



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO 95 OF 2011**

BETWEEN

MICHAEL BAKHONA CHIRWA PLAINTIFF

AND

MARK SYDNEY SOZA NDAFERANKHANDE DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Ngoma, of Counsel, for the Plaintiff

Katuya, of Counsel, for the Defendant

Ms. E. Chimang'anga, Official Interpreter

JUDGMENT

Kenyatta Nyirenda, J.

Introduction

This is the Plaintiff's claim is for (a) an order of specific performance of the agreement for sale of land, namely, Title No. Likabula 1016/37 being Plot No. LK781/2 [hereinafter referred to as "LK781/2"] entered between the Plaintiff and the Defendant and (b) damages for breach of contract in lieu or in addition to the claim for specific performance.

The Defendant vehemently resists the action. He denies offering LK781/2 for sale to the Plaintiff and he also contends that the Plaintiff's presence on LK781/2 is illegal and, consequently, counter-claims for damages for trespass.

Pleadings

The case of the Plaintiff, as set out in Amended Statement of Claim, is that by an agreement in writing dated 12th May, 2010 made between the Plaintiff and M/s Chagwamnjira & Company, acting as agents for and on behalf of the Defendant

[hereinafter referred to as the “Sale Agreement”], the Defendant agreed to sell and the Plaintiff agreed to buy the leasehold property in LK781/2 [hereinafter referred to as “LK 781/12”] at a price of K4,400,000. Clause 1(i) of the Sales Agreement provided that the Plaintiff should pay an initial deposit of K2,300,000. Clause 1(ii) of the Sale Agreement also provided that the balance of the purchase price would be paid upon the Defendant obtaining consent from the Malawi Housing Corporation (MHC) and clearance certificates for tax and city rates from Malawi Revenue Authority (MRA) and Blantyre City Council respectively.

The Plaintiff avers that the terms of the Sale Agreement were later orally varied at a meeting held at the offices of the Defendant’s agents to include a term that provided that the Plaintiff would take vacant possession of LK781/2 upon paying the initial deposit of K2, 300,000 and that the Plaintiff should thereafter proceed to develop LK781/2 to an acceptable level for purposes of complying with the MHC’s requirements.

The Plaintiff also avers that pursuant to the Sale Agreement, he paid the initial deposit to the Defendant’s agents, M/s Chagwamnjira & Company, who were actually engaged, with the approval of the Defendant by the Defendant’s other agents, Mr. Tsakala and Mr. Makunje, to sell LK781/2 on the Defendant’s behalf.

It is also averred that while the Plaintiff was at all material times ready and willing to perform his own outstanding obligation, namely, to pay the balance of K2, 100,000 under the Sale agreement, the Defendant has failed to complete his obligations by not obtaining the consent, tax clearance certificate and city rates clearance certificate from MHC, MRA and Blantyre City Council respectively to effect transfer and despite repeated requests by the Plaintiff’s legal practitioners and assurances by his agents, the Defendant continues to fail and complete the Sale Agreement.

The Statement of Claim concludes with the Plaintiff claiming (a) specific performance of the Sale Agreement, (b) damages for breach of contract in lieu of or in addition to specific performance, (c) further or other reliefs as the Court may deem fit, and (d) costs of the action.

The Defendant filed a defence wherein he admits being the registered owner of LK781/2 but denies (a) making an offer to the Plaintiff, (b) entering into any agreement with the Plaintiff, (c) authoring, or causing to be authored, any offer letter for the sale of LK781/2, (d) being paid by the Plaintiff the sum of K2,300,000, as an upfront deposit on accepting the offer or (e) that the Plaintiff

of LK781/2, as alleged or at all.

The Defendant addresses the issue of a perimeter fence in paragraphs 5.4 and 5.5 of his Defence as follows:

“5.4 ... that the Plaintiff illegally constructed the alleged perimeter fence without the consent or authority of the plaintiff and without the requisite planning permission from the local planning authorities.

5.5 ... that the illegal acts averred in paragraph 5.4. hereof amount to trespass and in the premises the plaintiff is guilty of trespassing on the defendant’s property.”

Based on the contents of paragraphs 5.4 and 5.5 of the Defence, the Defendant has counterclaimed against the Plaintiff damages for trespass. The Plaintiff filed a defence to the counterclaim. The defence is brief and it might be useful to set it out in full:

- “1. The plaintiff refers to paragraph 5.4 of the defendants defence and denies having illegally constructed the perimeter fence without the consent and authority of the defendant. On the contrary the plaintiff avers that the defendant sold the plaintiff the land and they constructed the perimeter upon paying the defendant a deposit of K2,300,000.00*
- 2. The plaintiff further deny that they constructed a perimeter fence without the requisite planning permission from the local planning authorities as alleged or at all and puts the defendant to strict proof thereof. On the contrary, the plaintiff avers that if they had breached some by-laws, the local planning authorities should have taken adverse action against them which has not been done up to date.*
- 3. The plaintiff refers to paragraph 5.5 of the defendant’s defence and deny being guilty of trespassing on the defendants land as alleged or at all. On the contrary, the plaintiff avers that they are licensed to be on the defendant’s premises as per the provisions of the sale agreement signed between the parties.”*

These then are the parties’ pleadings. I must now turn to the evidence which was addressed before me

Evidence

The Plaintiff called four witnesses to prove his case and these were the Plaintiff himself (PW1), Mr. David Nhlema (PW2), Mr. Dick Chagwamnjira (PW3) and Mr. James Makunje (PW4).

PW1 adopted his witness statement as part of his evidence in chief. He stated that in 2009 he was approached by PW2 of DN Properties and Estate Agents who informed

him about LK781/2, which was then an undeveloped piece of land, being on sale at K4, 400,000.00. The following emerged from the testimony of PW1:

- (a) the Defendant was the owner of LK781/2 and he wished to sale the same;
- (b) the defendant instructed Mr. Tsakala and DW4 to sale LK781/2 and he gave them a copy of the lease agreement between the Defendant and MHC – a copy of the lease was tendered;
- (c) the said estate agents were to act as agents of the Defendant and this fact relating to the agency was clear to the Plaintiff throughout the transaction;
- (e) M/s Chagwamnjira and Company were to act as legal practitioners for the vendor for purposes of ensuring the smooth transfer of title and to ensure compliance with all legal requirements;
- (f) throughout the transaction, the Plaintiff had no doubt in his mind that the Defendant had instructed both the agents and M/s Chagwamnjira and Company to act on his behalf in the land transaction;
- (g) pursuant to an offer letter dated 10th May, 2010, the Plaintiff agreed to purchase LK781/2 from the Defendant at a consideration of K4, 400,000;
- (h) the Plaintiff accepted the offer by signing the offer letter and paying the requested deposit – a copy of the letter was tendered
- (i) the Plaintiff believed that he had entered into a binding legal agreement upon signing the offer letter and it was on this basis that he paid the initial deposit of K2, 300,000 - a copy of the cheque was tendered;
- (j) in the course of the communication between the parties regarding the transaction, the Plaintiff was informed of the legal requirement to develop the land to a certain level to enable the Plaintiff apply for consent from the MHC as he was made to believe that the Plaintiff did not have the requisite resources to develop the land;

- (k) the Plaintiff also took possession of LK781/2; and

- (l) in 2011, the Plaintiff was summoned to Chilomoni Police station when it became apparent that the Defendant would not complete his contractual obligations hence these proceedings.

In cross-examination, PW1 testified that he had only met the Defendant sometime between 2012 and 2013 at a mediation session held at Kainja and Dzonzi offices. He further stated that he did not know whether PW2 was an estate agent for the Defendant. He further testified that he understood the offer letter and that it was necessary for him to sign it so that it should be a binding agreement between the parties. PW1 testified that he was not aware if the Defendant signed it. It was further PW1's testimony that at the meeting that was held at M/s Chagwamnjira & Company offices, PW3 confirmed that he was acting on behalf of PW1.

In his re-examination, PW1 stated that it was him and not Chisapi Limited that was interested in buying LK781/2 and he went to view LK781/2 as he was personally interested to buy it. He further testified that he understood the fact that M/s Chagwamnjira & Company were acting as agents of the Defendant to mean that they had full authority to sell LK781/2. He further testified that he has dealt with agents before, and that by virtue of the agency, he didn't have to meet the principal.

PW2 adopted his witness statement as his evidence in chief. In brief, he testified that he became aware of LK781/2 from one of his employees who informed him that it belonged to PW4. He testified that he approached PW4 who showed him LK781/2 and asked him to inform him if he finds a buyer.

PW2 further testified that he contacted the Plaintiff and told him about LK781/2. When the Plaintiff expressed his interest to buy LK781/2, the Plaintiff and himself went to meet PW4 who informed him that LK781/2 was being managed by PW3 of M/s Chagwamnjira & Company. PW2 further testified that when he met PW3 and PW4, he learnt that LK781/2 belonged to the Defendant and that PW4 and M/s Chagwamnjira & Company were acting on behalf of the Defendant.

