



Republic of Malawi

IN THE SUPREME COURT OF APPEAL

M.S.C.A CIVIL APPEAL NUMBER 23 OF 2016

(Being High Court Commercial Cause No. 35 Of 2012, Lilongwe)

5

NYIKA FARMS LIMITEDAPPELLANT

and

TOYOTA MALAWI LIMITED.....RESPONDENT

10

CORAM: THE HON. JUSTICE R.R. MZIKAMANDA SC, JA

THE HON. JUSTICE L.P. CHIKOPA SC, JA

THE HON. JUSTICE F.E. KAPANDA SC, JA

THE HON. JUSTICE H.S.B POTANI JA

15

THE HON. JUSTICE J. N. KATSALA JA

THE HON. JUSTICE I.C. KAMANGA JA

THE HON. JUSTICE M.C.C MKANDAWIRE JA

Mr. Mwale of Counsel, Counsel for the Appellant

Mr. Kambale, Counsel for the Respondent

20

Mrs Chimtande and Ms C Masiyano, Court Clerks

Date of Hearing: 11 May 2021

Date of Judgement : 30 March 2022

ANNOTATIONS

5 Cases cited

Malawi

Tikumbe Limited v Press (Properties) Limited [1992] 15 MLR, 458)

Finance Bank of Malawi Limited v. Benson Tembo (2007) MLR 99

Gestetner Limited (NCR OEC) v Malawi Revenue Authority [2008] MLR (Com) 332.

10 *Manja v Zidana* Civil Case No 759 of 2002 unreported

Simiyoni v Kanyatula (MSCA Civil Appeal No. 38 of 1997 (unreported)

England

Livingstone v Raywards Coal Co. (1880) 5 App. Cas. 25,39.

15 *Wroth v Tyler* [1974] Ch. 30.

Wolverhampton Corporation v Emmons [1901] QB 515

Hadley v Baxendale (1854) 9 Exch 341

Kay, J in Hart v. Hart (1881) 18 Ch. D. 670

Sudbrook Trading Estate Ltd v. Eggleton & Others [1983] AC 444

20

Statutes and Rules

Sale of Goods Act Cap 48:01 Laws of Malawi.

Malawi Revenue Authority Act Cap 39:07 Laws of Malawi

Customs and Excise Act Cap 42:01 Laws of Malawi


25 The Supreme Court of Appeal Rules

JUDGEMENT

Judgment delivered by the Honourable the Chief Justice R.R. Mzikamanda, SC, JA:

- 5 I have had the opportunity to read in advance the judgment of my Lord Justice of Appeal F.E. Kapanda SC about to be delivered in this matter with which I agree. I respectfully adopt all his reasoning as mine and I also allow the appeal. I abide by the order for costs contained in the aforesaid judgment. Further, I agree with the orders proposed by Justice of Appeal F.E. Kapanda SC.

10



.....
THE HONOURABLE THE CHIEF JUSTICE R.R. MZIKAMANDA, SC, JA

Judgment delivered by Justice L.P. Chikopa SC, JA:

- 15 I have had the opportunity to read in advance the judgment of my Lord Justice of Appeal F.E. Kapanda SC to be delivered in this matter with which I agree. I respectfully adopt all his reasoning as mine and I also allow the appeal in the manner put in the judgment of this Court as set out above. I abide by the order for costs contained in the aforesaid judgment. Further, I agree with the orders proposed by Justice of Appeal F.E. Kapanda SC.

20

.....
HONOURABLE JUSTICE L.P. CHIKOPA SC, JA

- Justice F.E. Kapanda SC, JA (Justice Justice R.R. Mzikamanda SC, JA; Justice A.C. Chipeta SC, JA; Justice L.P. Chikopa SC, JA; Justice H.S.B. PotaniJA ; Justice JN Katsala JA; Justice I.C. Kamanga JA and Justice MCC Mkandawire JA concurring):
- 25

Kapanda SC, JA:

INTRODUCTION

On 21 May 2012, the Appellant commenced the proceedings the subject matter of this appeal
5 against the Respondent claiming specific performance of the contract of sale of a motor vehicle.
In the alternative, it claimed damages for breach of contract, interest and costs.

