

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**

APPEAL NO. 221/2023

(Civil Jurisdiction)

BETWEEN:

ELIAS TEMBO

AND

GREATWALL FINANCIAL SERVICES LIMITED



APPELLANT

RESPONDENT

CORAM: CHASHI, NGULUBE AND BANDA-BOBO, JJA.

On 21st January, 2026 and 25th February, 2026.

For the Appellant : Mr. E. Chibeluka – Messrs. Chibeluka & Partners

For the Respondent : Mr. G. Hakainsi – Messrs. LM Chamber

J U D G M E N T

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to:

1. *Mutotwe Kafwaya vs Chasaya & 2 Others - CCZ/A0020*
2. *Savenda Management Services Limited vs Stanbic Bank Zambia Limited – SCZ Selected Judgment No. 10 of 2018*
3. *The Attorney General vs D. G. Mpundu (1984) Z.R. 6*
4. *Mhango vs Ngulube & Others (1983) Z.R. 61*

5. *JZ Car Hire Limited vs Chala & Scirocco Enterprises Limited (2002) Z.R. 112*
6. *Edison Mwanza vs Chibuluma Chati Farms & 3 Others - CAZ Appeal No. 186/2019*
7. *Kuta Chambers vs Concillia Sibulo – CAZ Appeal No. 122/2012*
8. *Khalid Mohammed vs Attorney General (1982) Z.R. 49*
9. *Marcus Kapumba Achiume vs The Attorney General (1983) Z.R. 1 (S.C.)*
10. *Zulu vs Avondale Housing Project Limited (1982) Z.R. 172 (S.C.)*
11. *Gillian Kasempa Mutinta vs New Future Financial Company Limited – SCZ Appeal No. 13 of 2023*

1.0 INTRODUCTION

1.1 This is an appeal against the Judgment of Honourable Justice C. Mikalile, High Court Judge – General Division, that was delivered on 21st April 2023, in which the Court held that the appellant would recover the sum of US\$26,500.00, subject to deduction of damages owing and concurrently granted the respondent specific performance of the contract of sale.

2.0 BRIEF BACKGROUND TO THE DISPUTE IN THIS APPEAL

2.1 The brief background to the matter is that on 29th October 2019, the appellant, who was the applicant in the Court below,

commenced an action against the respondent by originating summons for removal of caveat. The Court below deemed the matter as having commenced by writ of summons after the parties executed a consent order dated 30th November, 2020.

2.2 The appellant sought the following reliefs in his statement of claim:

- i. An order that the appellant was not indebted to the respondent;*
- ii. An order that the agreement between the parties was a credit facility which was secured by property known as Stand No. 1564, Mufulira;*
- iii. An order for removal of caveat placed on the property known as Stand No. 1564 Mufulira by the defendant;*
- iv. An order directing the defendant to surrender the title deed relating to stand No. 1564 Mufulira, to the appellant;*
- v. In the alternative, payment of the sum of U\$37,260.00 paid by the appellant towards the loan; and*
- vi. Damages for inconvenience suffered by the appellant.*

2.3 The appellant asserted that he entered into an agreement with the respondent, a money lending company, to borrow US\$26,000.00. He also asserted that the respondent's representative represented that it was the company's policy not to execute loan agreements, but rather execute contracts of sale

in respect of the pledged property. Further, that the interest on the loan facility would be payable upfront, to be deducted from the loan amount. The appellant contended that the execution of the contract of sale was a mere formality.

- 2.4 The appellant averred that, pursuant to signing the contract of sale, he received US\$12,916.69 in cash, being part of the US\$26,000.00 loan applied for. He stated that US\$1,300.00 was deducted upfront as a security, US\$9,360.00 was deducted as interest, and US\$2,423.38 was remitted to EFC Zambia to settle an existing loan obtained by the appellant.
- 2.5 That he paid back the loan in full, having paid the sum of US\$37,260.00 tabulated as follows: US\$9,360.00 interest upfront upon obtaining the loan; US\$1,300.00 security deposit upon obtaining the loan facility; US\$14,500.00 on 6th February, 2019; and US\$12,000.00 on 6th May, 2019.
- 2.6 That however, the respondent has refused to remove the caveat on Stand No. 1546 Mufulira, which secured the loan.
- 2.7 The respondent averred that the transaction entered into by the parties was not a loan agreement but a sale agreement with an option to buy back the property.