PW2 concluded his evidence-in-chief by stating that the Plaintiff signed the offer letter in his presence.

In cross-examination, PW 2 stated that he was not an agent of the Plaintiff. He further stated that he was present at the meeting where the offer letter was being signed but the Defendant was not present. PW2 reiterated that he received commission from PW4 in the sum of K150,000. He concluded by stating that he did not agree with the contents of the paragraph of the offer letter that referred to him as an estate agent for the Defendant.

In re-examination, PW2 stated that he knew that the Plaintiff was represented in the transaction by his estate agent, PW4. He also stated that he knew that DW3 was representing the Defendant.

PW3 was Mr. Dick Chagwamnjira. He adopted his witness statement and the exhibits attached thereto as his evidence in chief. His witness statement reads:

- “1. I am a licensed legal practitioner carrying on legal business as Messrs Chagwamnjira and Company.*
- 2. Sometime in 2009, I was approached in my professional capacity by one Mr. Ronnie Sakala and Mr. Makunje to help them prepare a sale agreement for their client who had since identified a buyer for the said land. The said plot of land was situated in Namiwawa behind Chilomoni Police Station. In support of the instructions to sell the land given by Mr. Ndaferankhande, the estate agents produced application for title documents from MHC. A copy of the said document is attached hereto as “DC”.*
- 3. At the time when the estate agents approached me, the person who expressed interest to purchase the land was one Mrs. Janet Chitsime. I immediately proceeded to draw up a sale agreement to be executed by both parties. The said sale agreement was duly signed by both Mr. Ndaferankhande and the intended purchaser, Mrs. Janet Chitsime. A copy of the said signed sale agreement is attached hereto as “DC1”.*
- 4. As can be seen from the sale agreement, Mrs. Chitsime offered to buy the land by paying for the purchase price in instalments. The proposal did not go well with Mr. Ndaferankhande.*
- 5. After the sale agreement had been signed, Mr. Ndaferankhande withdrew the offer to sale the land and the estate agents identified another potential buyer, Mr. Michael Chirwa, the Plaintiff herein.*
- 6. When I was given further instructions by the estate agents to draw up another sale agreement. This time around, I first prepared an offer letter stipulating some of the terms of the sale. In the offer letter, I clearly stated that as a sign of acceptance of the offer letter, the Plaintiff herein should pay the sum of K2, 300,000.00. To signify his acceptance of the letter, the Plaintiff herein accepted the offer and paid the requested deposit. A copy of the offer letter is attached hereto as “DC2”.*
- 7. As can be seen from the offer letter exhibited herein, the full purchase price was to be paid upon the finalisation of several modalities including the transfer to title and*

procurement of the Malawi Revenue Authority consent. That since these modalities remained outstanding to date, the deposit for the purchase price remained in my firm's client's account which I later paid into court upon the commencement of these proceedings.

8. *Prior to the letter marked "DC2" being sent to Mr. Chirwa as an offer letter, I erroneously sent one that referred the owner of the land as being Mr. Ishani. However,*

as can be seen from exhibit marked "DC2", Mr. Michael Chirwa signed the correct agreement where the vendor is properly named as Mr. Ndaferankhande. Additionally, as can be seen from the two letters Marked "DC1" and "DC2", save for the price, the contents of the letter are materially different, the letter was also not signed by Mr. Chirwa.

9. *That in the course of this transaction Mr. Chirwa identified and appointed Messers Tembenu, Masumbu & Company to act as his legal practitioners in relation to the transaction herein. A meeting was held sometime in 2009 to aid meeting we agreed as follows:*

- (a) *That preceding the payment of the sum of K2, 300,000.00, the buyer, (the Plaintiff herein) was to take immediate possession of the land herein and build a perimeter fence thereon to enable Mr. Ndaferankhande to obtain title to the property;*
- (b) *That upon payment of the deposit on the purchase price the buyer had a right to lodge a caution on the land which he duly did; and*
- (c) *that the balance of the purchase price was to be paid upon the delivery of original title documents.*

10. *Soon after the meeting, as the legal practitioner for the vendor, I disbursed the sum of K500,000.00 to the estate agents to enable them obtain the MRA Tax Clearance Certificate.*

11. *Whilst engaged in the process of obtaining an MRA Tax Clearance certificate, Messers Tembenu Masumbu & Co, the lawyers for the buyer prepared a draft transfer of lease which was sent to us for onward transmission to the vendor for his signature. However, the said transfer of lease documents was erroneously signed by Mrs. Ndaferankhande. A copy of the transfer of lease document erroneously signed by Mrs. Ndaferankhande is shown to me and exhibited as "DC3".*

12. *As regards the transfer of lease document erroneously signed by Mrs. Ndaferankhande, the error was only brought to my attention by my learned colleague Mr. Tembenu when I returned to his practice the transfer of lease documents prepared by him. The error does not and should not be interpreted to mean that we lacked the instructions of Mr. Ndaferankhande and intended to steal his land as alleged by him. At all material times, the agents had his express instructions to sale his land. A copy of the letter from Tembenu, Masumbu & Company informing me of the said error is shown to me and exhibited as "DC4".*

13. Also unknown to me at that time, the agents went and met with Mr. Ndaferankhande purportedly for purposes of negotiating their commission in relation to the transaction. When these proceedings were commenced, I was notified by Mr. Ronnie Sakala that when they went to discuss the issue of their commission with Mr. Ndaferankhande, Mr. Ndaferankhande communicated with them that he no longer intended to proceed with the sale and that he would get in touch with me, since he knew me very well having worked together before. At this point,

Mr. Ndaferankhande was well aware of the fact that Mr. Chirwa had deposited the sum of K2, 300,000.00 with me as the purchase price.

14. It later on transpired that since Mr. Ndaferankhande had indicated to the agents that he will communicate with me regarding his intention to withdraw the sale, the agents did not find it necessary to inform me of the same.

15. Sometime between 2009 and 2010 I received a telephone call from Mr. Ndaferankhande booking an appointment with me. At that particular time, I was not aware what he wanted to discuss with me. For unforeseen reasons, the said meeting never took place.

16. Similarly, since the defendant has not held up to his end of the agreement, the title to the land herein has never been transferred.

17. That regardless of the fact that the title has not been transferred to the buyer, the circumstances of this case clearly show that Mr. Ndaferankhande gave instructions to the estate agents to sale the land on his behalf. He has been fully briefed and updated on the progress made in relation to the transaction of sale. Indeed all communication between my firm and Messers Tembenu, Masumbu & Company were duly copied to Mr. Ndaferankhande for his information.

18. I would like to unequivocally state on record that throughout the transactions for the sale of land firstly as between Mrs Janet Chitsime and Mr. Ndaferankhande, he was at all material times informed about all the steps taken in relation to the land. Additionally, when the transaction fell through Mr. Ndaferankhande was well aware of the development and the basis. If indeed he intended to cancel the sale agreement, I am of the firm believe that Mr. Ndaferankhande ought to have taken proactive steps to make sure that he meets me and cancel his instructions. Alternatively, he could have conveyed the said intention to cancel the sale in writing.

19. I have noted his counter-claim and the relief's he seeks from this Court. I opine that Mr. Ndaferankhande is merely being greedy and wants to revoke a binding agreement when the Plaintiff has spent a lot of time on money based on the same agreement.

20. In the circumstances, I am of the firm belief that the Defendant herein should abide by the tenets of the agreement signed by Mr. Chirwa in relation to the land he voluntarily sought to dispose of. The Honourable Court should grant the Plaintiff herein all the reliefs prayed for by him as he is a bonafide purchaser for value”

PW3 tendered the Sales Agreement (Exhibit P8), Offer Letter dated 12 May 2010 (Exhibit P9), cheque dated 13th May 2010 (Exhibit P10) and Transfer of Lease (Exhibit P11).

In cross-examination, PW3 confirmed that he knew about LK781/2 through PW4 and Mr. Tsakala and he believed that they had instructions from the Defendant because they produced title deeds to LK781/2. He also testified that he has in his professional capacity received instructions from estate agents and concluded that they have authority to transact on behalf of their principal upon production of a lease. He further stated that throughout the transaction relation to LK781/2 he was confident that the agents had the authority from the Defendant to sale LK781/2. At the time of preparation of the legal documents, PW3 had not met the Defendant.

Counsel Katuya asked PW3 whether the signatures appearing on Exhibit D1(k) (Title of Lease), Exhibit D6, Exhibit D7 (DW's Letter to MHC dated 22nd June, 2011), Witness Statement of the Defendant were similar and PW3 answered in the affirmative. DW3 was also asked whether the signature on Exhibit D12 (Page 3 of passport of Stella Betty Ndaferankhande), purportedly that of Mrs. Ndaferankhande, was the same as that on the Lease Agreement and PW3 answered that they were not the same.

