

IN THE HIGH COURT OF MALAWI AT BLANTYRE

CIVIL CAUSE NO.421 OF 1979

BETWEEN:

JANE ROSE MBALULE PLAINTIFF

- and -

HASSAM REHMAN OSMAN DEFENDANT

Coram: N.S. Jere, Ag. Chief Justice
Mhango of Counsel for the Plaintiff
Savjani of Counsel with Msisha for the Defendant
Sonani: Official Interpreter
Caffyn: Court Reporter

J U D G M E N T

This is an action by Jane Rose Mbalule against Hassam Rehman Osman. She is claiming for specific performance of an agreement for sale; in addition she also claims for special damages or general damages for breach of contract and costs for the action. These claims are strenuously denied by the defendant who counterclaims possession of the premises, 20 days use of the said premises, mesne profits at the rate of K200.00 per month from the 21st day of June, 1979, until delivery of possession.

In this civil matter, I remind myself about the burden of proof in civil cases. The plaintiff need only satisfy me on the balance of probabilities.

The plaintiff's case was that she knew the defendant and in 1977, she had agreed to stay in his house at Mpingwe Plot No. 330 and in July, 1978, she agreed with him to purchase the property. She first completed a form which she handed to the defendant. This got lost and in January, 1979, she obtained another form which was completed by both of them. She last saw it in June 1979 at Messrs Wilson and Morgan offices. This form was produced in court and exhibited as exhibit 1. She recognised exhibit 2 as a letter written by Wilson and Morgan and was authority from Government that she could purchase the premises. After receiving exhibit 4, she went to the new Building Society seeking for a loan. She was told that the New Building Society could not advance moneys to her because she did not have enough money of her own. She then went to her father and then he signed a grantee form

which she handed over to the General Manager. This is Ex.5. This was in January, 1979. The New Building Society sent Mr. Fitzsimons. She was then told to carry out certain repairs to the premises which she did. According to her evidence, Mr. Osman knew this because he frequently came to the premises. The New Building Society granted her a loan and asked her to pay a deposit before the money could be released. This was communicated to her by a letter, Ex. 6 on the 2nd April, 1979. She went to her father asking for help. He, too, had no money. He gave her a letter to Mr. Aleke Banda asking him to help. Mr. Aleke Banda wrote a letter and she was given the money by Mr. Muinson but before he could give the money, he wanted security and she went to Bazuka and Company. She recognized Ex.7 and 8 as a result, she managed to secure the 25% required by the New Building Society. Ex. 9 was a receipt for the deposit she paid to New Building Society. Ex. 10 was a formal offer by the New Building Society. Exhibits 11A, B and C were guarantee etc. By the 26th of May, she had completed all the formalities required by the New Building Society. She then received Exhibit 12 from Wilson and Morgan. As a result, she went to collect all the documents from Wilson and Morgan. She also tendered Exhibit 12 from Mr. Osman written to the New Building Society informing them of his intention to discontinue with the sale. She found this letter at Wilson and Morgan. Mr. Osman told her at her office that he was no longer interested because she failed to pay him the rent. She told him that this was a different matter and that she would bring the money. She did so on the 6th of June, 1979. She then wrote a letter on the 13th of June because Mr. Osman kept on coming to the house saying he wanted her to vacate the house. She said she wrote it because she had nowhere to go and that she had spent a lot of money on the house and that is the reason why she could not cancel the agreement to purchase it. She asked Mr. Osman if he wanted more. She offered him K18,000.00. She then went to Bazuka and Company. She had paid rent up to June, 1979, through Bazuka and Company. She identified a cheque which she gave to Bazuka and Company to pay Mr. Osman for K200.00. She also recognised Exhibits 16A, B and C again written by Bazuka and Company including a notice to Complete. She told the court that Mr. Osman used to come to her office to check about the progress of the New Building Society loan. She said Mr. Osman had asked her to vacate the house but she refused because she had nowhere else to go. Mr. Osman continued persterring her but she could not leave and it was her view that if he had accepted, he would receive the money. She agreed that she used to plead to him. She told the court that Mr. Osman used to help her complete the forms and used to telephone the New Building Society. She identified Ex. 11C at the bottom as 4½% interest that she has to pay since the money is not taken out. She is claiming for possession of the house and that the defendant should be compelled to receive K16,000.00. She further claims that she has moved to a house where she pays K200.00 but now she is paying K46.00 with no chance of purchasing it. She only paid K200.00 per month

because she knew the house was going to be hers. She says she spent K300.00 for repairs. She went into the new house on the 26th September, 1979.

In Cross Examination, she said that they had verbal discussions before June, 1978, but it was only in June that they had serious discussions and it is when Exhibit 1 was completed. She said in January, 1978, there was no reference about the New Building Society but only afterwards she said, "let us try the New Building Society". They had all along been discussing how she could raise money. After failing, she said, "let me try the New Building Society". She agreed that she told Mr. Osman that she would pay the purchase price from the proceeds of the sale of her tobacco. She failed to raise a loan from the Bank. It was in May or June that this form was completed (Ex.1). She said that she did not accept the price of K17,000.00 but K16,000.00. She admitted however, writing to Mr. Osman on 14th November. Further, in evidence she said she was destroying all the letters from Mr. Osman. The other form was completed by the General Manager himself. She agreed that several things were damaged as confirmed by Mr. Khalid on the request of the Malawi Congress Party. She told the court that when she was vacating the house, Mr. Osman told her to repair it. She agreed that she was under a duty to repair the house even if the New Building Society did not tell her to do so. But she repaired the house not at the request of Mr. Osman. She said she arranged her children to leave the house because Mr. Osman was threatening her and she was frightened. She told the children that they should leave the house until she returned from Kasungu. She said that she had arranged with Mr. Kamange to keep the children during her absence. She said she was in arrears for four months and her cheques were returned by the Bank for lack of funds. It was her evidence that she told the party because her arrangements with Mr. Kamange were not completed and that she had gone to dance for the President. She said Mr. Osman knew that she was moving the children out of the house. She then in evidence denied that she had reported to the Malawi Congress Party. She told the court that the party informed her and others that there was injustice done as a result of the action of the Party.

The next witness for the plaintiff was a young man called Phillip Kasiya. He said he was a brother of the plaintiff. He was living with her in the same house belonging to the defendant. It was his evidence that when he came to the house, it was in good condition but when he left, it had wire fence broken. He said that Mr. Osman came to the house on the 3rd May and had discussions with Mrs. Mbalule in his absence. Mrs. Mbalule went to Kasungu and she informed him that he and the children should vacate the house because she did not pay the rent. Mr. Osman then came to tell him that he should vacate the house because other people were going to occupy the house on the 1st of June. He was told by Mrs. Mbalule to go into a house belonging to Mr. Kamange from Kasungu district. He went there with the children but Mrs. Kamange

objected to their staying into that house so by the 30th of May, they were back to the house of Mr. Osman. They stayed there until September, 1979. Mr. Fitzsimons of Fitzsimons Northcroft Associates gave evidence. He said he was a valuer and was asked by the New Building Society to value the premises at Plot No. 330, Limbe. He submitted a report to the New Building Society. He made the report on the 20th January, 1979. This was Ex.17(a). He revisited the place on 2nd March, 1979, and carried out a further inspection which is Ex.17(b). The fourth witness was George Nkata. He is a painter at David Whitehead. He knows Mrs. Mbalule who works for the same company. He carried out some painting work and charged Mrs. Mbalule. Mr. Caplin, the General Manager of the New Building Society told the court that he had received an application from Mrs. Mbalule on 29th January, 1979. She came with an application form, Ex.5 which he helped her to complete and he met Mr. Osman in May, 1979, who advised him that he had decided to withdraw the offer to sell the property to Mrs. Mbalule. He accordingly wrote Mrs. Mbalule advising her of the same. He told the court that the application was considered on the 28th April, 1979, and it was approved subject to a deposit of 25%. The price according to him was K16,000.00. She paid the money and a receipt was issued which is Ex. 10. He recognized his original offer and also Ex. 11C. It was his evidence that he made a formal offer on the 22nd June, 1979. It was his evidence that the New Building Society has now withdrawn the finances. He further told the court that the price was K16,000.00 and he was informed by Mrs. Mbalule. He said the New Building Society may in certain circumstances take a second mortgage. The other witness for the plaintiff was the secretary to the General Manager. Her evidence was brief and it is to the effect that he, the defendant, continuously came to the office to enquire about the progress of the application for a New Building Society loan made by the plaintiff. He was aware that the loan had been granted.

/from the
defendant. The evidence of the defendant is that he is the owner of premises situated at Mpingwe Plot 330, Limbe in the city of Blantyre. In the month of July, 1977, the plaintiff leased these premises at a monthly rental of K200.00/. The agreement was that she would pay 6 months rent in advance. This was agreed between the parties and such agreement was not reduced in writing. She took possession of the defendant's premises. There is no dispute about the conditions of the premises. They were in good condition suitable for human habitation. The house was fenced with a wire fencing. The house was decorated - tiles on the floor were in good condition and window glasses were all unbroken. In short, she took possession of an admirable house. So nice was the house that she developed a liking for it and asked whether she could purchase the property some time the following year after the sale of her tobacco crop.

Incidentally she is a part time farmer. She is fully employed by David Whitehead and Company. This offer was accepted by the defendant. He agreed that he would allow her to purchase the property some time in August, 1978, after the sale of her tobacco crop. The price agreed between the parties was K17,000.00. This initial warmth between the parties started cooling when two months elapsed without the plaintiff paying the six months rent in advance as promised when she took possession of the house in August, 1977. She only paid him K350.00 in November, 1977. This was after he had written her a letter asking about the rent. She replied to his letter quering as to the exact rent. She thought it was only K175.00. In her reply, she confirmed her intention of purchasing the property the following year. Now the defendant paid her a visit at the premises and they had discussions about the sale of the property. She told him that she would raise money from Mr. Aleke Banda and the defendant was excited about this source of funds. He wanted the money badly since he had ordered a truck from South Africa so he told her that he was prepared to accept K16,000. He was therefore reducing the price by K1,000. Mrs. Mbalule however denies that the agreed price was at first K17,000.00. She says it was always K16,000 (see paragraph 1 of the statement of claim). She failed to produce the K16,000.00 from Mr. Aleke Banda. So the parties reverted to their original intention to purchase the property in August after the sale of the tobacco crop. So August, 1978, came as sure as the day follows the night. He spoke to her and she reiterated her wish to purchase the house. The defendant went to Messrs Wilson and Morgan, a firm of legal practitioners and collected a form which was identified as exhibit 1. He completed his part so also the plaintiff. It is clear from this exhibit that the agreed price was K17,000. Messrs Wilson and Morgan started acting for the parties. He received exhibit 4 which was copied to her. She failed to produce the purchase price. In court she explained the failure of her tobacco crop and further that she had other moneys which she had invested in a shop business but the venture flopped so that at that time she had no money. The banks would not advance her moneys since her previous overdraft was still unpaid. There is indeed correspondence for the above statement of the evidence. She then told him that she would get a loan from the New Building Society and according to the defendant, this was the first time she came up with this story. Meanwhile, she had fallen in arrears with her rent so he wrote her DX.6 and she replied DX.7. She pleaded with him to give

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her a few months and extended the time within which she could purchase the property. He gave her two months. She explained to him the difficulties she was having in raising a New Building Society loan. She asked him to see her at the house. When he went there, he found the house was in poor condition. The glasses were broken and the fence was cut in two or three places. She told him that she had secured a loan with the New Building Society but she was required to pay a deposit. She asked for an extension of time, she pleaded with him and he extended the time. By May, her arrears of rent had accumulated to a tune of K800.00. He had checked at the New Building Society and there was no form and then he called on her and said, 'let us discuss the matter' and they got down early in May and agreed that whatever arrangement there was between them should be cancelled and that she should vacate the premises at the end of May. He then wrote a letter to the New Building Society to that effect copied to her. He said at that time she failed to raise the deposit asked for by the New Building Society. According to him, he gave her a letter confirming the cancellation of the agreement at David Whitehead and Sons. He later received a letter from Mrs. Mbalule pleading with him that he should reconsider his decision or sell her another plot.

Around 28th of May, he left for Mozambique and on his return, he found a note that he was wanted at the Malawi Congress Party Regional office. He met Mr. Sumani who asked him as to why he had evicted the children of Mrs. Mbalule when the lady was dancing for the President in Kasungu. He denied evicting the children. Both Mr. Sumani and the defendant visited the house and the house was empty. Mr. Sumani ordered him to take the children back since their mother was away in Kasungu. So he obeyed the instructions. The following week, he met the plaintiff and had discussions with her. They agreed that she could remain in the house until the 20th of June, 1979 when he would call on her to collect the keys. She would meanwhile continue paying K200 per month on daily basis. On the 20th he went to her as promised and she did not vacate the house. She refused to leave the house. He went back to the Malawi Congress Party and informed the officials accordingly. The party arranged a meeting on the 17th of August, 1979. All parties concerned were present including their legal advisors. She was told to leave the house but she vacated on the 27th of September, 1979. He is therefore asking for K133.32 being the amount of rent from 1st June, 1979 and mesne profits from 1st June to 27th September, 1979. It was his evidence that Mrs. Mbalule did the repairs because they had agreed that she should do so. The next witness for the defence was a Mr. Bernard G. Sumani. That some time in May, he received a telephone from the Regional Minister, Centre from Kasungu. As a result he invited Mr. Osman and asked him about certain allegations. He

denied so they went to the house where they found Mrs. Mbalule's children. He interviewed the children in the presence of Mr. Osman. The children informed him that Mr. Osman had not been at the house and the uncle of the children told him that he was acting on the advice of Mrs. Mbalule to vacate the house. They vacated the house but the owner of the new house refused to let them in. He then advised Mr. Osman to let the children in the house until Mrs. Mbalule returned from Kasungu. Some time in September in the same year, a meeting was arranged. Those present were members of Parliament from Blantyre, Mr. Mhango and Mr. Savjani. The Deputy Regional Chairman presided over the meeting. He gave his decision and that was that Mr. Osman can sell his house to any person he wanted and that he should have his house. He agreed that on several occasions he had rescinded his original intention of chasing her out of the house because he yielded nothing to her pleas of mercy but that on this last occasion, he was not prepared.

Findings of facts and analysis of the evidence:

By oral agreement, the defendant agreed to let his premises to the plaintiff at a monthly rental of K200.00. It was a further understanding between the parties that the plaintiff would keep the premises in the condition she had found them. I find it as a fact that the premises at the time she took possession of them were in good condition. There was no need at that time to repair the same. The understanding meant that the plaintiff would repair the premises as and when such repairs were needed. She was, therefore, obliged to repair the premises under the oral tenancy agreement. There was a further agreement that she would purchase the premises in August, 1978, at K17,000.00 and she expressly informed the defendant that she would finance the deal with the moneys from the sale of her tobacco crop. In pursuance to this agreement, she entered the defendant's premises situated at Plot LE 330 Limbe in the city of Blantyre. This was on the 1st August 1977. However, the plaintiff failed to pay the rent as agreed, namely, 6 months in advance and by November, 1977 she had not even paid the monthly rent of K200.00 per month. She was in financial trouble. She pleaded with him and eventually paid. During the same period, i.e. around November, 1977, the plaintiff informed the defendant that she wanted to purchase the property immediately. She said she would get the purchase price from Mr. Aleke Banda. The defendant then told her that if she was in a position to pay immediately, he would reduce the price to K16,000.00. He needed cash badly at that time since he wanted to purchase a truck from South Africa. It is my view that he had waived the price and that this was conditional on the defendant paying cash immediately.

She failed to pay the purchase price. The failure to pay at that time meant in my view that the parties had reverted to their original position, namely, that she would purchase the property in August, 1978 and that she would use the money from her proceeds of tobacco sales, the price being K17,000.00. In August, 1978, the parties resumed discussions for the sale of the premises. The plaintiff told the defendant that she was in a position to buy the premises. The defendant went to Wilson and Morgan and collected a form, completed his part and she also completed her portion. This document has been exhibited as no. 1. This document is headed 'Information required by Government in regard to sale of property'. This document seeks detailed information as to where the premises are situated, title deeds acreage, address of the parties, reason for sale and the price. In this form, the price is given as K17,000.00. Messrs. Wilson and Morgan wrote to Government seeking permission for the sale of the property. Authority was granted to sell the property and this was conveyed to the plaintiff by a letter written by Messrs Wilson and Morgan to the plaintiff. This was on the 31st October, 1978. The plaintiff failed to pay. She told the defendant that the bank was not prepared to give her a loan. She narrated to him the reasons for the bank's refusal. She, however, suggested that she would try the New Building Society. She said that the defendant told her that the New Building Society loans were very expensive because of interest charges but she told him that she should try all the same. He agreed that she should try. She went to the New Building Society. This was in January, 1979. She supplied the necessary information. The New Building Society sent their valuer, Mr. Fitzsimons who recommended some work to be done to the building. This was done and he finally issued a report. On the basis of this report, the application went for consideration before the Board of the New Building Society. At this stage, it is necessary to review the evidence as to the price of the premises. When the plaintiff failed to finance the deal with the tobacco money, the parties did not rediscuss the price. She said she told the general manager that the price was K16,000.00. The general manager completed the form on behalf of the plaintiff. He never asked the plaintiff to confirm this information with the owner of the premises. He only relied on her word. It is most interesting to note that the inspector's report gives the value of the property as K16,000.00 and recommended a loan of K12,000.00. Understandably, the inspector did not consult the defendant. The defendant on the other hand says that he had told the plaintiff some time that the price was K16,000.00 because she was going to pay cash and as soon as this failed, the price was once more the original price of K17,000.00. He said the earlier arrangement fell when she failed to produce the cash.

There is the evidence of the general manager's secretary who said that the defendant frequently came to find out the progress of the application for a loan made by the plaintiff. She said he used to ask her and saw the general manager. There is no direct evidence that he was aware about the price of the building to be K16,000.00 from the general manager or his secretary.

On the other hand in support of the defendant, there is his evidence that the price of K16,000.00 was conditional on her producing cash since he badly needed the cash in order to purchase a truck from South Africa. Once she failed to produce cash, they were back to square one. His story is confirmed by Ex.1 which was completed around end July or early August, but certainly before the 2nd of August, when it was sent to the Commissioner for Lands with a copy letter from Messrs Wilson and Morgan dated the 2nd of August, 1978. This document clearly shows the consideration as K17,000.00.

The next evidence which corroborates the story of the defendant that the price was fixed at K17,000.00 is the conduct of the plaintiff. It will be noted that after she returned to the house with the aid of the Malawi Congress Party, she wrote a letter to the defendant saying that she was prepared to pay K18,000.00 for the property. In my view, this suggests that the price was never fixed at K16,000.00. I have noted her demeanour and I think the truth is that the New Building Society's inspector's report was taken as the price and she thought she would in due course convince the defendant to accept a lower price. In my considered view, at best the parties were not agreed as to the price since the defendant thought it was K17,000 while the plaintiff thought or hoped it was K16,000.00. After the submission of the application to the New Building Society, the next problem that faced the plaintiff was to raise the deposit required as a condition for the release of the money. In my view, the plaintiff discussed this matter with the defendant and expressed her disappointment that she was experiencing problems in raising this amount. I accept the evidence of the defendant that she was in arrears and that she would be unable to raise the necessary deposit. It was the evidence of the defendant which was strenuously denied by the plaintiff that the parties had then agreed to call off whatever agreement they had. It was further agreed that she should vacate the house and leave it in suitable condition. There are divergent views about this conversation. At one stage, it appeared to me that the plaintiff was denying that such conversation took place and at another stage that the only agreement that took place was the termination of the tenancy agreement and not the oral agreement for sale. The evidence of the plaintiff is that Mr. Osman used to go and threaten her to vacate the house. 'I said I wanted to look for money

and I never agreed to vacate the house. I did agree to these suggestions. He came and asked me to vacate the house with immediate effect. I said it was impossible to vacate because I could not find a house. He gave me one week and later two weeks. All this time I was begging Mr. Osman that I should not leave the house. If he had agreed at that time, he would have received his money'. In re-examination, she said: 'Before I went to Kasungu, I asked Mr. Kamange to stay with the children in the house and that if anything happened, I should not ask him. He threatened me because I did not pay the rent for some time. Mr. Osman had the right to take me out of the house so I could not report to police.....'

I find it as a fact that a conversation had taken place between the plaintiff and the defendant. The question is when it took place. The plaintiff does not state the date - the defendant says it was late April or early May (or words to that effect). In my view, the conversation took place late April or early May. My reasons for so finding are that the plaintiff told the court that the defendant asked her to vacate the house immediately but she refused saying that that was too short a time for her to find accommodation and he then gave her two weeks within which to vacate the house. In my view, he gave her up to the end of May within which to move. Indeed she went to look for accommodation and found one belonging to Mr. Kamange. This evidence although fails to disclose the exact date when she went to see Mr. Kamange certainly lends weight to the view that Mr. Osman had told her to vacate the house some time in early May or late April. Her demeanour in court was not impressive. She was evasive and my own impression was that she was all out to tell lies which she thought would establish her case. I certainly do not believe her that Mr. Osman threatened her. This allegation was not confirmed by M.C.P. officials who went to interview her children in her absence. What then was the conversation that passed on between Mr. Osman and herself in the absence of the plaintiff's witness? She said that he asked her to vacate the house hence terminating the oral tenancy agreement but not the agreement for sale. She was in arrears of rent. Her cheques had 'bounced' so it appears she agreed to move at a two-week notice. The defendant said that she had difficulties in raising the deposit asked by the New Building Society so he said 'let us cancel whatever agreement had been made between us' and she agreed to leave at the end of the month i.e. May, 1979. It is correct that by the end of April, the New Building Society had indicated that she would be given a loan but that she must raise a deposit. It is true that she had no money even for the payment of rent. Her evidence was that she started looking for money. She went to her father who told her that he had no money because the tobacco crop was not sold. She was given a

letter to Mr. Aleke Banda by her father asking him to help. These two sources of money had already previously proved a failure. With this background, it is only reasonable to conclude that at the meeting they had she must have conceded defeat. I find it as a fact that both parties must have agreed to terminate not only the tenancy agreement but also the agreement for sale. However, she continued her efforts to obtain the deposit and Mr. Banda introduced her to a financier who indicated his willingness to give her a loan provided there was proper security for his money. Mr. Mhango was now fully in the picture acting on her behalf. She thought in her hearts of heart that once she waved a cheque for K16,000.00 in Mr. Osman's face, he would change and let the deal continue. This would cure all imperfections. That day never dawned for towards the end of May, Mr. Osman wrote a letter finally dashing all hopes of a come back. It has been argued that this letter was imprecise and conveyed the impression that he had only a wish to terminate the sale agreement. I think it clear that Mr. Osman is a layman. He cannot be expected to draft a legal document. He was writing it to the New Building Society and not to Mrs. Mbalule. This letter, in my view, was at best superfluous. There is one point which I think I ought to comment upon. The plaintiff says that she was threatened by Mr. Osman to vacate the house. I do not agree. She is no stranger to business life and a lady who is fully conversant with the Malawi Congress Party. She knows her rights. I cannot believe her allegations. They are a good example of what is meant by an afterthought. I dismiss the allegation as being baseless.

Applicable Law:

So much for the evidence.

I now consider the law applicable in the present case. The first question is: Was there a contract of sale between the plaintiff and the defendant? The statement of claim paragraph 1 states that some time in June or July, 1978, the defendant agreed to sell the premises and the plaintiff agreed to purchase the freehold premises known as Plot No.LE/330 situate at Mpingwe locality of Harper Road in the city of Blantyre and containing nought decimal point five one of an acre for the sum of K16,000.00 and completion of the purchase price was contingent upon the plaintiff's obtaining a New Building Society loan advance for the sum of K12,000.00. In order to constitute a valid contract whether required to be evidenced in writing in order to satisfy section 4 of the Statute Fraud or any simple contract, the following must be present:-

- (a) the parties;
- (b) the property;
- (c) the consideration;
- (d) in the case of a grant of a lease, the commencement and the period of the lease see Megany, The Law of the Property, 2nd Edition at page 342.

There is no doubt that the parties in this case are identifiable; they are Mrs. Rose Jane Mbalule and Mr. Osman. The property is also identifiable. It is LE/330 Mpingwe, Limbe. The real problem is that of consideration. My findings of fact are that the parties never agreed that the purchase price was to be K16,000. In fact the defendant said it was K17,000.00 and the plaintiff in her evidence said she never agreed with the defendant that the price was K17,000.00 but K16,000.00. On this evidence, it cannot be said in law that the parties had agreed as to the price. The contract between them therefore fails. I have considered the question as to whether the defendant had waived his right to receive K17,000.00 as agreed upon and by his conduct, he laid the plaintiff to believe that she would pay K16,000.00 only. The type of waiver relied upon is that of the defendant's conduct. He knew that the plaintiff had applied for a New Building Society loan. He kept on going to the offices of the New Building Society chasing the application for the loan. I have dwelt at length earlier in this judgment as to how the price of K16,000 came about. In any event, waiver is a kind of estoppel. Chitty on Contracts 24th Edition paragraph 1386 puts it this way:

"A waiver is also distinguishable from a variation of a contract in that there is no consideration for the concession or forbearance moving from the party to whom it is given. It may therefore be more satisfactory to regard the doctrine of waiver as analogous to estoppel".

He gives as his authority Hughes v. Metropolitan Railways (1877) 2 app. cases page 439. The rules of pleadings are clear and estoppel must be pleaded. It was not in the present case so I am precluded from considering whether there was a waiver as regards the price or not. However, having said so, I am of the opinion that there was no waiver moving from the defendant to the plaintiff. He did not know that the price has been reduced from K17,000 to K16,000 as valued by the New Building Society. In these circumstances, one of the essentials of a valid contract was missing. There is no contract.

I am satisfied that there is no contract. However, I will examine the legal implication of the rest of the evidence as if there was a contract.

The next problem is that the contract to be enforceable must have been evidenced in writing as is required by the Statute of Fraud. The particulars furnished by Mr. Mhango are clear. That memorandum relied upon is Exhibit 1 and a letter written by Messrs Wilson and Morgan to the Minister responsible for land matters. Msisha has based his argument on the basis that the particulars rely only on exhibit 1. There is a letter from Messrs Bazuka and Company dated the 16th of September, 1979.

"The letter of 2nd August, 1978, by Messrs Wilson and Morgan addressed to the Minister responsible for land matters together with the completed questionnaire constitute sufficient note of a memorandum. It was signed by Messrs Wilson and Morgan as agents for the defendant pursuant to the instructions received from the client".

This actually means that the two documents must be read together. They should not be read in isolation. Do these documents constitute a memorandum as is required by the Statute of Frauds?

The law is clear in Halsbury's Laws of England 3rd Edition, volume 36 paragraph 409. The foregoing statutory requirements relate to the mode of proving the contract and it is enough if a note or memorandum satisfying those requirements is in existence before an action is brought. Any note or memorandum is enough so long as it contains the terms of concluded contract even though it shows that the preparation of a formal contract is contemplated and even though it consists of a number of documents provided there is sufficient evidence of their interconnection. The note or memorandum need only be signed by the party to be charged; that is the defendant or his agent. It is immaterial for what purpose it actually was brought into existence nor does the place or form of signature matter if in fact it authenticates the document as a whole.

It is clear therefore that Exhibits 1 and 2 satisfy the above requirement. The question is whether the contract was subject to the plaintiff obtaining a New Building Society loan so as to take it within. I do not think so. The contract at that time was that the funds for the purchase of the property were to come from the tobacco sales. This was certainly the understanding of the parties. There is abundant evidence to that effect.

It is only when she failed to have the money from the tobacco sales that she indicated to the defendant that she would try to apply for the New Building Society loan. Her letter of the 9th January, 1979, and her subsequent completion of an application from around the 15th January, 1979, removes all doubts that at the time exhibits 1 and 2 came into existence, there was no question of the New Building Society.

Both Counsels went on to argue that in case I hold that there was no memorandum to satisfy the Statute of Frauds, the question of part performance was examined. The submission of Mr. Mhango was that there was part performance and he relied on the following acts:-

- /were
- (a) the repairs/done to the premises with the full knowledge of the defendant at the request of the inspector of the New Building Society;
 - (b) the obtaining of finance from the New Building Society.

I think the classical statement of the law as regards part performance is contained in Elizabeth Maddison v John Alderson (1882-3) Ch.D. page 475:-

"From the law thus stated, the equitable consequences of part performance of a parol contract concerning land seem to me naturally to result. In a suit founded on such part performance, the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the Statute cannot be thought to have in contemplation would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyance; the whole purchase money paid, the purchaser put in possession, expenditure by him (in costly building) upon property; leases granted by tenants. The contract is not a nullity; there is nothing in the Statute to stop any court which may exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract which is a measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused and an action for ejectment brought by the vendor or his heir against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and

liabilities of the parties without taking the contract into account....".


Applying the above principles to the facts in the present case, I can hardly find any equities created by the plaintiff's acts in repairing the building. She had caused the damages to the building; her own child who was insane broke the glasses; she left people breaking into the wire fence and above all, it is alleged that as a tenant, she was required to carry out the repairs. The acts of repairs also refer to the oral tenancy agreement. She was duty bound to leave or maintain the house in the condition she found it. The acts of obtaining money from the New Building Society cannot in equity establish the doctrine of part performance. In these circumstances, a plead of part performance fails.

Even if there was a valid contract or it can be held that there was part performance, the contract, in my view, was mutually terminated. She moved out of the house and although she was let in the following day, that could not undo what the parties had already agreed. It cannot be said that the only terminated agreement was the tenancy one. It looks absurd. This is a question of evidence which I have already dealt with. The plaintiff therefore for the above reasons fails.

/a There is/counterclaim by the defendant, paragraphs 7 and 9. It is clear from the evidence that the plaintiff vacated the premises on the 26th of September, 1979. The question of possession does not arise. If it did I would have ordered that the defendant should take possession of the same. The defendant succeeds on paragraph 9. He should recover K133.32. I agree that he is entitled to have mesne profits from 21st June, to 26th September when she vacated the premises at K200.00 per month which works out at K833.33.

The defendant is to have the costs on the main action and on the counterclaim.

PRONOUNCED in open court this 18th day of June, 1980, at Blantyre.


N.S. JERE
JUDGE