- 2.8 That the appellant also signed other documents to authorize change of ownership in case he failed to buy back the property within the agreed period, such as a deed of assignment. The appellant failed to buy back the property within the agreed period and now owed the respondent the sum of US\$18,000.00.
- 2.9 The respondent disputed that it was not its policy to execute loan agreements and denied having made upfront deductions. It also denied having received the sums alleged by the appellant.
- 2.10 The respondent admitted receiving the sums of US\$14,500.00 and US\$12,000.00. That the appellant paid the said sum of US\$14,500.00 on 20th February 2019, upon the respondent's demand of US\$12,870.00, for extension charges as a condition to buying back the property beyond the agreed period which was 11th October, 2018. That therefore, the appellant only paid the sum of US\$1,630.00, towards the purchase price to buy back the property leaving a balance of US\$24,370.00, which rose to US\$30,000.00 owing to extension, occupational charges, costs and profits. The respondent asserted that the only deduction the company made was the sum of US\$2,423.38, paid to EFC to offset the appellant's loan.

2.11 The respondent counterclaimed for the following reliefs: An order of specific performance of the contract of sale; alternatively, an order directing the appellant to pay the outstanding sum of US\$18,818.51; Payment of occupational fees in the sum of US\$5,500.00; and damages for inconvenience.

3.0 FINDING OF THE COURT BELOW

3.1 The learned trial Judge found that the appellant's assertion of a loan agreement lacked evidentiary support, as the contract of sale and deed of assignment demonstrated the appellant's intention to sell and transfer ownership of the property.

3.2 Regarding the appellant's indebtedness, the Court determined that he remained indebted to the respondent, as the purchase price of the property was US\$26,000.00 and the contract allowed redemption before 11th October, 2018. That the appellant's failure to repurchase entitled the respondent to dispose of the property. The Court found that the appellant agreed to pay US\$38,870.00 and payments totaling US\$26,500.00, left an outstanding balance of US\$12,370.00.

- 3.3 The Court declined to order removal of the caveat, citing the respondent's right as intending purchaser, and refused to order surrender of the certificate of title.
- 3.4 Concerning the sum of US\$37,260.00, the Court found the appellant had not fulfilled his contractual obligations, having failed to pay additional charges agreed upon for repurchase outside the original redemption period. The Court noted that the evidence supported payment of US\$26,500.00 only.
- 3.5 The Court ordered specific performance of the contract of sale, as per the respondent's counterclaim.

4.0 THE APPEAL

- 4.1 Dissatisfied with the Judgment of the learned Judge, the appellant launched an appeal in this Court on the following four (4) grounds of appeal:

- 1. The Court below erred in law and fact when it failed to order the respondent to pay the sum of US\$37,160.00 to the appellant when the unchallenged evidence on record proved that the respondent deducted interest and security deposits in the sums of US\$9,360.00 and US\$1,300.00 respectively upfront;***

2. *The Court below erred in law and fact when it held that the handwritten documents showing deductions pertaining to interest, security deposit and mortgage was devoid of the name of its author and that there was absolutely nothing to show that it was authored by the respondent's agent or employee when the unchallenged evidence of the appellant and his witnesses were that the document was authored by the respondent's employee and agent;*
3. *The Court below erred in law and fact when it awarded the respondent damages for inconvenience when the respondent did not prove the claim for damages for inconvenience at trial; and*
4. *The Court below erred in law and fact by awarding legal costs to the respondent when both the appellant and the respondent partially succeeded in their respective claims.*

5.0 THE APPELLANT'S ARGUMENTS

- 5.1 In support of the appeal, the appellant's counsel filed the heads of argument on 17th July, 2023. He argued grounds one and two collectively while grounds three and four were argued separately.
- 5.2 In support of grounds one and two, Counsel for the appellant submitted that the evidence that the respondent made upfront deductions for interest and security deposit was not challenged.

That evidence was also confirmed by the appellant's witness, Moses Bweupe and the handwritten document on page 154 of the record of appeal.

- 5.3 In relying on the cases of ***Mutotwe Kafwaya vs Chasaya & 2 Others***¹ and ***Savenda Management Services Limited vs Stanbic Bank Zambia Limited***,² Counsel argued that the learned trial Judge did not evaluate the evidence with regard to the deductions as seen on page 154 of the record of appeal but merely accepted the respondent's evidence.
- 5.4 In support of ground three, that the Court below erred in law and fact when it awarded damages for inconvenience to the respondent in the absence of proof of the inconvenience.
- 5.5 It was argued that damages for inconvenience are special damages and ought to be proved. To support this argument, Counsel referred to various authorities which included the cases of ***The Attorney General vs D. G. Mpundu***,³ ***Mhango vs Ngulube & Others***,⁴ ***JZ Car Hire Limited vs Chala & Scirocco Enterprises Limited***⁵ and ***Savenda Management Services Limited vs Stanbic Bank Zambia Limited (supra)***.

- 5.6 Counsel submitted that the respondent failed to prove damages for inconvenience because no evidence was led to prove them and it was only pleaded in the counterclaim.
- 5.7 In support of ground four, it was contended that the lower Court erred in law and fact by awarding costs to the respondent when both parties partially succeeded in their respective claims. That this was a proper case in which the Court should have ordered that each party bears its own costs.
- 5.8 He argued that the award of costs is a discretion but that such discretion should be exercised judiciously and a successful party should be awarded costs unless he did something wrong. To buttress this argument, Counsel relied on the cases of ***Edison Mwanza vs Chibuluma Chati Farms & 3 Others***⁶ and ***Kuta Chambers vs Concillia Sibulo***.⁷

6.0 THE RESPONDENT'S ARGUMENTS

- 6.1 In response to the appeal, the appellant filed heads of argument on 25th August, 2023. In response to grounds one and two of the appeal, Counsel for the respondent submitted that the evidence relating to the upfront deduction allegedly made by the

respondent was clearly challenged in cross examination as shown on page 262 of the record of appeal.

- 6.2 He argued that the evidence relating to the handwritten document relating to the alleged deductions on interest and security deposit was also challenged. That there was no evidence to support the assertion that the handwritten document was authored by the respondent's agent.
- 6.3 To buttress the argument that the appellant failed to prove the above argument, reference was made to the cases of ***Khalid Mohammed vs Attorney General***,⁸ ***Marcus Kapumba Achiume vs The Attorney General***⁹ and ***Zulu vs Avondale Housing Project Limited***.¹⁰
- 6.4 In response to ground three, it was contended that the lower Court was on firm ground when it awarded damages for inconvenience because the respondent pleaded it and averred that it suffered loss of income from the property in terms of mesne profits. That the loss was shown by the fact that the appellant did not give vacant possession of the property despite not having bought back the property by 11th October, 2018.

6.5 In response to ground four of the appeal, Counsel for the respondent contended that the lower Court was on firm ground when it awarded costs to the respondent because none of the reliefs sought by the appellant were granted by the Court. That the only order made in favour of the appellant was for the sum of US\$26,500.00.

6.6 Lastly, Counsel urged this Court to dismiss the appeal.

7.0 APPELLANT'S ARGUMENTS IN REPLY

7.1 Counsel for the appellant filed heads of argument in reply on 13th January 2026, which largely reiterated the submissions made in support of the appeal. To avoid repetition, the Court will not restate these arguments.

8.0 HEARING OF THE APPEAL

8.1 Counsel for both parties relied on their respective heads of argument filed into Court. In addition, Counsel for the respondent briefly augmented their submissions orally.

8.2 The oral arguments largely mirrored the written submissions, with the respondent additionally contending that grounds one and two of the appeal challenges findings of facts made by the

lower Court, but the appellant has not shown that these findings were perverse. That the appellant's argument that the evidence of the upfront deductions of interest and the handwritten notes were not challenged, is contrary to the evidence on record.

8.3 On the award of damages made by the lower Court, Counsel argued that that it was clear from the record that the appellant never repurchased the property within the agreed period but the appellant remained on the property.

8.4 The respondent's Counsel argued that the lower Court's order for damages was justified, despite the absence of a landlord-tenant relationship between the parties. It was submitted that where an individual occupies a property without agreement, the aggrieved party is entitled to claim rentals or compensation for such unauthorized occupation.

8.5 In reply, Counsel for the appellant submitted that there was no evidence put forth by the respondent to prove damages for inconvenience. Regarding the argument for costs, Counsel submitted that both parties partially succeeded on their claims. That the lower Court found that while the appellant was entitled to a refund of US\$26,000.00, it also found that the respondent

was entitled to specific performance. That therefore judicial discretion entailed that each party should bear its own costs.

8.6 It was submitted that the evidence advanced in the Court below demonstrated that the parties entered into a loan agreement. To buttress this argument, Counsel cited the case of ***Gillian Kasempa Mutinta vs New Future Financial Company Limited***¹¹ which he argued was on all fours with this case as the facts are similar.

9.0 CONSIDERATION AND DECISION

9.1 We have carefully considered the record of appeal, the grounds of appeal and the submissions by Counsel. The appeal raises the following issues:

- i. Whether the learned trial Judge erred in failing to find that the transaction was, in substance, a loan with upfront deductions;*
- ii. Whether the learned trial Judge properly evaluated the evidence relating to interest and security deposits allegedly deducted upfront;*
- iii. Whether damages for inconvenience were properly awarded in the absence of proof; and*
- iv. Whether the award of costs to the respondent was proper.*

- 9.2 We will deal with the first and second issues together as they are closely related. In the case of ***Gillian Kasempa Mutinta vs New Future Financial Company Limited (supra)***, the Supreme Court of Zambia dealt with similar issues as in this case. The Court stated that Courts must look at the substance of a transaction and not merely its form. The apex Court held that a transaction documented as a sale may, in reality, be a loan disguised to avoid regulatory scrutiny, particularly where the borrower retains possession, there is a right to redeem, interest and other charges are deducted upfront and the purchase price bears no rational relationship to the market value of the property.
- 9.3 The appellant argued that the learned trial Judge erred by rejecting the evidence relating to upfront deductions for interest and security deposit. The appellant relied on his own testimony, his witness's testimony, and a handwritten document reflecting the alleged deductions.
- 9.4 We have carefully examined the record. Contrary to the appellant's submissions, the evidence relating to upfront deductions was squarely challenged by the respondent in cross examination and by its witnesses.

- 9.5 The handwritten note on page 154 of the record was not signed, was undated, and bore no indication of its author. No independent evidence was led to link that document to the respondent or any of its agents.
- 9.6 The law is settled that documentary evidence must be authenticated before it can be relied upon. Where authorship is disputed and no proof is tendered, such document carries no probative value. The authorities cited by the respondent, including ***Khalid Mohammed vs Attorney General (supra)*** and ***Marcus Kapumba Achiume vs Attorney General (supra)*** are directly on point.
- 9.7 The decision of the Supreme Court in ***Gillian Kasempa Mutinta vs New Future Financial Company Limited (supra)***, does not assist the appellant as it can be distinguished from this case. In that case, the evidence of upfront deductions was clearly established and corroborated, and the Supreme Court found that the trial Court had ignored proven facts.
- 9.8 In the present matter, the situation is materially different. The appellant failed to discharge the burden of proof. The learned trial Judge was therefore on firm ground in holding that the alleged

upfront deductions were not proved. We accordingly find no misdirection on the part of the learned trial Judge on this issue.

9.9 Further, it is also not in dispute that while the appellant paid the sum of US\$26,500.00, he did not pay the additional charges which he freely and contractually agreed to as a condition for buying back the property beyond the agreed redemption period. These additional charges were not unilaterally imposed by the respondent but were accepted by the appellant, as evidenced by the payments demanded and partially met. The failure to settle the agreed additional charges meant that the appellant remained in default and did not fully exercise his right of redemption.

9.10 Therefore, the learned trial Judge was correct in finding that the respondent was entitled to enforce the contract and to seek specific performance. Grounds one and two of the appeal have no merit and are dismissed.

9.11 With regard to the issue of damages for inconvenience, the appellant contended that they were awarded without proof. The respondent pleaded damages for inconvenience and led evidence that it was deprived of possession and use of the property after the appellant failed to buy it back within the agreed period.

9.12 While damages must be proved, the assessment of such damages is a matter within the discretion of the trial Court, particularly where inconvenience and loss of use are apparent from these circumstances.


9.13 The Court agrees with the respondent's Counsel that even in the absence of a landlord-tenant relationship, a party occupying property without agreement renders them liable to pay rentals or compensation to the aggrieved party.

9.14 On the facts of this case, we are not persuaded that the learned trial Judge exercised her discretion injudiciously. This ground of appeal therefore fails.

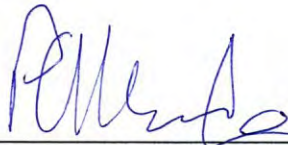
9.15 On the issue of costs, the award of costs is discretionary and is ordinarily made in favour of the successful party. The record shows that the appellant failed in all his substantive claims. The fact that he recovered a lesser sum than claimed does not of itself disentitle the respondent to costs. We are therefore of the considered view that there is no basis upon which to interfere with the learned trial Judge's exercise of discretion on costs. Ground four of the appeal also fails.

10.0 CONCLUSION

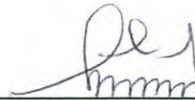
10.1 In view of the foregoing, the appeal has no merit and is accordingly dismissed. Costs of this appeal shall be for the respondent. Same are to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



P. C. M. NGULUBE
COURT OF APPEAL JUDGE



A. M. BANDA-BOBO
COURT OF APPEAL JUDGE