Following a full trial, the High Court delivered Judgement on 26 May 2014 in favour of the
Respondent. The Appellant, being dissatisfied with the judgement of the High Court, appealed
the whole decision to this Court.

10

FACTUAL BACKGROUND

In May 2011, the Managing Director of the Appellant approached the Respondent with the
intention to purchase a Land Cruiser 4.5 Turbo Diesel VX 8-seater 4x4 Motor Vehicle. During
15 his visit to Respondent, he indicated that the Appellant enjoyed a duty-free status which
allowed it to purchase such a motor vehicle duty free on account that it was operating within
the Export Processing Zone. Based on this representation, the Respondent went on to issue a
quotation for the sum of K17 500 000.00 as a duty-free price for the motor vehicle. Upon
receiving the quotation, the Appellant paid the said sum of K17, 500, 000.00 to the Respondent.
20 However, when the motor vehicle arrived in Malawi, the Appellant could not take immediate
delivery of the motor vehicle since there was a need by the Respondent to verify with the
Malawi Revenue Authority whether the appellant had duty free status. Upon making inquiries,
the Respondent was informed that the Appellant did not have free duty status, As such, its
application to buy the motor vehicle duty free was rejected. After some time, the Respondent
25 went on to sell the motor vehicle to a third party.

The Appellant was desirous to purchase a motor vehicle answering the above description. As
such, the Respondent revised the quotation to K51 505,250.00 to take into consideration the
duty and variation in price. Upon receiving the revised quote, Appellant declined to pay and

eventually commenced the court proceeding against the Respondent in the High Court-Commercial Division in Lilongwe.

Following a full trial, the court delivered its judgement on 26 May 2014 in favour of the Respondent. The court held that an Order of specific performance could not issue on a contract which could not be enforced and was thus voidable. The court also declined to award the Appellant any damages on the ground that the Respondent did not breach the contract of sale. The court further ordered that the Appellant would be entitled to the money it paid to the Respondent plus the interest that had accrued.

Being dissatisfied with the judgement of the High Court the Appellant has appealed against the whole decision to this Court.

GROUNDS OF APPEAL

Appellants filed five grounds of appeal to this Court contained in the Notice of Appeal dated 29 November, 2016:

- a) The learned judge erred in law by not ordering specific performance of the contract against the Respondent based on the purchase price of the vehicle amounting to K17,500,000.00 which the Appellant duly paid to the Respondent;
- b) The learned judge erred in law by holding that transfer of the property could only have occurred upon being established that the Appellant had a duty free status;
- c) The learned judge erred in law by not directing his mind on separation between purchase price of the motor vehicle and duty to be paid on vehicle;
- d) The learned judge erred in law by denying an award of damages for loss incurred by the appellant on K17,500,000.00 due to devaluation of Malawi Kwacha; and
- e) In all circumstance of this case the decision in the judgement of the High Court caused injustice to the Appellant.

ISSUES FOR DETERMINATION

What are the issues that arise and fall to be decided in the appeal under consideration by this Court? As this Court understands it, the questions raised by the appeal are as follows:

1.1 Whether or not the parties in this matter entered into a conditional contract?

1.2 Whether or not an order of specific performance of the contract would issue against the Respondent based on the purchase price of the vehicle amounting to MK17,500,000.00 which the Appellant duly paid to the Respondent.

1.3 Whether or not the learned judge erred in law by not directing his mind on separation between purchase price of the motor vehicle and duty to be paid on vehicle?

1.4 Whether or not the learned judge erred in law by holding that transfer of the property could only have occurred upon been established that the Appellant had a duty free status?

It is now necessary that this Court should look at the arguments that have been raised by the parties in response to these questions. We shall start with the Appellants' arguments then move on to deliberate those put forward by the Respondents.

PARTIES' POSITIONS

The Appellant's Arguments

In arguing the first ground, the Appellant argued that specific performance is an equitable remedy aimed at compelling a defendant to do what he promised to do. In buttressing the point the appellant relied on Section 52(1) of Sale of Good Act and also cited the case of *Finance Bank of Malawi v Benson Tembo*¹. It is the Appellant's case that in the present matter,

¹ (2007) MLR 99

damages cannot be adequate remedy for the Appellant. The nature and usage of the vehicle that was supposed to be supplied by the Respondent, a Toyota Land Cruiser VX, should be highly considered. The vehicle was supposed to be used at the farm environment and the current value of the vehicle is more than initial agreed price. Therefore, the only remedy that can efficiently put the Appellant in position they would have been is delivery of the vehicle. Thus, specific performance is the only adequate remedy in the circumstance. And that the learned Judge erred in law by not awarding specific performance.

In arguing the second ground, the Appellant cited Section 20(a) of the Sale of Goods Act, and submitted that where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods shall pass to the buyer when the contract is made. It is therefore the Appellant's position that the matter at hand, the contract was not conditional sale and the item to be sold was specific -Toyota Land Cruiser VX 4.5 turbo diesel. It does not matter whether or not the price has been paid. Thus, whether or not the duty has not been paid did not have a bearing on the sale.

Advancing the third ground of appeal, in substantiating this ground, the Appellant argued that the judge failed to separate the purchase price from the duty to be paid on the vehicle. The appellant cited Section 87 (1) of the Customs and Excises to buttress this submission. Further, the appellant argued that in the matter at hand, the duty charged and the purchase price are separate things. The respondent simply had to claim duty from the appellant. Thus, the learned judge erred in law by not separating duty and purchase price.

In arguing the fourth ground on denying to award damages for loss incurred by the Appellant, the Appellant argued that the contract could be enforced whether the duty-free status granted or not, as duty simply need to be claimed. The Appellant argued that it paid the purchase price to the Respondent and only got to find out that the vehicle was sold to third party at the time when it was making duty enquires from the Respondent. Further, the Appellant submitted that the contract was not conditional in any way. Therefore, the Respondent breached the contract of sale and is to compensate the Appellant for damages suffered as a result of breach.

In sum, the appellant submits that the judgement of court below be struck out in its entirety and prayed that this Court enforces specific performance. In alternative, the Appellant prays that this Court awards damages to the Appellant for the loss suffered as a result of the Respondent's breach of contract.

The Respondents' Arguments

In responding to the first ground of the appeal, the Respondent stated that specific performance cannot be ordered in an agreement of sale (conditional contracts) where the conditions precedent has failed to materialize. In cementing the position, the Respondent relied the case of *Justin Mose Simiyon v Kanyatula*². Thus, ordering the respondent to specifically perform the contract by delivering the motor vehicle to the Appellant duty free price of K17,500,000.00 would not have achieved a complete and perfect justice in the circumstance. The order of specific performance would have caused the Respondent to suffer hardship because it would be breaking the law of the land. It is the further argument of the Respondent that the order of specific performance would have compelled the Respondent to carry business at a loss because Malawi Revenue Authority would have demanded the Respondent to meet the duty obligation plus penalties. It is further submitted that the Judge was right in declining to order specific performance in the court below. The Appellant's appeal should therefore be dismissed on this ground. Thus, it is prayed that this ground should fail in in this Court.

In its second ground of appeal, the Appellant has argued that the Judge erred in law by holding that transfer of the property could only have occurred upon been established that the Appellant had a duty free status. The Respondent has a different view on this ground of appeal. It is the Respondent's argument that the Appellant misrepresented to it of its free of duty status in relation to the above motor vehicle. It is the Respondent's position that upon discovery of this misrepresentation, it rescinded the contract. At that point, the parties were at *status quo ante*. As such, passing the property to the Appellant when it was established that it had no duty-free status would have been breaking the tax laws.

Further, the Respondent stated that by giving the Appellant a revised quotation of K51,505,250.00, it demonstrated that they were not going to be bound by the original contract. The Respondent communicated to the Appellant that it could not continue keeping the motor vehicle in bond after six months. The Respondent also communicated that they could not supply the vehicle at old price and subsequently informed to Appellant to collect his money back.