PW3 further testified in cross-examination that it was not possible to deduce from the lease that the agent had authority to sale LK781/2. He, however, said that it is difficult to doubt instructions given by estate agents as they are in the business of selling property, therefore, documents from an estate agent is treated differently from an ordinary person. He further testified that MRA did not communicate the payable amount but it is easy to calculate the amount payable. He said that he was unable to recall how the same was calculated.

PW3 further testified that the sale agreement that was signed between Mrs. Chitsime and the Defendant fell through as the Defendant insisted on full payment. He reiterated that he got this communication from Mr. Tsakala and PW4.

In his re-examination, PW3 testified that throughout the transaction he had no reason to believe that LK 781/2 belonged to Mr. Tsakala, as Mr. Tsakala never purported to own the said land. He also said that Mr. Tsakala and PW4 were acting on behalf of the Defendant who gave them instructions to sale LK781/2. He further

testified that when the signed Sale Agreement was returned to his office, he had no reason to doubt the authenticity of the signature thereon.

PW4 adopted his witness statement which reads:

- “2. *I came to know of Mr. Ndaferankhande through Mr. Ronnie Tsakala who referred to him as his uncle and he called him “Mzukulu” (nephew).*

3. *Sometime in 2009 or early 2010, Mr. Tsakala, a business associate and my personal friend for a period of over 15 years, approached me and informed me that he has been instructed by Mr. Ndaferankhande to sale his plot in Namiwawa. As evidence of the instructions, he produced and showed me the title documents relating to the land which were given to him by Mr. Ndaferankhande. He also took me to Namiwawa, behind Chilomoni Police Station to see the perimeters and the extent of the plot. Suffice to mention that at the material time, there were adjacent to the plot, two or three other vacant plots.*

4. *At that time, after I had agreed help Mr. Tsakala to identify a buyer for the plot, he took me to meet Mr. Ndaferankhande at his office at the Polytechnic where he was working that time. At the said meeting, Mr. Ndaferankhande confirmed his instructions to Mr. Tsakala to sell his plot in Namiwawa. At the meeting we also agreed that all issues relating to how much commission we should be paid should be pended to be discussed once we have managed to identify a buyer and the transaction concluded.*

5. *At the material time, I was working together with Mr. Dick Chagwamnjira at Homemakers Limited, a company involved in property management including the buying and selling of property. I therefore briefed Mr. Chagwamnjira about the instructions from Mr. Ndaferankhande to sale his plot.*

6. *Within a short period of time we identified one Mrs. Janet Chitsime as a potential buyer of the said plot of land. Since the transaction was legal in nature, we procured the services of Mr. Dick Chagwamnjira with the defendant’s consent, to act as the lawyer for both parties. At that time, the defendant had no reservation with the proposed lawyer as they knew each other having worked together at Malawi Housing Cooperation. Mr. Chagwamnjira duly drafted a sale agreement.*

7. *When the sale agreement was drawn up by Mr. Chagwamnjira, Mr. Tsakala and I took it to Mr. Ndaferankhande for his signature. He duly signed it. A copy of the sale agreement has already been made available to this Court. However, the sale of the plot fell through because Mr. Ndaferankhande and Mrs. Chitsime failed to agree on mode of payment of the purchase price. At this point, we were instructed to find another buyer.*

8. *Since we had instructions to identify another buyer, I informed Mr. Nhlema, a business associate of mine and also an estate agent, of the instructions we had to*

sale the plot in Namiwawa. He informed me that his cousin, namely Michael Chirwa of Chisapi Schools could be interested in the plot.

9. *When Mr. Nhlemea briefed Mr. Michael Chirwa on the availability of the plot, he expressed his interest to purchase the plot. It is at this point that a meeting was arranged between us to discuss about the purchase price.*
10. *With respect to Mr. Michael Chirwa, a sale agreement was prepared by Mr. Chagwamnjira who was well aware of the previous transaction relating to the land and the instruction by Mr. Ndaferankhande to sale the plot herein. He proceeded to draft a sale agreement which Mr. Michael Chirwa signed. I am*

informed that in compliance with the terms of the agreement, Mr. Chirwa paid a deposit of K2,300,000.00 (two million three hundred thousand kwacha only).

11. *After Mr. Chirwa had paid a deposit on the purchase price, a sum of K500,000.00 was given to me and Mr. Tsakala to enable us to procure the MRA Certificate of Compliance for the plot.*
12. *As a means of ensuring compliance with Malawi Housing Regulations, Mr. Chirwa was also advised to build a perimeter fence around the plot, as at the time when Mr. Ndaferankhande confirmed his initial instructions to Mr. Tsakala to sale the plot, there were no developments on the land.*
13. *After we were informed that Mr. Chirwa had paid a deposit on the land, Mr. Makunje and I visited Mr. Ndaferankhande to discuss how much commission we would be paid after we had successfully managed to find a buyer for the said plot of land. At that time, Mr. Ndaferankhande indicated that he no longer wanted to proceed with the sale of the plot and that he will discuss the same with Mr. Chagwamnjira. At this point, Mr. Ndaferankhande was fully aware that the offer to purchase the land had been accepted and a deposit of K2, 300,000.00 paid by Mr. Chirwa to Mr. Chagwamnjira.*
14. *That since Mr. Ndaferankhande had indicated that he will communicate with Mr. Chagwamnjira I am not aware of what was discussed and what conclusions were made at the said meeting. At the time when Mr. Ndaferankhande informed me and Mr. Tsakala that he will talk to Mr. Chagwamnjira to cancel the sale agreement, I had no reason to doubt the intention of Mr. Ndaferankhande as the two gentlemen knew each other from the time when they were colleagues at Malawi Housing Cooperation.*
15. *From the time when Mr. Ndaferankhande told me and Mr. Tsakala of his intention to cancel the transaction between himself and Mr. Michael Chirwa, I had not heard from Mr. Ndaferankhande until sometime in 2012 when we met at Chilomoni Police Station where he accused us of stealing his land.*
16. *I would like to unequivocally state on record that throughout the transactions for the sale of land firstly as between Mrs. Janet Chitsime and Mr. Ndaferankhande, he was at all material times informed about all the steps taken in relation to the*

land. Additionally, when the transaction fell through Mr. Ndaferankhande was well aware of the development and the basis.

17. *With regard to the sale agreement with Mr. Chirwa, Mr. Ndaferankhande was equally well aware of the developments. Indeed his knowledge clearly explains why he let Mr. Chirwa enjoy peaceful occupation of the land from 2010 to sometime in 2011 the time which Mr. Chirwa built a fence to completion.*
18. *In the circumstances, I am of the firm belief that the defendant herein should abide by the tenets of the agreement signed by Mr. Chirwa in relation to the land he voluntarily sought to dispose of. The Honourable Court should grant the*

Plaintiff herein all the reliefs prayed for by him as he is a bonafide purchase for value.”

In cross-examination, PW4 confirmed that he was approached by Mr. Tsakala to help him identify a buyer on the instructions of the Defendant. He said Mr. Tsakala showed him title documents relating to LK781/2. He also testified that Mr. Tsakala took him to meet the Defendant at the Polytechnic where he was working at that time.

PW4 further testified that he met the Defendant on several occasions thereafter. He confirmed that after they had identified a buyer, they procured the services of PW3 who was his boss. He further testified that it was not the Defendant who asked him to procure the services of PW3. PW4 also testified that Mrs. Chitsime never met the Defendant but that after she had signed the sale agreement, the same was taken to the Defendant for his signature. The Defendant did not, however, immediately sign the agreement as he indicated that he needed more time to go through it.

It was PW4's testimony that when the sale agreement with Mrs. Chitsime fell through, PW3 prepared another sale agreement as the initial instructions by the Defendant to sale LK781/2 were still subsisting.

PW4 was asked to explain the roles played by different persons involved in this case. He testified that PW2 was the agent for the Plaintiff and he (PW4) was the agent for Mr. Tsakala who was the agent for the Defendant.

PW4 testified that he was not present when the offer letter was being signed by the Plaintiff but that he has seen the offer letter at his office. It was his testimony that he believed that the Defendant signed the transfer of lease document as it was left at his office and only collected days afterwards and after the Defendant had signed it. He confirmed that the signature on the vendor's part on the transfer of lease

document belonged to the Defendant as it was the same signature he saw at the office. PW4 further testified that it was the Defendant's signature as the document was collected days after it was left at his office for his signature. He, however, conceded after being shown several other signatures of the Defendant that they were different.

As regards the instructions/directions that the money be paid to Kool distributors, Mr Tsakala's company, PW4 testified that he was not aware whether such instructions came from the Defendant. He further testified in cross-examination that the Plaintiff was instructed to build a perimeter fence around LK781/2 by Mr.

Tsakala. It was also his testimony that unless Mr. Tsakala gave instructions, Home Makers Limited could not do anything.

