defendants were in breach of the Contract of Sale as they have failed, omitted and/or neglected to procure State

Consent to Assign, apply for Subdivision and Marking Off of the subject property to the Plaintiff and that the conduct by the Defendants was inconsistent with a person who had sold his property. That as a consequence of that, the Plaintiff had suffered and continues to suffer damage.

2.18. The Plaintiff would aver at trial that as a result of the Defendants' aforesaid conduct, he had been grossly inconvenienced and has suffered tremendous economic loss and damage.

2.19. The Plaintiff claims for the following: -

*2.19.1. An order for specific performance of Contract of Sale Relating to a subdivision of Sub 9 of Farm 288a in the extent of 1.2140 Hectares made on 13th March, 2021 between the Plaintiff and the Defendants for the Sale of Land;*

*2.19.2. An Order for the immediate possession of subdivision 9 of farm 288a by the Plaintiff;*

*2.19.3. An order that the Plaintiff is entitled to ownership of a subdivision of Sub 9 of Farm 288a in the extent of 1.2 140 Hectares made on 13th March, 2021, between the Plaintiff and the Defendants for the sale of Land.*

*2.19.4. An order that the Plaintiff be issued with Certificate of Title in respect to a Subdivision of Sub 9 of Farm 288a in the extent of 1.2140 Hectares*

*made on 13th March 2021, between the Plaintiff and the Defendants for the sale of land*

- 2.19.5. An order declaring the 2nd Defendant as an interested party to the contract dated 13th March, 2021.*
- 2.19.6. An Order declaring the 2nd Defendant as bound by the contract dated 13th March, 2021 from the date of registration of the Deed of Moiety.*
- 2.19.7. An order for damages for fraud*
- 2.19.8. An order for cancellation of the Deed of Moiety for fraud and or perpetrating a fraud;*
- 2.19.9. Damages for breach of Contract of Sale dated 13th March, 2021 made between the Plaintiff and the Defendants in the sum of One Million Kwacha (ZMW 1,000,000.00);*
- 2.19.10. Alternatively an order compelling the Defendants to account and refund the sum of seven hundred and fifty thousand (ZMW750,000.00) being the amount so far paid towards the purchase price;*
- 2.19.11. Damages for loss of use of the said monies under claim (v)*
- 2.19.12. compensation for unwarranted costs incurred in pursuit of this matter in the sum of One Hundred and Fifty Thousand Kwacha (K 750,000.00);*
- 2.19.13. Interest on the aforementioned claims*
- 2.19.14. An order for costs incidental to the proceedings.*

- 2.20. In their Defence, the Defendants stated that that they took steps to Subdivide the Property and had it numbered. That the purchase price was contracted to be paid in two equal instalments and the payment period was not to exceed five (5) months from the date of signing contract.
- 2.21. The Defendants denied that the balance of Four Hundred and Fifty Thousand Kwacha (K 450,000.00) which had remained outstanding pending payment at completion stage was to be paid within five (5) weeks from the date of the Contract of Sale as per Special Condition No.7, but that the Completion was to be achieved within five (5) months from the date of signing Contract.
- 2.22. It was stated that the Defendants were willing and able to obtain State Consent to Assign as it was the practice in Conveyancing and that the Defendants were ready to give Vacant Possession to the Plaintiff on completion of the payment but the Plaintiff failed or neglected to adhere to the terms of the Contract of Sale. That the Consent to Assign was not a pre-condition to Completion as it was due one week after the balance was due to be paid as acknowledged by the Plaintiff in the Statement of Claim.
- 2.23. It was also stated that the Plaintiff's Statement of Claim on his own admission showed that he was in breach of the conditions of the Contract of Sale by failing and/or refusing to pay. That the payments were made after the Defendants complained and considered various requests made by the Plaintiff for more time

to pay. Further that, those delays became inordinate and intolerable as the Plaintiff told the Defendants that he had other urgent uses for his funds and that he would only pay the Defendants when he got paid by the Government, despite having alternative income streams. That the Defendants reminded the Plaintiff of the Defendants' right to rescission of the Contract and Damages owed because of the conduct of the Plaintiff.

2.24. Further that, the Defendants advised the Plaintiff to collect the payment made on 14<sup>th</sup> December, 2022, because the Defendants had already issued a Notice of Rescission on 13<sup>th</sup> December, 2022, and that the Plaintiff refused to collect the money despite several requests and reminders.

2.25. Furthermore, the Defendants contented that the Contract was rescinded on 13<sup>th</sup> December, 2023 and the Defendants were entitled to claim for damages as they had not failed to complete the transaction nor were they in breach of the Agreement. That the conduct of the Plaintiff amounted to a breach of Contract and was not justifiable under the circumstances considering that the Defendants had been ready to complete the transaction and that the Plaintiff had been aware of that.

2.26. The Defendants' position is that the addition of the 1<sup>st</sup> Defendant's son on the Certificate of Title in no way affected the enforceability of the Contract and was immaterial to the matter at hand as the extent of the proposed Subdivision was a small proportion, of the remaining extent of the land.

2.27. It was the Defendants contention that Plaintiff's Statement of Claim is highly salacious, false and defamatory to the extent that it imputed Fraud on the part of the Defendants and their son, who is an Officer of Court and senior member of the Bar when in fact a Deed of Moiety was a normal instrument in Conveyancing and was used for specific lawful purposes as was the case in this matter and the defamation being that the 1<sup>st</sup> Defendant purportedly executed a Deed of Moiety in favor of the 2<sup>nd</sup> Defendant in furtherance of Fraud.

2.28. According to the Defendants, a Deed of Moiety was executed by the 1<sup>st</sup> Defendant in favour of the 2<sup>nd</sup> Defendant, on 9<sup>th</sup> November, 2022, granting the 2<sup>nd</sup> Defendant an interest in the Property. That however, the execution of the Deed of Moiety occurred subsequent to the Contract of Sale dated 13<sup>th</sup> March, 2021, and did not create any obligations for the 2<sup>nd</sup> Defendant under that contract. That the interest in the property which arises in relation to the 2<sup>nd</sup> Defendant was subject to all existing covenants and easements relating to the property. That the 2<sup>nd</sup> Defendant was not privy to the contract which was the subject of this dispute.

2.29. Further, that the Plaintiff's Application to join the 2<sup>nd</sup> Defendant to these proceedings was based solely on the Courts *Ex-Tempore* Ruling of 22<sup>nd</sup> October, 2024. That the Court explicitly observed that the 2<sup>nd</sup> Defendant might be affected by the outcome of these proceedings, without making any findings or

determinations regarding the 2<sup>nd</sup> Defendant's obligations or liabilities under the Contract of Sale.

2.30. It was stated that the 2<sup>nd</sup> Defendant's rights and obligations as a joint tenant or tenant in common with respect to the property rose solely under the Deed of Moiety executed on 9<sup>th</sup> November, 2022. That those rights and obligations were distinct and independent from the Contract of Sale between the Plaintiff and the 1<sup>st</sup> Defendant.

2.31. According to the Defendant, the Plaintiff's reliance on the Deed of Moiety to implicate the 2<sup>nd</sup> Defendant in the Contract of Sale was misplaced and legally unsound. The Deed of Moiety postdated the Contract of Sale and was unrelated to the Plaintiff's claims.

2.32. The Defendants stated that the 2<sup>nd</sup> Defendant informed the Plaintiff of the position of the law regarding completion and the processing of the Certificate of Title on payment of the outstanding balance in accordance with the Contract. That the Defendants had requested for Marking Off of the property on 18<sup>th</sup> November, 2022, with Ministry of Lands and Natural Resources, despite the conduct of the Plaintiff and expected that the Plaintiff would not commit further breaches of the Contract.

2.33. The Defendant stated that they rescinded the contract and are entitled to damages for breach of contract as the Plaintiff was the one in breach of the Contract of Sale on his own admission.

2.34. According to the Defendants, it was an express term of the Contract that the period fixed for completion under No.3 of the

Special Conditions was within two (2) weeks of signing the contract. That No. 5 of the Special Conditions stated that Title would commence with the Certificate of Title. Further that, the contract provided under No. 7 of the Special Conditions that the purchase price was to be paid as a deposit of ZMW 450,000.00 and a balance of ZMW 450,000.00 on completion and that at no time would the period for completion exceed five (5) months from the date of signing the contract.

2.35. That under No. 9 of the Special Conditions of the Contract of Sale, vacant possession would only be obtained on completion.

2.36. It was the Defendants' contention that in the present case, the Plaintiff neglected or deliberately failed to complete the contract within the period stipulated in the Contract of Sale, despite several reminders and the Defendants being patient with the Plaintiff. That No. 8 of the Special Conditions of the Contract of Sale stated that if the purchaser failed to pay the purchase price, the vendors had the right to rescind the contract and be entitled to damages for the breach of contract.

2.37. That the Deed of Moiety in no way affected the enforceability of the Contract of Sale and was immaterial to the matter at hand as the extent of the proposed subdivision is a small proportion of the remaining extent of the land, thus it was malicious and defamatory on the part of the Plaintiff to impute fraud of the Defendants.

2.38. According to the Defendants, because of the Plaintiff's failure to pay the Purchase Price in the stipulated time, a Notice of

Rescission dated 13<sup>th</sup> December, 2022 was issued in accordance with No. 8 of the Special Condition of Contract of Sale and that at that time, the outstanding balance or amount of the purchase price was in excess of ZMW 150, 000.00.

