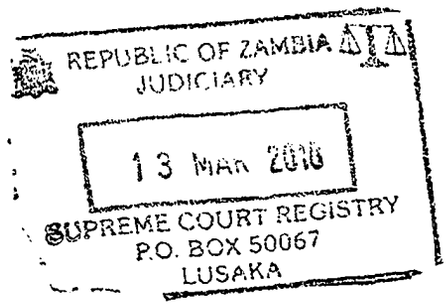
**IN THE SUPREME COURT OF ZAMBIA** **APPEAL NO. 123/2009**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)




**BETWEEN:**

**TUESDAY MULENGA** **APPELLANT**

**AND**

**WENDY TEMBO MUTAMBO** **RESPONDENT**

**CORAM:** Hamaundu, Kabuka and Mutuna, JJS.
On 3rd October, 2017 and 13th March, 2018.

**FOR THE APPELLANT:** In Person

**FOR THE RESPONDENT:** N/A

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**JUDGMENT**

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**KABUKA, JS delivered the Judgment of the Court.**

**Cases referred to:**

1. Heilbut Symons & Co. v Buckeleton (1913) AC 30.
2. Oscar Chess Limited v Williams [1957] 1 WLR 370.

3. Kunda v Konkola Copper Mines Plc Appeal No. 48 of 2005 (unreported).
4. Kankomba v Chilanga Cement Plc (2002) Z.R. 129.
5. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172.
6. Holmes Limited v Buildwell Construction Company Limited (1973) Z.R. 97.
7. Premesh Bhai Megan Patel v Rephidim Institute Limited SCZ Appeal No. 3/2011.
8. Nora Mwaanga Kayoba and Alizani Banda v Eunice Kumwenda Ngulube and Andrew Ngulube SCZ Judgment 19 of 2003.
9. Jane Mwenya and Jason Randee v Paul Kapinga (1998) ZR 17.
10. Mususu Kalenga Building Limited v Richman's Money Lenders Enterprises (1999) Z.R. 27.
11. Tito v Waddel [1977] Ch. D. 10611.
12. Peter Militis v Wilson Kafulo Chiwala SCZ Judgment No. 3 of 2009.
13. G.F. Construction [1976] Limited v Rudnap (Z) Limited and Another (1999) Z.R. 134.

**Other Works referred to:**

Robert Lowe, Commercial Law, 4th Edition, 1973, Sweet & Maxwell, London.

Halsbury's Laws of England, Vol. 28, 3rd Edition at page 561, paragraph 1230.

Supreme Court Practice, Sweet & Maxwell, London, 1999 Edition, Order 18/12/18.

Chitty on Contracts, General Principles, 30th Edition, 2008 Sweet & Maxwell, paragraph 27-005, at page 1719 paragraph 27-007, page 1720.

Atkin's Encyclopaedia of Court Forms in Civil Proceedings, 2nd Edition, Volume 24, paragraph 21.

On the 2nd of March, 2009, the High Court delivered a judgment in which it ordered specific performance of a contract of sale of land by the appellant, in favour of the respondent.

The chronology of the events leading to that order is that the appellant had entered into a contract of sale with the respondent in respect of property known as Plot No. 2018 Ndeke ("the Ndeke property"). The purchase price was K35,000.00 (rebased) and receipt of this amount was acknowledged by the appellant in the contract of sale executed between the parties. It was a term of the said contract that within four weeks of its execution the appellant would give vacant possession of the property to the respondent. The appellant did not however, honour his said undertaking.

When the appellant persisted in his refusal to yield vacant possession of the property to her and assign it in her name, the respondent issued a writ before the High Court claiming: specific performance of the contract of sale; an order granting her possession of the property; damages for breach of contract in form of mesne profits at current market rates to be assessed by the Deputy

Registrar; 20% interest per annum on amounts found due from 1st February, 2004 when she should have been given vacant possession of the property, to the date when it will be actually yielded to her.

The appellant filed a defence in which he did not deny that he had executed a contract of sale with the respondent. The appellant averred that, he deliberately refused to execute the assignment as the respondent had failed to pass good title to him of another property known as Plot No. 1804, Itawa, Ndola ("the Itawa Plot"), which was a condition precedent to the conveyance of the Ndeke property in her name. The appellant accordingly, counter-claimed K8,000.00 being the purchase price he paid for the Itawa Plot; the sum of K18,400.00 he allegedly expended on the purchase of building materials delivered on site; and interest on the said amounts at the commercial bank lending rate.

At the trial of the matter before the High Court, the respondent testified that she came to know the appellant when she was looking for a house to purchase with a loan to be obtained from her employers. She initially dealt with the appellant's agent who showed

her the Ndeke property. She liked the property and obtained an offer letter from the appellant. The property was inspected by the Engineering and Buildings Department of her employers after which an inspection report was submitted. Thereafter, the respondent's employers paid the purchase price through the appellant's lawyers, who acknowledged the payment by issuing a receipt. This was followed by execution of a contract of sale relating to the property, by the parties.

The respondent denied having entered into another contract to sell the appellant the Itawa Plot, but admitted that she was aware of the said property as it had once belonged to her husband. She also denied having received K8,000.00 paid by the appellant for the Itawa Plot or that there was any clause in the contract of sale which made the purchase of the Ndeke property, subject to the conclusion of the agreement relating to the Itawa Plot.

For his part, the appellant also testified that, he had occupied the Ndeke property which is located in Ndeke township, one of the high density areas of Ndola, as an incidence of his employment

whilst working for Indeni Petroleum Refinery Company Limited. This property was later sold to him and after retiring, he decided to indulge his quest to upgrade his living standards by re-locating to Itawa, a low density area of Ndola.

The appellant was thus compelled to sell his Ndeke property to enable him raise more money and he engaged an agent to find him a Plot in Itawa. It was the agent who introduced him to the respondent as a potential buyer for the Ndeke property, who was also selling a Plot in Itawa and they agreed to exchange their respective properties in issue. As the respondent had no cash at the material time, the appellant had to wait for her employers to process a loan for which she had applied.

In the meantime, the appellant went to the respondent's residence in the company of a friend where he found the respondent with her husband. At that meeting, the appellant said he made it clear to the respondent that he had let go of an opportunity to buy another Plot. He also intimated to her that, if she did not have a vacant Plot in Itawa, his Ndeke property would not be available for

sale to her. The respondent confirmed that she did have a Plot in Itawa, but that she had increased the purchase price from K7,000.00 to K8,000.00.

The appellant in his evidence confirmed receiving a payment cheque for the purchase price of the Ndeke property from the respondent's employers, in the sum of K35, 000. 00. That after cashing the cheque, he met with the respondent's husband and paid him K8,000.00 for the Itawa Plot which the latter had offered to him for sale. When it was time to exchange title deeds for the two properties however, the respondent contrary to their agreement, failed to produce the title deed for the Itawa Plot. This is what prompted the appellant to withdraw his title deed as well and he offered to refund the respondent the difference in the purchase price paid to him for the Ndeke property.

In reaction, the respondent promised to give him the title deed for the Itawa Plot within 14 days. The respondent further gave the appellant a go ahead to commence his intended construction works thereon. This is how the appellant proceeded to obtain building

plans for the structure he was to construct on the Itawa Plot and purchased building material which were delivered on site. He thereafter travelled to South Africa to purchase some more building materials but whilst there, his wife informed the appellant that she had discovered that the Itawa Plot did not belong to the respondent but to a Mrs. Kangunda.

Upon his return from South Africa, the appellant confronted the respondent over the issue who pleaded with him not to report the matter to the police. The owner herself however, did so, upon which the appellant was arrested and detained by the police for one night. The respondent and her husband were subsequently summoned to the Itawa Police Post where they suggested to the appellant that the matter be resolved out of court.

The appellant's further testimony in the court below was that, he had agreed with the respondent that she should resolve the issue of the Itawa Plot with Mrs. Kangunda, while he would retain his Ndeke property. He nonetheless admitted that from the purchase price he had received, he had failed to refund the respondent the

difference of K14,000.00. He contended that he failed to do so at the material time because he could not locate the respondent's whereabouts. The appellant maintained that he was still willing to effect the refund. It was his further testimony that the reason they had not embodied the sale of the Itawa Plot in the contract of sale executed for the Ndeke property, was to facilitate processing of the loan by the respondent's employers.

The appellant claimed it was not his wish to involve lawyers in their transaction but that he had done so at the instance of the respondent's employers. He maintained he was entitled to a refund of the K8,000.00 that he had paid for the Itawa Plot and K18,400.00 spent on buying building materials but conceded that he did not produce any receipts before the trial court to prove that expenditure. The appellant also conceded that he did not have any documentation to confirm there was an agreement that the ownership of the Ndeke property would only be effected upon change of ownership of the Itawa Plot into his name.

In her evidence, Christine Kangunda who testified for the appellant as DW2, told the trial court below, that she was the owner of the Itawa Plot and only came to know the appellant when she discovered that someone was trying to develop her said Plot. She reported the matter to the Itawa Police Post, where she was advised to go to the Council and the Ministry of Lands to check if there had been any change of ownership. Upon verifying that the property was still in her name, she proceeded to obtain a Police call out for the appellant. It was then, that the appellant revealed to her, that he had bought the Plot from the respondent. DW2's own inquiries into the matter revealed that the respondent had equally bought the same Plot from a Mr. Chizawu of Ndola City Council, but when the said person was confronted, he denied any knowledge of the transaction. After police interviews, the appellant and Mr. Chizawu were released and the appellant stopped developing the Itawa Plot.

Mrs. Chabu, the advocate who dealt with the sale transaction, was DW3. She testified that her firm was instructed to handle the conveyance between the appellant and the respondent, in respect of the Ndeke property. She applied for consent to assign from the

Council, and thereafter, paid property transfer tax to the Zambia Revenue Authority. She proceeded to prepare a contract of sale which she asked the appellant to sign and he did so. The respondent equally signed. When she later asked the appellant to yield vacant possession of the property however, he raised concern claiming the deal was off because the respondent had promised to give him a Plot in Itawa but did not do so.

The lawyer went on to testify that, since the appellant had requested to refund the purchase price, an amicable resolution of the matter was attempted, but the respondent was not willing to accept the monies back claiming that a Plot should first be given to him in Itawa, as part payment for the Ndeke property. That this condition was only brought to her attention as the lawyer attending to the conveyance, after the paperwork for the whole transaction was almost completed and the appellant was expected to yield vacant possession to her, but the appellant declined to do so insisting that the sale was conditional.

The lawyer nonetheless confirmed that the appellant executed the contract of sale for the Ndeke property, freely and voluntarily. She further confirmed that, there was no term in the contract which declared that the sale was conditional; nor was there to her knowledge, any other document to confirm the alleged condition precedent.

In dealing with the issues raised, the trial court first considered the evidence relating to respondent's claims on which he found as a fact, that the appellant and respondent entered into a contract for the respondent to purchase the appellant's Ndeke property, No. 2018, Ndola and that the full purchase price had since been paid to the appellant, through his lawyers. Accordingly, the court found the respondent had on a balance of probabilities, established that she had fulfilled her part of the contract.

The trial court then, proceeded to consider evidence relating to the appellant's contention that the sale of his Ndeke property was conditional upon the respondent giving him a Plot in Itawa. And, that since the said Plot belonged to someone else, the respondent

had not fulfilled, her part of the contract, as a result of which the appellant had counter-claimed for the monies paid for the Plot and the cost of building material he had bought. Upon considering the terms of the contract of sale executed by the parties in this regard, the trial court found that it did not contain any condition precedent requiring that a Plot in Itawa was to be given in part payment of the Ndeke property.

The trial court further found, the appellant in his evidence had infact admitted that the contract he executed did not include the Plot in Itawa. Having considered that the appellant had admitted, he did not mention the condition precedent even to the lawyer who was acting on his behalf, the trial court came to the conclusion that, whereas the respondent had established that she had fulfilled her part of the contract; the appellant had not provided sufficient evidence to prove his counter-claim. That he failed to produce any receipts before the trial court confirming he had paid K8,000. 00 to the respondent and bought building materials amounting to K18,400.00. The court also observed that even DW3, the appellant's lawyer, did not in her testimony in this respect, refer to any receipt.

The trial court further considered that although the appellant in his evidence had referred to having used a middle man to sell his property in issue, he did not call this person to testify on the aspect that the respondent had a Plot in Itawa which she was also selling. On the evidence led, the trial court found there was no condition attached to the sale of the Ndeke property and dismissed the appellant's counter-claim for lack of merit. The trial court accordingly granted the respondent an order for specific performance of the contract of sale, together with all the other relief that she was seeking as set out at page J3 of this judgment.

Dissatisfied with that judgment, the appellant now appeals to this Court on three grounds, stated as follows:

1. **The lower court erred in law and misdirected itself when it adjudged that the contract of sale made between the appellant and respondent for the respondent to purchase the appellants house No. 2018 Ndeke, Ndola did not include the assignment of Plot No. 1804, Itawa, by the respondent to the appellant as part of consideration which the respondent failed to fulfil.**
2. **The lower court erred in not considering the fact that by failure of such consideration the contract had been rendered null and void and the respondent could not benefit on it.**

3. **The lower court erred in not considering the fraudulent misrepresentation made over the ownership of Plot No. 1804, Itawa, Township in Ndola.**

At the hearing of the appeal, there was no attendance on the part of the respondent.

The appellant who was present, informed the court that due to persistent ill health he had been unable to file his heads of argument and submissions on which he sought to entirely rely. That he was diabetic and was unable to proceed as he was feeling unwell that morning. He requested the Court to allow him to go and seek medical attention. Upon considering the circumstances, we granted the appellant leave to file his heads of argument and submissions in open court.

The said heads of argument in substance, merely repeat what transpired between the parties regarding the two transactions relating to the sale of the Ndeke property and their engagement in respect of the Itawa Plot, as earlier in this judgment set out. The gist of the appellant's argument as we understand it, is that a contract for the sale of land may be partly in writing, partly oral or may be

implied from the conduct of the parties. What is important are the parties' intentions and not the form the contract takes. In support of the argument, the appellant cited the cases of **Heilbut Symons & Co. v Buckeleton**[1] and **Oscar Chess Limited v Williams**[2] where it was held that, the intentions of the parties can only be deduced from the totality of the evidence adduced.

The appellant further argued that, the conduct of the respondent and himself in the case subject of the present appeal reveals that the respondent was able and willing to sell the Itawa Plot, to him but that the Plot turned out to belong to someone else. That this is the reason the respondent had wanted the matter resolved amicably without involving the police or the courts. It was the appellant's submission that, based on that evidence, the trial court should have dismissed the respondent's claims.

In the event, according to the appellant, the actual finding made by the trial court that the parties did not incorporate the agreement relating to the Itawa Plot into the contract of sale for the Ndeke property, was not relevant to the determination of the matter.

The appellant cited the learned author of **Lowe's Commercial Law, 4th Edition1773 Sweet and Maxwell, London,** in advancing the principle that, a representation is a statement made, at or before, the making of a contract but not forming part of the contract or any other contract. That if a party is induced to make a fraudulent representation by the other party to the contract, he can claim damages for the tort of deceit and can rescind the contract, although this is an equitable remedy.

The appellant further argued that, the respondent's testimony confirming that a Plot for sale was available, except that she intended to increase the purchase price from K7,000 to K8,000, amounted to a contractual term that the Itawa Plot was available. That as he had fallen victim to this (mis)representation, the fraud must be properly remedied by payment of damages and loss of mesne profits.

The appellant submitted that, had the trial court properly considered his testimony, that of DW2, and accepted the existence of the real estate agent, it would have found the fraudulent conduct of

the respondent exposed and decided in his favour. It is on this basis that the appellant urged this Court to reverse the findings of fact made by the trial court and grant his counterclaims.

We have considered the appellant's arguments and submissions and will deal with them to the extent that they are relevant to the real issues raised in this appeal. We have also considered all the three grounds of appeal from which we find the real issue raised is whether there was any evidence led by the appellant to establish his allegation that the purchase of the Ndeke property, included the assignment of the Itawa Plot. And, that the latter, was a condition precedent which ought to have been fulfilled for the purchase transaction to be completed. This is the real issue calling for determination in both grounds one and two of the appeal. For that reason, we will deal with them at once, after which we will proceed to consider ground three.

In the cases of **Kunda v Konkola Copper Mines Plc**[3] and **Kankomba v Chilanga Cement Plc**[4], we reiterated the settled legal

position that, he who alleges must prove the allegation and went on to observe that:

> **"This principle is so elementary, the Court has had on a number of occasions, to remind litigants that it is their duty to prove their allegations."**

While in **Masauso Zulu v Avondale Housing Project**[5] we did state that, a claimant who fails to prove his allegations cannot be entitled to a judgment in their favour. We went further to observe that, a claimant is still required to prove his allegations, even where a defendant fails to establish his defence.

We have in that regard perused the contract of sale relating to Plot No. 2018, Ndeke and found nothing in it which refers to any condition precedent. The contract of sale for Plot No. 2018, Ndeke does not state that there must first be an assignment to the appellant of Plot No. 1804, Itawa. It is for the said reason that we are at a loss to see how disposal of the two properties is in anyway connected, as alleged by the appellant.

The point to note here, is that the parties' agreement for the sale of the Ndeke property was reduced to writing. The appellant is

nonetheless, arguing that there was attached to the completion of that written contract, an oral agreement relating to the disposal of the Itawa Plot.

According to the rule on parole evidence, a party will not generally, be allowed to vary, subtract from or contradict the terms of a written contract. In **Premesh Bhai Megan Patel v Rephidim Institute Limited**[7] we did acknowledge this general principle of law as stated in the High Court case of **Holmes v Buildwell**[6] and upheld it in the finding that, any discussion of verbal conditions before the written agreement is completed, can be suppressed by the written document. The facts of the **Premesh Bhai Megan Patel**[7] case were somewhat similar to those in the present appeal, to the extent that, a party was trying to rely on an alleged oral agreement to resile from the written contract which he had executed. We there, observed as follows:

> **"Provision of an irrigation system to cover 500 hectares of farm land is such a large area such that it cannot reasonably be argued that it was left out of the formal lease agreement... There is therefore no proof that indeed, the appellant could not have signed the lease agreement if the alleged systems were not installed or provided, let**

**alone, proof that the alleged term was discussed and/or agreed. Further, Halsbury's Laws of England states that the Court has no discretion to create a new contract for the parties. In the current case, it would amount to the Court creating a new contract for the parties if the appellant's proposition was upheld. We decline to do so."**

We consider the circumstances in the above case including the conclusion reached as being no different from this appeal, now before us. The appellant here, is trying to rely on some oral agreement allegedly made with the respondent to sell to him the Itawa Plot, to resile from completing performing his part of the written contract which he unconditionally, executed for the sale of the Ndeke property to the respondent. In **Nora Mwaanga Kayoba and Alizani Banda v Eunice Kumwenda Ngulube and Andrew Ngulube**[8], we did say that, we have time and again warned about the casual approach, with which property is purchased by the general citizenry, when we opined that:

**"..... in purchasing of real properties, parties are expected to approach such transactions with much more serious inquiries to establish whether or not the property in question has no encumbrances. Buying real property is not as casual as buying household goods or other personal property."**

We emphasised the value attached to land in a later case, **Jane Mwenya and Jason Randee v Paul Kapinga**[9] where we stressed the legal position that, damages cannot adequately compensate a party for breach of the contract for sale of an interest in a particular piece of land or of a particular house, however ordinary.

In the present appeal, we similarly hold the view that, the alleged sale of the piece of land described as the Itawa Plot, was an important transaction which could not have been left out of the contract of sale, if, as claimed by the appellant, it was meant to be a crucial part of the whole transaction. As correctly observed by the trial judge, if indeed the disposal of Plot No. 1804, Itawa, was meant to be part of the sale transaction relating to the Ndeke property, the appellant would not have failed to disclose such critical information to his lawyer.

Even if we were to accept, which we do not, that there were discussions relating to the sale of the Itawa Plot, as a condition precedent. Any such discussion of a verbal condition before the

written agreement was completed, was suppressed by the contract of sale that was subsequently executed by the parties.

In the event, as the contract of sale which was executed by the parties does not state that the sale of Plot No. 2810, Ndeke, was subject to any condition precedent, there is no basis for faulting the findings of fact made by the trial court in this respect as they are certainly supported by the evidence on record. Accordingly, we are precluded from creating a new contract for the parties, outside the one relating to the sale of Plot No. 2018, Ndeke, which they voluntarily entered into and signed. That contract does not contain any condition precedent requiring prior assignment of the Itawa Plot.

Grounds one and two of the appeal must accordingly fail.

Coming to ground 3, we can only remind litigants as we have done many times in previous decisions, that a matter not raised at trial cannot be raised on appeal. The cases of **Premesh Bhai Megan Patel**[7]and **Mususu Kalenga Building Limited v Richman's Money Lenders Enterprises**[10] refer.

The appellant did not in his defence filed in the court below, plead fraudulent misrepresentation on which he has anchored his arguments and submissions in ground three of the appeal. For that reason, the same was not part of the issues considered and determined by the trial court. Further in this regard, the **Supreme Court Practice, Sweet & Maxwell, London, 1999 Edition, Order 18/12/18** requires that an allegation of fraud must be specifically pleaded for it to be relied upon by a party at the trial. The appellant who failed to plead fraud, and thereby made it a non-issue at the trial of the matter, cannot now, on appeal, raise it for the very first time. It is for those reasons that we are precluded from considering ground three of appeal and it accordingly, fails.

The inevitable conclusion is that, all the three grounds having failed this entire appeal fails for total lack of merit.

In upholding the trial judge however, we have considered that, when he granted the respondent's claims, he did so holistically. The court did not consider each specific relief sought by the respondent. The said relief as set out earlier at page J5 of this judgment, was not

only for specific performance. The respondent in addition, was seeking an order for mesne profits and damages for breach of contract. The appellant had also, in the alternative, counterclaimed refund of the K8, 000.00 paid to the respondent's husband for the Itawa Plot and allegedly K18,400.00 spent in purchasing the materials delivered on site.

Starting with the K18,400.00 claim for the cost of building materials raised by the appellant, the evidence that was placed before the trial court did not establish that the alleged expenses were incurred, by way of producing receipts and it is for that reason that the trial court found this head of claim was unsubstantiated. The appellant's claim for K8,000.00 refund of the purchase price for the Itawa Plot as lamented by the trial court, was similarly not supported by any receipt produced before it. We, in this regard found that the respondent's husband to whom the purchase price was said to have been paid, was not made a party to the action. In the premises, the trial court could not properly, have considered this claim against him as he was a non-party to the action.

Further, as we earlier in this judgment stated, the law is that you cannot on appeal, rely on any matter (and this includes any document incorporated in the record of appeal) which was not placed before the trial court and considered by it. It is for the reasons given that the appellant's arguments urging us to grant his counterclaims based on documents not produced before the trial court, cannot be sustained.

Coming to the respondent's claims for breach of contract that were allowed and wholesomely granted to her by the trial court without any consideration at all, we can only note that, in dealing with situations when an order for specific performance or damages, can be made by the court in respect of claims for breach of contract for the sale of land, the learned authors of **Chitty on Contracts, General Principles, 30th Edition, 2008 Sweet & Maxwell, paragraph 27-005, at page 1719** which relates to the adequacy and appropriateness of damages as a remedy, state that:

> ".....**the historical foundation for ordering specific performance of a contract was that specific performance will not be ordered where damages were an 'adequate' remedy.** (underlining for emphasis, supplied)

> At a later stage, courts tended to ask whether damages would in fact adequately or was likely to compensate the claimant, but in more recent times, the courts have reverted to the earlier approach of asking whether specific performance was the most appropriate remedy in the circumstances of each case. **The question is therefore not whether damages are an adequate remedy but whether specific performance will "do more perfect and complete justice than an award of damages."** (Boldfacing and underlining for emphasis only)

At **paragraph 27-007, page 1720,** specifically relating to land, the learned authors go on to state that:

> "The purchaser of a particular piece of land or of a particular house (however ordinary) cannot on the vendor's breach obtain a satisfactory substitute, so that specific performance is available to the purchaser."

That approach was adopted by this court in the case of **Jane Mwenya**[9] and we further agreed with the observations expressed in **Tito v Waddel**[11] that, in such matters:

> **"The question is not simply whether damages are an adequate remedy but whether specific performance as it were, will do a more perfect and complete justice than an award of damages. This is particularly so in cases with a unique subject matter such as land."**

Finally, in addressing the award of mesne profits which were granted to the respondent, as claimed, in **Peter Militis v Wilson**

**Kafulo Chiwala**[12] we did consider what is meant by *'mesne profits'* and when they are payable. We, in that respect, relied on the following excerpt from learned authors of **Halsbury's Laws of England, Vol. 28, 3rd Edition at page 561, paragraph 1230**:

> ".....the legal position is that **the landlord may in an action for mesne profits recover damages which he has suffered through being out of possession of the land**..... The action for mesne profits does not lie unless either the landlord has recovered possession or the tenant's interest in the land has come to an end." (Boldfacing for emphasis only)

**Atkin's Encyclopaedia of Court Forms in Civil Proceedings, 2nd Edition, Volume 24, paragraph 21** clarifies the situation where a Landlord who is kept out of his property recovers possession as a result of a court order, in the following words:

> **"where the Landlord re-enters by process of law, rent is claimed down to the date of the writ and mesne profits thereafter."**

In the case of **G F Construction (1976) Limited v Rudnap (Zambia) Limited and Unitechan Limited**[13], which arose from a dispute relating to a contract of sale, there was no evidence led showing that the claimant was the owner or Landlord, who was wrongfully kept out of possession of his property. In declining to

award his claim for mesne profits as damages for breach of contract, for the sale of land, we did observe that, ***'mesne profits'***:

> ".....**are damages awarded to a landlord for holding over a tenancy by a tenant.** In this case there was no relationship of landlord and tenant between the appellant and the first respondent nor was there an agreement between them that before completion (of the contract of sale) the appellant would pay rent to the .....respondent....." (Boldfacing for emphasis only)

The case law cited and other authorities referred to, all underscore two situations only, which entitle a Landlord to recover mesne profits as a relief. The first is where the evidence reveals that a *de facto* Landlord and Tenant relationship had in fact existed between the parties; and, the Landlord has been denied vacant possession of his property without justifiable cause. The second, is when the parties had entered into a contract for the sale of the property in issue, and had further agreed that, rent will be payable by one to the other, pending completion or where completion has taken place by execution of the contract of sale, but the contracting purchaser is denied vacant possession by the vendor without justifiable cause.

In this appeal, now before us, the record shows evidence placed before the trial court disclosed the relationship between the appellant and the respondent was not one of Landlord and Tenant but rather, that of vendor and contracting purchaser; or buyer and seller. There is also no evidence, that the appellant and respondent entered into any agreement relating to payment of rent pending completion of the sale transaction. The evidence that is there is that the contract of sale which was executed by the parties did not have any condition preceded attached. As a result, there is no justifiable basis on which the appellant has failed to yield vacant possession to the respondent within four weeks of execution of the contract as agreed. It is for the reasons given, that we uphold the award of mesne profits and interest made by the trial court in favour of the respondent. The amount due is hereby referred to the learned Deputy Registrar for assessment, should the parties fail to reach an agreement.

For the avoidance of doubt, we uphold the dismissal of the counterclaims as they were not established by evidence that there was any condition precedent attached to the sale. The claim for

K8,000.00 and K18,400.00 were not supported by receipts in the court below and were thus not established.

Accordingly, we uphold the order of specific performance of the contract by the appellant in favour of the respondent, made by the trial court. We further order that, the appellant yields vacant possession to the respondent within thirty (30) days of the delivery of this judgment. The appellant will also sign all documents necessary, for the conveyance of Plot No. 2018 Ndeke, Ndola, in the name of the respondent. Should the appellant, for whatever reason fail to do so, such documents shall be executed by the Deputy Registrar.

As all the three grounds of appeal advanced by the appellant were unsuccessful and the respondent did not defend the appeal, we make no order as to costs.

Appeal dismissed.

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E.M. HAMAUNDU

**SUPREME COURT JUDGE**

.....

J.K. KABUKA

**SUPREME COURT JUDGE**

.....

N.K. MUTUNA

**SUPREME COURT JUDGE**