In re-examination, PW4 explained that although Mr. Tsakala did not have a letter instructing him to sell LK781/2, he believed that he had such instructions when he was taken to be introduced to the Defendant at his offices at the Polytechnic. At the said meeting, the Defendant confirmed his instructions to sale LK781/2. Additionally, Mr. Tsakala took him to Namiwawa and showed him the fence perimeters of LK781/2. PW4 also testified that he had met the Defendant several times at the Polytechnic where he was working. He ably identified the Defendant.

The Defendant (DW) testified on his own behalf. After being sworn in, DW adopted his witness statement whose material part reads as follows:

- “6. *I am the legal and beneficial owner of property comprised under Title Number Likabula 1016/37 being Plot Number LK 781/2 situate at Namiwawa in the City of Blantyre having purchased the same from MHC in 2007. Copies of the documents showing the transactions between myself and MHC including the lease document are annexed marked MN1(a)-(l).*
7. *Having so purchased the above-mentioned plot, I applied for planning permission with the Blantyre City Assembly. The Town and Country Planning Committee approved the building plans. A copy of the Assembly's acknowledgment of my submission of building plans; a receipt of my payment of planning fees; the approval document, some pages from the approved building plans are annexed marked MN2, MN3, MN4 and MN5 respectively. I was ready to start construction work on the plot.*
8. *For that purpose, on Friday 17th June, 2011 I visited my plot. To my surprise and shock, I found people constructing structures on the plot without my knowledge and/or consent.*

9. *Upon inquiry from the people on the site, I was informed that it is was the plaintiff who was building on the plot. What transpired thereafter is detailed in a letter I wrote to the Malawi Law Society on 7th July, 2011 to request for its assistance. A copy of the said letter is annexed marked **MN6**.*
10. *As I stated in the letter I wrote to the Malawi Law Society, I contacted MHC and Blantyre City Assembly for confirmation that the plot belonged to me. I requested MHC to put their confirmation in writing. Copies of the letter I sent to MHC and their response are annexed marked **MN7** and **MN8** respectively.*
11. *Further, as I stated in my letter to the Malawi Law Society, with the intervention of the police, I discovered that two unscrupulous individuals, namely Tsakala and Makunje had connived with Mr Dick Chagwamnjira of Messrs Chagwamnjira &*

Company and other collaborators and purported to sell my plot to the plaintiff herein without my knowledge or consent.

12. *The background to the above developments is as follows:*
 - 12.1 *Sometime in 2010, I had intended to sell the plot and asked Mr Tsakala to find a purchaser for me. He was simply to find the purchaser and I would negotiate the price and receive payment from the prospective purchaser.*
 - 12.2 *However, at his own initiative and without my knowledge, Mr Tsakala enlisted the assistance of Mr Makunje and they found a prospective purchaser, a Mrs Chitsime. The two gentlemen involved Mr Chagwamnjira to handle the paperwork. This was initially unknown to me.*
 - 12.3 *At a certain stage in that process, the two gentlemen came to my office (I was working at the Polytechnic at the time) and told me about the prospective purchaser that they had identified; they informed me that Mr Chagwamnjira was handling the paperwork. They brought some documents which they said I should sign.*
 - 12.4 *At that moment, I became suspicious of the activities of the two gentlemen, that is, Messrs Tsakala and Makunje, and the involvement of Mr Chagwamnjira. I questioned the two as to why they had the audacity of discussing terms with the prospective purchaser without my knowledge or instructions. I questioned them as to why they involved Mr Chagwamnjira without my authority. I there and then told them that I had cancelled the intended sale. I told them that I was no longer selling my plot. Further, I telephoned Mr Chagwamnjira and told him that I was not selling the plot and that he should have his hands off my plot. That was the only and the end of the communication that I had with Mr Chagwamnjira until 29th June, 2011 when I met him at Chilomoni Police.*

- 12.5 *I never gave any oral or written instructions either to Mr Chagwamnjira after the telephone call that I had with him or to Messrs Tsakala and Makunje after the meeting we had at my office, to sell my plot to anybody.*
13. *It happened that without my knowledge or consent Mr Chagwamnjira took it upon himself to sell the plot to the plaintiff. In the course of doing so, there was involved in the transaction one other individual called David Nhlema, apparently of D N Properties. Prior to the commencement of the action by the plaintiff I never knew nor had any dealings with the said David Nhlema.*
14. *During the course of this action, Ms Martha Ngoma of Messrs Tembenu, Masumbu & Co. swore an affidavit in support of a summons for specific performance; and exhibited (exhibit "MN") a letter dated 12th May, 2010 from Mr Dick Chagwamnjira on his law firm's letterhead to Chisapi Limited, a business belonging to or associated with the plaintiff offering for sale Plot Number 781/2 at Namiwawa being Title Number Likabula 1016/37 which happens to be my plot. It is the same letter which is being relied on and held out by the plaintiff as*

constituting an agreement between the plaintiff and I for the sale of the plot to him (see paragraph 3 of the statement of claim and paragraphs 3 to 9 of Ms Martha Ngoma's affidavit). A copy of the affidavit of Ms Martha Ngoma is annexed and marked "MN9". I wish to make the following critical observations on the said letter;

- 14.1 *The letter is from Mr Dick Chagwamnjira through his law firm Chagwamnjira & Company to the plaintiff, through Chisapi Limited. It is not from me to the plaintiff.*
- 14.2 *By the said letter, Mr Chagwamnjira does not purport to act or represent me in the transaction. Mr Chagwamnjira was referring to some discussions between Mr David Nhlema and Chisapi Limited and stated that he was offering for sale a residential plot at Namiwawa namely Title Number Likabula 1016/37 being Plot Number LK 781/2 the property of one **Mr I. Ashani** of P.O Box 54102 Limbe on instructions of the said **Mr I. Ashani** through Mr David Nhlema as agent.*
- 14.3 *Surely, Mr Chagwamnjira was purportedly acting for one **Mr I. Ashani** of P.O Box 54102, Limbe. The offer for sale was therefore purportedly being made on behalf of the said **Mr I. Ashani**, not on my behalf.*
- 14.4 *It was mind-boggling and beyond my comprehension for the plaintiff to allege and contend, as he does under paragraphs 3 through to 9 of his statement of claim and paragraphs 3 through to 8 of Martha Ngoma's affidavit, that by virtue of the said letter I offered for sale and he accepted to purchase of my plot Number LK 781/2 being title Number Likabula 1016/37 and that there was an agreement between the plaintiff and I when the plaintiff was plainly offered the said plot by Mr Chagwamnjira representing one **Mr I. Ashani**.*

- 14.5 *I have laboured but failed to find any nexus between the said Mr I. Ashani and myself and do not know how the plaintiff understands an offer on behalf of **Mr I. Ashani** can mean an offer on my behalf.*
- 14.6 *Although the plaintiff alleges that the said offer letter required him to sign a copy thereof to signify acceptance and he alleges that he accepted the offer, the letter exhibited to Martha Ngoma's affidavit is not so signed by him.*
- 14.7 *I therefore do not see any agreement between the plaintiff and I.*
- 14.8 *However, in the course of the action, I have also come across a copy of a letter containing the same particulars as the letter exhibited and marked "MN" to the affidavit of Ms Martha Ngoma, except that this one states that the offer is being made on my behalf and not one I Ashani like in "MN". I still remain surprised that from the same Chagwamnjira & Company there came out two contradictory letters of offer in respect of my property both addressed to the plaintiff through Chisapi Limited. I am not certain as to*

which of these constituted a valid offer for the purpose of the agreement alleged by the plaintiff. A copy of the second letter from Chagwamnjira & Company is annexed marked "MN10".

15. *Under paragraph 4 of the statement of claim and paragraph 4 of Martha Ngoma's affidavit, the plaintiff alleges that he paid a deposit of K2,300,000 towards the purchase price by way of a cheque issued to Chagwamnjira & Company. In fact a copy of the said cheque has been exhibited to Martha Ngoma's affidavit as "MN1". It was dated 13th May, 2010 and receipt thereof was acknowledged by Mr Dick Chagwamnjira on the same date.*
16. *I wish to state that to the knowledge of the plaintiff Mr Chagwamnjira never acted for me as the purported offer letters show. The payment that was made to Chagwamnjira cannot reasonably be imputed to me.*
17. *In any event, I had not been aware of the dealings between the plaintiff and Mr Dick Chagwamnjira including the payment of any purported purchase price until 29th June, 2011 at Chilomoni Police Substation whereat Mr Chagwamnjira revealed that he received the sum of K2,300,000.00 from the plaintiff as a deposit.*
18. *Without explanation whatsoever, Mr Chagwamnjira has since paid the sum of K1,800,000 into court. He has not in any way given any notice to anyone as to who should accept the payment into court. I do not understand the legality of the payment that Mr Chagwamnjira has made into court as he is not a party to this action. A copy of the notice of payment into court is annexed marked "MN11". The notice holds out Chagwamnjira & Company as my legal practitioners, but they are not representing me nor have they ever represented me in this or any other action, matter, proceeding or transaction.*

19. Under paragraph 6 of Martha Ngoma's affidavit, it is alleged that pursuant to the purported "agreement" between the plaintiff and I, the plaintiff's legal practitioners prepared the lease transfer document and sent it to Chagwamnjira & Company for execution by me. A copy of the document is exhibited as 'MN2'. It is alleged that the document was mistakenly executed by a Mrs Ndaferankhande, apparently my wife. I wish to comment as follows:

- 19.1 I had never seen the document exhibited as "MN2" until the commencement of this action. Neither had my wife seen the document.
- 19.2 The document shows that it was signed by a Mrs E Ndaferankhande, purportedly my wife, on my behalf. My wife is not Mrs E Ndaferankhande. She is Mrs Stella Ndaferankhande. There is now produced and shown to me a copy of the relevant page from my wife's passport showing her full name exhibited hereto and marked MN12. The signature too does not belong to my wife.
- 19.3 Further, the witness to the purported signature of my wife is one Aaron Tsakala allegedly of KDL Ltd. The said Aaron Tsakala is and at all

material times was not a Registrar General, District Commissioner, Principal Lands Officer, Senior Lands Officer or Notary Public. I worked for and was General Manager for MHC for many years. I had never seen a party's signature to a transfer of lease document being witnessed by a person other than the Registrar General, District Commissioner, Principal Lands Officer, Senior Lands Officer or Notary Public as specified under Rule 6(1) of the Registered Land Rules and the Fifth Schedule to the Registered Land Act.

- 19.3 Surely, the execution of the draft lease document was a typical forgery on the part of Mr Chagwamnjira and any other person on his behalf.
- 19.4 I am quite certain that the gravity of the irregularity in the execution of the draft lease document, having regard to all the ominous antecedents, should have and did actually put the plaintiff on notice through his legal practitioners that Mr Chagwamnjira was acting fraudulently in this transaction because a lawyer of Mr Chagwamnjira's experience would not cause legal documents citing a husband's name to be signed by his wife and verified by a person not prescribed by Rule 6(1) of the Registered Land Rules for purposes of verification of instruments under that Act.
- 19.5 Similarly, a lawyer of Mr Samuel Tembenu's calibre and experience, who was acting for the plaintiff in the purported transaction ought to have known that there was fraud at the heart of the purported sale of my property by merely looking at the nature of the documents that were coming from Mr Chagwamnjira.

20. *In the premises, it is abundantly clear that the plaintiff never entered into any agreement with me. The plaintiff has shown no such agreement. There is therefore no agreement which is capable of founding an order for specific performance or damages. I never offered my property for sale to the plaintiff. The plaintiff is merely a victim of Mr Chagwamnjira's fraudulent conduct or attempt to defraud. Of course, it is not for me to advise the plaintiff that his recourse should be to Mr Chagwamnjira for whatever loss or damage, if any, that he may have incurred.*
21. *In the premises, the plaintiff's activities on my plot constitute trespass for which he is liable in damages."*

DW was cross-examined by Counsel Ngoma. He affirmed that his witness statement was authored by him and he stood by its contents. When asked to describe himself, he said that he is a civil engineer by profession and he is a very careful and cautious person. He was at some point in time the Chairman of MHC.

He affirmed that he purchased LK781/2 in 2007 and that between 2008 and 2009 he took several steps to obtain a lease in respect of LK781/2. When shown Exhibit D1, DW affirmed that it was the application form he had filled and that the name,

signature and address thereon were his. He further affirmed that he desired to occupy LK781/2 in 2009.

DW told the Court that he understood the offer letter from MHC to mean that he was being offered to buy LK781/2 from MHC. DW testified that from the letter he was to pay development charges of K1, 123,007.00 of which 50% was to be paid upon acceptance of the offer and within 30 days. DW further testified that in accordance with paragraph 4 of the offer letter, after full payment of the development charges he was given 12 months within which to commence development of LK 781/2. DW stated in cross-examination that he was only able to pay for the development fees on 27th November, 2008, a year after the development charges were due and payable. He stated that he failed to pay the said sums of money as he partly didn't have the funds available and also because the deal was negotiable.

DW testified that the handwriting on Exhibit D2 (Submission for Approval Plans) was his and that it was materially different from his other handwriting that appeared on several documents he had signed and tendered in Court. When asked to compare the handwritings on Exhibit D2 and Exhibit D12 (Page 3 of passport of Stella Betty Ndaferankhande) and the signature on his witness statement, DW conceded that the handwriting on the Exhibits D2 and D12 were similar and it was

possible that he signed both of them. He conceded that although his handwritings on these two documents were similar, they were different from his handwriting that appeared on all other exhibits tendered by him.

DW further testified that he was offered to purchase LK781/2 in 2007, and that he paid for the necessary development fees in 2009 and that he did nothing until 2011. He refused that he did not visit LK781/2 for close to 5 years because he intended to sale LK781/2. The witness affirmed that he had omitted all events that transpired in 2010 both in Exhibit D6 (DW's letter to Malawi Law Society) and from his chronology of relevant events. He conceded that in paragraph 12 of his witness statement he testified that he intended to sale LK781/2 through agents.

As regards instructions to sale LK781/2, DW said that he knew Mr. Tsakala and that he only came to know PW4 after Mr. Tsakala had introduced him. It was his testimony that he formed the view that PW4 was an unscrupulous individual even before he met him. DW conceded that despite his baseless opinion of Mr. Tsakala and PW4, he gave them instructions to sale LK781/2. It was his evidence that his suspicion as to the activities of the Mr. Tsakala and PW4 was baseless as they had done nothing contrary to his instructions throughout the transaction. DW initially stated that the instructions were verbal but conceded later in cross-examination that it was possible that he gave Mr. Tsakala and PW4 documents relating to LK781/2

as neither his house nor his office was broken into and that the only plausible explanation as to why the two gentlemen had documents relating to his land was because he gave the documents to them.

As regards what impression a potential buyer was to have, DW testified that the potential purchaser was to take it that he (DW) was the owner of the LK781/2 and that Mr. Tsakala and DW4 were to act as his agents. He confirmed that Mr. Tsakala and PW4 had his authority to sale LK781/2. He further affirmed that the said instruction subsists to date and that he has never withdrawn them.

Commenting on the sale agreement that was prepared by PW3 between himself and Mrs. Chitsime, DW testified that on the purchaser's part, the purchaser was to understand that she was being offered LK781/2 for sale and that she was entitled to take possession of LK781/2 upon fulfilling the contractual conditions stipulated in the sale agreement. It was DW's testimony that Mrs. Chitsime was identified by the estate agents and that he had never met her or spoken to her. It was DW's testimony that he cancelled the sale agreement with Mrs. Chitsime as she wanted to pay the purchase price in instalments contrary to what he wanted: a buyer to pay the purchase price in one lump sum and not in several instalments. It was his testimony that he communicated his decision to cancel the sale agreement with

Mrs. Chitsime through the estate agents and he was confident that they would do as instructed since he trusted them. Although he initially denied having seen the sale agreement between Mrs. Chitsime and himself, he conceded later in cross-examination that the said document was left at his office by the estate agents. DW further testified that upon cancellation of the agreement between Mrs. Chitsime and himself, the estate agents were advised to find another purchaser.

As regards the Plaintiff, DW maintained that he has had no dealings with the Plaintiff. It was his testimony that from the contents of Exhibit D10 (Letter offering LK781/2 for sale to Chisapi Schools from M/s Chagwamnjira & Company) the impression one gets is that LK781/2, his property, was being offered for sale. He further conceded that by signing the letter the Plaintiff accepted to buy LK781.

In re-examination, DW confirmed that his instructions to Mr. Tsakala were verbal. It was his testimony that the handwriting appearing on Exhibit D2 was his. He further affirmed that when Mr. Tsakala and PW4 brought to his office a document, he might have signed it. He stated that the said document that was brought to him was a copy of a lease. He said that he cancelled the deal between himself and Mrs. Chitsime because he was unhappy with the terms of the sale relating to payment in instalments. He said that his wife did not sign the transfer of lease document because she objected to doing so.

At the end of cross-examination, and re-examination, the Court posed several questions to DW relating to signatures appearing on several exhibits. DW confirmed that the respective signatures on his witness statement, Exhibit D1(f) (Certificate – Purchase of MHC House or Lease of a Plot), Exhibit D1(g) (Application for a Lease), Exhibit D2 (Submission for Approval Plans), specifically the words written in ink, Exhibit D6 (DW's Letter to Malawi Law Society) and (Exhibit D7 (DW's Letter to MHC dated 22nd June, 2011) were his. When referred to item 11 on Exhibit D6, he confirmed that it was him who included the item in his own handwriting. Finally, the Court referred DW to Exhibit D12 (Page 3 of passport of Stella Betty Ndaferankhande) and he affirmed that the signature thereon belonged to his wife.

Having finished asking its questions, the Court asked if Counsel wished to pose follow-up questions. Counsel Katuya asked DW to look at Exhibits D2, D6 and D12 simultaneously and see if the handwritings are the same, DW responded by stating that the handwritings were different. Asked as to whether the handwritings were written by the same person, the Defendant stated that they were and that he was that person.

Issues for Determination

There are three main issues in this matter for the determination of the Court, namely, whether or not:

- (a) Mr. Tsakala had any instructions from the Defendant to offer LK781/2 for sale to the Plaintiff?
- (b) there was any agreement between the Plaintiff and the Defendant for purchase or sale of LK781/2?
- (c) the Plaintiff's activities on LK781/2 amount to trespass to land for which the Defendant is entitled to compensation in damages?

Submissions by the Defendant

The Defendant denies the existence of any agreement between himself and the Plaintiff which could be the basis of an order for specific performance or payment of damages for an alleged breach of contract.

Counsel Katuya forcefully argued that the Defendant authorized neither PW3 nor any other person to sell LK781/2 to the Plaintiff. It was contended that PW3, PW4 and Mr. Tsakala acted in concert to sell LK781/2 without the Defendant's knowledge and dealt with the proceeds of the sale as their own. This contention is

dealt with in paragraph 4.4 of the Defendant's Final Written Submission and it may be useful that the same is set out in full:

"4.4.1 Both Mr Chagwamnjira and Makunje attempted to say that when they were approached to sell the defendant's plot they had a copy of the lease and that that gave them the assurance that the defendant had intended to sell the plot. Of course, Counsel had no clear explanation when challenged in cross-examination as to whether possession of a copy of the lease documents implied instructions to sell the plot. However, we demonstrated when the defendant was testifying that the lease that they were referring to is actually the document annexed to Mr Tsakala's witness statement marked "RS". That document did not exist at the time Mr Chagwamnjira was offering the plot to the plaintiff for the reasons set out in paragraph 4 of the Mr Tsakala's witness statement. There is no evidence that they had that document prior to the commencement of this action by the plaintiff as the actual copy annexed to Mr Tsakala's witness statement is a copy that came from the defendant and it got into their possession through the disclosures at mediation, or through disclosures in an affidavit the defendant filed in opposition to the plaintiff's interlocutory application for specific performance, or through his witness statement (exhibit "MN1(k)" or "EX.D1(k)". That document is marked

“7” at the top of the front page. That number is the number the defendant had assigned to that document in the list of documents he had attached to his letter to the Malawi Law Society (exhibit “MN6” or “EX.D6”) dated 7th July, 2011. If Mr Chagwamnjira, Makunje or Tsakala had possession of a copy of the defendant’s lease they could have exhibited a copy of a lease which did not have the defendant’s mark of “7” made on 7th July, 2011. The alleged transaction with the plaintiff allegedly occurred in 2010. It is remarkable that the other documents attached to “RS” marked attachment No. 1, 3 and 4 are all the documents that the defendant had attached to the letter he wrote to the Malawi Law Society only in July 2011 and therefore Tsakala could not have had these documents in 2010 when he was acting in concert with Mr Makunje or Chagwamnjira.

- 4.4.2 Both Mr Tsakala who did not testify and Mr Chagwamnjira exhibited a copy of a sale agreement (“RS1” and “DC” or “EX.P8” respectively) as proof that the defendant was selling the property and that at one time had in fact signed a sale agreement with one Mrs Chitsime. However, that document was shown to be a shameless forgery. The document was signed by Tsakala and these people still had the audacity to contend that they should be believed when they said that the defendant gave them instructions to sell the property on his behalf. Why would they forge a signature in alleged sale agreement and attribute the signature to the defendant if the defendant was indeed selling the plot to Mrs Chitsime. And why would the defendant sell a plot, sign an agreement that provided that the purchaser would first pay a deposit of K2,500,000 and the balance of K1,000,000 after the issue of various consents and then take a U-turn due to alleged unhappiness with the purchaser’s proposal to pay the purchase price in instalments, terms he had already agreed to by signing the sale agreement, if at all he had signed. Is it not Mrs Chitsime who would have had a better right to enforce the agreement than the plaintiff? This does not make any sense!
- 4.4.4 The execution of the draft transfer of lease documents (“EX.D11”) on the defendant’s behalf is another tale of horror, clearly showing that Mr Chagwamnjira, Makunje and Tsakala were not acting with the defendant’s instructions.
- 4.4.5 Counsel Chagwamnjira and Mr Makunje had great difficulty in explaining or justifying the use of K500,000 from the deposit they received from the plaintiff. It is said in their witness statements that it was used for obtaining a clearance certificate from MRA. Counsel Chagwamnjira said some money was for capital gains tax and the other was for a clearance certificate. Makunje, after evasive answers at first when being cross-examined, finally spilt the beans saying his boss, referring to Counsel Chagwamnjira, instructed him and Tsakala to share K250,000 from that money and use the rest to obtain a clearance certificate from MRA. When asked as to who then was instructing who between Counsel Chagwamnjira and him or Tsakala if the latter two were indeed representing the defendant, Makunje’s answer was simply that his boss was the one in a position to answer that question. They could not give any clear answer if all this was on the defendant’s instructions. Further, Counsel could not explain his paying K450,000 to David Nhlema as stated in the notice of payment into court (“EX.D11” or

“MN11”) when Mr Nhlema was an agent for the plaintiff as stated by him in evidence and the fact that the K500,000 given to Makunje and Tsakala was not accounted for in the notice of payment into court.

4.4.6 *Further, Counsel Chagwamnjira could not justify why he clung on to the deposit he was paid by the plaintiff in May 2010 and could not remit it to the defendant if he indeed was acting for the defendant. Is it not rather odd? He only paid it into court albeit irregularly in 2012. He purportedly received the deposit in the defendant’s behalf; was it not the natural thing to pay it over to the defendant or pay it back to the plaintiff? Did he make any attempt to pay it to the either of the parties to the action and the parties rejected it? What prompted him to pay the money into court as if he was party to the action? Is it not out of realisation that he was caught up in a scenario he did not expect? It is in the defendant’s witness statement that he became aware of the fact of the deposit only in June 2011 at Chilomoni Police Substation where he reported the issue, more than a year after it was paid by the plaintiff to Mr Chagwamnjira. See paragraph 17 of the defendant’s witness statement. Would a man who has instructed others to sell his property be kept in the dark about the receipt of a deposit for over a year?*

4.4.7 *It does not make any sense that the defendant would have resiled from an agreement with a Mrs Chitsime after binding himself to receive a deposit of K2,500,000 and the balance of K1,000,000 after the issue of various consents and yet Counsel Chagwamnjira made an offer to the plaintiff also for payment of the price in two instalments, first a deposit of K2,300,000 and the balance of K2,100,000 when we were told that the reason the defendant refused to proceed with Mrs Chitsime was that she was proposing to pay the purchase price in instalments. It does not make any sense. More importantly, Makunje admitted that Chagwamnjira just made use of his experience in the previous dealings with Mrs Chitsime and came up with the terms contained in the offer letter to the plaintiff*

without any instructions from the defendant, clearly admitting that the deal with the plaintiff was without the defendant’s instructions.

4.5 *All the above-stated factors go to show that the three people Chagwamnjira, Makunje and Tsakala acted and dealt with the defendant’s property without his instructions. Therefore, the plaintiff and his legal practitioner ought to have satisfied themselves that those people were indeed the defendant’s agents and had authority to bind the defendant”*

On her part and in addressing the contention by Counsel Katuya that the Defendant did not authorize PW3, PW4 and Mr. Tsakala to sell LK781/2, Counsel Ngoma submitted at length to show that the contrary was the case, that is, the Plaintiff gave instructions to Mr. Tsakala to sell LK781/2 on his behalf. Paragraphs 8.1 and 8.2 of the Plaintiff’s Final Written Submissions are relevant and they read as follows:

“8.1.1 From the totality of the evidence tendered on behalf of the Plaintiff, the plaintiff has established that the defendant herein instructed Mr. Tsakala to act as his estate agent and sale his land. Mr. Tsakala with the Defendant’s Knowledge and

consent solicited the services of Mr. Chagwamnjira. The fact of agency being this clear, the defendant is bound by the acts of his agents and should fulfil his contractual obligations. The law on agency is clear; Where a person by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of that other person with respect to anyone dealing with him as an agent on the faith of such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no such actual authority. Consequently, the defendant is bound by the acts of his agents and must fulfil his contractual obligations.

8.1.2 *Additionally, it is clear from the Plaintiff's evidence that the Plaintiff was on the Defendant's land with his knowledge and his consent. Indeed it explains why the defendant did not take any action to forcibly evict the plaintiff from his land or obtain an order of injunction restraining the plaintiff from building his land. On the contrary, it is the plaintiff who commenced the current proceedings and obtained an order of injunction against the defendant herein.*

8.2 **The Defendant's evidence.**

8.2.1 *From the defendant's own testimony, the fact of agency is also clear. The defendant conceded that he instructed Mr. Tsakala to sale his land. From the testimony before the court, the reasonable inference is that he was well aware of his agent's acts and conduct including his agent's act of appointing Mr. Makunje as an agent and Mr. Chagwamnjira to deal with the legal aspects of the transaction relating to the sale of his land. The law is clear; the authority of the principle is implied where from the conduct of the principal and the agent it may be reasonably be presumed to have been their intention that the agent should have power to delegate his authority. From the circumstances of this case, such authority to delegate is clear. The*

defendant knew and consented to the delegation of his agent's powers. He is therefore bound by their acts.

8.2.2 *Additionally, from the evidence before the court, the defendant has not proved his counter-claim that the plaintiff is a trespasser on his land. The defendant, as the legal and beneficial owner of the land, did not do anything to forcibly eject the plaintiff on his land when he discovered his presence in 2011. On the contrary, in 2013, the defendant attempted to sale his land through the estate agents and the Plaintiff had to obtain an order of injunction against him. The law on the rights of a legal owner of land as against trespassers is clear; a legal owner of land is entitled to forcibly eject a trespasser on his land or indeed commence court proceedings for the recovery of his land. The defendant in the matter herein did nothing. We submit that this is the case because the Plaintiff was not a trespasser on his land. This explains why the Defendant was able to collaborate and testify to the truthfulness of several assertions the Plaintiff's witnesses stated under Oath. The defendant on several occasions collaborated the testimony of PW4, Mr. Makunje.*

- 8.2.3 *From the court proceedings, and the testimony of the defendant, the defendant was not truthful. In his exhibit marked and labelled “D6” by the court which is a letter to the Malawi Law Society, the defendant did not mention anything about his instructions to estate agents to sale his plot in 2010. This fact is also not captured in the defendant’s Chronology of relevant events.*
- 8.2.4 *Additionally, from the proceedings before the court and from the totality of the defendant’s evidence, the defendant gives the impression that he is a dishonest man, who simply does not wish to abide by the tenants of the sale agreement dated 12th May, 2010. The defendant conceded that he had different handwritings. He further conceded that the handwriting on exhibit marked “D2” was similar to the handwriting on exhibit marked “D12”. The defendant in paragraph 19 of his witness statement explained at length his legal knowledge of the implications of signing and witnessing transfer of lease documents. From the totality of the evidence the defendant gave the impression that he has a dishonest man who may have used his vast knowledge of the law to escape his legal obligations. Indeed this perhaps explains why he tendered exhibit “D12” being a copy of his wife’s signature instead of calling her as a witness to attest to the fact that she has never signed any document in relation to the land in question and indeed confirm her signature.”*

Analysis and Determination

Before I analyse the evidence and decide on the issues involved, I wish to make the following observation regarding the five witnesses that appeared before me. The Plaintiff was cool and calm and testified with ease and I would not doubt his credibility and integrity. His evidence was clear and it was largely corroborated by

the testimony of PW2, PW 3 and PW4. On the other hand, the Defendant proved inconsistent and evasive under cross-examination. His answers, including his conduct, seemed deliberately calculated to confuse issues and to circumvent answering directly awkward questions. His evidence pertaining to his different handwritings and signatures on some of the documents tendered in Court as exhibits is one of the many examples showing the utter unreliability of the Defendant as a witness of truth. In the premises, the straight forward evidence of the Plaintiff is to be preferred to the inconsistent and contradictory testimony of the Defendant.

That LK781/2 was the subject matter of a sales agreement is not in doubt. The question is whether the Defendant had instructed Mr. Tsakala to be his agent in seeking to find the Defendant a potential purchaser of LK781/2 and whether the Defendant is bound by the contract that was entered into by Mr. Tsakala. This being the case, the principles of the law of agency come into play.

The word “agent” is used to refer to a person who has legal authority to bind another by entering into a contract with a third person on that others behalf. The significant feature of this relationship is that the agent has power to bind his principal to a contractual relationship with a third party without the agent himself becoming a party to the contract. At law, an agency is the fiduciary relationship that arises when one person (“a principal”) manifests assent to another person (“an agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control and the agent manifests or otherwise consents so to act: see L.S. Sealy & R.J.A. Hooley, Commercial Law, Texts and Materials. 4th Edition, Oxford, 2009. Pg. 95

An agreement by an agent to act on behalf of the principal does not have to be in writing; mere consent by both parties is enough at law. Further, the consent can either be express or implied. In **Yasunda Fire & Marine Insurance Company of Europe Ltd v Orion Marine Insurance Underwriting Agency (1995) QB 174 at page 185**, the Court held, inter alia, that:

“Although in modern commercial transactions agencies are almost invariably founded upon a contract between principal and agent, there is no necessity for such a contract to exist. It is sufficient if there is consent by the principal to the exercise by the agent of authority and consent by the agent to his exercising such authority on behalf of the principal.” - (Emphasis by underlining supplied)

Furthermore, the agreement between the principal and agent may be expressed orally, in writing or by deed (usually by power of attorney). In general, no formality is required and an agent may be appointed orally even when he is appointed to make a contract which has to be in writing or evidenced in writing as with a contract for the purchase of land or contract of guarantee: see L.S. Sealy & R.J.A. Hooley, Commercial Law, Texts and Materials. 4th Edition, Oxford, 2009 at page 111.

From the evidence before this Court and the basic foundations of the law of agency we have just looked at, it is undisputable here that the Defendant expressly appointed Mr. Tsakala to be his agent in the sale of LK781/12. I am fortified in my view by the Defendant’s own testimony during his cross-examination by Counsel Ngoma. It might not be out of place to capture the “Q & A session” on the matter:

“Q: *In paragraph 11 of your statement, you use the word “unscrupulous”, what does the word mean?*

A: *Some people you do not trust*

Q: *Did you trust Mr. Tsakala and Mr. Makunje?*

A: *I did not trust them*

Q: *What are you saying in paragraph 12 of your statement?*

A: *I had identified Mr. Tsakala to find a purchaser in 2010*

Q: *You intended to sell the land, is that correct?*

A: *Yes, it is correct*

Q: *Confirm that you instructed Mr. Tsakala to find a purchaser*

A: *Yes*

Q: *Was Mr. Tsakala to be your agent?*

A: *Yes, he was to be my agent*

Q: *When you gave him instructions, did you give him anything to show that he had your instructions to sell the land?*

A: *No!*

Q: *Did you write a letter that these were your instructions?*

A: *No!*

Q: *How did you give your instructions?*

A: *Verbally*

Q: *Look again at paragraph 11 of your statement, When did you find Mr. Tsakala and Mr. Makunje to be unscrupulous?*

A: *Before I gave them these instructions*

Q: *You formed this opinion before meeting Mr. Makunje?*

A: *Yes*

Q: *Are you that foresighted?*

A: *... (after a long pause) this was like a gamble*

Q: *You heard the testimony of Mr. Makunje, did he mention that Mr. Tsakala showed him title documents?*

A: *Yes, he did*

Q: *Look at MN1 (k) (the Lease), is it the same as "RS" in Mr. Tsakala's statement?*

A: *Yes, it is the same*

Q: *How did it get to Mr. Tsakala and Mr. Makunje?*

A: *It came from me*

Q: *Would you therefore change the statement in your Witness Statement that you did not give the Lease to them?*

A: *No!*

Q: *But the Lease came from you?*

A: *Yes, it came from me”*

Counsel Ngoma turned to the unsuccessful deal concerning Mrs. Chitsime and then reverted to issuance of instructions:

“Q: *How did you withdraw your instructions?*

A: *I have not yet withdrawn my instructions*

Q: *Even to date?*

A: *Yes*

Q: *So they still have your instructions?*

A: *Yes”*

Even if, for the sake of argument, it were to be contended that the Defendant never expressly appointed Mr. Tsakala as his agent, clearly it has been seen from the record that by the conduct of both persons, that is, the Defendant and Mr. Tsakala, an agency relationship was created: see **Garnac Grain Co. Inc. v. HMF Faure and Fairclough Ltd (1968) AC 1130** wherein Lord Pearson held that an agreement between the principal and agent may be implied from their conduct.

The question that now begs is whether the act by Mr. Tsakala to request and engage the law firm, M/s Chagwamnjira & Co., to prepare the Sale Agreement on behalf of the Defendant was an act incidental to his authority or he had exceeded the agency authority in as far as the transaction was concerned.

Whether an agent has authority is a question of fact. If the principal has given prior consent to the agent acting on his behalf then the agent can be said to have “actual authority”. In the words of Diplock LJ in **Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Ltd (1964) 2 QB 480** at Page 502:

“An actual authority is a legal relationship between principal and agent created by consensual agreement to which they alone are parties. Its scope is to be ascertained by

applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the business between the parties.”

Ascertaining the scope of the agent’s actual authority is important. As a general rule, only if the agent acts within the scope of his actual authority is he entitled to an indemnity from his principal (and the same applies to any remuneration due under the contract of agency). Moreover, if the agent acts outside his actual authority he may be liable to his principal for breach of contract: see L.S. Sealy & R.J.A. Hooley, Commercial Law, Texts and Materials. 4th Edition, Oxford, 2009 at p. 113

It is trite law that even when actual authority may lack in certain respects of that relationship between the principal and the agent, the law in certain instances may assume implied actual authority by the nature of the office or particular act that the agent has been assigned to undertake by the principal. Implied actual authority may arise in four broad ways, namely, incidental authority, usual authority, customary authority and authority inferred from conduct.

An agent has implied actual authority to do everything necessary for, or ordinarily incidental to, the effective execution of his express authority in the usual way. In **Rosenbaum v. Belson (1990) 2 Ch 267**, an agent instructed to sell a house was held to have incidental authority to sign the sale agreement. However, an agent who is instructed to find “a purchaser” and not to “sell” has no incidental authority to conclude a contract: see **Earner v. Sharp (1874) LR 19 Eq 108**. It is noteworthy that the scope of the agent’s incidental authority in these two cases turned on the construction of the agent’s express authority.

With respect to usual authority, an agent has implied actual authority to do what is usual in his trade, profession or business for the purpose of carrying out his authority or anything necessary or incidental thereto. For example, if a board of directors appoints someone to be a managing director, they thereby impliedly authorise him

to do all such things as fall within the usual scope of that office: see **Hely-Hutchison v. Brayhead Ltd [1967]1 QB 549**.

An agent has customary authority to act in accordance with the usages and customs of the particular place, market or business in which he is employed so long as those usages or customs are reasonable and lawful. A usage or custom will be unreasonable if it is inconsistent with the instructions given by the principal to the agent or with the nature of the principal and agent relationship itself. A principal will only be bound by an unreasonable usage or custom if he had actual notice of it

at the time he conferred authority on the agent and whether such illegal usage can bind the principal who is aware of the illegality probably depends on the nature of the illegality as per Bowstead and Reynolds on Agency, 20th ed., Sweet & Maxwell, at Para 3-055.

Implied actual authority may also be inferred from the conduct of the parties and the circumstances of the case. It should be noted that, unlike incidental authority, usual authority and customary authority, authority inferred from conduct corresponds to the creation of an agency relationship by implied agreement.

It must also be noted that an agent cannot have actual authority when he exceeds an express limit on his authority or when he does something which his principal has expressly prohibited. This means that the principal can prevent implied actual authority arising by expressly restricting his agent's authority. However, the principal will continue to be bound by prohibited acts of his agent if:

- (a) if those acts fall within the authority which an agent of that type would usually possess (usual authority); and
- (b) a third party dealing with the agent is not aware of restrictions which the principal has placed on the agent's authority.

I now turn to the discussion of how the above-mentioned legal principles apply to the present case. It is clear from the facts of this case that there was an agency relationship between the Defendant and Mr. Tsakala. The Defendant appointed Mr. Tsakala as his agent to sell LK 781/12.

The crucial questions that ought to be asked are, firstly, whether Mr. Tsakala's act of approaching M/s Chagwamnjira & Co to prepare the necessary documentation to effect the sale of LK781/2 was incidental to his authority as an agent and, secondly, whether Mr. Tsakala acted beyond his scope as an agent when he decided to engage DW4 as a sub-agent. The answer to these pertinent questions lie in the decision of Lord Diplock in **Freeman & Lockyer v. Buckhurst Park Properties (Mangal)**, supra, where it was held that:

“It is necessary at the outset to distinguish between the “actual” authority of an agent on the one hand and apparent or ostensible authority on the other. Generally, they coexist and coincide, but either may exist without the other and their respective scopes may be different. As I shall endeavour to show, it is upon the apparent authority of the agent that the contractor normally relies in the ordinary course of the business when entering into contracts.

An actual authority is a legal relationship between principal and agent created by a consequential agreement to which they alone are parties. Its scope is to be ascertained by

applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the contractor is a stranger, he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a contract pursuant to the “actual” authority, it does create contractual rights and liabilities between the principal and the contractor. It may be that this rule relating to “undisclosed principal” which is peculiar to English law can be rationalised as avoiding circuity of action for the principal could in equity compel the agent to lend his name in action to enforce the contract against the contractor and would at common law be liable to indemnify the agent in respect of the performance of the obligations assumed by the agent under the contract.

An “apparent” or “ostensible” authority on the other hand, is a legal relationship between the principal and the contractor created by the representation made by the principal to the contractor intended to be and in fact acted upon by the contractor that the agent has authority....”

We have seen that it has been settled by law that if an agent has been given express authority to sell land, it is also to be implied from such authority that the agent equally has power to sign the necessary documents of sale on behalf of the principal. Further, the Defendant cannot state as a reason and excuse not to fulfil his contractual obligations that Mr. Tsakala involved PW3 and PW4 in the transaction. It was the Defendant’s own testimony that he knew PW4 because he was introduced to him by Mr. Tsakala. The Defendant also testified that he knew of DW3’s involvement early in the transaction. Conclusively, PW3 and PW4’s respective services were solicited by Mr. Tsakala who was the Defendant’s agent.

In any case, even if Mr. Tsakala went beyond the scope of his instructions, the Defendant is still bound by the acts of his agent as from the conduct of the principal and the agent herein it is a reasonable inference that their intention was that the agent should have the power to delegate his authority, indeed when the agent did delegate his powers to PW4, he took him to his principal to introduce him. The principal was equally advised of PW3’s involvement. If at all the Defendant is aggrieved with the acts of his agents, his remedy lies against them.

This Court, therefore, holds that the Sale Agreement, which contract was entered into on behalf of the Defendant by his agent was valid and the defendant (principal) therefore is bound. There isn’t any mala fide on the part of Mr. Tsakala to merely engage the law firm to do the paper work as that act by law would be deemed incidental to the office he was appointed to. This position is further supported by the fact that Mr. Tsakala in his quest to perform his duties as an agent never attempted to sign the sale agreement himself but there is evidence on record

to show that when the Sale Agreement was prepared by the law firm, an effort to get the Defendant had been made. Ironically, the Defendant for reasons best known to himself conveniently avoided to sign the documents. No reasons were given as to why this was so; but even if he had not signed the documents at that point when they were taken to him, a valid verbal contract had been made on his behalf by his agent, Mr. Tsakala, and part consideration had already passed.

Conclusion

In the present case, the total evidence and surrounding circumstances overwhelmingly lead to the conclusion that there was a valid contract which was entered into between the Plaintiff and the Defendant through Mr. Tsakala. The Defendant had engaged Mr. Tsakala as his agent. Any other view of the evidence would be a travesty of justice. I also come to the conclusion that the Defendant is in breach of the contract. In the premises, the Defendant's counter-claim is without merit and it is, accordingly, dismissed.

I now turn to the prayer for relief by the Plaintiff. The Plaintiff seeks specific performance of the sale of LK781/2 or, in the alternative, damages for breach of contract.

Specific performance is an equitable remedy which courts order particularly in cases where the common law remedy of damages is inadequate. The leading Malawian authority on the matter is **Finance Bank of Malawi Limited v. Benson Tembo (2007) MLR 99** wherein the Supreme Court of Appeal stated the law, at page 101, as follows:

“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. Where a vendor of land refuses to convey the land sold, it is a widely accepted general rule that an award of damages would not meet the just and reasonable expectations of the purchaser, hence it becomes necessary for the courts to decree for specific performance of

the agreement, one reason for this being that each piece of land is unique.” – Emphasis by underlining supplied

This being a judgment of the Supreme Court of Appeal, I will do well to heed the wise counsel of Mwaungulu, J., (as he then was) in **Mkhubwe v. National Bank of Malawi, HC/PR Civil Cause 2702 of 2000 (unreported)**, at page 13:

“Supreme Court decisions bind this Court. Departure from them is at the peril of reasons. Per in curium decisions never bind this Court. Equally, this Court never follows decision overlooking statutory provisions. This Court also distinguishes binding decision on the facts or principle.”

In the present action, the Plaintiff maintained that he is still willing to abide by the terms and conditions of the Sale Agreement. There is also unchallenged evidence that the Plaintiff, acting on the instruction of the Defendant’s agent, has spent a considerable amount of money on LK781/2. In the premise and bearing in mind the fact that the Defendant has advanced no grounds why the Court should not exercise its discretion in favour of granting specific performance, I am minded to grant the Plaintiff’s prayer for specific performance compelling the Defendant to fulfil his obligations under the Sale Agreement. So it is ordered.

The general principle is that a successful party is entitled to his or her costs. The Plaintiff has succeeded in his claim. The Defendant is, therefore, condemned in costs.

Pronounced in Court this 18th day of January 2016 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE