

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
AT LUSAKA**

**2013/HP/338**

*(Civil jurisdiction)*

**BETWEEN**

**MOHAMMED ABDI**

**PLAINTIFF**

**AND**

**AMON LUSWILI**

**DEFENDANT**

***Before Hon. Mrs. Justice B.M.M. Mung'omba this 14<sup>th</sup> day of April, 2015.***

*For the Plaintiff : Mr. K.M Simbao of Messrs Mulungushi  
Chambers.*

*For the Defendant : Mr. G. Lungu of Messrs Muleza  
Lungu & Co.*

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## **J U D G M E N T**

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**Case referred to:**

- 1. Holmes Limited vs Buildwell Construction Company Limited (1973) ZR page 97.***
- 2. William Jacks & Company (Zambia) Limited vs O'Connor (in his capacity as Registrar of Lands & Deeds) and Construction & Investment Holdings Ltd (1967) Z.R. 141***
- 3. Harvey vs Pratt (1965) 2 ALL ER. 786; (1965) 1 W.L.R. 1025***

On 18<sup>th</sup> March, 2013, the Plaintiff commenced this action by way of writ of summons claiming for:

- (a) A sum of K99, 260.00 being value of improvements made on the Defendant's property which improvements the Plaintiff can no longer use.
- (b) A sum of K528, 000.00 being loss of profits from the business at K22, 000.00 per month for the remaining 24 months of the lease.
- (c) Further or other relief as the Court may deem just and expedient.
- (d) Interest and costs.

In the statement of claim that accompanied the writ of summons, the Plaintiff states that he was at all material times a Zambian businessman carrying out construction related business. The Defendant is an individual and owns the property on which a portion was leased out to the Plaintiff for a period of three years at monthly rent of K 700.00.

It was a condition of the contract that the Plaintiff was to pay rent for five months in advance and thereafter would be paying in three months intervals. It was another condition of the Lease that commencement of the lease would begin when the Plaintiff started operations. The Plaintiff was given a grace period in order to construct a slab on which to make blocks, offices and also to connect power to the premises. The Plaintiff spent more than a sum of K99,260.00 on the improvements. As it took long to construct the structures it was mutually agreed that the plaintiff would commence paying rent from the month of February, 2012. However, there was information that the Defendant had found a new tenant for the leased premises in January, 2013. The Defendant made it difficult for the Plaintiff to access the leased premises

According to the Defendant had started doing business on the same structures built by the Plaintiff or had put in a new tenant. As a result of the Defendant's actions the Plaintiff has suffered loss and damages.

On 3<sup>rd</sup> April, 2013, the Defendant filed into Court his defence and counter-claim. Save in so far as it consists of admissions, the Defendant

denies each and every allegation contained in the statement of claim as if the same were set out herein and traversed seriatim.

However, in the counter-claim;

- (a) The defendant avers that it was a term of the lease agreement that he had with the Plaintiff that there would be an annual increment of 50% of the rentals but that the said increments were not paid by the Plaintiff during 2011 and 2012.
- (b) The Defendant avers that the payment of rentals by the Plaintiff was erratic for instance he never paid the five months rentals at commencement of lease but resorted to doing so in installments contrary to agreement.
- (c) As a result of the Plaintiffs actions the Defendant has suffered loss and damages.

Particulars of loss and damage were itemized as follows:

- i. K350 being 50% rentals increment for the year 2012;
- ii. Interest on the delayed payments of rentals when they fell due
- iii. Damages
- iv. Any other relief Court may deem fit
- v. Interest
- vi. Costs

When this matter came up for trial, the Plaintiff, Mohamed Abdi, confirmed the lease entered into with the defendant. His testimony did not vary from the averments in the statement of claim. He however added that he had built a slab, septic tank and a three-roomed structure on the portion of land in issue. He also applied for a three-phase electricity line from ZESCO for the purpose of the business. According to the Plaintiff, before he could finish the construction and as he was awaiting the block-making machine to arrive, the Defendant chased him from the premises. He claims that later the

Defendant allowed another person to be making blocks on the slab he had made. The Plaintiff stated that although he had been chased from the premises, the lease was, at that time, still valid.

In cross-examination, the Plaintiff admitted that there was no certainty regarding the date of commencement of the tenancy.

In his defence, the Defendant called three witnesses. DW1 was the Defendant, Amon Luswili. He confirmed entering into a lease with the Plaintiff and having received the K800.00 in rentals. He stated that following the failure by the Plaintiff to pay rentals for about three months and due to his financial difficulties, he wrote to the Plaintiff, giving 7 days to settle the rentals. Failing which he would authorize someone else to move on the portion of land in issue. According to the Defendant, the Plaintiff did not respond and after 14 days he proceeded to allow a third party to move on the said premises. The Defendant is also counter-claiming as indicated earlier in this judgment.