2.39. That in the premises and further or alternatively by reason of Plaintiff's breach of Contract of Sale, the Defendant had suffered damage and Counter-claimed the following:

*2.39.1. A declaration that the Plaintiff has no enforceable rights under the rescinded contract of sale dated 13<sup>th</sup> March, 2021.*

*2.39.2. A declaration that the 2<sup>nd</sup> Defendant, has no obligations or liabilities under the rescinded contract of sale.*

*2.39.3. An order declaring the Plaintiff's continued reliance on the rescinded contract of sale as vexatious and an abuse of the court process.*

*2.39.4. Damages for breach of contract of sale*

*2.39.5. Damages for mental strain*

*2.39.6. Interest for the unpaid balance of the purchase price up to the date of rescission according to the LAZ General Conditions*

*2.39.7. Damages for Defamation for the malicious and false claim of Fraud against the Defendant by the Plaintiff*

*2.39.8. Costs incidental to the proceedings; and*

*2.39.9. Any other relief the Court might deem necessary and just.*

2.40. The Plaintiff's Reply to Defence and Counterclaim is that the 2<sup>nd</sup> Defendant did not have the authority as a Tenant in Common or Joint Tenant to subdivide the property and have it numbered when the Defendant contracted to sell the property to the Plaintiff.

2.41. According to the Plaintiff, Special Condition No.7 of the Contract of Sale stipulated that the payment period of the full purchase price of Nine Hundred Thousand Kwacha (ZMW 900,000.00) should not exceed five (5) months from the date of signing the contract. That this was to be done in two equal installments. That the Plaintiff actually made payments totaling Seven Hundred and Fifty Thousand Kwacha (ZMW 750,000.00) as follows:

- i. ZMW450, 000.00 on 13<sup>th</sup> March, 2021 (date of contract);
- ii. ZMW20,000.00 on 22<sup>nd</sup> July,2021;
- iii. ZMW100,000.00 on 24<sup>th</sup> July, 2021;
- iv. ZMW50,000.00 on 14<sup>th</sup> January, 2022; and
- v. ZMW80,000.00 on 14<sup>th</sup> December, 2022

2.42. Further that, completion of payment within the said five (5) months was subject to the Defendants obtaining the statutory State Consent to Assign. That the 2<sup>nd</sup> installment of Four Hundred and Fifty Thousand Kwacha (ZMW450,000.00) was to be paid at completion which was to take place within two (2)

weeks from the date of contract according to Special Condition No. 3 of the Contract of Sale dated 13<sup>th</sup> March 2021. That however, Special Condition No.3 is void for illegality because it provides for completion before the Defendants obtain State's Consent to Assign, because obtaining State Consent to Assign is a mandatory requirement before the transfer of any land.

2.43. The Plaintiff stated that it would have been illegal to complete the said conveyance without obtaining State Consent. That thus, the failure or neglect to complete was at the instance of the Defendants who failed or neglected to obtain State Consent within the required or reasonable period. That the Plaintiff had insisted that the Defendants show proof of an application for State Consent to Assign prior to completion. That however, the Defendants failed or neglected to avail the proof to the Plaintiff.

2.44. That State Consent to assign was a legal pre-condition for the sell, transfer or assignment of any land and the Defendants' insistence on completion without obtaining State Consent to Assign would have been prejudicial to the Plaintiff hence the illegality and fraud. That despite the Defendants' aforementioned failure and neglect, the Plaintiff withheld only the balance of One Hundred and Fifty Thousand Kwacha (ZMW 150, 000.00) of the purchase price so as to avoid the illegality or fraud of completing a land transaction without obtaining State Consent. Further that the Plaintiff avoided to be defrauded of more monies after he became aware that the

Defendants wanted to give away and or sell the land to other people other than himself.

- 2.45. The Plaintiff's claim is that he actually made a part-payment of Three Hundred Thousand Kwacha (ZMW300,000.00) towards the 2<sup>nd</sup> installment and denied that he made numerous requests for more time to settle the outstanding balance. That those payments were made to the Defendants in settling the 2<sup>nd</sup> installment before completion contrary to Special Condition No.7 of the Contract of Sale.
- 2.46. Further that, the Plaintiff would aver that the Defendants had no basis whatsoever to rescind the Contract of Sale and that the purported rescission was a smokescreen to justify the Defendants' sale of the Plaintiff's property to new buyers.
- 2.47. The Plaintiff disputed that the Defendants legally rescinded the Contract of Sale on 13<sup>th</sup> December, 2022 and that the Defendants are not entitled to any claim for damages for breach of contract. That the Defendants sought to obtain the full purchase price from the Plaintiff before completion contrary to Special Condition No. 7 of the Contract and contrary to law prohibiting the transfer of land without State Consent.
- 2.48. It was the Plaintiff's claim that the Defendants' default prompted the Plaintiff not to pay the outstanding balance of One Hundred and Fifty Thousand Kwacha (ZMW150,000.00) on the 2<sup>nd</sup> installment as the Defendants refused, neglected or failed to apply for or obtain State Consent. That the Plaintiff was justified in withholding the balance of One Hundred and Fifty Thousand

Kwacha (ZMW150,000) because the Defendants refused, failed or neglected to obtain the State Consent in preference for selling the Plaintiff's land to new buyers and at a higher price.

2.49. That adding the 2<sup>nd</sup> Defendant to Certificate of Title No. 136780 by virtue of the Deed of Moiety materially affected the interests of the Plaintiff as the Deed of Moiety related to the whole or part of the land which was pending assignment to the Plaintiff and whereof the 2<sup>nd</sup> Defendant was not a party to the Contract of Sale herein. Further, that the fact that the 1<sup>st</sup> Defendant is the only party to the Contract of Sale dated 13<sup>th</sup> March, 2021, did not preclude the 2<sup>nd</sup> Defendant from having an interest in the Contract. That this was because the 2<sup>nd</sup> Defendant had an interest in the subject matter of the Contract by virtue of the Deed of Moiety.

2.50. That fraud arose as a result of the Deed of Moiety which was registered on 9<sup>th</sup> November, 2022, subsequent to the Contract of Sale dated 13<sup>th</sup> March, 2021, between the Plaintiff and the 1<sup>st</sup> Defendant. That the Deed of Moiety sought to fraudulently deprive the Plaintiff of the fruits of his contract. Further, that defamation cannot be established from a document filed before Court. That the 2<sup>nd</sup> Defendant was not joined to the proceedings solely based on the *Ex-Tempore* Ruling dated 22<sup>nd</sup> October 2024, though the Ruling was rendered based on the joinder application by the Plaintiff dated 19<sup>th</sup> September, 2024.

2.51. Further, that the 2<sup>nd</sup> Defendant would be affected by the outcome of these proceedings based on his Interest in the

subject matter of the contract and the interest has consequent rights and liabilities. That those rights and obligations conferred by the Deed of Moiety over the property are linked to the rights and obligations arising by virtue of the Contract of Sale dated 13<sup>th</sup> March 2021. That the Deed of Moiety executed subsequent to the Contract of Sale created an exception to the doctrine of privity of contract.

2.52. The Plaintiff stated that the period for completion being two (2) weeks of the signing of the contract was not feasible and subsequently illegal as the Defendant was only required to obtain the requisite State Consent within six (6) weeks from the date of contract. That State Consent is a pre-condition to the transfer of any land and that completion could not take place without obtaining State Consent.

2.53. According to the Plaintiff, Special Condition No.5 stated that the Title would commence with the Certificate of Title, that however, the Defendant could not legally transfer Title to the Plaintiff without obtaining State Consent which is a condition precedent for completion. The Plaintiff did not dispute that the purchase price would be paid in two equal instalments of Four Hundred and Fifty Thousand Kwacha (ZMW450,000.00) each and that the 2<sup>nd</sup> instalment would be paid on completion. That however, despite completion not taking place, the Plaintiff paid, at the Defendants' insistence, Three Hundred Thousand Kwacha (ZMW300,000.00) with a remaining balance of One Hundred

and Fifty Thousand Kwacha (ZMW150,000.00) due to the fault or neglect of the Defendant's in obtaining State Consent.

2.54. That the Plaintiff did not dispute that vacant possession would be given on completion. That vacant possession was not given because completion did not occur due to the lack of an application or the acquisition of State Consent by the Defendant.

2.55. It was the Plaintiff's position that he was not in breach of the Contract of Sale and that the Defendant had no consequent right to rescind the contract.

2.56. That the Defendants did not suffer any damage and that it was actually the Plaintiff that suffered damage due to the Defendants' failure, neglect and or refusal to obtain State Consent.

### **3.0. THE HEARING**

3.1. At the hearing held on 18<sup>th</sup> September, 2025, the Plaintiff in addition to his own testimony, called one other (1) Witness. The Plaintiff, Kelvin Moono, is aged 40 years, a Businessman and resident at Plot No. 72, Siafwa Farm Kalomo in the Southern Province of Zambia (hereinafter referred to as **PW1**).

3.2. For his Examination in Chief, **PW1** relied on his Amended Witness Statement filed on 17<sup>th</sup> June, 2025.

3.3. It was **PW1**'s testimony that between January and March 2021, Mr. Trevor Mwiinde in his capacity as a real estate Agent called

**PW1** regarding a piece of land that was available for purchase because he had earlier told Mr. Mwiinde that he wanted to purchase a piece of land where he wanted to build a house for his residence.

- 3.4. That the Plaintiff together with Mr. Mwiinde, between February and March of 2021, went to inspect the property that he had earlier been told about. That after viewing the land, the 1<sup>st</sup> Defendant with Maria Nkunika (Deceased) as the vendors and the Plaintiff as the purchaser agreed that on 13<sup>th</sup> March, 2021, they would sign the requisite contract containing the detailed terms and conditions of their commitment.
- 3.5. That the land in question measured in extent of 3 Acres. That on the 13<sup>th</sup> of March, 2021, it was agreed that the price of the piece of land per acre was Three Hundred and Fifty Thousand Kwacha (ZMW 300,000.00) giving them the full purchase price of Nine Hundred Thousand Kwacha (ZMW 900,000.00) for the three Acres.
- 3.6. The Plaintiff testified that according to Special Condition No.7 of the Contract, it was a term that the total purchase price of the property contracted to be sold was to be paid in two equal instalments of Four Hundred and Fifty Thousand Kwacha (ZMW450,000.00) upon signing the of contracts and Four Hundred and Fifty Thousand Kwacha (ZMW 450,000.00) upon completion. Reference was made to page 5 of the Plaintiff's bundle of Documents.

- 3.7. That upon signing the contract on the 13<sup>th</sup> March, 2021, in the company of Mr. Mwiinde as a witness to both the contract and the payment, the Parties proceeded to Stanbic Bank situate at Cosmopolitan Mall where the Plaintiff withdrew Four Hundred and Seventy Thousand Kwacha (ZMW 470, 000.00) cash. That thereafter, while still at Cosmopolitan Mall, the Plaintiff proceeded to pay the 1<sup>st</sup> Defendant and the deceased Four Hundred and Fifty Thousand Kwacha (ZMW 450,000.00) as Per Special Condition No.7 of the contract, and that it was witnessed by Otis Mudio and Trevor Mwiinde. Reference was made to Pages 2, 3 and 19 of The Plaintiff's Bundle of Documents.
- 3.8. Further, as the cash was being paid to the 1<sup>st</sup> Defendant and the deceased, photographs of them were captured as proof of the physical transfer of the 1<sup>st</sup> instalment of Four Hundred and Fifty Thousand Kwacha (ZMW450,000). Reference was made to pages 6-8 of the Plaintiff's Bundle of Documents.
- 3.9. It was **PW1**'s evidence that according to Special Condition No.2 and No.12 of the contract, the parties had agreed that State Consent and any other necessary licence to assign was to be obtained within six (6) weeks from the date of the contract and that the vendors shall bear the fees with respect to State Consent to Assign, Subdivision and Marking Off and any pending, ground rent. Reference was made to page 5 of the Plaintiff's Bundle of Documents.

3.10. That however, before State Consent to Assign and any other licences were obtained by the Vendors, the Vendors (Defendants) started pressuring the Plaintiff to provide more funds contrary to Special Condition No.7 of the Contract. That according to Special Condition No.7 of the contract, the Plaintiff was obligated to pay the outstanding amount or second instalment or Four Hundred and Fifty Thousand Kwacha (ZMW 450,000.00) upon completion which was to take place five (5) months from the date of signing the contract. Reference was made to page 5 of the Plaintiff's Bundle Documents.

3.11. An averment was made that as a result of the Defendants' actions, the Plaintiff started paying irregular amounts at irregular intervals. That the second payment after the initial deposit was on 22<sup>nd</sup> June, 2021, in the sum of Twenty Thousand Kwacha (ZMW20, 000.00); the third payment was made on the 23<sup>rd</sup> July, 2021, in the sum of One Hundred Thousand Kwacha (ZMW100,000.00); the fourth instalment was paid on 14<sup>th</sup> January 2022 in the sum of Fifty Thousand Kwacha (ZMW50,000.00); the fifth instalment was paid on the 28<sup>th</sup> October, 2022 in the sum of Fifty Thousand Kwacha (ZMW50, 000.00). That the sixth instalment was paid on 12<sup>th</sup> of December, 2022, in the sum of Eighty Thousand Kwacha (ZMW 80, 000.00). Reference was made to pages 9 to 13 of the Plaintiff's Bundle of Documents.

3.12. According to **PW1**, the transactions above were in relation to the second half of the outstanding amount of the purchase price. A

total sum of Three Hundred Thousand Kwacha (ZMW 300,000.00) was paid towards the second instalment. That the Defendants were still pushing the Plaintiff to complete the payments even before they had obtained State Consent and all requisite licences as per the contract.

3.13. It was testified that in November, 2022, the Plaintiff conducted a search at the Ministry of Lands and noticed that the 2<sup>nd</sup> Defendant had been added to the Certificate of Title by virtue of a Deed of Moiety. That the said Deed of Moiety granted an interest in the property subject of the Contract making the 2<sup>nd</sup> Defendant a joint owner of the property. Reference was made to page 1 of the Plaintiff's Supplementary Bundle of Documents.

3.14. That the Plaintiff noticed the fraudulent activity that was taking place in an attempt at depriving him of the ownership of the property and/ or his money. That when the Plaintiff decided to stop paying, on 13<sup>th</sup> December, 2022, the 1<sup>st</sup> Defendant and the Deceased then issued a Notice of Rescission by stating that the Plaintiff did not want to finish paying the balance and that as a consequence he had willfully failed or refused to complete the transaction. Reference was made to page 15 of the Plaintiff's Bundle of Documents.

3.15. The Plaintiff went on to state that the Defendants then rescinded the contract despite the Plaintiff's objections. That on 21<sup>st</sup> December, 2022, the Plaintiff placed a caveat on the property as a prospective buyer to prevent the Defendants from transferring the property in question, in order to protect

his interests. Reference was made to page 16 of the Plaintiff's Bundle of Documents.

3.16. It was stated that on 22<sup>nd</sup> December, 2022, the Plaintiff wrote to the Defendants demanding that the 1<sup>st</sup> Defendant and Deceased immediately surrender the property to him or give him a full reimbursement. Reference was made to page 18 of the Plaintiff's Bundle of Documents.

3.17. That in light of the foregoing, an injunction was obtained to stop the Defendants from entering on the land, surveying and demarcating it. That however, the Defendants had demarcated and sold the disputed property to third parties, some of whom had already constructed buildings on the property which is the subject of ongoing litigation and has registered interests thereby defying the Order of the Court dated 10th March, 2023. Reference was made to page 7 of the Supplementary Bundle of Documents.

3.18. In Cross Examination, **PW1** denied that he failed to pay the balance of ZMW 450, 000.00 as per Special Condition No. 7 because there were some documents he was supposed to be given. That he only paid 85% of the purchase price. The Plaintiff stated that the other payments were done within 5 months. That the Plaintiff paid ZMW 300, 000.00 out of the balance in ten months

3.19. The Plaintiff denied that according to Special Condition No.2 in the Contract of Sale, obtaining state consent was conditional upon the contract being in effect and consideration being paid

nor did he agree with the notion that since he did not complete paying the vendor, the vendor was not obliged to obtain state consent. Further that he was not given any document.

3.20. According to the Plaintiff, the time the parties engaged in the sale of land, the Title appeared in the names of 1<sup>st</sup> Defendant and the Deceased. That after sometime when he took the matter to his lawyers, the Plaintiff found that there was another person added by the name of Andrew Nkunika (the 2<sup>nd</sup> Defendant). That he noticed that there was some crookedness in the whole matter. That shortly after, he received a letter indicating that there was a reversal of the said contract and that constituted fraud.

3.21. It was the Plaintiff's testimony that he paid ZMW 750, 000.00 before rescission of the contract. The Plaintiff denied that that he attempted to pay the balance of ZMW150,000.00 after the vendor had rescinded the contract. He stated that he did not pay the ZMW150,000.00 because he was not given certain documents. That according to clause 12, of the contract he should have been given certain documents.

3.22. It was the Plaintiff's evidence that that the vendor had the right to rescind the contract if he was in breach of the contract and stated further, that he had paid ZMW450,000.00 but there was no paper given to him. The Plaintiff agreed that when he failed to pay ZMW900,000.00, the vendor exercised his right to rescind. He however insisted that he was supposed to be given certain documents.

- 3.23. It was testified by the Plaintiff that his lawyers initiated a refund that the 1<sup>st</sup> Defendant attempted to repay between March and June 2023. That he refused to receive the money because the Defendants wanted to pay him the exact amount even after so much time had passed. That the Plaintiff claimed for specific performance because he had paid 85% of the Purchase price and he had not been given any documents. It was stated that the act of the Defendants trying to refund the Plaintiff was not done in good faith.
- 3.24. It was the Plaintiff's evidence that the 2<sup>nd</sup> Defendant was not a party to the Contract the Plaintiff had signed but his name was on the Title Deed. That the Contract of Sale dated 13<sup>th</sup> March 2021, covered only one point two (1.2) Hectares (three (3) Acres) out of the total six (6) Hectares. That a large portion of the farm was never part of their agreement. That the photos in the Supplementary Bundle showed the piece of land he was shown when he signed the contract.
- 3.25. It was averred by the Plaintiff that he knew where the beacons were but that he did not capture them on the photos and only captured the structures. That the injunction was personally served on the Defendants. The Plaintiff also stated that he did not know the third parties that had built on the land that he had bought.
- 3.26. In Re-Examination, the Plaintiff stated that what made him not finish making payments, is because, it was agreed that upon payment of 50% which is ZMW450,000.00 the balance was to

be paid once he was given the consent. That however before the consent was given, the Defendants started calling him requesting that he should give them the remaining balance. That the Defendants requested for the money from the Plaintiff piecemeal until he had paid monies totaling ZMW 300,000.00. That the Plaintiff then told the Defendants that the money he had given them was a lot without them having given him any document. That this was against Special Condition No.12 of the contract which stated that the Plaintiff was supposed to have been given some papers before he was required to pay the balance of ZMW450,000.00.

3.27. An averment was made by the Plaintiff that he had paid the aforesaid sum of ZMW 300,000.00 and had informed the Defendants that he would only pay the balance of ZMW 150,000.00 upon being given the papers. That he was however neither given back the money nor land. That the vendor could not cancel the contract because it was agreed that the Plaintiff should be given State Consent to Assign before paying the balance. That however, the Plaintiff paid ZMW 300,000.00 before being given State Consent to Assign.

3.28. That the Defendants had been pushing the Plaintiff to complete the full payment of ZMW 900,000.00 while according to the contract he should have been given State Consent to Assign and that the said land had to be subdivided. That the Defendants did not subdivide the land and that was why the Plaintiff only paid ZMW750,000.00 in total.

- 3.29. It was the Plaintiff's testimony that his payment of ZMW300,000.00 was not in instalments. That it is the other party who had failed to furnish him with the documents within the agreed five (5) months. That the Defendants started calling the Plaintiff and collected money in bits amounting to ZMW 300,000.00. That had the Defendants given the Plaintiff the documents within five (5) months as contained in the contract, he would have given them the balance of ZMW450,000.00 at once the way he had done for the first payment.
- 3.30. According to the Plaintiff, he refused to be refunded in instalments of ZMW250,000.00 because his first payment to the Defendants was ZMW450,000.00. That he later started giving money in bits to the Defendants in the sum of ZMW50,000.00 and ZMW100,000.00 respectively. Also, that the land was not very expensive at the time he had bought it. But at the time the Defendants wanted to refund him, the value of the land, had appreciated. That having failed to agree on the said land the Plaintiff knew that the money initially paid to the Defendants would not enable him buy an equivalent land now.
- 3.31. It was the Plaintiff's position that when he was shown the piece of land, he kept visiting the said land for which he paid 85% of the purchase price. That one day when he went to the said piece of land, he found people digging a foundation at the same piece of land he had been shown. That it was at that point that he reported the development to his lawyers.

3.32. Further, that the Plaintiff went back after some time and found that houses had been erected. That it was at that point that he decided to take pictures so that he could show his lawyers. That the people were building even though the matter was already in Court and he had been informed that there was an Injunction in place. That the said houses were still there and had been roofed even though the matter was still in Court.

3.33. The Plaintiff reiterated that the reason he had not paid the sum of ZMW150,000.00 was because he had realized that he had paid over 35% of the balance but no document had been given to him. That the said term of five (5) months in the Contract, had not been breached by him.

3.34. It was also testified that in the said five (5) months, no documents had been given to the Plaintiff. That the Plaintiff was willing to pay the balance because he had already paid ZMW300,000.00 from the balance without being given any documents. That the Defendants are the ones that should have given the Plaintiff the State Consent to Assign together with other documents.

3.35. The Plaintiff called as his Witness, Trevor Mwiinde Sialunga, aged 43 years, a Businessman, who resides at Plot No. 5640, Lufubu Road Kalundu, Lusaka. (herein referred to as **PW2**).

3.36. For Examination in Chief, **PW2** relied on his amended Witness Statement dated 17<sup>th</sup> June, 2025.

- 3.37. It was **PW2**'s testimony that he was an agent who had facilitated the Contract of Sale Agreement entered into on the 13<sup>th</sup> March, 2021, between the Plaintiff as the buyer and the 1<sup>st</sup> Defendant and the Deceased, both as sellers of the Property. That he was informed by the Defendants that they wanted to sell the family land.
- 3.38. An averment was made that **PW2** decided to advertise the said land through his social networks. That it was through advertisements that the Plaintiff, among others, became interested in the land. That the 1<sup>st</sup> Defendant and the Deceased agreed to sell, and the Plaintiff agreed to purchase 3 acres of the land. That Mr. Otis Mudiyo, the 1<sup>st</sup> Defendant's nephew prepared the Contract for the property. That the Contract was signed by all the parties on 13<sup>th</sup> March, 2021, and **PW2**, was a witness to the signing of the Contract. Reference was made to pages 2, and 3 of the Plaintiff's Bundle of Documents.
- 3.39. That after preparation of the contract, the Parties agreed to the terms of the contract and they proceeded to Cosmopolitan Mall, ABSA Bank where the Plaintiff withdrew Four Hundred and Fifty Thousand Kwacha (ZMW 450,000.00) cash. Reference was made to page 19 of the Plaintiffs Bundle of Documents.
- 3.40. It was testified that upon withdrawing the aforementioned amount, while still at Cosmopolitan Mall, the Plaintiff paid to the Defendants the sum of Four Hundred and Fifty Kwacha (ZMW 450, 000.00) being the first of the two equal instalments and as per Special Condition No. 7 of the Contract. That the

Plaintiff further captured photographs of the payment of the 1<sup>st</sup> Instalment to the 1<sup>st</sup> Defendant. Reference was made to page 68 of the Plaintiffs Bundle of Documents. Further that, the first instalment was to be paid upon the signing of the contract and the last instalment was due to be paid on completion.

3.41. That after the Agreement was executed on 13<sup>th</sup> March, 2021 a surveyor was engaged, who then put beacons for 3 Acres, subject of the contract. That the Plaintiff kept on pushing **PW2** to inform the 1<sup>st</sup> Defendant and the Deceased to obtain State Consent to Assign as per Special Condition No. 2 of the Contract of Sale dated 13<sup>th</sup> March, 2021. Reference was made to page 5 of the Plaintiff's Bundle of documents. Further that, State Consent to Assign was to be obtained six (6) weeks from the date of the Contract.

3.42. It was **PW2**'s evidence that according to Special Condition No. 12 of the Contract of Sale, the Vendors were obligated to bear the fees with respect to State Consent to Assign, Subdividing and Marking Off and any pending ground rent. Reference was made to page 5 of the Plaintiff's Bundle of Documents.

3.43. According to **PW2**, Special Condition No.7 of the Contract of sale, in the respect of the balance of ZMW 450,000.00 was to be paid upon completion and that completion was to be achieved within five (5) months from the date of signing of the Contract that is to say, from 13<sup>th</sup> March, 2021. Reference was made to page 5 of the Plaintiffs Bundle of Documents.

- 3.44. It was **PW2**'s testimony, that he never witnessed the other transactions relating to the second instalment. That however, he was informed that the transaction was never completed. That he was informed by the Plaintiff that the transaction was never completed because the owners of the land proposed that they rescind the contract and refund the amounts already paid by the Plaintiff.
- 3.45. In Cross-Examination, the Witness informed Court that the agreement of him being an agent for the Plaintiff was oral. That his role was that of a middleman. That **PW2** was informed about the rescission of contract. That aside from the initial deposit of the purchase price, he was informed that further transactions were made.
- 3.46. It was **PW2**'s evidence that the balance according to condition No. 7 was to be paid upon completion agreed to be within five (5) months. That **PW2** did not see this as a breach because there were conditions to be fulfilled by the seller. That the witness was not aware that it was wrong to insist on assigning the property before completion.
- 3.47. According to **PW2**, the Defendants did not give valid reasons for not obtaining State Consent to Assign. **PW2** did not agree that if the Plaintiff did not pay the full price, the 1<sup>st</sup> Defendant was not obliged to complete the transaction.
- 3.48. Further that, **PW2** did not receive any rescission letter but he was informed about it. The witness did not agree with the notion that if the buyer fails to complete payment within five (5)

months, the seller is entitled rescind. He also stated that the buyer had demonstrated capacity by making extra payment in addition to the initial deposit of the purchase price.

3.49. It was testified that the purchase price was paid and that there were conditions to be fulfilled by the seller.

3.50. In Re-Examination, **PW2** informed Court that when they sat down to agree on a deposit, ZMW 450,000.00 was made despite the Plaintiff requesting to make a deposit, of 10% because the Defendants had stated that they needed the money urgently. That capacity was demonstrated by the buyer, who accepted and made the payment immediately in the presence of witnesses. That thereafter there were unnecessary delays in obtaining State Consent to Assign and even in signing the Contract of Sale.

3.51. It was also stated that as an Agent, **PW2** was introduced to the seller (Defendants) by Mr. Otis Mudiyo who was a nephew to the Defendants. That as an Agent **PW2** was a middleman responsible for transfer of information between the seller and the buyer. That **PW2** was the first to be informed of any process or hardship in the transaction. That however, he questioned the process of subdivisions through Mr. Mudiyo and was surprised to learn from the Plaintiff that he had paid extra monies of over ZMW 150,000.00 at the sellers' verbal command. That **PW2** found it surprising that the contract would be rescinded despite the Plaintiff's willingness to pay.

3.52. It was **PW2**'s testimony that he had witnessed a sum of ZMW 450,000.00 being paid. That the Plaintiff had also informed him that he had made another payment of ZMW 150,000.00 to help expedite the process of subdividing the land and towards other costs known to the seller.

3.53. It was also **PW2**'s testimony that the Plaintiff was taken to the site and he believed that the piece of land he was shown was correct in value. That a deposit was made which meant that, that particular piece of land was held in trust for the person that had made the deposit. That the said piece of land was committed to the Plaintiff. That the Plaintiff had paid at least 50% of the purchase price.

3.54. This marked the end of the Plaintiff's case.

3.55. The Defendants both testified in their Defence. The 1<sup>st</sup> Defendant, Billy Nkunika, is aged 85 years, a Farmer and resident at Farm No. 288a, Makeni, Lusaka. (herein referred to as **DW1**).

3.56. **DW1** for his Examination in Chief relied on his Witness Statement filed on 10<sup>th</sup> April, 2025.

3.57. It was **DW1**'s evidence that the Plaintiff, entered into a Contract of Sale with the 1<sup>st</sup> Defendant on 13<sup>th</sup> March, 2021, in respect of a proposed subdivision of Subdivision No. 9 of Farm No. F/288a/A, situated in Makeni, Lusaka. That the contract was duly signed and had clear Special Conditions binding both parties. That it was an express term of the Contract under

Special Condition No.3 that completion was to be achieved within two (2) weeks of the date of signing. That however, the Plaintiff negotiated an extension, and the Defendants agreed in good faith that completion would not exceed five (5) months from the signing date.

3.58. It was stated that the purchase price was ZMW900,000.00, to be paid in two equal installments of ZMW450,000.00. That the first instalment was paid as agreed. That however, the balance of ZMW450,000.00 was not paid within the stipulated timeframe. That the Plaintiff breached the terms of the Contract by failing to pay the balance of the purchase price within the agreed five (5) months. That despite several reminders and indulgences granted by the Defendants, the Plaintiff continued to delay and offered no satisfactory justification. That at one point, he advised that he had other pressing financial obligations and would only pay the Defendants once he received money from the Government.

3.59. It was **DW1**'s testimony that in view of the prolonged breach, and after giving notice, **DW1** lawfully rescinded the Contract of Sale by way of written notice on 13<sup>th</sup> December, 2022, pursuant to Special Condition No.8 of the Contract. That on 14<sup>th</sup> December, 2022, the Plaintiff paid a late instalment of ZMW 150,000.00 which **DW1** rejected because rescission had already been communicated a day earlier. That **DW1** asked the Plaintiff to collect the refund, but that he refused, even after several reminders.

3.60. Further that, the Plaintiff claimed that **DW1** had failed to obtain State's Consent to Assign, which was misleading. That it was a standard practice in conveyancing that Consent to Assign was obtained after Completion, which in this case was dependent on full payment. That the 1<sup>st</sup> Defendant was ready and willing to obtain the consent once Completion was achieved. That vacant Possession was also only due upon Completion of payment, as per Special Condition No.11 and that **DW1** could not lawfully grant possession before the Plaintiff met his contractual obligations.

3.61. **DW1** testified that the Plaintiff also alleged that he improperly dealt with the property by executing a Deed of Moiety in favour of the 2<sup>nd</sup> Defendant, on 9<sup>th</sup> November, 2022. That however, the Deed of Moiety was executed after the Plaintiff had breached the contract, and that the 2<sup>nd</sup> Defendant's rights under that instrument were subject to all existing encumbrances and in no way affected Plaintiff's entitlements under a disputed contract, if any.

3.62. That the Plaintiff's attempts to impute fraud and impropriety on **DW1** and the 2<sup>nd</sup> Defendant were not only false, but also defamatory, and amounted to an unwarranted attack on their respective characters and professional standing. That the Plaintiff also misrepresented the legal position regarding Completion, Consent to Assign, and Marking Off of the plot. That despite his default, **DW1** still submitted a request for

Marking Off of the property on 18<sup>th</sup> November, 2022, in good faith, expecting that the Plaintiff would comply.

- 3.63. It was also testified by **DW1** that at no point did he fail or refuse to complete the transaction. That rather, it was the Plaintiff who failed to honour the Contract, and **DW1** was compelled to rescind the same in accordance with the Contract provisions. That **DW1** counterclaimed for Damages for breach of Contract, as the Plaintiff's persistent default not only frustrated the Contract but also deprived **DW1** of the opportunity to transact with other willing buyers during the entire period of indulgence.
- 3.64. Further, that the Plaintiff had placed a caveat over the property as intending purchaser after the contract had already been rescinded and that his legal basis for placing a caveat had been extinguished as a result of his breach of contract and the subsequent rescission of the contract by **DW1**.
- 3.65. Furthermore that, the Plaintiff was not entitled to any of the remedies he seeks. That the Plaintiff was the defaulting party, and his breach caused loss and inconvenience to **DW1**.
- 3.66. In Cross-Examination, **DW1** informed Court that there was a Contract of Sale. That completion was to be achieved in two (2) weeks meant that the money agreed had to be paid in full. **DW1** conceded that the LAZ General Conditions protect both the purchaser and the vendor. That **DW1** was aware that the purchaser has to fulfil the condition and on that day the vendor also has to come to the table with the Assignment, State Consent to Assign and that the Zambia Revenue Authority Tax

ought to have been paid and that diagrams also have to be ready.

3.67. It was **DW1**'s evidence that he had the documents but he did not give the Plaintiff because he was waiting for him to pay the balance before he could surrender them. That the said documents were at **DW1**'s home. That **DW1** thought he could answer what he knew without necessarily referring to the aforementioned documents. **DW1** conceded that he never wrote to the Plaintiff that he was ready to complete nor did he inform him that he had obtained State Consent.

3.68. Further that **DW1** was aware that one can conduct a search at the Lands and Deeds Registry and that such a search would reveal the history of transactions. When referred to pages 1 to 3 of the Plaintiff's Supplementary Bundle of Documents, **DW1** conceded that he could not see any entry of the State's Consent to Assign.

3.69. When it was put to the 1<sup>st</sup> Defendant that he was lying, he stated that he had bad memory and that he was failing to recall. That he had sold the land to the Plaintiff but because of delay, he withdrew the offer and sold to another person. That **DW1** had written to the Plaintiff that he was withdrawing the offer to him. That the letter that the Plaintiff signed acknowledging receipt of aforementioned letter was at **DW1**'s home and that he could not remember when it was written.

3.70. It was **DW1**'s testimony that he was aware that land was governed by certain laws and that without State Consent to

Assign, land can not be transferred. **DW1** stated that the agreement between him and the Plaintiff was a verbal agreement and nothing was signed. **DW1** however conceded that there was a Contract of Sale between him and the Plaintiff as exhibited in the Plaintiff's Bundle of Documents.

3.71. When asked about the Plaintiff paying only a deposit of 10% according to the LAZ General Conditions, **DW1** stated that Mr. Nkunika, **DW2** would answer that in his testimony. That **DW1** was however aware that he had sold 1.214 Hectares, a portion which was supposed to be marked off from the Title. That he had applied to Lusaka City Council for the portion to be marked off. **DW1** however, stated that the said application was not before Court.

3.72. **DW1** in his evidence informed Court that the process for Marking Off may take two months. **DW1** also stated that he did not know if it was possible to obtain State Consent to Assign and diagrams following the procedures as per the LAZ General Condition within (2) weeks.

3.73. **DW1** in further Cross Examination stated that he could not remember obtaining State Consent to Assign within six (6) weeks. That **DW1** confirmed that the Plaintiff had paid 85% (ZMW 750,000.00) of the purchase price with a balance of ZMW 150,000.00 which he had refused to accept because he had rescinded the contract. The 1<sup>st</sup> Defendant could not remember at what point he had sold the land to a third party. **DW1** also stated that when the Plaintiff delayed in settling the amount, he

withdrew the offer. That **DW1** had registered the transaction with the third party, however, those documents were not before Court.

3.74. It was stated that he believed that Title for the third party had been issued but that he was finding it hard to go back in memory. **DW1** denied that the transaction with the third Party was full of deceit and fraudulent. That he did not pay the Plaintiff back because the Plaintiff had refused to be refunded. **DW1** confirmed that he owed the Plaintiff ZMW 750,000.00. That the money owed to the Plaintiff was supposed to be paid in instalments.

3.75. Further that according to **DW1**'s understanding, State Consent is only paid for upon completion. That he did not communicate that he was ready to complete the transaction. **DW1** conceded that he did not meet anywhere with the Plaintiff where he, the Plaintiff, refused to pay the balance.

3.76. It was **DW1**'s evidence when asked about registering the Deed of Moiety in the 2<sup>nd</sup> Defendant's favour, that right from the beginning he had given the property to the 2<sup>nd</sup> Defendant. That **DW1** had registered the same despite there being a transaction between himself and the Plaintiff. Further that he did not know if the same amounted to fraud. That he also did not know if selling property subject of another transaction amounted to fraud.

3.77. **DW1** declined to answer a question about his alleged defamation in his Witness Statement.

- 3.78. The 1<sup>st</sup> Defendant responded that he was not sure if he had submitted documents for Marking Off. He also stated that the rescission was not an afterthought.
- 3.79. In Re-Examination, **DW1** stated that the documents he was referring to was the major one which was the Title Deed. That **DW1** was not aware that he was required to bring the Consent to Assign to Court.
- 3.80. **DW1** also stated that the reason he rescinded the contract was because the Plaintiff who was the buyer was not complying with what was agreed.
- 3.81. The 2<sup>nd</sup> Defendant, Andrew Nkunika, is aged 47 years, a Legal Practitioner who resides at Plot No. 302, Ibex Hill, Lusaka (herein referred to as **DW2**).
- 3.82. **DW2** for his Examination in Chief relied on his Witness Statement dated 10<sup>th</sup> April, 2025.
- 3.83. It was **DW2**'s testimony that he was not a party to the Contract of Sale dated 13<sup>th</sup> March, 2021, between the Plaintiff, and the 1<sup>st</sup> Defendant. That **DW2** was not involved in the negotiation, drafting, or execution of that contract, nor did he at any time assume or undertake any obligations under it. That the only legal interest that **DW2** holds in relation to the property, arose from a Deed of Moiety executed on 9<sup>th</sup> November, 2022, by the 1<sup>st</sup> Defendant. That the Deed of Moiety was a legal instrument that lawfully granted **DW2** an undivided interest in the said property.

- 3.84. It was also testified that **DW2** was advised by his Advocates and verily believed that a Deed of Moiety is a lawful conveyancing instrument used to formalize co-ownership of land, and that its execution in his favour did not in itself render him liable or privy to any contract entered into prior to its execution. That the legal instrument was neither fraudulent nor irregular, and any suggestion by the Plaintiff that its execution was done to frustrate his rights was unfounded, defamatory, and malicious.
- 3.85. It was stated that **DW2** was further advised by his Advocates that the Court's Ruling of 22<sup>nd</sup> October, 2024, which permitted his joinder to these proceedings, was made solely on the basis that he might be affected by the eventual outcome due to his co-ownership interest, and not because he was a party to the Contract of Sale.
- 3.86. **DW2** denied that he had ever represented to the Plaintiff that he was under any obligation to perform or honour any part of the Contract of Sale. That at no point did he participate in any transaction, discussion, or negotiation with the Plaintiff concerning the sale, possession, or transfer of ownership of the property in question, except to advise him to conclude payment of the purchase price prior to the rescission of the contract by the 1<sup>st</sup> Defendant.
- 3.87. An averment was made that the Plaintiff's attempts to impute contractual liability on **DW2** based on the Deed of Moiety was both misconceived in law and unsustainable in fact. That it is settled law that one cannot become a party to a contract after

its formation, except by novation or express assumption of obligations, neither of which applied in this case.

