

IN THE HIGH COURT FOR ZAMBIA
2007/HK/KT04
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE
(Civil Jurisdiction)

**IN THE MATTER OF: SECTION 10 OF THE LAW OF DISTRESS
ACT OF 1888 AND SECTION 7 OF THE
LAW OF DISTRESS AMENDMENT ACT
1895**

AND

**IN THE MATTER OF: SECTION 13 OF THE RENT ACT OF THE
LAWS OF ZAMBIA**

AND

**IN THE MATTER OF: PREMISES SITUATE AT AND KNOWN AS
PLOT NO. 840/7/A/G, INDUSTRIAL**

AREA,

KITWE

BETWEEN:

IMPALA GEMS AND TROPHIES

APPLICANT

AND

E.N.T. MOTOR LIMITED

TENANT

Before the Honourable Madam Justice C.K. Makungu

For the Applicant: Mr. D. Mazumba of Douglas & Partners

For the Tenant: Mr. S.A.G. Twumasi of Kitwe Chambers

J U D G M E N T

Legislation referred to:

1. Lands and Deeds Registry Act Cap. 185 of the Laws of Zambia - S. 33
2. White Book 1999 O. 2 R. 2

Cases referred to:

1. Corruption Commission v Barnet Development Corporation Ltd (1) SCZ Judgment No. 5 of 2008 Z.R. 69.
2. Namun'gandu vs Lusaka City Council (1978) Z.R. 358.
3. Edgar Hamuwele and Christopher Mulenga v Ngenda Sipalo and Brenda Sipalo (2010) vol. 1 Z.R. 160.
- 4.
5. G.F. Construction (1976) Limited v Rudrap (Zambia) Limited and Unitechna Limited (1999) selected Judgments 140.
6. Titus Chingonyi vs ZCCM Investments Holdings Plc and Angela Mwape Kashiwa Appeal No. 120/2007 (unreported).

For convenience, I will refer to the company cited as "tenant" as the respondent in this Judgment.

This case was started by the applicant in the Subordinate Court at Kitwe on 23rd April, 2003 by Ex-parte Originating Summons for leave to issue a warrant of distress for rent arrears. The affidavit in support of the Originating Summons was sworn by Steward Chilufya who stated *inter alia* that he runs the applicant's company in partnership with Victor Sylvester Mulenga. That the applicant company owns plot 840/7/A/G off Nyerere Road where the respondent carries on business. A copy of the Certificate Of Title was exhibited and the applicant claimed K1,000,000.00 per month from 1st August, 2002 until date of payment.

The same affidavit reads that; Instead of paying rent, the respondent offered to buy the plot at K12 million and K14.5 million on 15th April, 2002 and 15th July, 2002 respectively. These letters have been exhibited. The Subordinate Court granted leave to issue a warrant of distress and such a warrant was issued on 23rd April, 2003 and executed.

Therefore, the respondent obtained a stay of execution on 16th June, 2003 pending the hearing of an application to set aside the warrant of distress. The affidavit in support of summons to set aside the warrant was sworn by Elias Ngoma who stated that he is one of the directors of the respondent company. That his company has never been a tenant of the premises in issue and there is no tenancy agreement to prove the applicant's allegations. He further stated that the respondent actually owns the property in issue which was built by it.

On 29th November, 2005 the respondent through its advocates applied for the transfer of the case to the High Court. The Magistrate allowed the application on 15th August, 2006 but signed an order of transfer on 22nd August, 2006.

Upon transfer, the case was allocated to Judge L.V. Siame and it came up for hearing before him several times before he retired. On 1st August, 2008, the Honourable Judge Siame issued an Order for Directions saying *inter alia* that the applicant should file a

statement of claim and the defendant should file a defence and lists of documents should be exchanged by the parties before the matter could be set down for trial.

On 11th September, 2008 a statement of claim was filed in which the applicant claims *inter alia* that; it acquired the property known as K/840/A/G/7 from the Ministry of Lands in 1980. After acquiring it, the applicant built a boundary wall around it and a foundation for a workshop and a block of offices. The premises were then rented out to a West African who promised to build a workshop and an office block there and it was agreed that the building expenses would be accounted for as rent. The statement of claim further reads: When the West African left, the respondent moved in without the plaintiff's consent. That the respondent influenced the Ministry of Lands through Kitwe City Council to re-enter the land and the re-entry has since been reversed. The respondent also requested the applicant to offer the property to him for sale. Furthermore, the respondent occupied the said piece of land illegally without paying rent and the applicant claims possession of the land; payment of mesne profits/rent arrears from the date the respondent occupied the premises to the date of judgment interest and costs.

On 25th September, 2008 a defence was filed in which the respondent alleges that the said piece of land was allocated to one G.A. Miti after a successful re-entry by the Commissioner of

Lands as the plaintiff had failed to develop the land for a long time. That after the demise of G.A. Miti in 1990, the estate passed on to one Elias Ngoma the chief executive of the respondent company who has since developed the piece of land to its current value. And the respondent claims to be the legal owner of the piece of land in issue and denies owing any money to the applicant.

In October, 2010 after the retirement of Judge Siame, the case was re-allocated to me. Several hearing dates were given and the parties appeared before me to apply for adjournments for various reasons until 10th September, 2012 when I put my foot down and forced the applicant's advocate to commence trial after he had applied for an adjournment and the respondent's advocates had objected to the application.

PW1 Kennedy Chilufya Chisembe's testimony was that his late father Steward Chilufya who died in 2011 was a shareholder and director of the applicant company. He is the administrator of his late father's estate. He said the property in question belongs to the applicant company as evidenced by the title deed exhibited on page 1 of the applicant's bundle of documents. He also referred to a letter dated 15th April, 2002 written by Mr. Ngoma of the respondent company to the applicant, proposing to buy the plot from the applicant company at K12 million. He further stated that the plot was not sold to anyone.

Under cross-examination, he said that his late father and Mr. Mulenga were the only shareholders of the applicant company that he knew of. Mr. Mulenga pre-deceased his father (Steward Chilufya). He added that he had since filed in the company registry, a notice of change of directors and shareholders of the company.

PW2 Happy Kambi, testified that he has been company secretary for the applicant since 1980. His responsibilities are to write minutes of meetings, keep company records and attend to other company business when the directors are unavailable. He further stated that the applicant owns the property in issue as evidenced by the Certificate Of Title on pages 1-5 of the Plaintiff's bundle of documents. Sometime in 1985 the applicant agreed with a certain Senegalese man whose name he could not remember, that the Senegalese man would enter upon the premises and complete building the offices which were at foundation stage. He said at that time, the warehouse was already fully built. It was further agreed that the rentals would be off set against the building costs. The Senegalese man took occupation of the premises and commenced building and doing business there. He completed building the offices at a cost of about K20 million. PW2 further stated that he went out of the country for studies for some time. When he returned, he found that the Senegalese tenant had

passed away and Elias Ngoma who was the deceased's driver had taken possession of the same premises.

He further testified that; on 15th April, 2002 the respondent company through E. Ngoma wrote a letter to the directors of the applicant company proposing to buy the property at K12 million, copy of that letter is on page 8 of the plaintiff's bundle of documents. The applicant company rejected the offer as it was too little and requested an agent called Dex Rez Real Estate Agency to start collecting rent from the respondent. A letter written to the respondent on 11th July, 2002 by the agent is exhibited in the plaintiff's Bundle of Documents at page 9. In that letter, the said premises were offered to the respondent for rent at K1 million per month with effect from 1st August, 2002. However, no rent has ever been collected from the respondent, that is why this case was instituted.

PW2 added that; on 15th July, 2002 the respondent through Elias Ngoma wrote a letter which is on page 10 of the plaintiff's Bundle of Documents. The letter was for the attention of M/s Chilufya and Mr. Mulenga who were the company shareholders, on the subject, "Title Deed for lot 840/5/6/7". The writer referred to his letters and numerous discussions held, and counter proposed K14.5 million for the property.

On 24th September, 2003 Kitwe City Council wrote a letter to the respondent which was copied to the applicant and the Commissioner of Lands. That letter was with regard to the land in issue. It advises the respondent that the land belongs to Impala Gems and Trophy Dealers Limited and that the offer which was given to Mr. Miti was in error since Stand number F/840/7 does not exist and the cheque on which payments of lease charges was made and returned to Mr. Miti by the Commissioner of Lands through his letters to the council dated 23rd June, 1989 and 6th February, 1990, which were copied to Mr. Miti. It further reads that therefore, the council could not recommend E.N.T. to the Commissioner of Lands as the latest computer print-out from the Lands Ministry still showed Impala Gems and Trophy Dealers as at 3rd September, 2003. Therefore, the issue could only be resolved by the Commissioner of Lands who by copy of the same letter was informed accordingly.

PW2 further testified that he learnt about the re-entry made on the premises by the Commissioner of Lands on 17th November, 1992 and appealed against the re-entry on 26th March, 2004. Copy of letter of appeal is on page 21 of the plaintiff's bundle of documents. The appeal was based on the ground that the applicant had started developing the plot by July, 1982. By September, 1982 there was a boundary wall, a foundation and concrete slab for the workshop and storeroom. Pilling was already done on the plot as it was water logged.

He referred to the Plaintiff's Notice to Produce dated 12th July, 2012 where there is a computer print-out from the office of the Commissioner of Lands, relating to the plot in issue, on which there is no entry relating to Mr. Miti. The last entry on the same print out is a certificate of cancellation of certificate of re-entry on 19th August, 2004. He further stated that the respondent never developed that piece of land.

On 4th October, 1982 Mr. Mulenga lodged a caveat on the same piece of land because there was a rumour that someone wanted to fraudulently obtain the property. He said to date the caveat has not been removed. He further stated that the respondent has been in possession of the land since 2003 without paying rent.

Under cross-examination, he said that he is not registered with the company registry as a company secretary. He said that apart from the late Chilufya and Mulenga, there was another director of the applicant company by the name of Victor Mulenga who was the son of Steward Mulenga whom he had failed to locate. He said he left Zambia for studies in 1998 and returned between 2001 and 2002. According to the notice of re-entry of 17th November, 1992 the certificate of title was supposed to be returned to the Ministry of Lands. However, he did not know if it was returned. He said he only wrote to challenge the re-entry about 12 years after

the re-entry. The Ministry of Lands did not call the applicant to discuss the re-entry.

He acknowledged that on page 1 of the respondent's bundle of documents there is a copy of a letter of offer of Stand No. 840/7 to Mr. G.A. Phiri which is dated 8th December, 1988. Page 2 of the same bundle is a letter dated 21st December, 1988 from the legal counsel of Kitwe City Council to the Commissioner of Lands relating to the same offer which advises the Commissioner of Lands to amend the name of the offeree from G.A. Phiri to G.A. Miti.

He also acknowledged that document No. 3 of the "respondents" bundle of documents is a letter dated 3rd June, 1991 from the Commissioner of Lands to the District Executive Secretary with regard to service of notice of intention to re-enter on Stand No. 7 subdivision A of sub a of Farm 840. It says such notice was sent to the lessee but returned because it was unclaimed. The writer also instructed the executive secretary to serve the notice and later on make a report as to whether the company had developed the stand or not.

PW2 further stated that he learnt of Mr. Miti's fraudulent actions after his death. Therefore, he was unable to report the fraud to the police.

In re-examination, he said that the purported allocation of the land to Mr. Miti was made before re-entry because the letter of offer is 21st December, 1988 and the re-entry was made on 3rd June, 1991.

When PW2 was re-called, he testified that he was appointed as a company secretary by company resolution. However, he was unable to produce the resolution because the file was taken away by the late director of the applicant company Mr. Mulenga. He further stated that the applicant company passed a resolution to commence this case. He said Victor Mulenga did not tell him that the applicant only owned the plot and not the buildings on it and that it was Mr. Ngoma who had the structures on that plot constructed. He further stated that his appointment as company secretary had nothing to do with the ownership of the property in issue.

DW1 Elias Ngoma's testimony was that he is a transporter and a Director of the respondent company. He bought the plot from his cousin David Miti the administrator of the estate of his late uncle Mr. G.A. Miti, at K350m but had no documents relating to that transaction. He said he had confirmed with Kitwe District Council that the plot belonged to G.A. Miti who acquired it from the Ministry of Lands on 8th December, 1988 as evidenced by the letter of offer from the said Ministry to G.A. Miti dated 8th December, 1988 on page 1 of the respondent's bundle of

documents which was mistakenly addressed to Mr. G.A. Phiri. On page 2 of the same bundle, there is a letter from the legal secretary of Kitwe City Council to the Commissioner of Lands dated 21st December, 1988 advising the commissioner to amend the name on the letter of offer to G.A. Miti instead of G.A. Phiri. However, he did not know if it was amended.

DW1 further stated that G.A. Miti acquired that plot after it was repossessed from Impala Gems and Trophies as the Ministry of Lands registered its re-entry on January, 1991. He said he was unaware of the withdrawal of the said re-entry. He further stated that by December, 1993 he was in possession of the plot and had built a workshop, 7 offices, a car port, 2 toilets, 2 ware houses, fenced the premises and put a gate. He referred to documents 12-14 in the respondent's bundle of documents which are floor and building plans for the structures he said he built at the plot. Some of the plans are in the name of the late G.A. Miti. He also referred to an invoice/receipt on page 15 of the same bundle which he said he obtained from P.D.M. builders and General Contractors who built the structures on the plot. The invoice is for K15 million.

He added that sometime in 2004 John Mulenga and victor Mulenga approached him and asked him the number of the plot he was occupying, he gave them 84/A/G/sub 7 and they told him that they had inherited that plot from their parents. They showed

him a map of their plot and he accepted that it was indeed of the plot that he occupies. Later, he had a meeting with Mr. Chilufya and Victor Mulenga in which they discussed the sale of the property in issue. In that meeting, representatives of the applicant company offered him the property at K150 million which he rejected. He said the price was finally negotiated and agreed at K14.5 million which he was supposed to pay after they had proved title. By then, the offices at the plot were on rent. Later, the applicant requested him to start paying rent for the same property but he has never paid rent to anyone. He said that it was not true that by 1982 the land was partially developed by the applicant because he had initially taken possession of bare land.

Under cross-examination he was referred to a letter on page 18 of the plaintiff's bundle of documents which is dated 24th September, 2003 from Kitwe City Council to E.N.T. Motors Limited. The letter refers to Stand No. 840/G/A/7 - Kitwe. It was signed by the Town Clerk and it reads as follows:

**“My ref: DLS/PF/840/A/A/7/MZ
24 September, 2003
Messrs E.N.T. Motors Limited
Box 58 M7
Plot No. 840
KITWE**

Reference is made to your letter dated 23rd June, 2003. Please note that according to our records this stand belongs to Messrs Impala Gems and Trophy Dealers Limited and its held on title. The offer which was given to Mr. Miti was in error since Stand No.

F/840/7 does not exist and the cheque on which payments of lease charges were made was returned to Mr. Miti. This was done by the Commissioner of Lands through his letters to Council dated 23rd June, 1989 and 6th February, 1990, the same was copied to Mr. Miti. Therefore council can not recommend you to Commissioner of Lands as the latest computer print-out from the Lands Ministry still shows Impala Gems and Trophy Dealers as at 3rd September, 2003. Therefore the issue can only be resolved by the Commissioner of Lands.

By copy of this letter the Commissioner of Lands is informed accordingly.

Yours faithfully,

**A.D. Simwinga
TOWN CLERK**

**Cc: Commissioner of Lands
P.O. Box 30069
LUSAKA**

**Cc: Impala Gems and Trophy Dealers Ltd
P.O. Box 270082
KITWE"**

He denied having received that letter and further stated that at one point in time, he did apply to the council to allocate him the said plot. He took occupation of the plot early in 1992. He admitted having written the letter on page 10 of the plaintiff's bundle of documents which says:

"15th July, 2002

**The Director
Impala Gems & Trophies Dealers Ltd
P.O. Box 22456
Kitwe**

ATT: M/s Chilufya & Mr. Mulenga

Dear Sir,

Re: TITLE DEEDS FOR PLOT NO. 840/5/6/7

We refer to our letters and numerous discussions held and the subsequent proposal made towards settlement of this issue after our earlier proposal another figure has been proposed to the sum of K14,500,000.00 (Fourteen Million Five Hundred thousand kwacha). We therefore uphold our earlier figure.

We believe and trust that this will be for the betterment of all PARTIES.

Thanking you for understanding.

Please acknowledge receipt.

**Elias Ngoma
DIRECTOR**

**Morgan Mubanga
SECRETARY**

He further stated that he offered to pay for the plot because he wanted title to the property. He did not pay because they did not get back to him. He said he is entitled to the property because David Miti gave him documents indicating that the plot belonged to G.A. Miti.

DW2 Victor Sylvester Mulenga's testimony was that he is the son of the late Pearson Mulenga who was one of the directors of the applicant company. He said he and the late Steward Chilufya were also directors of the same company and that he was actually the company secretary. The company was formed in 1979 and his father died in 1988. He is the administrator of his late father's estate. The company acquired the plot in issue with the intention of building a workshop and some offices there. However, they did

not manage to do so. After the death of the other two directors, the company has been disorganised.

He further stated that he knew PW2 for he used to work with him at Copperbelt bottling company and he is the late Steward Chilufya's brother in law. PW2 has no connection with the applicant company but there was a private arrangement between him and the late Steward Chilufya to appoint him as a company secretary. He said in the year 2000 he went with his brother to see DW1 whom they advised that he had built on a plot belonging to the applicant company. DW1 expressed ignorance about that but after making a search at the council, DW1 agreed that the plot was not his. Mr. Chilufya then got involved in the negotiations to sale the plot to DW1. Then the applicant company through Chilufya offered the respondent the plot at K150 million and DW1 made a counter offer of K14.5 million so they had a dead lock and Chilufya decided that the applicant should claim the whole property as its own if DW1 refused to pay K150 million.

He also told the Court that the directors of the applicant company never agreed to institute this action, but he was present when Chilufya gave instructions to Mr. Mazumba of Douglas & Partners to start the case. He added that his view was that E.N.T. Motor Ltd should pay the value of the plot and not the value of the structures on it. He said he intends to involve the widows of the deceased directors of the Applicant Company and administrators

of their estates in negotiating an ex-curia settlement with the respondent company.

Under cross-examination, he said that he had agreed with Chilufya to re-possess the property. He had learnt from Chilufya that a Senegalese assisted the respondent company to build the structures on the plot. By 1988 the applicant company had not put up any structures on the plot. The Commissioner of Lands registered a certificate of re-entry but cancelled it. He further stated that DW1 came into occupation of the land because he was working as a driver for Phiri and another who had been permitted to occupy the plot by his late father. When Ngoma's boss died, he remained in occupation and teamed up with the Senegalese man.

DW3 Paul Davis Musenge testified that in 1990 he registered his business under the name of P.D.M. Builders and General Contractors involved in land works and construction. In 1991 he was engaged by the respondent to construct seven offices, a warehouse, a storeroom, some toilets and a boundary wall on the plot in issue. The land was bare when they first went there. They used the building plans which have been exhibited in the respondent's bundle of documents which plans were supplied by DW1. By 1993 they had completed constructing the buildings and they charged a total to K15 million for all the works which amount was fully paid. He referred to the invoice on page 15 of the

respondent's bundle of documents saying it was issued by his company.

Under cross-examination, he said that he is a civil engineer by profession and in 1991 he was the one who prepared the building plans he referred to. They were meant for Mr. Miti according to instructions by DW1 and that was indicated on the plans. DW1 showed him that piece of land which was bare in 1990. The building project went on from 1991 to 1993. He was not aware if the plans were submitted to the council for approval.

SUBMISSIONS

On behalf of the plaintiff, learned counsel Mr. Mazumba firstly referred to ***section 33 of the Lands and Deeds Registry Act*** (1) which provides:

“A Certificate of Title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person or of any estate or interest, whether derived by grant from the President or otherwise, which but for parts III to VII might be held to be paramount or to have priority; the Registered proprietor of the land comprised in such Certificate shall, except in case of fraud, hold the same subject only to such encumbrances, liens, estates or interests as may be shown by such

certificate of Title and any encumbrances, liens, estates or interests created after the issue of such Certificate as may be notified on the folium of the Register relating to such land but absolutely free from all the encumbrances, liens, estates or interests whatsoever:

- (a) Except the estate or interest of a proprietor claiming the same land under a current or prior Certificate of Title issued under the provisions of parts III to VIII; and**
- (b) Except so far as regards the omission, or misdescription of any right of way or other easement created in or existing upon any land; and**
- (c) Except so far as regards any portion of land that may be erroneously included in the Certificate of Title, evidencing the title of such Registered Proprietor by wrong description of parcels or of boundaries.”**

Secondly, he referred to the case of ***Anti Corruption Commission v Barnnet Development Corporation Ltd*** (1) where the Supreme Court followed section 33 of the Lands and Deeds Act and held that:

“Under S. 33 of the Lands and Deeds Registry Act, a Certificate of Title is conclusive evidence of ownership of land by a holder of a Certificate of Title...”

In the light of the foregoing, he argued that in this case, there is no evidence that the respondent owns the land. The respondent has only showed documents indicating that there were steps taken by DW1 and others to try and fraudulently obtain ownership of the said land.

He further submitted that the piece of land in issue belongs to the applicant that holds a Certificate of Title to it because none of the exceptions to section 33 of the Act (1) have been proved. The defendant therefore has no valid claim to that piece of land or the structures on it or any fixtures thereon. In support of this argument he cited the Latin maxim "*Quicquid Plantatur solo, solo cedit*" which in English means; "whatever is attached or annexed to land becomes part of the land." He also relied on the case of ***Namun'gandu vs Lusaka City Council*** (2) where the plaintiff had erected a building on land belonging to the defendant without the defendant's permission. The defendant demolished the building as a result of which electrical fittings, roofing sheets, window frames were destroyed with the rest of the building. The Court held that the electric appliances, doors, door frames, roofing sheets, bulbs and window frames which the plaintiff contended were already part of the completed house, were fixtures.

He finally submitted that the applicant is entitled to possession of the property as it is, without the removal of any fixtures. The applicant is also entitled to rent for the whole period that the respondent has been in occupation of the land with interest and costs and any other relief the Court might deem fit.

On behalf of the respondent, learned counsel Mr. Twumasi submitted that the applicant has failed to prove this case on the balance of probabilities as required by law. He said the defendant was the one that built the structures on the plot in issue. DW2 a shareholder and director of the applicant company is totally opposed to this action and requests that there be an amicable settlement. He further submitted that when construction of the building took place, the land did not belong to the applicant because there was a re-entry by the Commissioner of Lands.

Furthermore, the structures were built with the applicant's consent, therefore the applicant cannot claim the development on the said plot. Should this Court find and hold that the land does not belong to the respondent, it should also find in favour of the respondent company that it is entitled to the value of the developments on the plot. He finally submitted that this action is improperly before the Court because it seems as though there was no resolution of the company to commence it. He said it is trite law that a company only acts upon resolution. In support of this, he relied on the case of ***Edgar Hamuwele and***

Christopher Mulenga v Ngenda Sipalo and Brenda Sipalo

(2) where it was held *inter alia* that:

“The minutes of the meeting which took place on 25th March, 1997 show that it was a meeting of members and not of the board of directors. As members of the bank, they had the power to pass the resolution to commence the process of liquidation. Thus, the appointment of the appellants as joint liquidators by members of the Bank was valid.”

FINDINGS OF FACT AND APPLICATION OF THE LAW TO THE FACTS

The issue brought up by the respondent in evidence and argued in the submissions, relating to lack of a company resolution to commence this action, was not pleaded in defence. In fact if the respondent felt that there was an irregularity in the way the case was commenced, they should have applied to dismiss the action for irregularity before taking any steps in the action (See O.2 R. 2 of the White Book (2)). Since such evidence was not objected to, I have considered it and I find that there was consensus between DW2 and Chilufya both directors of the applicant company and PW1 the company secretary or agent to commence this action. It is therefore in the interest of justice that it be resolved on its own merits.

It is not in dispute that the applicant company was issued with a Certificate of Title to Plot 840/7/A/G situated in the industrial area of Kitwe on 22nd October, 1981. The applicant then took possession of the land which they cleared. Although there is a dispute as to whether the applicant had made any other improvements to the land, I find that since the applicant was in possession of the land for a long time before the respondent took possession, it is possible that they did make a foundation for some buildings and fence the premises during the period they had been in possession. I therefore find that they did develop the land to that extent.

It is also not in dispute that before 1990, the applicant company rented out the property to a Senegalese man with whom they had agreed that he builds offices, a ware house and toilets on the plot and that the cost of the buildings would be accounted for as rent. Due to disorganization in the applicant company, when the directors of the company went in different directions doing other businesses, none of them or their agents followed up the matter of rent of the premises by the Senegalese man until about 2002 when some of the directors had passed away. In or about 2002 it was discovered by the applicant's agents or servants that DW1 who was merely a driver of the Senegalese man who was a tenant, had taken over the premises because the Senegalese had

passed away. It is not in dispute that DW1 and the respondent took occupation of the land by 1990 or 1991.

By 1993, there were 7 offices, a warehouse, storeroom, workshop, toilets and boundary wall constructed on the plot. I am not convinced that it was DW1 or the respondent that actually put up those structures because DW1 was merely a driver of the actual tenant of those premises and he most likely, had no means of paying for the construction of such structures. It seems to me that the Senegalese man had put up most structures on that plot with the applicant's authority. If at all the respondent had those buildings constructed, I find that the company did so without any legal authority because it did not own the plot and the applicant did not grant it permission to occupy the plot and build on it. I do not accept DW1's evidence that the respondent company bought that piece of land from the administrator of the estate of the late G.A. Miti at K350 million because there is no contract of sale supporting that allegation.

Furthermore, I find that G.A. Miti who was DW1's uncle, was offered Stand No. 840/7 by the Ministry of Lands on 8th December, 1988 which stand did not exist as evidenced by the letter from Kitwe City Council dated 24th September, 2003 on page 18 of the applicant's bundle of documents. The same letter shows that cheques on which payment of lease charges were made were returned to Mr. Miti by the Commissioner of Lands on 23rd June,

1989 and 6th February, 1990. That letter also indicates that by 3rd September, 2003 Plot 840/G/A/7, Kitwe was registered in the name of Impala Gems and Trophy Dealers.

I further find that Plot 840/G/A/7 was re-entered by the Commissioner of Lands on 17th November, 1992 and a certificate of re-entry was registered on 8th December, 1992. The re-entry was only on paper as the applicant company did not receive the notice of re-entry and there was no actual repossession of the land by the Commissioner of Lands or re-allocation of the land to anyone else. It is clear that the applicant company challenged the re-entry through its advocates Douglas and Partners on 17th and 27th November, 2003 as shown in the letters on pages 19 and 20 of the applicant's bundle of documents, on the ground that the plot was developed to a certain extent by the time of re-entry. The applicant company further objected to the re-entry by letter dated 26th March, 2004 which was written by PW2. It is not in dispute that on 19th August, 2004 the Commissioner of Lands registered a certificate of cancellation of certificate of re-entry.

It is clear and undisputed that by July, 2002 the respondent company through DW1 started negotiating to purchase the property from the applicant company but they failed to agree on a price because there was an offer of K150 million and a counter offer of K12 million on 15th April, 2002 and another counter offer of K14,500 million on 15th July, 2002. I therefore find and hold that

there was no contract of sale of that piece of land between the applicant and respondent.

I accept the applicant's advocate's submission that according to **section 33 of the Lands and Deeds Registry Act** (1) the land belongs to the applicant company that holds a Certificate of Title to it. I also accept his submissions that the Latin maxim *Quicquid Plantatur Solo, Solo credit* applies to this case and so the land, all the buildings on it and fixtures belong to the applicant. I am satisfied that the respondent has benefitted a lot by using the property for his own business for over 14 years.

The other issues to be determined are whether or not the respondent is entitled to continue occupying the premises and whether or not the applicant is entitled to rent arrears or mesne profits. My answers to these questions are as follows:

I reiterate that that the respondent went into occupation of the land without the applicant's authority. In fact the respondent had no legal right to take occupation and make any improvements to the land. In order for a lease to be formed the parties ought to agree on the amount of rent and the duration of the lease. In this case, there was no lease agreement between the parties. Therefore, the claim for rent arrears or mesne profits is unfounded. I rely on the case of **G.F. Construction (1976) Limited v Rudrap (Zambia) Limited and Unitechna Limited** (4), where it was held *inter alia* that mesne profits are damages

for a tenant holding over the property after the expiry of a lease. For the foregoing reasons I find and hold that the warrant of distress was wrongly issued.

In the case of ***Titus Chingonyi vs ZCCM Investments Holdings Plc and Angela Mwape Kashiwa*** (5) the Supreme Court gave judgment to the respondent for damages for having been deprived of the opportunity to rent out a house on the ground that equity demanded that such justice be done and the respondent had pleaded for “any other relief the court may deem fit.”

In the present case, it is unjust that the applicant has been deprived of the use of the property and the opportunity to rent out the premises but I am unable to grant the company any relief for that because there is no claim for any other relief in the statement of claim. I am of the view that it is not a defence to this case to say that one of the directors of the applicant company hopes for an amicable settlement.

For reasons stated in this Judgment, it is hereby adjudged that the applicant is entitled to immediate possession of the property and costs. The costs should be taxed in default of agreement. Leave to issue a writ of possession is hereby granted.

Delivered at Kitwe this 1ST day of August, 2014.

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C.K. Makungu
JUDGE