DW1's testimony did not materially vary in cross-examination. He stated that the lease agreement was to commence immediately he was paid the first agreed rentals. When directed to clause 6 of the contract, the witness testified that the lease was to commence when business starts. He claims that he was supposed to increase rentals after 12 months by 50% as per the agreement, hence his counter-claim. He admitted that the Plaintiff made some developments on the said land and that he did receive some payment. This witness also admitted writing a letter at page 2 of the Defendant's Bundle of documents giving the Plaintiff 7 days' notice within which the Plaintiff was to give reasons why there were no activities on the leased portion of land.

DW2 was Anna Luswili, the wife to the Defendant. This witness was dispensed with as she was giving hearsay evidence. DW3, Mpundu Luswili merely confirmed the testimony of his father, DW1, Mr. Amon Luswili.

I have carefully considered the evidence before me and also taken into account the submissions by Counsel.

It is common cause that the Plaintiff entered into a tenancy agreement with the Defendant vide exhibit "MA1" for a three year period. The tenancy agreement is undated. The terms of the agreement inter-alia were that the Plaintiff would pay the sum of K700.00 per month and an upfront payment for the first 5 months would be paid and thereafter payments would be made in 3 monthly intervals.

Another significant term of the tenancy agreement was that the contract would begin running when business starts and clause 7 provided that there would be an annual increment of 50%.

The parties do not dispute the fact that payments were made on diverse dates beginning August 2011 with respect to rentals. From the evidence on record the rentals were paid in installments in an erratic manner. Due to this mode of payment and the delay in effecting the rentals due, the Defendant purported to terminate the lease agreement. In January, 2013 the Defendant leased the premises to another tenant.

It is on account of the Defendant's purported termination of the lease that the Plaintiff is claiming that he suffered loss and damages.

He has particularized his claims as follows:

- (a) A sum of K99, 260.00 being value of improvements made on the Defendant's property which improvements the Plaintiff can no longer use.
- (b) A sum of K528, 000.00 being loss of profits from the business at K22, 000.00 per month for the remaining 24 months of the lease.
- (c) Further or other relief as the Court may deem just and expedient.
- (d) Interest and costs.

The Defendant is not disputing that he entered into a tenancy agreement with the Plaintiff. His bone of contention is that after the Plaintiff had paid a down payment of K800.00 after signing the 3 year lease agreement, he only paid a further K700 after a month elapsed which was contrary to the spirit of the agreement. That the Plaintiff informed him that he did not have any money to pay him. This is what provoked the Defendant to write a letter to the Plaintiff dated 26<sup>th</sup> January, 2013 wherein he drew the Plaintiff's attention to the terms of the contract (page 16 Plaintiff's bundle). He gave the Complainant a week's notice to react failure to which he warned that he would lease it to another interested party. The letter was met with silence and the Defendant proceeded to terminate the lease agreement and leased the premises to a third party. He has denied any wrongdoing on his part. He has strenuously denied the claim by the Plaintiff that the structures erected on the premises gobbled K99, 260.00

I have carefully considered the evidence before me and the submissions made by Counsel.

The starting point as I see it in resolving this matter is the lease agreement entered into by the parties. The lease agreement is what governed the relationship by the parties. I am alive to the principle that parties are bound by the contents of the documents they signed.

In the case of ***Holmes Limited vs Buildwell Construction Company Limited (1973) ZR page 97***, Bruce Lyle J, observed at page 101 that:

*"the parties have embodied the terms of the contract in a written document, extrinsic evidence is not generally admissible to add to, vary, subtract from or contradict the terms of the written contract."*

For ease of reference the relevant portion of the tenancy agreement is reproduced hereunder:

*'TENANCY AGREEMENT*

*I Amon Luswili, of NRC No. 113640/31/1, do hereby allow Mr. Mohamed Abdi to start making blocks for the period of three (3) years at my Farm number.....(Renting).*

*This contract will run on the following conditions:*

- 1. Charges per month will be K700, 000.00 (now K700.00);*
- 2. To start with, the rentals will be paid for five months, thereafter, in three months period;*
- 3. The water bill will be paid by the landlord;*
- 4. Electricity will be shared between the Tenant and the Landlord; the landlord will not interfere in the Tenant's business as long as the business is being conducted within the conditions agree upon;*
- 5. The contract will begin running when business starts; and*
- 6. Increment will be effected annually by 50%."*

I have examined the tenancy agreement, it is clear it is for a period of 3 years, however it is devoid of the date it was signed or when exactly the contract would commence. Clause 6 simply reads: *"The contract will begin running when business starts."*

The Plaintiff is contending that the commencement date was after he would have finished his preparatory works on the premises, that is, upon completion of construction of a slab and offices. The Defendant on the other hand contends that the tenancy commenced in August, upon down-payment towards the rentals. The view I take is there was no *consensus ad idem* on the commencement date.

The Plaintiff and the Defendant gave rather confusing testimony regarding the commencement of the tenancy. I say so because the Plaintiff in his examination in chief stated that the tenancy was for 3 years and he had paid rentals for 7 - 8 months before he was chased in December, 2012.

On cross-examination he admitted that there was no date when the tenancy agreement was made but he had made a down payment of K800.00 in August, 2012.

Taking into account all the circumstances of the case and in particular the contracting parties before me, it is clear they operated on the poorly drafted contract.

The question that arises is whether or not the document before me purporting to be a lease agreement is a valid agreement.

I recall the case of ***William Jacks & Company (Zambia) Limited vs O'Connor (in his capacity as Registrar of Lands & Deeds) and Construction & Investment Holdings Ltd (1967) Z.R. 141*** where the Court of Appeal articulated the five essential items for a valid lease agreement, namely: (i) parties; (ii) property, (iii) length of term; (iv) rent and (v) commencement date of term. Doyle, A.G, C.J in delivering the Judgment of the Court held:

*“An alleged agreement for lease which contains no commencement date is not, in fact, an agreement for lease; nor does it resemble one sufficiently to be accepted as purporting to be an agreement for lease.”*

**Doyle A.G., C.J.** went further and cited the case of ***Harvey vs Pratt (1965) 2 ALL ER. 786; (1965) 1 W.L.R. 1025***, where the Court of Appeal in England considered the requirements of a valid agreement for lease and it was decided that a certain agreement was invalid as an agreement for lease as it did not contain this date.

In the Harvey case, Lord Denning expressed himself thus:

*“it has been settled law for all my time that, in order to have a valid agreement for a lease, it is essential that it should appear, either in*



*express terms or by reference to some writings which would make it certain, or by reasonable inference from the language used, on what day the term is to commence.”*

*“It is settled beyond question that, in order for there to be a valid agreement for a lease, the essentials are that there shall be determined not only the parties, the property, the length of the term, and the rent, but also the date of its commencement. This is an agreement for a lease to start at some future time. The time has never been specified or agreed. There was, therefore, no concluded contract.”*

Turning to the case *in casu* it is a fact that it has no commencement date. In applying the case of **William Jacks & Co vs O'Connor** (*supra*) it is clear that one of the essential elements is lacking which is the date of commencement of the proposed lease and description of the property farm number left blank. I find as a fact that the document before me was not a valid lease agreement.

One might ask then what the document was. What remains to be decided is whether or not it purports to be an agreement for a lease. The document I found was just a mere agreement by the parties to govern their relationship albeit with the elements missing for to qualify as a valid agreement. I shall therefore refer to it as simply ‘an agreement.’

I find as a fact that the commencement date of the contract was in August, 2012 when the Plaintiff paid the sum of K800.00 towards the rentals. Some subsequent payments were made from February, to October 2012 (see pages 2,3,4,5 and 6 of the Plaintiff’s bundle). In the meantime the Plaintiff was constructing offices, a slab for the blocks and a septic tank. Due to financial constraints he did not complete the works and also failed to heed the demand to pay for arrears of rent.

Having found that the agreement commenced in August, and finding as a fact that the Plaintiff did in fact fail to pay the rental arrears when they became due, the next question that falls to be determined is whether or not the Defendant was entitled to terminate the 'agreement' in the manner he did owing to the failure by the Plaintiff to pay rent on time?

The 'agreement' itself as earlier as earlier explained has several salient missing and among them is a termination clause or notice clause. That being the case I will have to have recourse as to the common law which requires that reasonable notice be given. What is reasonable can be deduced from the facts in each particular case. In this case this agreement was for a period of 3 years and the Plaintiff did make some developments on the property and it is my considered view that a period of notice of not less than 6 months would constitute reasonable notice.

In light of the foregoing I find that notwithstanding that the Plaintiff breached the terms of the 'agreement' by failure to pay rent the Defendant could not simply be given one week notice of termination or any notice less than 6 months for that matter. The Defendant should have exercised other avenues in order to assert his claim.

It is for this reason that I find that the Plaintiff has proved his case on a balance of probability against the Defendant. He has suffered loss and damages.

I find in favour of the Plaintiff for the value of improvements made on the Defendant's property.

However the value of these improvements is to be assessed by the Deputy Registrar

Regarding the claim for damages for loss of profits from the business this has not been substantiated and I am unable to grant it.

The counterclaim by the Defendants for 50% increment of rent is not tenable as the lease was prematurely terminated before a year had elapsed.

Costs are for the Plaintiff. To be taxed in default of agreement.

Leave to appeal granted.

***Dated this 14<sup>th</sup> day of April, 2015***

***Betty Majula - Mung'omba***  
**HIGH COURT JUDGE**