

**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**2015/HP/0566**

IN THE MATTER OF: SUBDIVISION 'B' OF FARM No. 401a LUSAKA  
IN THE MATTER OF: ORDER 113 OF THE RULES OF THE SUPREME COURT (WHITE  
BOOK) 1999 EDITION  
IN THE MATTER OF: ORDER VI RULE 2 OF HIGH COURT RULES CAP 27 LAWS OF  
ZAMBIA

**BETWEEN**

**ALASIA BUILDING CONSTRUCTION LIMITED**

**PLAINTIFF**

AND

**TAP ZAMBIA LIMITED  
OSCAR CHINYANTA & 47 OTHERS**

**1<sup>ST</sup> DEFENDANT  
2<sup>ND</sup> DEFENDANT**

Before the Hon. Mr. Justice C. Kajimanga in Chambers this 14<sup>th</sup> day of August 2015

**FOR THE PLAINTIFF:** Ms N. Sikombe, Messrs AMC Legal Practitioners  
**FOR THE 1<sup>ST</sup> DEFENDANT:** N/A  
**FOR THE 2<sup>ND</sup> DEFENDANT:** Mr. M. Mwandenga, Messrs M. Z. Mwandenga &  
Company

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**JUDGMENT**

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The Plaintiff issued an originating summons pursuant to Order 113 of the Rules of the Supreme Court (White Book) 1999 Edition and Order VI Rule 2 of the High Court Rules, Cap 27 of the Laws of Zambia seeking the following relief:

1. An Order and a declaration that the Plaintiff is and was at all material times the absolute legal owner and registered proprietor of the property situated at subdivision 'B' of Stand 401a Lusaka in the Republic of Zambia under and by virtue



of the Certificate of Title No. 282210 duly issued to the Plaintiff by the relevant authority in respect of the said piece of land.

2. An Order for forthwith delivery of vacant possession of the said property and premises to the Plaintiff by the Defendant and 47 others (Defendants).
3. An Order that the 2<sup>nd</sup> Defendants do forthwith vacate and yield vacant possession of the Plaintiff's said property and premises or portion thereof forthwith and in default thereof to be removed and ejected by the Plaintiff.
4. Further or other relief that the Court may deem fit and appropriate under the circumstances.

The application is supported by an affidavit sworn by one, Pricilla Chisulo, the Company Secretary of the Plaintiff company. The affidavit discloses that the Plaintiff bought Subdivision 'B' of farm No. 401a in 2013 from Tap Zambia Limited, the 1<sup>st</sup> Defendant herein (see exhibit 'PC1') and that the Plaintiff has already obtained the Certificate of Title for the said property (see exhibit 'PC2').

The affidavit further discloses that the Defendants who are the former employees and occupants of the 1<sup>st</sup> Defendant have refused to vacate the said property, alleging that they should have been accorded the first right of refusal to purchase the said property. The 1<sup>st</sup> Defendant had dispelled the Defendants' assertions as the lease agreement which was made between the 1<sup>st</sup> Defendant and Defendants did not give the 2<sup>nd</sup> Defendant the first right of refusal (see exhibit 'PC4').

The affidavit also discloses that the 1<sup>st</sup> Defendant served the Defendants with the notice of termination of tenancy. The 1<sup>st</sup> Defendant notified the Defendants on the need to vacate the said property and render vacant possession to the Plaintiff on 21<sup>st</sup> May, 2014 and 1<sup>st</sup> July, 2014, respectively (see exhibits 'PC5'). The Plaintiff has suffered loss and damage as a result of the Defendants' said trespass, encroachment and illegal occupation thereby interfering with the Plaintiff's quiet possession, development and use of the said property.



The 1<sup>st</sup> Defendant's affidavit in opposition sworn by one Martin Pikira, the Chief Executive Officer discloses that a contract of sale was entered into between the Plaintiff and the 1<sup>st</sup> Defendant for the sale of the land in issue (see exhibit 'MP1'). There was a tenancy agreement that existed between the 1<sup>st</sup> Defendant and Defendants prior to the sale of the said property which tenancy agreement was terminated at the instance of the 1<sup>st</sup> Defendant following the sale of the said property. The Defendants were given ample time to vacate the said property (see exhibits 'MP3', 'MP4' and 'MP5').