3.88. That the Plaintiff approached **DW2** informally and sought clarification on the Contract and Title issuance. That **DW2** informed the Plaintiff that completion and the processing of the Certificate of Title could only proceed upon full payment of the purchase price, as per the Contract's terms, which **DW2** was not a party to. That **DW2** never made any assurances to the Plaintiff that he would receive a Certificate of Title or that **DW2** would facilitate such issuance upon payment.

3.89. It was **DW2**'s evidence that the Plaintiff's allegations against him, particularly those suggesting fraudulent conduct or a collusive scheme with the 1<sup>st</sup> Defendant to defeat his contractual rights, are false, highly defamatory, and unsupported by any evidence. That **DW2** reserves the right to seek redress in defamation should these claims be pursued outside the boundaries of privileged Court proceedings.

3.90. It was testified that **DW2**'s interest in the property did not affect the Plaintiff's legal remedies under the contract he had entered into with the 1<sup>st</sup> Defendant, nor did it extinguish any valid claims he may have had against the 1<sup>st</sup> Defendant. That however, **DW2** had never been contractually obligated to the Plaintiff.

3.91. It was **DW2**'s testimony that this Court should dismiss all claims made against him, because they were misconceived,

legally untenable, and unsupported by the facts or applicable legal principles.

3.92. In Cross-Examination **DW2** informed Court that the land subject of this proceedings was F/288a/A/9 Makeni Lusaka. That the said property is under a Title Deed which bore the names Billy Nkunika and Maria Nkunika before he was added. That **DW2** was aware of a Contract of Sale that was executed on 13<sup>th</sup> March, 2021 between the Plaintiff and the 1<sup>st</sup> Defendant.

3.93. The Witness stated that he was aware of the deposit of the of the Purchase price and the legal dispute between the late 1<sup>st</sup> Defendant and the Plaintiff. The Witness confirmed that despite being aware of the Contract of Sale, **DW1** executed a Deed of Moiety in his favour which was registered on 9<sup>th</sup> November, 2022. Further, that he was aware that the Deed of Moiety was registered for the whole property which was in extent of Six (6) Hectares.

3.94. **DW2** confirmed that the Deed of Moiety was subject to the portion that was scheduled for sale. That as far as he was aware there was no Marking Off of the Property to be sold to the Plaintiff that measured 1.2140 Hectares. That he did not know if there was State Consent to Assign. The Witness also stated that he could not say with certainty if it was possible to obtain necessary conveyancing documents within two (2) weeks because conveyancing transactions vary. That it is possible to apply and obtain State Consent within two (2) weeks.

- 3.95. It was **DW2**'s testimony that the Law Association of Zambia has general conditions (LAZ General Conditions) relating to Contract of Sale for Real property which can be modified by Special Conditions. That as far as he was aware the Special Conditions embody the modified conditions agreed to by the parties. That the general conditions can be varied by the Special Conditions.
- 3.96. It was also **DW2**'s testimony that he became aware that the Plaintiff had paid ZMW 450,000.00 to the 1<sup>st</sup> Defendant when the dispute arose. That he was also aware that the Plaintiff paid an additional ZMW 300,000.00 from the documents on record.
- 3.97. **DW2** averred that he had no personal engagement with the Plaintiff as regards the Deed of Moiety. That the Deed of Moiety was executed in his favour on account of his parents' ailing age and it was registered on that basis. **DW2** confirmed that immediately he was registered he became a part owner of the property. The witness however denied that he informed the Plaintiff that he had become owner and could conclude the transaction or otherwise.
- 3.98. The 2<sup>nd</sup> Defendant confirmed that he was aware of the registration of the Injunction and a caveat based on the documents on record. That as far as he was aware, no sale of land was undertaken during the subsistence of the injunction and Caveat as that would have not been possible. That he was not aware of any buildings that had been erected on the subject property which was purchased by the Plaintiff.

- 3.99. **DW2** admitted that there was an attempt to remove the Caveat that had been placed. When asked to read a clause of the Contract of Sale and explain what was supposed to happen at completion of the Contract, **DW2** stated that Special Condition No. 7 stated that completion was to take place upon completion. That as far **DW2** was aware, completion requires preparation of necessary documents to facilitate transfer of a property from the vendor to the purchaser.
- 3.100. That the documents required to be prepared towards completion were the Assignment, obtaining State Consent to Assign, Application of plaining permission for Marking Off and Subdivision and the processing of Property Transfer Tax. Further that Special Condition No. 7 provided that completion would be done upon payment of purchase price provided. That the obligation would therefore rest on the vendor once payment had been made.
- 3.101. **DW2** when asked if it was a required legally that the purchaser cannot pay the balance in the absence of the requisite documents and that the word 'completion' was to protect both the vendor and the purchaser, the exchange occurring at once, stated that the sequence of events for completion may vary depending on the agreement.
- 3.102. Further, that his reading of Special Condition No.7 of the Contract of Sale was that the balance of ZMW 450,000.00 should have been paid upon which all relevant documents would have

been availed and the transaction concluded. That according to his knowledge, completion did not take place.

3.103. When asked if a letter was written to the Plaintiff informing him that vendor was ready to complete, **DW2** informed Court that he was not a party to the contract and as such did not have any engagement with the Plaintiff. That the only engagement he had with the Plaintiff was what he had stated in his Witness Statement. That he was also not aware of any form of correspondence but that he was aware of electronic communication between the parties. That however, he did not have the said electronic communication before Court.

3.104. **DW2** as regards the contents of his Witness Statement in Special Condition No.7 of the Contract of Sale, stated that he is Senior Counsel and Legal Practitioner and had occasion to read the same. Further, that he only became aware of the deposit when the dispute arose. That as a Legal Practitioner he agreed that once a contract is drawn, both parties must sign it subject to becoming compliant with the terms.

3.105. Further, that at the time the contract was being entered into, he was not present and he only had occasion to see it after execution. That as far as general principles are concerned to which the question related, to his knowledge, the obtaining of State Consent to Assign was subject to the agreed terms and conditions of the contract. **DW2** conceded that without State Consent to Assign, Zambia Revenue Authority Property Transfer Tax could not be paid for and would not be accepted by the Deeds

Registry. **DW2** also confirmed that Tax was to be paid by the vendor unless the parties agreed otherwise.

- 3.106. It was testified by **DW2** that as far as he was aware, there was no application for Marking Off. **DW2** denied that No. 12 and No.13 of the Special Conditions were supposed to form part of completion in exchange for final payment. **DW2** informed Court that he was yet to do a conveyancing transaction as he had spent over 20 years in government employment.
- 3.107. It was stated that the law protects both parties and further as a member of the Bar, the same law presumes him competent. That his never having undertaken any conveyancing does not render him incompetent. That obligations rest on the parties who must agree in a conveyancing transaction.
- 3.108. No questions were asked in Re-Examination and this marked the end of the Defence's case.

#### **4.0. THE PARTIES FINAL SUBMISSIONS**

- 4.1. The Plaintiff filed his Final Submissions on 9<sup>th</sup> October, 2025.
- 4.2. The Defendants filed their Final Submissions on 29<sup>th</sup> October, 2025.
- 4.3. The Plaintiff filed his Reply to the Defendants' Final Submission on 7<sup>th</sup> November, 2025.
- 4.4. I have duly considered the bulky Submissions filed into Court by the Parties. I will not reproduce them but will refer to them where necessary.

## **5.0. CONSIDERATION AND DECISION OF THE COURT**

- 5.1. There is no dispute that the Plaintiff and the 1<sup>st</sup> Defendant and his late wife entered into a Contract of Sale on 13<sup>th</sup> March, 2021, for a Subdivision of Sub 9 of Farm 288a (F/288A/A/9) Makeni Lusaka at a consideration of K900,000.00 evidenced by the Contract of Sale exhibited in both the Plaintiff and the Defendant's Bundles of Documents.
- 5.2. The Plaintiff contends essentially that the Defendants have breached the Contract and seeks reliefs anchored on specific performance of the Contract or alternatively that the Defendants be compelled to account and refund the amount of Seven Hundred and Fifty Thousand Kwacha (ZMW 750,000.00).
- 5.3. On the other hand, the Defendants' position is that the Plaintiff breached the conditions of the Contract of Sale by delaying, failing and/or refusing to pay. That the 1<sup>st</sup> Defendant and his late wife had advised the Plaintiff to collect the payment made on 14<sup>th</sup> December, 2022, because the 1<sup>st</sup> Defendant and his late wife had already issued a Notice of Recision on 13<sup>th</sup> December, 2022, but that the Plaintiff had refused to collect the money despite several reminders. Further that the Respondent is entitled to damages as counterclaimed owing to the fundamental breach by the Plaintiff.
- 5.4. As I see it, the issue in dispute and therefore falling for my determination is how the Parties performed their respective obligations under the Contract of Sale. The obligations of the Parties are to be found in the Special Conditions contained in

the Contract of Sale. For avoidance of doubt, I set out the Special Conditions.

- “1. The Property is sold subject to the Law Association of Zambia General Conditions of Sale 1997 so far as the same are not inconsistent with or varied by these Special Conditions.*
- 2. The period fixed for obtaining state’s consent to assign and any other necessary licence shall be six (6) weeks from the date of contract.*
- 3. The date fixed for completion shall be within two weeks of the date this Certificate of Title.*
- 4. The vendors are selling as beneficial owners.*
- 5. The Title shall commence with the Certificate of Title.*
- 6. The Property is being sold subject to exceptions, reservations restrictions covenants and conditions contained in the Certificate of Title.*
- 7. The total purchase price of the property contracted to be sold shall be paid in two instalments of Four Hundred and Fifty Thousand Kwacha (ZMW450,000.00) on signing of contract and Four Hundred and Fifty Thousand Kwacha (ZMW450,000.00) on completion. However completion should be achieved within five months from the date of signing contract.*
- 8. If the purchaser fails to pay the purchase price, then the vendor has the right to rescind the contract and be entitled to damages for Breach of Contract.*

11. *The purchaser shall take vacant possession of the Property on completion.*

12. *The vendor shall bear the fees with respect to state consent to assign, subdivision and marking off and any pending Ground Rent.*

13. *The purchaser shall bear the fees with respect of Property Transfer Tax and registration and related expenses.*

14. *Each Party shall bear its own legal fees of this transaction”.*

5.5. A Contract is a promise or set of promises which the law will enforce in accordance with the agreement giving rise to the same as aptly defined in the case of **Ringford Habwanda v Zambia Breweries Limited**<sup>1</sup>. It is evident from the Special Conditions set out above that both the Plaintiff and Defendants were enjoined to perform their respective obligations before the agreement could be consummated. There is no dispute that upon signing of the Contract, the 1<sup>st</sup> instalment of ZMW450,000.00 was paid by the Plaintiff to the 1<sup>st</sup> Defendant.

5.6. There is evidence as contained in the Plaintiff’s Bundle of Documents at Pages 9, 10, 11, 12, 13 and 14 that a total amount of ZMW300,000.00 was paid by the Plaintiff to the 1<sup>st</sup> Defendant between 22<sup>nd</sup> June, 2021, and 14<sup>th</sup> December, 2022, towards the 2<sup>nd</sup> instalment payment.

5.7. It is noteworthy at this point that while Parties are at liberty to vary the LAZ General Conditions of Sale, such variation must

be done in manner that sits well with both common sense and realistic timelines for performance of the Parties' respective obligations under the Contract. The rationale behind the LAZ General Conditions is also to ensure that both the vendor and purchaser are protected as the sale transaction is progressing. A careful perusal of the Terms and Conditions as set out by the Parties herein reveals challenges. First, Special Condition No. 3 and Special Condition No. 7 provide contradictory timelines for completion, that is to say, within two weeks and within five months respectively from date of signing. Secondly the numbering of the Special Conditions from No. 7 is not sequential, perhaps done using cut and paste approach, which may also have caused the former challenge.

- 5.8. From a practical view in terms of conveyance transactions, it is simply not possible given the respective obligations placed on both the Plaintiff and the Defendants that a conveyance of this nature could have been completed within the period of two weeks. Giving the Parties a benefit of doubt, I would be inclined to take the view that the Parties contemplated that completion would take place within 5 months of signing of the Contract as provided for in Special Condition No. 7.
- 5.9. Having stated the above, it would appear to me that the Plaintiff on one hand and the Defendants on the other were and are at cross purposes regarding what completion means. I say so because according to the Plaintiff **PW1**, in his testimony, the Defendants started pressing him for payment of the second

instalment before they performed their obligations yet this should have been paid at completion. According to **DW1**, the Plaintiff had misrepresented the legal position regarding completion by tying it to the Defendant's obligations with respect to obtaining State's consent to assign and marking off and that at no point did **DW1** fail or refuse to complete the transaction. Further that it was the Plaintiff who failed to honour the transaction leading to **DW1** being compelled to rescind the Contract in accordance with Special Condition No.8 of the Contract.

5.10. My understanding of the date of completion or completion point as it is sometimes referred to in a conveyance transactions is the moment that all the conditions in the Contract are fulfilled, ownership of property officially transfers from the vendor to the purchaser and possession of property is handed over. At the point of completion, the transaction is basically completed because none of the parties can unilaterally reverse the transaction.

5.11. Applying my understanding to this case, it would be the point at which both the Plaintiff and the Defendants would be ready to perform their last respective obligations under the Contract. That is to say, the Plaintiff would be ready to make the final payment in exchange for all the documents from the Defendants so that what remains for the Plaintiff to do is to register the Property in his name which happens post completion.

- 5.12. In the chronology of the steps to be taken in a conveyance transaction, it is the responsibility of the vendor who is the owner of the property to apply for State's Consent to assign and any other licences which I would like to believe is what Nos. 5, 2 and 12 of the Special Conditions in the Contract herein speak to. From the evidence of **PW1**, the Defendants were pushing for him to complete the payments for the second instalment even before they had obtained State's Consent to assign and all requisite licences as per the Contract.
- 5.13. I have thoroughly reviewed the evidence by the Parties. According to **DW1**'s testimony, he had submitted a request for marking off of the Property on 18<sup>th</sup> November, 2022, in good faith expecting that the Plaintiff would comply. In Cross Examination, it was **DW1**'s response that he could not remember obtaining State's Consent to assign within the period of six weeks indicated in the Special Conditions.
- 5.14. I have also reviewed the Bundles of Documents by the Plaintiff and the Defendants and found no evidence whatsoever that there was an application for State Consent to assign or indeed any licence or documentation pertaining to marking off of the Subdivision contracted to be sold to the Plaintiff.
- 5.15. I am of the view that obtaining of State Consent to Assign was a fundamental or material term of the Contract. This is because without State's Consent to Assign, it would not have been practically possible for the Plaintiff to even proceed with bearing the fees with respect to Property Transfer Tax and registration

and related fees as envisaged in No. 13 of the Special Conditions. **DW2** who is a Legal Practitioner in fact confirmed this in Cross Examination.

5.16. A fundamental term of the contract was defined by the House of Lords in the case of ***Suisse Atlantique Societe D'armement Maritime S. A N. V. Rotterdamsche Kolen Centrale***<sup>2</sup> as follows:

***“A fundamental term of the contract is a stipulation which the parties have agreed either expressly or by necessary implication or which the general law regards as a condition which goes to the root of the contract”.***

5.17. I find from the evidence that the 1<sup>st</sup> Defendant breached the terms of the Contract by failing to obtain State's Consent to assign which was a fundamental term of the Contract not to mention the other obligations placed on him. It is clear that the 1<sup>st</sup> Defendant had not taken this important step and was not ready to proceed with completion at the expiration of the period of five months indicated in the Contract. As if that breach was not enough, the 1<sup>st</sup> Defendant continued pushing for more money from the Plaintiff until the total paid by the Plaintiff reached ZMW 750.000.00.

5.18. Regarding the payments made towards the second instalment, it is evident from the conduct of the parties that they both acquiesced to these payments being made outside the terms of the contract as set out in Special Condition No.7. This clearly

is what may have led to the Plaintiff paying a sum of K300,000.00 towards the second instalments before completion.

5.19. Completion date or point was an important clause of the Special Conditions which from the evidence was totally misapprehended by the 1<sup>st</sup> Defendant. I do not agree with the Defendants' startling propositions that State's Consent to assign was not a precondition to completion or that payment of the 2<sup>nd</sup> instalment should have occurred before State's consent to assign was obtained. My understanding of completion is fortified by the Learned Author **Mark Thomson**, in **Barnsley's Conveyancing Law and Practice** at Page 415 where it was described as:

**"The stage has now been set for forging the final link in the chain of procedures- completion, an expression which usually refers to the complete conveyance of the estate and final settlement of the business. For Parties, this normally signifies cash for the vendor and keys (ie possession) for the purchaser. From the legal stand point, the vital element in the case of unregistered land is the passing of the legal interest. Not even payment of the whole of the purchase price coupled with possession of the premises constitutes completion in the absence of any conveyance of the legal interest. On a sale of registered land, the legal title does not vest in the purchaser until registration,**

therefore completion also occurs on the purchaser's payment of the balance of the purchase price in exchange for the land or charge certificate and a duly executed transfer document.

As a general rule, the parties' respective obligations regarding completion are dependant and concurrent.

Almost invariably completion is a bilateral or consensual act; both parties have their own respective duties to discharge". (emphasis mine)

5.20. Having found that it was the 1<sup>st</sup> Defendant who breached a fundamental term of the Contract leading to non completion, **DW1**'s testimony that he lawfully rescinded the Contract of Sale by way of a written notice on 13<sup>th</sup> December, 2022, pursuant to Special Condition No.8 of the Contract is of no effect. The purported Notice of Recission appearing at Page 15 of the Plaintiff's Bundle of Documents and issued after the 1<sup>st</sup> Defendant had received almost 85% of the purchase price from the Plaintiff is of no legal effect.

5.21. I am fortified in taking this position by the case of **Chitambala v Chitambala**<sup>3</sup> where the Supreme Court held that:

***"A party who is himself in default cannot rely on the other party's failure to perform, and cannot rescind the contract or claim relief on the basis of his own breach".***

5.22. Flowing from the above, the Defendant's Counterclaims that the Plaintiff has no enforceable rights under the purportedly

rescinded Contract of Sale and related claims for damages and interest have no leg to stand on. At the point that the purported Notice of Rescission was issued, the 1<sup>st</sup> Defendant had already breached a fundamental term of the Contract, namely failure to apply for and obtain State's Consent to Assign which is a prerequisite for payment of Property Transfer Tax, an obligation which according to Special Condition No.13 was supposed to be borne by the Plaintiff as the purchaser.

5.23. The Law takes the view that damages can not adequately compensate a party for breach of contract for the sale of an interest in a particular piece of land or a particular house (however ordinary) as held in a plethora of authorities among them the case of **Kajimanga v Chilemya**<sup>4</sup>. On the basis of the position of the law, I am inclined to take the view this is a fit and proper matter in which the discretionary remedy of specific performance ought to be granted with damages for breach of Contract by the 1<sup>st</sup> Defendant.

5.24. I now proceed to address the issue of the Deed of Moiety registered by the 1<sup>st</sup> Defendant in favour of the 2<sup>nd</sup> Defendant, Andrew Nkunika as a beneficiary to sub 9 of Subdivision of Farm 288a which was subject of the Contract of Sale dated 13<sup>th</sup> March, 2021.

5.25. The Plaintiff's assertion is that this was dishonest conduct on the part of the Defendants intended to mislead and deceive for purposes of securing unfair or unlawful gain. Further that the 2<sup>nd</sup> Defendant be declared as an interested party to the Contract

dated 13<sup>th</sup> March, 2021, and bound as such, and an order be granted for cancellation of the Deed of Moiety for fraud and/or perpetrating a fraud.

5.26. The Defendant contends that the assertion by the Plaintiff regarding the Deed of Moiety is highly salacious, false and defamatory of the parents and their son who is a senior member of the Bar. That the Deed of Moiety was a normal instrument in conveyancing and was used for a specific lawful purpose and not in furtherance of a fraud.

5.27. In determining the diametrically opposed positions, I have to necessarily consider the meaning and use of a Deed of Moiety. According to **Black's Law Dictionary**, Moiety is defined as:

***“A half of something (such as an estate). A portion less than half; a small segment”.***

5.28. In the case of **Young v Smith**<sup>5</sup> usefully cited by the Plaintiff, Judge Gaskins defined the term Moiety as:

***Moiety as so used means half of the estate and not the whole thereof”.***

5.29. In the present case, it is not in dispute by the Parties that a Deed of Moiety was registered on Subdivision 9 of Farm 288a, Makeni on 9<sup>th</sup> November, 2022, in favour of the 2<sup>nd</sup> Defendant.

5.30. I am inclined to take the view that the same was registered in accordance with **Section 4** of the **Lands and Deeds Registry Act Chapter 185** of the **Laws of Zambia** which requires every document purporting to grant or convey an interest in land for longer than one year to be registered. This position is informed

by the fact that at the time it was registered, there was no caveat that had been placed by the Plaintiff. The Caveat by the Plaintiff was only placed on 21<sup>st</sup> December, 2022, as the Record shows at Page 16 of the Plaintiff's Bundle of Documents.

5.31. Although the Plaintiff has contended that the execution of the Deed of Moiety was intended to mislead and deceive for the purpose of securing an unfair or unlawful gain, no proof has been tendered to support such an allegation. Neither has any proof been furnished regarding fraud. It is trite that the Plaintiff bears the legal and evidentiary burden to prove fraud strictly to the standard which is higher than the balance of probabilities but lower than beyond reasonable doubt. This position finds favour in a plethora of authorities, among them the case of **Lazarous Estates Ltd v Bearsly**<sup>6</sup> and that of **Standard Chartered Bank v Wotela and Others**<sup>7</sup> where the Supreme Court stated that:

***“From the outset, we must agree with Counsel for the Appellant that it is trite law that fraud must be distinctly alleged and proved. This is evident from Order 18/816 of the Rules of the Supreme Court, 1999, which states that.***

***‘Any charge of fraud or misrepresentation must be placed with utmost particularity.....’***

***Order 18/12/18 of the Rules of the Supreme Court 1999, is also couched in a similar manner. It provides that:***

***'Fraudulent conduct must be distinctly alleged and it is not allowable to leave fraud to be inferred from the facts'.***

5.32. It would appear to me that the Plaintiff also grossly misapprehended the import of the Court Ruling for joinder of the 2<sup>nd</sup> Defendant to the Proceedings. The view I took in my Ruling was that the 2<sup>nd</sup> Defendant would be affected one way or the other by the outcome of these proceedings which may lead to further litigation touching on the same subject matter. To avoid multiplicity of actions which thing is abhorred by the Courts, I granted the Application for Joinder on the authority of Attorney **General V Aboubacar Tall and Zambia Airways Corporation Limited**<sup>8</sup>. For avoidance of doubt, the 2<sup>nd</sup> Defendant was by Ruling of this Court joined, on application by the Plaintiff, for the reason that being an interested party pursuant to a registered Deed of Moiety, he was likely to be affected as such by any decision of this Court. The Deed of Moiety does not divest the Plaintiff of his equitable interest over the subdivision contracted to be sold to him by the 1<sup>st</sup> Defendant and his late wife. The argument by the Plaintiff that the Deed was an attempt to create an overlapping or competing interest, does not from what I have indicated hold any water.

5.33. In the result, I am inclined to agree with the 2<sup>nd</sup> Defendant, that the registration of the Deed of Moiety is a lawful conveyance instrument used to grant or apportion a share mostly between family members without transferring ownership to a Third Party and without extinguishing prior encumbrances or covenants attached to Title or enforceable against land. Put differently the Deed of Moiety which was executed long after the Contract of Sale dated 13<sup>th</sup> March, 2021, does not and can not affect any pre-existing contractual relations between the Plaintiff and the 1<sup>st</sup> Defendant. More so that what was contracted to be sold between the Plaintiff and the 1<sup>st</sup> Defendant was merely a 3 acres Subdivision of the entire property. Legally, the Deed of Moiety which has been defined as a portion and not the whole is in relation to the remaining extent excluding the 3 acres (1.2140 hectares) portion contracted to be sold to the Plaintiff. Consequently, the allegations of fraud regarding the Deed of Moiety have no basis whatsoever.

5.34. Related to the fraudulent conduct alleged, the Plaintiff has asserted that the 1<sup>st</sup> Defendant has continued selling portions of land to third parties. Reviewing the evidence, I have found none that shows that any sell was legally done during the subsistence of an injunction or caveat. This would not have been legally tenable and was also confirmed by the evidence of **DW2**. Needless to state that the position of the law is that he who asserts must prove and the case of **Mausauso Zulu v Avondale Housing Projects Ltd**<sup>9</sup> and **Anderson K. Mazoka**

**and Others v Levy Patrick Mwanawasa<sup>10</sup>** are instructive on this point. Mere production of pictures of uncompleted buildings without coordinates or narration or indeed without certainty that the same are sitting on the 3 acres (1.2140 hactares) subdivision contracted to be sold to the Plaintiff is, in my view, insufficient to prove that the same were constructed during the subsistence of an injunction or caveat.

- 5.35. Having determined that the Deed of Moiety in this case was legally registered, I proceed to address the issue raised by the Defendants that the Plaintiff's allegation was malicious and aimed at lowering the 2<sup>nd</sup> Defendant's standing in the eyes of reasonable members of society, especially as a legal professional.
- 5.36. The contention is that the defamatory material was published by the Plaintiff to his Advocates, in Court documents seen by Court officials and served on the Defendant's Advocates who also saw the defamatory statements. Further that the Court documents were filed and became public documents liable to a search and thus available to a potentially limitless number of third parties who know the 2<sup>nd</sup> Defendant especially within the legal profession.
- 5.37. The Plaintiff on the other hand has attempted to justify its position by pointing to scanty pieces of evidence that I will not delve into given the position I have taken above. Further, the Plaintiff contends that statements made in the course of judicial

proceedings whether in pleadings, affidavits or oral testimony are absolutely privileged in law.

5.38. The general position in Zambia and indeed in other jurisdictions is that statements made by a party in Pleadings are generally protected by absolute privilege. This means that they are not actionable in defamation. This is the position I am inclined to take regarding the Defendant's Counterclaim herein. To maintain an action in defamation on statements stemming from Court Proceedings would, in my view, seriously fetter the conduct of litigation rather than serve the ends of justice. As stated in the case of **Lincoln v Daniels**<sup>11</sup>, the rationale for such protection is so that parties are free to present their cases without fear of subsequent litigation for defamation.

5.39. In any event, this Judgment has, by the position taken regarding registration of the Deed of Moiety in favour of the 2<sup>nd</sup> Defendant, vindicated him. The Court officials who are said to have seen the purported defamatory statements, the Plaintiff's and Defendants' Advocates who are also said to have seen the defamatory statements will all see this Judgment and will appreciate that the 2<sup>nd</sup> Defendant's standing in the eyes of reasonable members of the society has in fact not been lowered. The same can be said about other members of the society and limitless numbers of third parties who know the 2<sup>nd</sup> Defendant especially within the legal profession should they elect to conduct a search on the Court Record which is in the public domain as correctly submitted by the 2<sup>nd</sup> Defendant.

## **6.0. CONCLUSION**

6.1. Having found that the 1<sup>st</sup> Defendant, in the first place, breached a fundamental term of the Contract of Sale executed on 13<sup>th</sup> March, 2021, relating to a Subdivision of Sub 9 Farm 288a, Makeni in extent of 1.2140 Hectares, I Order:

6.1.1. Specific performance of the Contract by both parties performing their respective obligations as set out in the Special Conditions, barring passage of time, stipulated from the date of Contract therein. The parties' respective obligations shall be performed within five (5) months of date hereof in keeping with the period originally contemplated for completion under the Contract.

6.1.2. Damages to be paid to the Plaintiff for Breach of Contract by the 1<sup>st</sup> Defendant and the same to be assessed by the Deputy Registrar.

6.2. The purported rescission of the Contract by the 1<sup>st</sup> Defendant and his late wife dated 13<sup>th</sup> December, 2022, was unlawful and therefore of no legal effect.

6.3. Regarding the Deed of Moiety post contractually registered on 9<sup>th</sup> November, 2022, in favour of the 2<sup>nd</sup> Defendant, I declare that it was validly executed and registered in accordance with the law as no fraud has been proved by the Plaintiff. Further that the 2<sup>nd</sup> Defendant accordingly has an interest in Sub 9 of Farm 288a, Makeni to the extent of the portion not contracted

to be sold to the Plaintiff, effective 9<sup>th</sup> November, 2022, when the Deed of Moiety was registered.

- 6.4. The Plaintiff's statements and assertions regarding the registration of the Deed of Moiety having been made in the course of judicial proceedings are privileged and therefore not actionable in defamation.
- 6.5. In any event, the 2<sup>nd</sup> Defendant's reputation as a Legal Practitioner has not been lowered in the eyes of members of the legal profession where he belongs and the public generally. This is because he has been vindicated by this Court having found that the Deed of Moiety registered post contractually in his favour was lawfully done and not fraudulently as asserted by the Plaintiff.
- 6.6. The Parties shall each bear their own costs.

**DELIVERED AT LUSAKA THIS 22<sup>ND</sup> DAY OF JANUARY, 2026.**



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**I. M. MABBOLOBOLO  
HIGH COURT JUDGE.**