

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



2023/HPA/020

BETWEEN:

BWALYA MICHAEL KASANDA**APPELLANT**

AND

GWENDOLINE KASAPO CHISAKULA**RESPONDENT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THE 4th DAY OF JANUARY, 2024.

For the Appellant : Mr Y. Daka and Ms Mutale Chileshe, Messrs Lisutu Chambers

For the Respondent : in person

J U D G M E N T

CASES REFERRED TO:

1. *Nkhata and others v Attorney General* 1966 ZR 124
2. *Chizonde v The People* 1975 ZR 66
3. *Attorney-General v Kakoma* 1975 ZR 212
4. *Haonga and others v The People* 1976 ZR 200
5. *Khalid Mohamed v The Attorney-General* 1982 ZR 49
6. *Wilson Masauso Zulu v Avondale Housing Project Limited* 1982 ZR 172
7. *The Attorney-General v Marcus Kampumba Achiume* 1983 ZR 1
8. *Mwananshiku and others v Kemp and Mwananshiku* 1990 - 1992 ZR 42
9. *Gaulunia Farms Limited v National Milling Company Limited and another* 2004 ZR 1
10. *Colgate Palmolive v Shemu and others Appeal No 18 of 2005*
11. *Samatamba v Zambezi Waterfront Limited (Appeal No 110 of 2011) [2012] ZMSC 53 (14th June 2012)*
12. *Angel Musonda v Pulse Financial Services Appeal No 132 of 2017*
13. *Oscar Chinyanta & 31 others v Alasia Building Construction Limited and Tap Zambia Limited Appeal No 158 of 2015*
14. *Phiri v Tembo Appeal No 4 of 2012 [2015] ZMSC (19 August, 2015)*

15. Angel Musonda v Pulse Financial Services Appeal No 132 of 2017

LEGISLATION REFERRED TO:

- 1. The Rent Act Chapter 206 of the Laws of Zambia**
- 2. The Subordinate Court Act, Chapter 28 of the Laws of Zambia**

OTHER WORKS REFERRED TO:

- 1. Evidence Law and Practice and Procedure in Zambia, 1st Edition**

1. INTRODUCTION

1.1 This is an appeal against the decision of the Subordinate Court of the First Class sitting at Lusaka which was delivered on 28th October, 2022. Before that Court, the Respondent herein, Gwendoline Kasapo Chisakula sued the Appellant, Bwalya Michael Kasanda by Originating Notice of Motion seeking the following reliefs:

- i. Specific performance arising from Bwalya Michael Kasanda's renting out Flat No 8 of Ncsk flats Avondale in an unscrupulous, debauched and or bad condition to the extent where the adjacent neighbour lodged a complaint of having Bwalya Michael Kasanda's flat running sewer waste all over the flat and the neighbourhood.*
- ii. An Order compelling Bwalya Michael Kasanda to acknowledge receipt of the rejected house keys for the vacated house, being Flat No 8 Ncsk Flats, Avondale, Lusaka.*
- iii. An Order to immediately compel Bwalya Michael Kasanda to immediately pay back the sum of K9,*

000.00 for One (1) month rent of K3, 000.00 and the security deposit of K6, 000.00.

- iv. *An Order that the Eight (8) days occupied by Gwendoline Kasapo Chisakula in Bwalya Michael Kasanda's flat be deducted from the paid rent of K3, 000.00.*
- v. *Damages for inconvenience caused by Bwalya Michael Kasanda's actions.*
- vi. *Costs.*
- vii. *Any other relief that the Court may deem fit.*

2. EVIDENCE BEFORE THE COURT BELOW

2.1 An affidavit in opposition was filed to the Originating Notice of Motion on 17th August, 2022.

GWENDOLINE KASAPO CHISAKULA'S TESTIMONY

2.2 The Judgment of the Court below shows that at trial, the evidence that was led, was essentially that Gwendoline Kasapo Chisakula rented Bwalya Michael Kasanda's property, being Flat No 8 Ncsr Flats in Avondale in Lusaka. In that respect, she paid him Nine Thousand Kwacha (K9, 000.00), which comprised One (1) months' rent of Three Thousand Kwacha (K3, 000.00) and a security deposit being Two (2) months' rent in the sum of Six Thousand Kwacha (K6, 000.00) on 15th March.

2.3 She also told the Court below, that on 24th March, on the date that she occupied the flat, she received a text message from Bwalya Michael Kasanda requesting her to execute an agreement with him, provide him with a bank statement for

her account, provide a letter from her employers and that she should share the house keys with him.

- 2.4 Gwendoline Kasapo Chisakula further, told the Court below that she was uncomfortable with the request, and she did not execute the contract. Then on 27th March, she received a phone call from a person that she did not know, but who said that they were a neighbour, who informed her that the sewer from Bwalya Michael Kasanda's flat was flowing into his flat. The evidence given was that Gwendoline Kasapo Chisakula phoned Bwalya Michael Kasanda, but he did not pick her call.
 - 2.5 However later that day, Bwalya Michael Kasanda phoned her and he informed her to attend to the sewer, as it was flowing from the flat into the neighbour's flat. It was also her testimony, that it became difficult for her to stay in the flat and she went to her sister's house, and she waited up to 31st March, and when Bwalya Michael Kasanda was nowhere to be seen, she phoned him, and informed him that she was moving out of the flat.
 - 2.6 It was stated that on 6th April, Gwendoline Kasapo Chisakula approached Bwalya Michael Kasanda, and asked for a refund of the rentals and the security deposit that she had paid. Further, she asked him to inspect the flat and thereafter, she would give him the keys to the flat. However, Bwalya Michael Kasanda refused to inspect the house and get the keys, stating that he was counting the days, and
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according to him, she was still a tenant, and he did not accept that she had moved out of the flat.

- 2.7 It was her testimony, that Bwalya Michael Kasanda refused to deduct the days that she had occupied the flat from the rentals that she had paid. In conclusion, her testimony was that she still had the keys to the flat and Bwalya Michael Kasanda had not refunded her the monies that she had paid.
- 2.8 When cross examined, Gwendoline Kasapo Chisakula, testified that she stayed in the flat for Seven (7) days, after having occupied it on 24th March, 2022. She explained that she signed the agreement on 15th March, 2022. It was also her evidence, that she stayed at her sister's house from 28th March, 2022 until 27th April, 2022, and she had counted the days from 24th March, 2022. It was stated that Gwendoline Kasapo Chisakula did not speak with the tenant who was affected by the sewer.

BWALYA MICHAEL KASANDA'S TESTIMONY

- 2.9 In defence, Bwalya Michael Kasanda told the Court below that he started renovating the flat No 8 Ncsr in September, 2021. Then Mrs. Mulenga approached him with a view to rent the said flat. That was how on 15th March, the renovations were concluded, and he handed over the keys to the flat to Mrs. Mulenga. He stated that thereafter, he drafted a tenancy agreement for Mrs. Mulenga's perusal.
- 2.10 Then on 24th March, Mrs. Mulenga and her son conducted an inspection of the flat, and she thereafter paid the security deposit of Six Thousand Kwacha (K6, 000.00), and One (1)

month's rent in the sum of Three Thousand Kwacha (K3, 000.00). Bwalya Michael Kasanda's testimony was also that he asked Mrs. Mulenga to give him back a signed copy of the lease agreement and a copy of the keys for the front door. However, she did not avail either.

2.11 It was Bwalya Michael Kasanda's evidence that on 27th March whilst he was in Kitwe, he was phoned by a tenant who occupied the flat directly below his, who informed him that his toilet was flooding, as Mrs. Mulenga was flushing the toilet in the flat that she occupied. He stated that when he tried to call Mrs. Mulenga, she did not pick up. However, the tenant later called him, and informed him that the problem which had been caused by sanitary towels being flushed in the toilet, had been resolved by unblocking.

2.12 The continued testimony was that Mrs. Mulenga phoned Bwalya Michael Kasanda, and told him that she had moved out of the flat. He stated that she went to see him on 9th April with a view to hand over the keys to the flat. It was explained that Mrs. Mulenga had inquired about the security deposit and no inspection of the flat was done. Bwalya Michael Kasanda's evidence was also that on 22nd April, Mrs. Mulenga showed up with Two (2) heavily armed police officers and asked him to sign some Court documents. He stated that she wanted to hand over the keys to the flat and the prepaid electricity metre.

2.13 However, his response was that as the matter was in Court, it would be best to wait for the outcome of the Court

proceedings. Bwalya Michael Kasanda also testified that no one was in occupation of the flat, and he had not been there as he was waiting for the matter to be concluded. Thus, he had incurred loss of income and costs.

2.14 It was his evidence in cross examination, that he did not know why Mrs. Mulenga did not sign the lease agreement. Bwalya Michael Kasanda however acknowledged that the tenant had a problem of overflowing in his toilet, and that Gwendoline Kasapo Chisakula did not phone him and inform him that she had a problem. His testimony was that he was unaware, that Gwendoline Kasapo Chisakula had a problem with the toilet and that she had moved out of the flat.

2.15 He stated that he only got to know that she had moved out of the flat when she took the keys to the flat to him. Bwalya Michael Kasanda's evidence was further that he did not inspect the flat because Gwendoline Kasapo Chisakula did not tell him that she had moved out. He denied that they lived at the same flats, or that he refused to get the keys to the flat, as he needed to inspect the flat before he got the keys.

3. DECISION BY THE COURT BELOW

3.1 The Court below, in its' Judgment, considered the definition of a lease as defined in **Section 2 of the Rent Act, Chapter 206 of the Laws of Zambia**. The Court found that in line with that definition, there was a lease agreement between Gwendoline Kasapo Chisakula and Bwalya Michael Kasanda

to rent the flat in issue, which was verbal, as the written lease agreement was not produced before the Court.

- 3.2 The finding was further that exhibit 'GKC1' to the Originating Notice of Motion was merely an acknowledgement by Bwalya Michael Kasanda that he had received the sum of Nine Thousand Kwacha (K9, 000.00) from Gwendoline Kasapo Chisakula. It was also the Court's finding that Gwendoline Kasapo Chisakula moved out of the flat on 28th March, 2022, and that the tenancy relationship came to an end in April, 2022. Further, that it was only right that Bwalya Michael Kasanda accepted the keys for the flats and the prepaid metre.
 - 3.3 Still on the findings by the Court below, it was found that Bwalya Michael Kasanda refused to refund Gwendoline Kasapo Chisakula the sum of Nine Thousand Kwacha (K9, 000.00) on the basis that he still considered her to be a tenant, and that the matter was already before the Court. It was also found that Gwendoline Kasapo Chisakula did not give Bwalya Michael Kasanda notice to vacate the flat.
 - 3.4 The Court below did not accept that Bwalya Michael Kasanda was entitled to claim Five (5) months as lost income in rent, as he was not justified in refusing to accept the keys for the flat, as there was no Court Order even though the matter was in Court.
 - 3.5 The provisions of **Section 24 of the Rent Act** were referred to, which oblige a landlord to keep the premises in a good state of repair and suitable for human habitation. The Court
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with reference to that provision, stated that Bwalya Michael Kasanda expected Gwendoline Kasapo Chisakula to resolve the sewer problem when she had only occupied the flat for a few days.

- 3.6 It was noted that while the record showed that Bwalya Michael Kasanda eventually engaged a plumber to rectify the sewer problem, it was unclear as to whether indeed the problem was rectified or whether Bwalya Michael Kasanda contacted Gwendoline Kasapo Chisakula to inform her that the plumber would rectify the problem.
- 3.7 With regard to the failure by Gwendoline Kasapo Chisakula to give Bwalya Michael Kasanda notice to vacate the flat, **Section 15 of the Subordinate Court Act** was cited, which enjoins the Subordinate Court to administer law and equity concurrently, and that where the rules of equity and those of the common law conflict or are at variance, the rules of equity shall prevail.
- 3.8 The Court below found that Gwendoline Kasapo Chisakula did not give notice to vacate the flat, but that she did however communicate to Bwalya Michael Kasanda sometime in April, 2022, her intention to vacate the flat. It was stated that while at common law, Gwendoline Kasapo Chisakula was obliged to give notice to vacate, in the circumstances of the case, it would not have been just and equitable for her to give such notice.
- 3.9 This was arrived at, on the basis that the flat had become unsuitable for human habitation, due to the sewer problem

and Bwalya Michael Kasanda had shown reluctance to resolve the problem. On that premise, the Court below found that the Rules of equity prevailed over the common law, and the tenancy agreement was deemed to have come to an end when Gwendoline Kasapo Chisakula communicated her intention to vacate the flat to Bwalya Michael Kasanda in April, 2022.