The Defendants opposed the Plaintiff's application in an affidavit in opposition sworn by one Jacob Njobvu, a representative of the tenants of the 1<sup>st</sup> Defendant. His affidavit discloses that the Defendants are divided into three groups which comprise of employees and ex-employees of the 1<sup>st</sup> Defendant as well as tenants of the 1<sup>st</sup> Defendant. The tenants of the 1<sup>st</sup> Defendant occupied their respective residential houses under one year lease agreements which were being renewed by the 1<sup>st</sup> Defendant yearly. Prior to the year 2010, the lease agreements contained a clause which gave the tenants a right of first refusal to buy the properties in the event that the 1<sup>st</sup> Defendant decided to sale the property (see exhibit 'JN3'). The 1<sup>st</sup> Defendant removed the clause that gave the tenants a right of first refusal in the lease agreements that were made in 2010 and the subsequent years.

The affidavit also discloses that the tenants believe they have accrued rights to buy the houses that they are occupying. The tenants continued paying their rent to the 1<sup>st</sup> Defendant as and when the same fell due until January 2014, when the 1<sup>st</sup> Defendant refused to accept the said rentals.

The affidavit further discloses that the Plaintiff has not served the tenants with notices terminating their tenancies in the accordance with the Rent Act. The tenants are not squatters at all and that these proceedings ought to have been brought under the Rent Act.



The Defendants filed another affidavit in opposition to the Plaintiff's application sworn by one Nsemukila Chanda, a representative of the employees and ex-employees of the 1<sup>st</sup> Defendant. His affidavit discloses that the employees and ex-employees of the 1<sup>st</sup> Defendant occupied their various residential houses under one year lease agreements which were renewed by the 1<sup>st</sup> Defendant yearly. The 1<sup>st</sup> Defendant informed its employees about the workers empowerment scheme through a Tap Bulletin Volume 2, issue 2 of July 2001 at page 7, in which it was stated that the properties would be sold to employees who had served the company continuously for at least 3 years, had a clear record of employment, could show proof of savings and had not over borrowed (see exhibit "NC2'). The 1<sup>st</sup> Defendant has not reversed its workers empowerment policy nor has the 1<sup>st</sup> Defendant communicated the reversal of the said policy to its employees and ex-employees. Prior to 2010, the lease agreements contained a clause that gave the employees a right of first refusal to buy the properties in the event that the 1<sup>st</sup> Defendant decided to sell (see exhibit 'NC3').

The affidavit also discloses that the employees continued paying their rent as and when they fell due through payroll deductions even after the purported sale of the property to the Plaintiff. The 1<sup>st</sup> Defendant made the last rental deductions in June, 2014 for managerial staff and in July, 2014 for other staff (see exhibit "NC4(a) – NC4(o)").

The affidavit further discloses that the ex-employees of the 1<sup>st</sup> Defendant continued paying rent to the 1<sup>st</sup> Defendant until January, 2014 when the 1<sup>st</sup> Defendant started refusing to accept the said rentals. The employees and ex-employees of the 1<sup>st</sup> Defendant are protected tenants under the Rent Act, Cap 206 of the Laws of Zambia and that they are not squatters. The said employees and ex-employees were not in breach of their leased agreements and that the Plaintiff has not served the Defendants with notices terminating their tenancies.

On behalf of the Plaintiff, Ms. Sikombe submitted that there was a contract of sale between the Plaintiff and the 1<sup>st</sup> Defendant, and that before the purchase of the said



property, due diligence was done on the part of the Plaintiff at Ministry of Lands to determine if there were any encumbrances on the said property. She further submitted that a Certificate of Title had already been issued to the Plaintiff.

It was her contention that the Defendants were illegally occupying the property in question, as the tenancy agreement that existed between the 1<sup>st</sup> Defendant and Defendants was terminated and that there was no tenancy agreement that existed between the Plaintiff and the Defendants. It was her prayer that the Defendants should yield vacant possession of the said property.

On behalf of the Defendants Mr. Mwandenga, submitted that, it was clear from the Plaintiff's application that the Plaintiff's object was to assert its right to ownership of Sub B of Stand 401A Lusaka. He submitted that this assertion cannot be done under Order 113 of the Rules of the Supreme Court which provides for the mechanism to be used for summary possession of the land and that the issue of ownership of the land is not in contention. He submitted that the Rent Act should apply to the Defendants, as the employees and ex-employees of the 1<sup>st</sup> Defendant did not occupy their houses as an incident of their employment rather they were tenants of the 1<sup>st</sup> Defendant in their own right (see exhibit "NC3" and "NC4(a)-NC4(o)"). It was his prayer that this application be dismissed with costs as it should have been made under the Rent Act as it applies to the said Defendant.

In reply, Ms. Sikombe submitted that the Defendants did not have a right of first refusal as the clause that contained that right was deleted in the subsequent tenancy agreements. She further submitted that no consideration was paid to the Plaintiff by the Defendants and that the Plaintiff was not privy to the fact that consideration was paid to the 1<sup>st</sup> Defendant.



I have considered the affidavit evidence, skeleton arguments, authorities cited and the oral submissions of both parties. Order 113 Rule 1 of the White Book (1999) pursuant to which this application is made provides that:

***"Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order."***

The editorial introduction provided by the learned authors of the White Book is quite illuminating: see 113/0/2 (1999 White Book). Apart from tracing the genesis of the Order, the introduction also contains the following extract:

***"The circumstances in which the procedure can be used are restricted to cases where the land is occupied by persons who have entered into or remain in possession of the land without the licence or consent of the person claiming possession..."***

It has been contended by the Defendants that this application should be dismissed with costs because it ought to have been commenced under the Rent Act and not Order 113, rule 1 of the White Book as the Defendants were tenants of the 1<sup>st</sup> Defendant. I opine that this argument cannot stand. The reason is that as between the Plaintiff and the Defendants the evidence on the file shows that there has never been a landlord and tenant relationship. Absent such a relationship, I am satisfied that there is no impropriety on the part of the Plaintiff in commencing this action under Order 113, rule 1 of the White Book.

The opposition to this application by the Defendants comprising of the tenants of the 1<sup>st</sup> Defendant is principally anchored on the argument that they have accrued rights to buy



the houses they are occupying and that the Plaintiff has not served them with the notices terminating their tenancies. As regards the other category of Defendants comprising of the employees and ex – employees of the 1<sup>st</sup> Defendant the kernel of their contention is that they are protected tenants under the Rent Act, Cap 206 of the Laws of Zambia and that they are not squatters.

The evidence on the file shows that some time in 2013, the 1<sup>st</sup> Defendant entered into a contract of sale relating to S/D B of Farm 401A Lusaka for a consideration of K 15, 000, 000-00. Subsequent to this sale the Plaintiff was issued with a certificate of title number 282210 which evidences its legal ownership of the said property.

According to the evidence of the 1<sup>st</sup> Defendant, the Defendants' tenancy agreements were terminated to facilitate the sale of the property to the plaintiff and the Defendants were given ample time to vacate the houses they were occupying on the said property. This is confirmed by exhibits "MP3" to "MP5" in the 1<sup>st</sup> Defendant's affidavit. Exhibit "MP3", for example, confirms that the Defendants were given three (3) months notice to vacate the houses while exhibit "MP5" indicates that the Defendants were given a further six (6) months notice to vacate. It therefore follows that the Defendants' contention that they were not given notices terminating their tenancies by the Plaintiff is untenable.

Also critical and worth noting is the Defendants' own evidence that in 2010 and subsequent years the 1<sup>st</sup> Defendant removed the clause from the tenancy agreements giving them the right of first refusal to purchase the houses they were occupying. It is plain from this evidence that the Defendants' assertion that they have accrued rights to buy the houses they are occupying is equally untenable. Furthermore, I am also of the considered opinion that the empowerment scheme relied upon by the Defendants ceased to have effect when the 1<sup>st</sup> Defendant removed the clause from the tenancy agreements giving them the first right of refusal. If I may add, the view I take is that



the said scheme was not a contract capable of enforcement but a mere policy which, as I have already indicated, was overtaken by a subsequent event.

For the foregoing reasons, I am driven to the conclusion that the Plaintiff's application has merit and it must succeed. I accordingly grant the Orders sought by the Plaintiff in its originating summons. The Defendants are given one month notice from the date of this judgment to vacate the Plaintiff's property. Costs shall follow the event and will be taxed in default of agreement.

**DELIVERED THIS 14<sup>TH</sup> DAY OF AUGUST, 2015**



**C. KAJIMANGA**

**JUDGE**