² MSCA civil Appeal No. 38 of 1997. (unreported)

In the third ground of appeal, the Appellant contends that the Judge erred in law by not directing his mind on separation between purchase price of the motor vehicle and duty to be paid thereon. On this third ground, the Respondent argues that there is no difference between purchase price and duty as the duty payable is part of the purchase price. It is the Respondent's further
5 argument that it does not see how the court would have separated the purchase price from duty payable as the duty payable is part of the purchase price in Malawi unless one can demonstrate that they have a duty free status. Hence, both are one and the same unless one can demonstrate that they have duty free status.

In ground 4 of appeal, the Appellant is arguing that the Judge erred in law by denying an award
10 of damages for loss incurred by the Appellant on K17, 500,000 due to the devaluation of the Malawi Kwacha. In response, the Respondent relied on the case of *Hadley v Baxendale*³ where it was stated that damages for breach of contract is to compensate the injured party. It is the Respondent's position that the parties in the present matter made an agreement to sale and purchase a duty-free vehicle Toyota VX Land Cruiser, to be delivered in 60 days of the date of
15 quotation. The Respondent submitted that it fulfilled its obligation, and the motor vehicle was ready to be delivered within 60 days but that the Appellant failed to collect the car because it had not procured the duty-free status. The Respondent said that it waited too long and sold the vehicle before it was caught up by statutory obligation regarding bonds. Thus, the Respondent argued that it was the Appellant that was in breach of contract by misrepresenting that it had
20 duty free status, when in fact it did not have and failed to satisfy condition precedent of the contract. Further, it is submitted that the Appellant neglected to take delivery within reasonable time when the vehicle arrived. Therefore, it is Respondent's position that it will not be fair to order it to pay damages as if it was responsible for non-completion of contract.

It is therefore submitted by the Respondent that it was the Appellant who was in breach of the
25 contract by misrepresenting that he had duty free status, when in essence he did not, by failing to satisfy a condition precedent to the contract and by neglecting to take delivery within a reasonable time when the vehicle arrived. Thus, the Judge did not err in law by denying an award of damages for loss incurred by the Appellant on K17, 500,000 due to the devaluation of the Malawi Kwacha.

³ (1854) 9 Exch 341

Further, it was the argument of the Respondent that it would not have entered into a contract with the Appellant to supply the motor vehicle in question if the latter had not represented that it did not have a duty free status. However, based on the misrepresentation, the Respondent went on to quote for the sum of K17, 500,000 as a duty free price for the above Motor Vehicle.

5 It adds that upon receiving the quotation, the Appellant paid the said sum of K17, 500,000 to the Respondent. But, when the motor vehicle arrived in Malawi, the Respondent was informed by MRA that the Appellant did not have a duty free status, as such, their application to buy the motor vehicle duty free was rejected. The Respondent argues that it would not be fair to order it to pay damages for exchange rate losses as if it was responsible for non-completion of the
10 contract. It therefore submits that the Appellant's fifth ground of appeal should be dismissed.

Lastly, the Respondent notes that in ground 5 of the appeal the Appellant has argued that in all circumstance of this case the decision of the judgment of the High Court caused injustice to the Appellant. In reply, the Respondent stated that the Appellant has failed to give any particulars of the injustice which was caused to it. The Respondent cited Order 111 (2) of the Supreme
15 Court of Appeal Rules and alleged that the fifth ground of appeal should be struck out because it is vague and too general. It is argued by the Respondent that the Appellant should have given more particulars of the injustice it is alleging so as to enable the Respondent prepare and respond appropriately. It continued to argue that in *Professor Abe v University of Ilorin*⁴ the Supreme Court of Nigeria, referring to a provision similar to our above Order 111 of the
20 Supreme Court of Appeal Rules, said, among other things, that where a ground of appeal is defective or the particulars do not flow therefrom or related thereto, such a ground of appeal or particular or particulars are liable to be struck out. Further, that once the ground or one or more of its particulars are struck out the remaining particular or particulars as well as the ground itself are rendered otiose. This is so because it is not the duty of the court to extend hands of
25 fellowship to one of the parties by assisting him to carry out a surgical operation of that party's ground of appeal by excising the defective part from it.

The long and short of it is that it is the Respondent's submission that the court a quo was correct in law for not ordering specific performance. It further contends that the court below was correct in law and fact in ruling that the motor vehicle could only have been delivered upon
30 establishing that the Appellant had a duty free status. Further, the Respondent submits and

⁴ 2013 16 NWLR 183,

argues that that the court below was right in not awarding damages to the Appellant. The Respondent therefore prays that the Appellant's appeal to this Court should be dismissed with costs.

5

ANALYSIS OF THE LAW AND DETERMINATION

The Law

A contract is an agreement giving rise to obligations which are enforced or recognised by the law⁵. Further, according to Section 3 (1) of the Sale of Goods Act⁶ “a contract of sale of goods
10 is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called price.” Section 3 of the Sale of Goods Act (Cap. 48:01) defines what a contract of sale of goods is under the Laws of Malawi. There is an outright sale and, second, an agreement to sell. In terms of section 3 of the Sale of Goods Act, a distinction is made between a sale and an agreement to sale. The section 3 (3) (4) and (5) provides, inter
15 alia, that:

“(3) A contract of sale may be absolute or conditional.

(4) where under a contract of sale the property in the good is transferred from the seller to the buyer the contract is called a sale; but, where the transfer of property in the goods is to take p[lace at future time or subject to some condition thereafter to be fulfilled ,
20 the contract is called agreement to sell.

(5) an agreement to sell becomes a sale when the time elapses or the condition are fulfilled subject to which the property in the goods is to be transferred.”

As it were, a contract of sale can be absolute or conditional. Further, a contract of sale may be in writing, oral, partly written and partly oral, or implied from the conduct of the parties⁷.

⁵ Chitty on contracts 29th edition General Principles Pages 3-4

⁶. Cap 48:01.

⁷ Section 5 of the Sale of Goods Act.

“The trial Judge, quite properly, summed-up the position by stating that at best, the two parties merely agreed to agree without reaching a binding agreement. The Judge cited as authority on this point the case of **Sudbrook Trading Estate Ltd v. Eggleton & Others (1983) AC 444 at 459**, where **Templeman, LJ** reading the judgment of the court said that:

principle of law from the dictum above is that there will be no contract to be enforced by
 rt if an agreement on the fact of it is incomplete until something else has been done. This

Accessed 13 September 2021

could arise either through a further agreement between the parties or by the decision of an arbitrator or valuer,

Specific Performance

- 5 At law, a breach of contract is a failure to fulfil contractual obligation which entitles the innocent party to a remedy. Thus, section 52 (1) of the Sale of Goods Act provides that:

10 “In any action of breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgement or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages.”

Further, it is well to note that specific performance is an equitable remedy aimed at compelling a defendant to do what he promised to do. In *Tikumbe Ltd v Press Properties Ltd*¹⁰, Tambala J had this to say on specific performance which is illuminating:

15 “An order for specific performance is made by the court for the purpose of compelling the defendant to perform the promise which he made. It is an equitable remedy: see Law of contract by Cheshire and Fifoot (6 edition) at 532. It is therefore important to ascertain what the defendant promised to do in the present case... if this court decreed specific performance against the defendants, it would be compelling defendants to perform a greater obligation than that which they intend to discharge. That would be
20 unjust and it is a thing which a court of equity would not do. This is one of the reasons why the application for an order of specific performance should be refused”.¹¹

Specific performance will not be ordered in agreements to sale (conditional contracts) where the conditions precedent have failed to materialize.

DISCUSSION (FINDINGS AND CONCLUSIONS)

25

¹⁰ [1992] 15 MLR 458 (HC)

¹¹ *Simiyoni v Kanyatula* ((MSCA Civil Appeal No. 38 of 1997: <https://malawilii.org/mw/judgment/supreme-court-appeal/1999/1>. Accessed 13 September 2021

This Court finds and concludes that the court below made a mistake in not ordering specific performance of the contract between the Appellant and the Respondent. It is common cause that specific performance is an equitable remedy aimed at compelling a defendant to do what he promised to do. Further, the Supreme Court of Appeal in *Finance Bank of Malawi Limited v. Benson Tembo*¹² has instructively summarised some relevant legal principles respecting the remedy of specific performance. The Court stated that:

"Specific performance is an equitable remedy which the courts will decree when the remedy available at common law, usually damages is not adequate. In other words specific performance will not be ordered if there is adequate remedy at law. And like other equitable remedies, specific remedy is not a matter of right in the person seeking relief but is given as a matter of discretion to be exercised, of course, in accordance with settled principles; it is not left to the uncontrolled caprice of an individual judge, so to speak."

The remedy of specific performance is also provided under statute. Section 52(1) of the Sale of Goods Act provides that:

"In any action for breach of contract to deliver specific or ascertained goods, the court may, if it thinks fit, on the application of the plaintiff, by its judgement or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages."

As this Court understands it, section 52 of the Sale of Goods Act confers on a buyer the right to specific performance compelling a seller to do as they promised to a buyer. In the case under consideration, damages cannot be an adequate remedy for the Appellant. The nature and usage of the vehicle that was supposed to be supplied by the Respondent, a Toyota Land Cruiser VX, should be highly considered. It is a fact that the Appellant is engaged in crocodile farming business in Salima and the vehicle was to be specifically used at the farm and the vehicle is suited for usage in the farm environment. Further to this, the current value of the vehicle is more than the initially agreed price. The Appellant would have purchased the vehicle at the previous lower price had the Respondent not sold the vehicle to somebody else. The only remedy that can efficiently put the Appellant in a position they would have been is the delivery of the vehicle. Thus, specific performance is the only adequate remedy in the

¹² (2007) MLR 99; see also *Tikumbe Limited v Press (Properties) Limited* (1992) 15 MLR 458

circumstances. Furthermore, it is this Court's understanding of the law that commercial transactions must be performed and that where one party opts not to perform his part of the contract, the courts must give an effective remedy to the innocent party.¹³ In the instant case, the Appellant ought to have been given an effective remedy of specific performance regardless of the cost implications to the Respondent. It is not for the Courts to encourage the spirit of non-compliance with contractual obligations merely because damages are an adequate remedy. It is about what is just in all the circumstances. It therefore does not matter the cost implications to be borne by the Respondent in purchasing the vehicle at the current market price. The Appellant performed their obligations in the contract, and the Respondent must also perform their contractual obligations. As specific performance is an equitable remedy, it also falls under the principle that he who comes to equity must come with clean hands. Therefore, any misrepresentation on the part of the Appellant would deny them a remedy in equity. It is well to observe that misrepresentation refers to statements or conduct which conveys a false or wrong impression. In the matter at hand, the Appellants had been issued with an Export Processing Zone Certificate (EPZ Certificate) which they presented to the Respondents as proof that they were exempted to pay duty. This was no misrepresentation on their part as they reasonably believed that through the nature of their business, the type of purchase and the certificate, they were exempt from paying duty.

This Court therefore finds and concludes that the Appellant is with clean hands. Thus, the court below erred at law by not ordering specific performance as prayed for by the Appellant. Further, it erred at law by holding that the transfer of property could only have occurred upon being established that the Appellant had a duty free status. According to section 20(a) of the Sale of Goods Act, "where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods shall pass to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed". Therefore, for goods in deliverable state, like in this instance, the transfer of property in the goods is said to be done when such contract is made, especially where the contract is unconditional. This Court finds that the contract between the Appellant and the Respondent was not conditional. At the time the parties were contracting, approval of duty free status by MRA was not a condition. It was in evidence that the Appellant simply informed the

¹³ *Gestetner Ltd (NCR OEC) v. Malawi Revenue Authority* (2008] MLR (Com) 332

Respondent that it had an EPZ certificate which allowed it duty free status and that they would therefore make an application to Malawi Revenue Authority for duty free status in respect of the vehicle using their EPZ certificate. The goods in this case were specific- A Toyota Land Cruiser VX 4.5 Diesel Turbo. For specific goods, it does not matter whether or not the price has been paid. Therefore, whether or not duty had been paid did not have and should not have had a bearing. Consequently, the court below erred at law by holding that the contract was conditional on the duty free status of the Appellant and that therefore the property had not yet transferred to the Appellant.

This Court further finds and concludes that the court below erred at law by not separating between purchase price of the motor vehicle and duty to be paid on the vehicle. As we understand it, the purchase price and duty to be paid on the vehicle can be separated. Duty is collected by Malawi Revenue Authority and it is a certain percentage of the value of goods. This is what obtains from our reading of Section 87 (1) of the Customs and Excise Act which allows both buyers and sellers to claim reimbursement of part of money paid as duty in certain circumstances. This happens where for instance a buyer purchases a good and the duty imposed by Malawi Revenue Authority on that product increases, the seller can always claim for the difference from the purchaser and where duty imposed on the product decreases after a purchaser has already made a purchase, the purchaser can always claim the difference from the seller. On the other hand, where goods have been purchased at a certain price, any part of it can never be reclaimed from either the seller or the buyer after the transaction has been concluded. Thus, money paid as duty is not the same as purchase price. In the matter at hand, duty charged and the purchase price are separate things. The Respondent simply had to claim the duty due from the Appellant. Therefore, the court below erred at law by not separating duty payable and purchase price.

We now move on to deal with the decision of the court below in denying to award damages to the Appellant for loss incurred by it. This Court finds that the judge erred at law by denying an award of damages for loss suffered by the Appellant. It is on record that the court below denied to award damages to the Appellant stating that the contract could not be enforced and thus voidable. It held that since the property did not transfer at the point of the payment of the purchase price, the contract of sale in this action was voidable.

As found and concluded above, the contract should have been enforced whether duty free status was granted or not granted to the Appellant as duty simply needed to be claimed from the Appellant. Further, this Court is alive to the fact that it was only after the Appellant had asked for duty calculations that it was then informed that the vehicle had been sold to a third party.

5 An instructive case on this point is the case of *Manja v Zidana*¹⁴ where the Plaintiff had paid a deposit on purchase price of a house to the Defendant. The Plaintiff was waiting for a loan that he had applied for in order to complete payment of purchase price to the Defendant. The Defendant was aware of the fact that the plaintiff was awaiting the loan. The Defendant later withdrew his offer for sale. The Plaintiff claimed for deposit and damages suffered as a result
10 of breach by the Defendant. The court in making its decision pointed out that an award of specific performance was appropriate. It however felt inclined not to order specific performance as a remedy for fear of the same might be impossible. However, the Court went ahead to award the plaintiff damages for breach.

In the matter at hand, the Respondent cancelled and thereby breached the contract of sale by
15 selling the vehicle to a third party. The Appellant is therefore entitled to claim damages. We therefore so find and conclude that the court below erred at law by holding that the contract could not be enforced and that therefore the Respondent could not have breached the contract.

Determination

20 Following the discussion above, on the appeal before this Court it is determined and concluded as follows:

First, that at all material times there was, under Section 3 of the Sale of Goods Act, a contract of sale of a motor vehicle between the Appellant and the Respondent. Therefore, the sale of the motor vehicle to a third party was ill-thought-out. Secondly, on the authority of *Manja v*
25 *Zidana*,¹⁵ which decision we agree with as representing the position at law, the Appellant is entitled to invoke his right of specific performance under Section 52 of the Sale of Goods Act. Alternatively, the Appellant is entitled to a claim of damages under Section 51 of the said Sale of Goods Act; and Section 51 of the Sale of Goods Act allows a buyer too sue for damages for

¹⁴ Civil Cause No 759 of 2002) 2005) MWHC 40 (1 January 2005) (unreported)

¹⁵ *ibid*

non-delivery of good. However, it is well to note that when monetary damages cannot adequately remedy the harm, specific performance can be considered by the court. Generally, an award for damages can remedy the damage in an effective way. There are instances when that is not the case, particularly when dealing with unique property, real estate, rare objects, artwork or other specific goods. Further, the position at law is that a claimant can successfully demand specific performance, i.e. to have the defendant deliver the specific goods that he/ she purchased only where monetary damages cannot adequately remedy the harm. This is the position as in most cases an award of damages can remedy the damage in an effective way. Further, the Appellant is entitled to a claim of damages under Section 51 of the Sale of Goods Act; and Section 51 of the Sale of Goods Act allows a buyer to sue for damages for non-delivery of goods. This Court observes that the record does not show that monetary damages cannot adequately remedy the harm that was caused by the breach of the sale agreement between the Appellants and the Respondent. Thus, this Court finds and concludes that an award for damages can adequately remedy the damage suffered as a result of the breach of contract on the part of the Respondent. Accordingly, the Appellant shall get back the money it paid as purchase price. The payment of the purchase price shall be with interest from the time the Appellant paid Toyota Malawi to the date the Respondent tendered the money to him. Further, the interest payable shall be compounded at the bank lending rate applicable at Standard Bank at that time. This Court also finds and concludes that pursuant to Section 51 of the Sale of Goods Act the Appellant is entitled to general damages for breach of the contract. In the circumstances, we have determined the general damages and have put it at K10,000,000. We order accordingly. The long and short of it is that this appeal is allowed.

Costs

Costs to the Appellant both here and in the court below to be agreed or taxed in default of agreement.



.....

HONOURABLE JUSTICE F.E. KAPANDA SC, JA

Judgment delivered by Justice H.S.B. Potani JA

I have had the privilege to read before now the judgment to be read by my brother Justice of Appeal F.E. Kapanda SC, I am in entire agreement with him that this appeal be and is hereby
5 successful. Accordingly, the respondents are condemned to pay cost here and below.

The background to this case and the ensuing litigation leading up to this appeal have been fully set out in the judgment of Justice of Appeal F.E. Kapanda SC and it is not necessary for me to cover so much ground as has been so carefully covered by him. I would therefore only make the following observations which have influenced my opinion in the judgment.

10


.....
HONOURABLE JUSTICE H.S.B POTANI JA**15 Judgment delivered by Justice J.N. Katsala JA:**

I have had the opportunity to read in advance the judgment of my Lord Justice of Appeal F.E. Kapanda SC delivered in this matter. For the reasons he has given with which I agree, I would allow the appeal with costs.

20


.....
HONOURABLE JUSTICE J. N KATSALA JA**Judgment delivered by Justice I.C. Kamanga JA:**

I had the opportunity to read in advance the judgment of my Lord Justice of Appeal F.E. Kapanda SC about to be delivered in this matter with which I agree. I respectfully adopt all his
25 reasoning as mine and I also allow the appeal. I also abide by the order for costs contained in the aforesaid judgment. Further, I agree with the orders proposed by Justice of Appeal F.E.

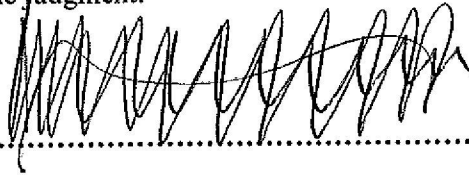
Kapanda SC. I would therefore only make the following observations which have influenced my opinion in the judgment.



HONOURABLE JUSTICE I. C. KAMANGA JA

Judgment delivered by Justice M.C.C. Mkandawire JA:

I have had the opportunity to read in advance the judgment of my Lord Justice of Appeal F.E. Kapanda SC just delivered in this matter with which I agree. I respectfully adopt all his reasoning as mine and I also allow the appeal. I confirm and abide by the order for costs contained in the aforesaid judgment. Further, I agree with the orders proposed by Justice of Appeal F.E. Kapanda SC. I would therefore only make the following observations which have influenced my opinion in the judgment.



HONOURABLE JUSTICE M.C.C. MKANDAWIRE JA

Pronounced and delivered in Open Court at the Supreme Court of Appeal, sitting in Lilongwe this 30th day of March 2022