- 3.10 The Court also found that Gwendoline Kasapo Chisakula only occupied the flat for Eight (8) days, and it directed Bwalya Michael Kasanda to refund her on account of failing to keep the flat in a good state of repair and suitable for human habitation.
- 3.11 Gwendoline Kasapo Chisakula was also awarded the amount of Three Thousand Kwacha (K3, 000.00) as damages for inconvenience, on the basis that she was forced to search for alternative accommodation, as she had already paid One (1) months' rent for the flat.
- 3.12 Bwalya Michael Kasanda was directed to immediately accept the keys for the flat and the prepaid metre for the said flat, from Gwendoline Kasapo Chisakula in the presence of the Clerk of Court. He was further directed to refund Gwendoline Kasapo Chisakula the monies that were paid on 15th March, less the Eight (8) days that she occupied the said house, amounting to Eight Thousand Two Hundred Kwacha (K8, 200.00).
- 3.13 This was directed to be done by 4th November, 2022, together with the sum of Three Thousand Kwacha (K3, 000.00) which

was awarded as damages for inconvenience, together with interest and costs, which would be assessed by the Clerk of Court.

4. NOTICE OF APPEAL AND GROUNDS OF APPEAL

4.1 Disgruntled with the Judgment of the Court below, Bwalya Michael Kasanda filed a Notice of Appeal on 22nd November, 2022 appealing the Judgment. The grounds of appeal raised are:

- i. *The Learned Magistrate erred in fact and in law when she found that there was a sewer problem in the flat when the unrefuted evidence on the record showed that the sewer blockage occurred outside and affected the flat below the one that Gwendoline Kasapo Chisakula occupied only.*
- ii. *The Learned Magistrate erred in law and fact when she found that the flat that Gwendoline Kasapo Chisakula occupied was uninhabitable and that Bwalya Michael Kasanda had failed in his duty as landlord to keep the flat habitable contrary to the evidence on record.*
- iii. *The Learned Magistrate erred in law and fact when she found that it was reasonable and fair for Gwendoline Kasapo Chisakula to terminate the lease agreement without notice.*
- iv. *The Learned Magistrate erred in law and fact when she found that Bwalya Michael Kasanda was reluctant to address the sewer issue despite unrefuted evidence on record that clearly showed that a plumber was*

contracted a day after the issue arose to address the problem.

5. BWALYA MICHAEL KASANDA'S HEADS OF ARGUMENT

GROUND ONE, TWO AND FOUR

- 5.1 In arguing the appeal, grounds One, Two and Four were argued together. It was stated that the Court below found that the flat that Gwendoline Kasapo Chisakula occupied had a problem with the sewer which made it uninhabitable, and that Bwalya Michael Kasanda was in breach of his duties as landlord, and he was reluctant to address the sewer problem.
- 5.2 The case of ***Wilson Masauso Zulu v Avondale Housing Project Limited*** ⁽⁶⁾ was relied on as authority, stating that the Court in that matter held that:

“The appellate court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of the facts.”

- 5.3 Further reference was made to the case of ***The Attorney-General v Marcus Kampumba Achiume*** ⁽⁷⁾ where the Supreme Court held that:

“The appeal court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were

findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make....

An unbalanced evaluation of the evidence, where only the flaws of one side but not of the other are considered, is a misdirection which no trial court should reasonably make, and entitles the appeal court to interfere.”

- 5.4 Other authorities relied on in that regard, was the case of ***Nkhata and others v Attorney General*** ⁽¹⁾. The argument was that going by the decisions in the authorities cited above, before an appellate Court can interfere with the findings of fact that are made by a trial Court, it has to be satisfied that they were either perverse, or were made in the absence of relevant evidence or were made on a misapprehension of facts or were findings that on a proper view of the evidence, no trial Court could reasonably make.
- 5.5 It was further argued that pursuant to the authorities cited, an appellate Court may interfere with the findings made by a trial Court, where there was an unbalanced evaluation of the evidence, where only the flaws of one party were considered and not of the other side.
- 5.6 The argument was that page J7 of the Judgment, showed that the trial Magistrate relied on the unsubstantiated fact that there was a sewer problem in the flat that Gwendoline Kasapo Chisakula occupied. However, the evidence on record showed that the problem was in the flat that was

occupied by the tenant below the one that Gwendoline Kasapo Chisakula occupied. It is further argued that Gwendoline Kasapo Chisakula gave contradictory evidence on the same, as seen from paragraphs 6 and 7 of the affidavit filed in support of the Originating Notice of Motion.

- 5.7 In that regard, the submission was that she stated in those paragraphs, that the sewer problem was surrounding the flat, making it difficult for her to sleep. However, in her testimony, her evidence was that the sewer problem was in the flat below. Then in paragraph 6 of the affidavit, she had averred that the neighbour in the flat below, had called her and informed her that his flat had sewer outflow or leakage.
- 5.8 It was further argued, that the tenant in the flat below, had sought Gwendoline Kasapo Chisakula's indulgence that she should temporarily not flush her toilet, as it was causing flooding in his flat. The contention was that there was unrefuted testimony that a plumber was engaged, and the issue was resolved the same day.
- 5.9 Then at page J8 of the Judgment, the trial Magistrate found that the flat was unsuitable for human habitation, and that Bwalya Michael Kasanda had failed in his duty to keep the flat in a good state of repair. The argument was that given that the sewer problem was in the flat below, it was difficult to see how the flat that was occupied by Gwendoline Kasapo Chisakula was unsuitable for human habitation.
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- 5.10 Thus, the Learned trial Magistrate arrived at the conclusion that the flat was unfit for human habitation without any evidence to substantiate it.
- 5.11 It is further argued that both parties agreed that the flat was occupied on 24th March, 2022, and Bwalya Michael Kasanda deposed that on the same day, Gwendoline Kasapo Chisakula inspected it, in the presence of his son, after which it was deemed fit for human occupation. She thereafter, promptly moved in. The contention was that the Court below relied unreasonably and unjustifiably on Gwendoline Kasapo Chisakula's testimony without proper consideration of Bwalya Michael Kasanda's evidence.
- 5.12 It was reiterated that as the sewer problem was in the flat below, it did not follow that the flat that was occupied by Gwendoline Kasapo Chisakula was unsuitable for human habitation, and that Bwalya Michael Kasanda was in breach of his duties as landlord.

GROUND THREE

- 5.13 On this ground, the argument was that the Learned Magistrate erred in law and fact when she found that it was reasonable and fair for Gwendoline Kasapo Chisakula to terminate the tenancy agreement without giving notice. It was stated that the basis for the Learned Magistrate to arrive at that conclusion, was that the flat had become unsuitable for human habitation, due to the sewer problem that Bwalya Michael Kasanda had shown reluctance to resolve.
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5.14 The case of ***Oscar Chinyanta & 31 others v Alasia Building Construction Limited and Tap Zambia Limited*** ⁽¹³⁾ was called to aid as authority, stating that the Supreme Court in that matter, held that a tenancy agreement may be terminated by either a landlord or a tenant, and that the party that intends to terminate the tenancy must serve a valid notice on the other party.

5.15 Therefore, Gwendoline Kasapo Chisakula was under a contractual duty to give reasonable notice of her intention to quit the tenancy agreement. It was stated that the record showed that she clearly failed to do so, and consequently, she was in breach of contract.

6. GWENDOLINE KASAPO KASAKULA'S ARGUMENTS IN RESPONSE

6.1 In response, Gwendoline Kasapo Chisakula responded globally. She argued, citing the cases of ***Colgate Palmolive v Shemu and others*** ⁽¹⁰⁾ and ***Angel Musonda v Pulse Financial Services*** ⁽¹⁵⁾ that parties of full age have freedom to contract, and that the Courts must enforce such agreements. Thus, the Court below correctly found that the parties in this case had entered into a lease agreement.

6.2 She also argued that the Court below found that Bwalya Michael Kasanda was aware that the flat that Gwendoline Kasapo Chisakula had occupied, had a sewer leakage even before she occupied it. Then Eight (8) days after she occupied the flat, as she was at work, one of her neighbours Muchindu Kawana phoned her, and informed her that the flat had a

terrible sewer outflow or leakage, and that it had messed up the entire surrounding.

- 6.3 Thus, when Gwendoline Kasapo Chisakula rushed home, she found that the surrounding had been messed up by waste. Her submission was that Muchindu Kawana had informed her that he got her phone number from Bwalya Michael Kasanda, who had confirmed in a text message, that the sewer had a blockage which needed to be fixed.
- 6.4 Then Bwalya Michael Kasanda informed Gwendoline Kasapo Chisakula to attend to the problem of the sewer messing up the flat and the adjacent neighbour, as it had been in existence, and due to the same, the previous tenant had vacated the flat. The contention was that Bwalya Michael Kasanda despite being notified of the problem, neglected and or refused to have the sewer outflow fixed, and he left the surrounding messed up and smelling to an extent that Gwendoline Kasapo Chisakula could not sleep.
- 6.5 Thus, she was prompted to inform Bwalya Michael Kasanda that she would vacate the flat for failure to attend to the problem or sewer. Her submission was that efforts to have Bwalya Michael Kasanda attend to the problem proved futile, as he did not respond to her phone calls, prompting her to vacate the flat on 31st March, 2022.
- 6.6 She then requested Bwalya Michael Kasanda to deduct the Eight (8) days that she had occupied the flat from the rental monies and the security deposit that she had paid. However, he had refused to do so, and when she tried to resolve the

matter amicably with him, he went into hiding until sometime on 6th April, 2022, when she found him at home despite him having informed her on the phone that he was out of Lusaka.

- 6.7 The case of ***Gaulunia Farms Limited v National Milling Company Limited and another*** ⁽⁹⁾ was cited as having held that:

“The burden to prove any allegation is always on the one who alleges.”

- 6.8 She submitted that she had shown that Bwalya Michael Kasanda had failed to maintain the flat, and therefore she opposed all the grounds of appeal. Her assertion was that she had been put to loss, as she had to source for funds to pay for alternative accommodation, and Bwalya Michael Kasanda refused to accept Court process until she engaged police officers to go with her to serve him the Court process. The prayer on that basis, was that the appeal be dismissed.

7. HEADS OF ARGUMENT IN REPLY

- 7.1 In reply, Bwalya Michael Kasanda, reiterated his position that there was an unbalanced evaluation of the evidence, and he emphasized the decision in the case of ***Attorney General v Marcus Kampumba Achiume*** ⁽⁷⁾, stating that it was reiterated in the case of ***Phiri v Tembo*** ⁽¹⁴⁾. The argument was further that the Supreme Court in the case of ***Samatamba v Zambezi Waterfront Limited*** ⁽¹¹⁾ held that:

“A finding of fact becomes a question of law when it is a finding which is not supported by the

evidence or when it is one that is made on a view of facts which cannot reasonably be entertained.”

- 7.2 Further reference was made to the learned authors of ***Evidence Law and Practice and Procedure in Zambia, 1st Edition at pages 41-42*** stating that the learned authors state as follows at those pages:

“It is trite law that a person who initiates civil proceedings must prove his case in Order to succeed in his claim, and must do so on a balance of probabilities, which depends on a preponderance of the evidence. Preponderance of evidence requires the Plaintiff to introduce slightly more or slightly better evidence than the defence....

If the party that bears the burden of proof fails to discharge it, a value of zero is retained and the fact is treated as not having happened. If a party discharges it, a value of one is retained and the fact is treated as having happened.”

- 7.3 It was also argued that the Supreme Court in the case of ***Khalid Mohamed v The Attorney-General*** ⁽⁵⁾ held that:

“An unqualified proposition that a Plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to Judgment.”

7.4 Thus, the contention was that Gwendoline Kasapo Kasakula failed to prove her case in the below, and the appeal should succeed.

8. SUBMISSIONS AT THE HEARING

8.1 Both parties relied on the heads of argument at the hearing.

9. DECISION OF THIS COURT

9.1 I have considered the appeal.

GROUND ONE, TWO AND FOUR

9.2 These grounds of appeal attack the Judgment of the Court below, on the basis that the Learned Magistrate erred in law and fact when she found that there was a sewer problem in the flat that was occupied by Gwendoline Kasapo Chisakula, when the evidence on record showed that the blockage was outside, and affected the flat below the one that Gwendoline Kasapo Chisakula occupied.

9.3 The grounds further attack the decision of the Court below when she found that the flat that was occupied by Gwendoline Kasapo Chisakula was uninhabitable, and that Bwalya Michael Kasanda as landlord, had failed to keep it habitable, contrary to the evidence on record, and that he was reluctant to address the sewer issue when there was unrefutable evidence on record that he engaged a plumber the day after the issue happened, to address the problem.

9.4 In arguing these grounds, Bwalya Michael Kasanda submitted that as shown at pages J7 and J8 of the Judgment, the Learned Magistrate found that there was a sewer problem in the flat that Gwendoline Kasapo Chisakula

occupied, and that the flat was unsuitable for human habitation. Further reference was made to paragraphs 6 and 7 of the affidavit filed in support of the Originating Notice of Motion.

- 9.5 In that regard, the argument was that those paragraphs showed that Gwendoline Kasapo Kasakula had deposed therein, that the sewer problem affected the surrounding flat, and made it difficult for her to sleep. Further, that the neighbour had called her, and told her that his flat had sewer outflow or leakage, However, in her evidence before the Court, she stated that the sewer problem was in the flat below the one that she occupied.
- 9.6 The argument was also that the tenant in the flat below the one that Gwendoline Kasapo Kasakula occupied, had asked her to stop flushing her toilet, as when she did so, it caused flooding in the flat that he occupied. That in any event, the problem was resolved by the plumber who was engaged to resolve the issue the same day.
- 9.7 The cases of ***Attorney General v Marcus Kampumba Achiume*** ⁽⁷⁾ and ***Wilson Masauso Zulu v Avondale Housing Project*** ⁽⁶⁾ among other authorities, were cited as authority for when an appellate Court can reverse findings of fact that are made by a trial Court. Those instances can be summarised as where:
1. The Appellate Court is satisfied that the findings in question were either perverse;

2. or the findings were made in the absence of any relevant evidence;
3. or that the findings were made upon a misapprehension of the facts;
4. or that they were findings which, on a proper view of the evidence, no trial Court acting correctly can reasonably make or;
5. That the trial Court made an unbalanced evaluation of the evidence, where only the flaws of one side but not of the other are considered.

9.8 In this case, the matter was commenced under the **Rent Act, Chapter 206 of the Laws of Zambia. Section 3 of that Act**, in providing for the application of the Act states that:

“3. (1) Subject to the provisions of subsection (2), this Act shall apply to all dwelling-houses in Zambia, whether or not the terms of the letting of such dwelling-houses include the use in common with the landlord or other persons authorised by him of other rooms in or amenities of or portions of the building of which the said dwelling-house forms a part or the grounds or gardens immediately adjacent thereto, and whether or not the terms of the letting include a provision for services or the use of furniture.”

9.9 In terms of the mode of commencing proceedings under that Act, **Rule 3 of the Rent Rules** promulgated under **Section 32 of the Act**, provides that:

“3. A complaint or application to the Court under the Act shall be commenced by an originating notice of motion. Evidence in support thereof may be on affidavit or viva voce.”

- 9.10 That is the procedure that was adopted in this matter. Therefore, the evidence in support of the claims was by way of affidavit. In paragraph 6 of the affidavit, Gwendoline Kasapo Chisakula deposed that immediately after occupying the flat in issue, on 24th March, 2022, her adjacent neighbour phoned her whilst she was at work, and informed her that the flat in issue had a terrible sewer outflow or leakage, which had messed up the surrounding.
- 9.11 She further averred that the said adjacent neighbour informed her that Bwalya Michael Kasanda had given him her phone number, and had confirmed by text message that the sewer had a blockage that needed to be fixed. Gwendoline Kasapo Chisakula also averred, that she had informed Bwalya Michael Kasanda to attend to the problem as the sewer was messing around the flat, and the adjacent neighbour, and it had been continuous, and had caused the previous tenant to vacate the flat.
- 9.12 She also deposed that Bwalya Michael Kasanda however, neglected to attend to the problem, leaving the surrounding messed up and smelling to the extent that Gwendoline Kasapo Chisakula could not sleep. It was her averment that she informed Bwalya Michael Kasanda that she would vacate the flat, and she did so on 31st March, 2022, when she

informed Bwalya Michael Kasanda to deduct rentals for the Eight (8) days that she had occupied the flat, and pay her the balance from what she had paid as rentals and the security deposit.

- 9.13 However, Bwalya Michael Kasanda refused to pay her and to get the keys to the flat, on the basis that he was not at home, as he had travelled outside Lusaka. Then on 6th April, 2022, Gwendoline Kasapo Chisakula found Bwalya Michael Kasanda at his home after he had informed her on the phone that he was out of Lusaka.
- 9.14 In responding to those claims, Bwalya Michael Kasanda in the affidavit in opposition, stated that Gwendoline Kasapo Chisakula had before occupying the flat, inspected it, in the company of his son Malumbo Kasanda, and the flat was deemed suitable for occupation. He contended that the sewer problem was in the flat below the one that Gwendoline Kasapo Chisakula occupied, which had a blocked pipe.
- 9.15 Thus, the tenant in the flat below, had asked Gwendoline Kasapo Chisakula to stop flushing the toilet in the flat that she occupied temporarily, in Order to facilitate unblockage of the pipes, since use of the toilet in the flat that Gwendoline Kasapo Chisakula occupied was causing flooding in his flat.
- 9.16 Bwalya Michael Kasanda also in opposition, stated that the tenant in Flat 4, phoned him in distress, asking him to help contact Gwendoline Kasapo Chisakula and ask her to stop flushing the toilet in the flat that she occupied for the night of 27th March, 2022, as the waste from the flat that she
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occupied was going into Flat 4, and he had to mop the waste each time the toilet in the flat that Gwendoline Kasapo Chisakula occupied was flushed.

- 9.17 He denied that Gwendoline Kasapo Chisakula called him, contending that rather, he is the person who tried to call her, but she did not respond to his calls. That was how he shared Gwendoline Kasapo Chisakula's phone number with the tenant in Flat 4. It was also his averment, that he sent a text message to Gwendoline Kasapo Chisakula, which he had exhibited.
- 9.18 Bwalya Michael Kasanda alleged that he only learnt of the sewer blockage on 27th March, 2022, for the first time that was in Flat 4, which is directly below Flat 8. He denied having neglected to fix the problem, stating that a plumber was contracted on 28th March, 2022, to fix the blockage. His defence was that the blockage was caused by foreign material that was dumped in the sewer system by either Gwendoline Kasapo Chisakula or the tenant in Flat 4.
- 9.19 Bwalya Michael Kasanda denied that Gwendoline Kasapo Chisakula gave him notice to vacate the flat, and he stated that she did not inform him when she vacated the flat. He alleged that it was unreasonable for Gwendoline Kasapo Chisakula to move out of the flat as the sewer problem was not caused by him.
- 9.20 He agreed that on 6th April, 2022, Gwendoline Kasapo Chisakula went to his home, and informed him that she had vacated the flat, and that she wanted a refund of the rent
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and security deposit paid, less the days that she had occupied the flat. That was how it was agreed that on 7th April, 2022, Bwalya Michael Kasanda and his son Malumbo Kasanda together Gwendoline Kasapo Chisakula would conduct a joint inspection, and the amount to be refunded, agreed on.

- 9.21 However, the inspection was not carried out, as Bwalya Michael Kasanda was feeling unwell, and it was late. Then on 22nd April, 2022, Gwendoline Kasapo Chisakula showed up with the police and served him Court process, and he did not accept the keys and the prepaid metre, as she had commenced Court process.
- 9.22 When the matter came up for trial, as can be deciphered from the Judgment, which is at pages 59-67 of the record of appeal, as the proceedings at trial are not on the record of appeal, Gwendoline Kasapo Chisakula was only cross examined on how many days she had occupied the flat, when she occupied it, and whether she signed the lease agreement. She was also asked how long she stayed at her sister's house after she vacated the flat, and whether she spoke with the tenant who occupied the flat that was affected by the sewer outflow.
- 9.23 Bwalya Michael Kasanda on the other hand, in cross examination, testified that he did know why Gwendoline Kasapo Chiskula signed the tenancy agreement. He agreed that the tenant in the flat below had overflowing of sewer in the flat, but denied that Gwendoline Kasapo Chisakula had
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phoned him, and informed him about the problem with the toilet. He also stated that she did not tell him that she had moved out of the flat, and he only got to know about it when she took the keys the flat to him.

9.24 The evidence that Bwalya Michael Kasanda also gave in cross examination, was that he refused to get the keys to the flat, as Gwendoline Kasapo Chisakula did not tell him that she was moving out of the flat, and not that he first needed to inspect the flat.

9.25 In light of this evidence, the question that arises is whether the Court below in finding that the flat that Gwendoline Kasapo Chisakula occupied had a problem with the sewer, and that it had become uninhabitable, as well as that Bwalya Michael Kasanda had failed in his duty to maintain the flat as landlord, were findings that were either perverse, or were findings that were made in the absence of any relevant evidence, or were findings that were made upon a misapprehension of the facts, or that they were findings which, on a proper view of the evidence, no trial Court acting correctly could reasonably have made?

9.26 The question is further, whether the trial Magistrate made an unbalanced evaluation of the evidence, where only the flaws of one side were considered, but not those of the other side?

9.27 I have highlighted the assertions that Gwendoline Kasapo Chisakula made against Bwalya Michael Kasanda in the affidavit filed in support of the Originating Notice of Motion.

I have also given the response as deposed to by Bwalya Michael Kasanda in the affidavit in opposition.

- 9.28 It will be noted that while Bwalya Michael Kasanda acknowledged that he was informed of the problem in Flat 4, of sewer outflow, which was occupied by a tenant below the flat that Gwendoline Kasapo Chisakula occupied, and was not in the one that was occupied by Gwendoline Kasapo Chisakula, he agreed that when the toilet that was in the flat that Gwendoline Kasapo Chisakula occupied was flushed, it caused sewer overflow into Flat 4.
- 9.29 Bwalya Michael Kasanda also deposed that a plumber was contracted to fix the problem on 28th March, 2022, after he was informed about the problem on 27th March, 2022. The evidence as given in the Court below, did not establish whether Bwalya Michael Kasanda was the landlord for Flat 4, in addition to the flat that Gwendoline Kasapo Chisakula occupied. However, he admitted that he engaged a plumber to rectify the sewer problem.
- 9.30 That in itself, was an admission that he was responsible for maintaining the sewer at the premises. Further, it will be seen from the affidavit filed in support of the Originating Notice of Motion, that Gwendoline Kasapo Chisakula deposed that the tenant in Flat 4, informed her that the sewer problem had been long standing, and that was why the tenant before her had vacated the flat.
- 9.31 Bwalya Michael Kasanda did not respond to that assertion, but alleged that he only came to learn about the problem for

the first time, when the tenant in Flat 4 called him in distress on 27th March 2022, asking him to tell Gwendoline Kasapo Chisakula not to flush the toilet in the flat that she occupied temporarily, as it was causing the sewer to flow into his flat, and he had to mop it each time the toilet was flushed.

9.32 Further, Bwalya Michael Kasanda merely denied Gwendoline Kasapo Chisakula's allegation that he did not respond to phone calls when she tried to call him and notify him about the sewer problem which had affected the surrounding. He stated that he tried to call Gwendoline Kasapo Chisakula, but she did not pick up his calls.

9.33 From the trial Court's findings, it can be seen that the Magistrate believed Gwendoline Kasapo Chisakula, and not Bwalya Michael Kasanda. However, the basis for the belief was not stated. In the case of **Attorney-General v Kakoma** ⁽³⁾ it was held that:

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

9.34 Further, the holding in the case of **Chizonde v The People** ⁽²⁾ was:

“An adverse finding as to credit is very different from a decision on an issue of credibility, i.e. resolving a conflict between two stories in favour of one of the parties. An adverse finding as to

credit is a finding that the witness is not to be believed; such a finding is in turn one of the factors which will influence the Court in its decision as to which of two conflicting versions of an affair it will accept.....

It is not however, valid for a court to hold a witness to be untruthful for no other reason than the existence of the very conflict which the Court is called upon to resolve; indeed such an approach would be both purposeless and circular. If the Court is entitled to prefer the one story to the other without finding one of the witnesses to be untruthful it is obviously unnecessary so to find, but if there is nothing to weigh the scales to the extent necessary to discharge the particular onus then the missing weight cannot be made up by a circular finding as to credit.”

9.35 It is trite that the principles that govern the credibility of witness are universal to both civil and criminal proceedings. I have noted that Bwalya Michael Kasanda did not respond to the assertions that were made by Gwendoline Kasapo Chisakula regarding her being informed by the tenant in Flat 4, about the long-standing problem of the sewer, and that, that was why the previous tenant of the flat that Gwendoline Kasapo Kasakula occupied had moved out or that Gwendoline Kasapo Chisakula had informed him that she was moving out of the Flat.

- 9.36 By not disputing those assertions, Bwalya Michael Kasanda agreed with them. Therefore, in terms of the evidence that was before the Court below, it established that the problem of the sewer was long-standing. The Magistrate although, she misdirected herself by not giving reasons why she believed Gwendoline Kasapo Chisakula over Bwalya Michael Kasanda, she cannot be faulted for finding as she did, that there was a sewer problem although, going by the failure by Bwalya Michael Kasanda's failure to rebut that assertion.
- 9.37 Further, she cannot be faulted for finding that the flat had become uninhabitable, as there was evidence on the record to support that finding. This is on the basis that the sewer problem affected Gwendoline Kasapo Chisakula's occupation of the flat, as each time the toilet in the flat that she occupied was flushed, it caused overflow into the adjacent flat.
- 9.38 It is a matter of common knowledge that everybody answers the call of nature. In this case, that was made difficult for Gwendoline Kasapo Chisakula and those that she lived with, in the flat to attain, as it affected the flat below.
- 9.39 Further, it is trite that the standard of proof in civil matters is on a balance of probabilities. Thus, if Gwendoline Kasapo Chisakula could not answer the call of nature without affecting the occupants of the flat below the one that she occupied, then it was more probable than not, that her living conditions had become uninhabitable. Grounds One and Two of the appeal fail.
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- 9.40 While Bwalya Micheal Ksanda denied that he neglected to sort out the problem, Gwendoline Kasapo Chisakula deposed in the affidavit in support of the Originating Notice of Motion, that she was notified of the problem by the tenant in the flat below the one that she occupied on 24th March, 2022 when she moved in. Bwalya Michael Kasanda stated that he only became aware when the tenant in Flat 4 called him on 27th March, 2022.
- 9.41 In view of the fact that Bwalya Michael Kasanda did not respond to the assertion that the tenant in fact informed Gwendoline Kasapo Chisakula that the previous tenant had moved out of the flat that she occupied due to the same sewer problem, he was in fact a witness not to be believed. In the case of *Haonga and others v The People* ⁽⁴⁾ the Supreme Court held that:

“Where a witness has been found to be untruthful on a material point the weight to be attached to the remainder of his evidence is reduced; although therefore it does not follow that a lie on a material point destroys the credibility of the witness on other points (if the evidence on the other points can stand alone) nevertheless there must be very good reason for accepting the evidence of such a witness on an issue identical to that on which he has been found to be untruthful in relation to another accused.”

- 9.42 Therefore, not having responded to a material assertion regarding the long standing problem of the sewer, the weight to be attached to Bwalya Michael Kasanda's testimony was reduced, unless that evidence could stand on its' own.
- 9.43 The Court below, even though it did not make a finding on credibility, which in turn affected which of the Two (2) stories that it believed, and in that respect, misdirected itself, nevertheless, in view of the averments that were made in the affidavit in support of the Originating Notice of Motion, which were not responded to, the Magistrate cannot be faulted for finding that Bwalya Michael Kasanda neglected to attend to the sewer problem.
- 9.44 **Section 24 of the Rent Act** places obligation on a landlord to maintain premises. It states that:

“24. In the absence of any provisions to the contrary in the contract of tenancy, for the purposes of this Act it shall be deemed to be the obligation of the landlord of any premises to maintain and keep the premises in a state of good repair and in a condition suitable for human habitation; and it shall be deemed to be the obligation of the tenant of any premises to maintain the premises in the same state as that in which the premises were at the commencement of the tenancy, fair wear and tear, damage arising from irresistible force and the repairs for which the landlord is liable excepted.”

9.45 The evidence on record shows that no lease agreement was signed in this matter. The problem of the sewer arose on the day that Gwendoline Kasapo Chisakula moved into the flat, entailing that it was an issue of maintenance that fell in the hands of Bwalya Michael Kasanda as landlord. The record shows that it may only have been attended to Four (4) days later on 28th March, 2022, and Gwendoline Kasapo Chisakula left the flat, when it was a very urgent problem. Ground Four of the appeal fails.

GROUND THREE

9.46 In respect of this ground, it attacks the trial Magistrate's finding that it was reasonable and fair for Gwendoline Kasapo Chisakula to terminate the lease agreement without notice.

9.47 **Section 15 of the Subordinate Court Act** was relied on, in finding that the Rules of equity prevailed over the common law. That provision of the law states that:

“15. In every civil cause or matter which shall come in dependence in a Subordinate Court, law and equity shall be administered concurrently; and a Subordinate Court, in the exercise of the jurisdiction vested in it by this Act, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, as any of the parties thereto may appear to be entitled to, in

respect of any and every legal or equitable claim or defence properly brought forward by them respectively, or which shall appear in such cause or matter; so that, as far as possible, all matters in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and, in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.”

- 9.48 The Court below found that Gwendoline Kasapo Chisakula did not give notice to Bwalya Michael Kasanda to terminate the lease agreement but she communicated with him sometime in April, 2022, that she had vacated the flat. It was also the Court below’s finding that at common law, a tenant is required to give notice to terminate a lease.
- 9.49 However, in this matter, it would not have been just and equitable for Gwendoline Kasapo Chisakula to give Bwalya Michael Kasanda notice to terminate the lease, as the flat had become uninhabitable due to the sewer problem, which Bwalya Michael Kasanda was reluctant to resolve. On that basis, it was found that the rules of equity prevailed over the common law.
- 9.50 ***Section 5 of the Rent Act, Chapter 206 of the Laws of Zambia*** states that:

“5. (1) In addition to any other powers specifically conferred on it by this Act, the court may investigate any complaint relating to the tenancy of premises made to it either by the landlord or a tenant of such premises.”

9.51 Further, **Section 4 of the said Rent Act** empowers the Court as follows:

“4. The Court shall have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in particular shall have power-

- (a) to determine the standard rent of any premises, either on the application of any person interested or of its own motion;***
- (b) to fix, in the case of any premises, at its discretion and in accordance with the requirements of justice, the date from which the standard rent is payable;***
- (c) to apportion payment of the standard rent of premises among tenants sharing the occupation thereof;***
- (d) where the rent chargeable in respect of any premises includes a charge for services in addition to the standard rent, to fix the amount of such charge;***

(e) subject to the provisions of section thirteen, to make either or both of the following orders, that is to say:

(i) an order for the recovery of possession of premises, whether in the occupation of a tenant or of any other person; and

(ii) an order for the recovery of arrears of standard rent, mesne profits and a charge for services;

(f) for the purpose of enabling additional buildings to be erected, to make orders permitting landlords (subject to the provisions of any written law) to excise vacant land out of premises where such a course is, in the opinion of the Court, desirable in the public interest;

(i) when the landlord fails to carry out any repairs for which he is liable, to order the landlord to carry out such repairs;

(ii) to permit the levy of distress for standard rent;

(g) to impose conditions in any order made by the Court under the provisions of this section;

(h) upon the determination of any application or other proceedings, in its discretion to

order any party thereto to pay the whole or any part of the costs thereof;

- (i) to exercise jurisdiction in all civil matters and questions arising under this Act;*
- (j) at any time, of its own motion or for good cause shown on an application by any landlord or tenant, to re-open any proceedings in which it has given any decision, determined any question, or made any order, and to revoke, vary or amend such decision, determination or order, other than an order for the recovery of possession of premises or for the ejectment of a tenant therefrom which has been executed:*

Provided that-

- (i) nothing in this paragraph shall prejudice or affect the right of any person under section seven to appeal to the Supreme Court from any such decision, determination or order as aforesaid, or from the revocation, variation or amendment of any such decision, determination or order;*
- (ii) the powers conferred on the Court by this paragraph shall not be exercised in respect of any decision, determination or order while an appeal therefrom is pending or in*

a manner inconsistent with or repugnant to the decision of the appellate Court on such appeal.”

9.52 Therefore, there is a law in the Rent Act that deals with the payment of rent. In the case of **Oscar Chinyanta and 31 others v Alasia Building Construction Limited and Tap Zambia Limited** ⁽¹³⁾, the Supreme Court held that:

“To start with, a tenancy may be terminated by either the landlord or the tenant and the party who intends to terminate the tenancy must serve a valid notice on the other party. However, where a tenancy that was entered into for a fixed period comes to an end, a notice of termination does not have to be issued. The tenancy is determined by the effluxion of time. The landlord can give the tenant a notice to vacate at the end of a fixed term but a tenant has a right to challenge a notice to vacate if it is not given properly or if he disagrees with the reason given. It is also important to bear in mind that just because the tenant receives a notice to vacate; it does not necessarily mean that he has to move out. If the landlord wants to evict him, they must apply to court for the grant of a possession order under the Rent Act, Chapter 206 of the Laws of Zambia.”

9.53 In the case of **Mwananshiku and others v Kemp and Mwananshiku** ⁽⁸⁾, the Supreme Court with regard to

Section 13 of the High Court Act, which is very similar in provision with **Section 15 of the Subordinate Court Act** that the Court below relied on, in finding that the rules of equity prevailed over the common law, stated that:

“On s.13 Mr. Jearey submitted that this was irrelevant to this case as it dealt with situations where there was conflict between rules of common law and equity and that common law is not statute law and that rules of equity are not to be confused with rules of natural justice....”

Turning to arguments relating to s. 13 of Cap. 50 which provides for concurrent administration of law and equity, we agree with the submission by Mr. Jearey that the provisions of that section are irrelevant to the appeal before us as there is no conflict between rules of common law and equity. And above all the Inheritance (Family Provision) Act 1938 is not common law but statute law.”

9.54 In this matter, while the **Rent Act Chapter 206 of the Laws of Zambia** provides for the payment of rent and other obligations that are incidental to a tenancy agreement under the Act, it does not make any provision for Notice to quit a tenancy. Therefore, the common law principles on giving notice to terminate a tenancy agreement under the Act apply. Further, this is more so as, no tenancy agreement was signed in this case.

9.55 Thus, can it be said that the Court below erred in finding that it would not be reasonable and just to have required Gwendoline Kasapo Chisakula to give notice to terminate the lease when the flat had become uninhabitable, on the basis of the principles of equity prevailing over the common law in the event of conflict? I think not, having stated that use of the toilet is human function that cannot be deferred.

9.56 Therefore, the Court below did not err, in finding that the rules of equity prevailed over the common law, and consequently Gwendoline Kasapo Chisakula was not required to give notice to terminate the tenancy agreement in view of the prevailing circumstances. Ground Three of the appeal fails.

10. CONCLUSION

10.1 Having found that all the grounds of appeal have failed, the said appeal is dismissed with costs to Gwendoline Kasapo Chisakula, which if not agreed shall be taxed. Leave to appeal is granted.

DATED AT LUSAKA THE 4th DAY OF JANUARY, 2024

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE

