IN THE HIGH COURT FOR ZAMBIA   2003/HP/0356
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

PUMULO MUYANGWA — **PLAINTIFF**

AND

ISAAC NGOMA	**1ST DEFENDANT**
BERNGO ENTERPRISES LIMITED	**2ND DEFENDANT**
ATTORNEY GENERAL	**3RD DEFENDANT**

CORAM: **HONORABLE JUSTICE MR. MWILA CHITABO, SC**

For the Plaintiff: **Mrs. M. Muyambango of Messrs Dove Chambers**

For the Defendant: **N/A**

J U D G M E N T

LEGISLATION REFERRED TO:

(i) Landlord Tenant (Business Premises) Act Chapter 193

CASES REFERRED TO:

(i) Hina Furnishing Lusaka ltd v Mwaiseni Properties Ltd (1983) ZR 40

(ii) *Mutwale v Professional Services Ltd (1984) ZR 72*
(iii) *Jasuber R Naik and Naik Motors v Agnes Chama (1985) ZR 227 (SC)*
(iv) *Masauso v Avondale Housing Project Ltd (1982) ZR 172*

The genesis of this case as much as it can be constructed from the record is that the Plaintiff launched proceedings by way of Writ of Summons and Statement of Claim on 15th April 2003 seeking for the following reliefs:-

(a)An order to deliver property known as 377a/26/c Ibex hill, Lusaka hereinafter called the property.

(b)A declaration that the liability for electricity and water areas incurred on the said premises from 1st June, 1998 until the property is surrendered to the Plaintiff does not lie with the Plaintiff.

(c) Damages for pecuniary compensation amounting to K83, 836,410.05 net of withholding tax and interest.

(d)Legal costs

In so far as I can establish from the statement of claim, the Plaintiff claims that on 19th May, 1998 the Plaintiff entered into a Tenancy with the 2nd Defendant which is a company of limited liability through the 1st Defendant who was a Director of the 2nd Defendant.

The term of the lease was to be for 5 years from the 19th May, 1998. The Tenancy contained a termination clause.

The Plaintiff averred that the Defendants did not deliver possession of the said property upon demand as reflected in a judgment of Mr. Justice Kakusa. He stated that under clause 2K of the lease the Defendants were to deliver and yield vacant possession in a tenantable state in good state.

But contrary to that clause, the Defendants surrendered the property in a dilapidated state. A report on state of property was produced from the Zambia National Building Society Property and Estates Department.

He averred that contrary to clause 2K of the lease the 2nd Defendant did not pay the rent due for period covering 1st June, 1998 o 9th December, 1999.

He further averred that contrary to clause 2b of the lease the 2nd Defendant did not pay for electricity and water consumed on the said property since June, 1998 when the 1st Defendant was in occupation of the property.

He further averred that contrary to clause 2 (i) of the lease the 2nd Defendant parted with possession of the property without written consent of the Plaintiff. He averred that by reason of the said breaches or negligence the Plaintiff suffered loss and damage and claimed damages amounting to K83, 836,410.

Particulars

(i)	Rent	K14, 632,250.05
(ii)	Loss of meisne profits	K33, 600,000.00
(iii)	Cost of dilapidation	K30, 804,160.10
(iv)	Loss of rent during repairs	K 4, 800,000.00
	Total	**K83, 836,410.00**

On 29th April, 2003, the Defendants filed in a defence and counterclaim. The Defendants admitted entering into a tenancy (agreement) with the Plaintiff on 19th May, 1998 for a period of three years at a rate of K800,000.00 per month not of withholding tax, for residential and business purposes.

They however contended that the Plaintiff cannot enforce the provision of tenancy because it lacks presidential consent to assign or sublet pursuant to the Lands Act, Chapter 184 of the Laws of Zambia.

The Defendants deny being in breach of the tenancy and averred that it was the Plaintiff who while the Defendant was attending a close relatives funeral at his mother's residence on 18th February, 1999 without reasonable cause or justification evicted the Defendant from the property and threw out the 1st Defendants household goods outside resulting in loss and damage to the said property.

The Defendant averred that the Plaintiff in disregard of the provisions of the tenancy agreement took possession of the property as explained above.

It was averred that upon evicting the Defendant, the Plaintiff did not take any steps to secure his property from waste and theft. A concerned neighbor Mrs. Grace Chibwa wrote to the Defendant that the house had become a haven for thieves and reported the matter to Zambia Police who put a contingent of officers to live and guard the house from waste and vandalism.

Following his eviction, the 1st Defendant business virtually came to a standstill as clientele could not trace him. His business equipment to be kept at the Russian Business Centre. However this did not prevent damage to Defendant's property due to rains despite reasonable care and diligence to mitigate damages.

It was averred that PAXEM (PTY) Limited of the Republic of South Africa, the suppliers of equipment to the Defendant prompted them to sue the Defendant in February, 2000 under cause No. 2000/SSP/43 and obtained a judgment on 4th April, 2001 in the sum of ZAR87, 901.27 and ZAR 2, 439.00 legal fees.

The Defendant denied being in breach of the tenancy agreement. He stated that the Plaintiff owes the Defendant the sum of K7, 217,000.00 prepaid rent in advance, expenses on renovations, damages for wrongful eviction, damages done to household and

personal goods, embarrassment, inconvenience and loss of business.

He stated that attempts to take possession by Messrs LC and Company (Advocates) on 18th March, 2003 failed. The Defendant therefore counterclaimed for the following:

(i) *Refund for rent advance in the sum of K7, 217,000.00*
(ii) *Renovation expenses in the sum of K2, 400.00*
(iii) *Refund of ZAR 87, 901.27 and ZAR 2, 439.00 judgment debt and solicitors fees paid to Paxem (PTY) Limited*
(iv) *Damages for wrongful eviction*
(v) *Damages for loss of household personal chattels*
(vi) *Damages for inconvenience, humiliation, harassment and victimization*
(vii) *Damages for loss of amenities as a result of wrongful eviction*
(viii) *Costs and incidentals connected therewith.*

In his reply and defence to counterclaim the Plaintiff on 5th May, 2003 stated that the tenancy period was for 5 years and not 3 years. He denied that the tenancy was restricted for residential purposes and not business. He stated that the judgment of Judge Kakusa dated 4th February, 2000 under Cause No. 1999/HP/1899 does not sustain the Defendant's contention that the Plaintiff cannot enforce the provisions of the Tenancy Agreement. He further stated the Judgment alluded is inconsistent with the Defendants counterclaims.

In respect to allegations of expenses of renovations undertaken by the Defendant, the Plaintiff stated that it was an express condition of the contract (tenancy) that such could only be effected upon prior consent or agreement by the Plaintiff.

In any event, he had no knowledge of any such renovations in respect of the present claims the Plaintiff stated that there was an accumulation of rent arrears instead of overpayment.

The said reply and defence was set aside for pleading evidence and law by the Learned Deputy Registrar. On appeal to a judge at chambers the order of the Learned Deputy Registrar was upheld but the Plaintiff was granted liberty to deliver another reply and defence to counterclaim.

He stated that the parties entered into an agreement for renting of a residential property pursuant to clause 2(g) of agreement dated 19th May, 1998. He pleaded the defence of Estoppel per Rem Judicatam in that there is a Ruling of court dated 4th February, 2000 at page 4 of cause No. 1999/HP/1889. He averred that the Defendant cannot be heard to challenge the legality of the contract.

He stated that the Defendant abandoned the property on his own. He counterclaimed for

(a)An order for delivery of the house to the Plaintiff

(b)The Defendant is liable for the water and electricity bills incurred since 1st June, 1998.

(c) *Compensation for loss in the sum of K83,836,410.05 net of withholding tax plus interest.*

(d) *Further damages from 28th February, 2013 to date of judgment and meisne profits from 1st June, 2013 to date of judgment.*

(e) *Costs*

On 3rd November, 2006 the Learned Deputy Registrar granted a third party notice to the Town Clerk, Lusaka claiming property tax relief with costs in the cause.

On 19th April, 2006 the Learned Deputy Registrar granted leave to the Plaintiff to add the attorney General as a 3rd Defendant to the proceedings. On 10th October, 2006 Mr. Justice Kakusa granted an order for the Plaintiff to take immediate possession of house No. 377/a/26c Ibex Hill, Lusaka.

On 11th May, 2006 Orders for Directions were granted by the court for redelivery of statement of claim and defence. The Plaintiff redelivered his statement of claim and added an alternative of joint liability with 3rd Defendant for concealing fraudulent and reckless negligence causing losses and damages aggregating K83, 836,410.05.

The 1st and 2nd Defendants refiled in a defence and counterclaim on 21st June, 2006. On 25th July, 2006 the Learned Deputy Registrar granted leave to file third party notice to ZESCO Ltd and Managing Director Lusaka Water and Sewerage Company Limited claiming indemnity against payment of electricity and water charges.

On 3rd October, 2006 the 3rd Defendant (Attorney General) entered defence. They averred that officers were put in the house to guard and prevent the house from further waste, vandalism following a complaint made by the 1st Defendant that the house was being vandalized.

They further averred that the officers were merely performing their duties in accordance with the law. The 3rd Defendant denied that its agents neither acted fraudulently nor negligently and they denied any liability.

Trial commenced on 13th May, 2009. The first Plaintiff's witness was Mr. Pumulo Muyangwa, the Plaintiff himself.

PW1 – He was 70 years and resided at Farm No. 406/c Chilanga area in Lusaka; a retired civil servant as Commissioner for Country and Town Planning in the Ministry of Local Government. He relied on his statement of claim reply and defence to counterclaim filed into court.

He stated that he sued for possession and charges of electricity and water to be paid by whosoever was in occupation of the house. He would also like to recover rent in accordance with the figure in the contract. He would also like to recover damages as quantified by the National Building Society report.

He testified that the parties, the 2nd Defendant and the Plaintiff signed a Tenancy on 19th May, 1988 in respect of House number 377a/26/c, Mosi road, Ibex Hill Lusaka and Defendant took

occupation on 1st June, 1998. Payment of rent was rescheduled after negotiations.

The matter was adjourned to 18th May, 2009 for continued hearing of Plaintiffs testimony. On the return date, Plaintiff informed the court that he was not feeling well. He was partially deaf and blind and would rely on evidence of PW2 and any other witnesses that might be called. By consent of the parties PW1 was accordingly stood down.

PW2 was Liswaniso Muyangwa 33 years in residence at 460A/C, Chibongwe in Chilanga. He is a farmer. He testified they owned a house in Ibex Hill Mosi Road, Lusaka 377A/26/c. It was put on rent. Mr. Isaac Ngoma of Bengo Enterprises Limited expressed interest to rent it, for residential purposes only.

A tenancy was subsequently signed between his father and the Company on 5th June, 1998. The company took possession on 1st June, 1998. (See Tenancy at pages 14 – 21 of Defendants Bundles of Documents) The rent was K800,000.00 per month for the first 3 years and the subsequent 2 years rent was to be negotiated at the market prevailing price. Some money was paid.

Problems commenced in the 2nd year. He referred to a schedule of net payments at pages 24 and 25 in the Plaintiffs 2nd Bundle of Documents filed on 28th January, 2009. It was argued by the parties that rent due would be paid in arrears with interest as per document 35 in the Defendant's bundle of documents.

In the 2nd year a balance of K7, 783.00 was outstanding. In the 3rd year a sum of k9, 600,000 was outstanding. The current rent for the type of house under rent was K2, 000, 000 and therefore the rent due was K48,000,000. The contract was to end on 31st May, 2003 as per page 6 of Tenancy. There were problems contract came to an end, tenant did not want to hand in the keys.

The prayer was for

(1)Rent arrears K9, 600=
(2)Rent for last 2 years K48, 000,000
(3)Damages to house as per bill of ZNBS bill of quantity K31, 739,570

In summary the evidence of PW2 was hearsay. He admitted that it was his father PW1 who was dealing with the tenancy matter. He didn't know when the police moved into the property. He was not denied access to inspect the house. He did not object or complain of the police presence on the property because his father PW1 was the one who was dealing with the matter.

He stated that they took possession on 10th October, 2006. He stated that the Tenant was to pay for electricity and water bills during occupancy. The electricity bill stood at K2, 931,469.49 as at 26th August, 2005. The water bill was unascertained. He confirmed that the lease was not registered.

He stated that he did not know that (PW1) his father had evicted the Defendant; see letter dated 16th March, 1999 from LC and Company

the Advocates for Berango Enterprises Ltd the 2nd Defendant in which they were claiming a refund of K7, 200, 000.

The response was on 10th September, 1999 saying 3 months notice terminating lease. He did not know the date 2nd Defendant vacated the house. He did not know what happened to the house in 2003. He did not know that the house was burnt at one point in time on 3rd May, 2001 (see pages 3 -4 Defendants bundle) letter dated 4th May 2001.

He heard from PW1 on 26th September, 2006 that the property was occupied by police. Police should be liable for damages. The Plaintiff closed his case.

DW1 was Isaac Ngoma (the 1st Defendant) 37 years of age residing at 4B (110 Musonda Ngosa Road Villa Elizabeth) a business consultant in economics and Business Development.

In May, 1998 a company Berngo Enterprises now 2nd Defendant entered into a contract in respect of House 26c Mosi Road Ibex Hill, Lusaka. He is shareholder in that company. The tenancy which was prepared by the Plaintiff was signed. The house was in a dilapidated state. The rent was K800, 000 per month from May, 1998 for 3 years.

In 1999 the Plaintiff claimed that they were not good tenants and besides there was another prospective tenant who was ready to pay more rent and in any event he wanted to sell the property. By

February, 1919, they had paid K11,417.00 in addition to the K3,000,000.00 on repair costs, totaling K14, 417,000.00.

In February, 1999 he had a funeral in Helen Kaunda of a close friend. Whilst he was at the funeral he received information that the Plaintiff was removing items the house to evict him. He gave them one day to remove all their items.

The goods were removed and taken to a warehouse along freedom way at the Russian Centre. They cleared the Plaintiffs house the following day and locked the place. They left the keys with the gardener Mr. Nyendwa (since deceased) to wait for the landlord to collect the keys.

The Plaintiff 3 days later went to the Russian Centre and pleaded with the 2nd Defendant that they return to the house and was sorry. I declined keys were surrendered to the together with a statement of account showing overpayment to 1st Defendant and 2nd Defendant. At that point the Plaintiff became hostile and abusive and threw the keys of the house back.

He said he had a tenant and he would them back the money. He told Plaintiff he had nothing to do with the house. He later presented case to his advocates LC and Company Mr. Lannet Chiti who wrote to the Plaintiff on 20th September, 1999 advising him that the Plaintiff had evicted the 1st Defendant on 20th September, 1999. The letter and keys were delivered to Plaintiff in March or April 1999 at his far in Shimabala area. Plaintiff was hostile but he

got the keys and the letter. Defendant was with Uncle Mr. Lameck Ngoma at that time of delivery.

The keys were left on the reed mat in the presence of the Plaintiffs wife. Subsequently his advocates started claiming for the sum of K7, 214, 000 overpayment following his eviction. The caretaker (Mr. Nyendwa) was subsequently removed from the Plaintiff with the full knowledge of the Plaintiff and he had pledged that he would find someone to look after the house.

The 1st Defendant subsequently left for Namibia.

A neighbor Mrs. Chibwa wrote expressing concern on the lack of security at the property which had been turned into a den of thieves. I took the letter to woodlands police subsequently and gave them physical address of the Plaintiff so that they could deliver the letter to Plaintiff from Mrs. Chibwa. I later visited the property and found paramilitary guarding the property.

He was surprised to receive summons in 2003 from the Plaintiff claiming that the 1st Defendant was still staying on the property. He was claiming for the K7, 214,000 advance on rentals, repairs undertaken K2, 400,000 and 87, 000rand and loss of business. He further counterclaimed for wrongful eviction and costs.

He denied occasioning damages to property as tabulated in document No.4. It had been authored long after he had left property. Call out had been issued by police to invite Plaintiff to go

and inspect property (house) which was being vandalized by thieves.

Cross examined by 3rd Defendants counsel he stated that he had gone to Namibia. Upon his return the house was visited and it was true. Gate was broken and frill gate broken. Mon was taking care of the house then. I lent from police that the house had been burnt and neighbors called fire brigade.

Cross examined by Plaintiff and DW1, he confirmed that tenancy was signed and it was for 5 years. The Respondent in of 2013, 25th February was done 4 years after he had vacated property.

DW2 was Mr. Francis Hamakoma aged 39 years – a businessman in printing of plot 451, Kabwata site and service. He narrated that in February, 1998 the 1st Defendant asked him to look for a house to rent.

He found the property subject to these proceedings which was occupied by a caretaker Mr. Mike Liswaniso, the nephew to the Plaintiff. The house required repairs; it took 2 months to undertake necessary repairs.

They moved into house in June 1998. In February, 1999 the Plaintiff came to demand for money from Mr. Isaac Ngoma. Plaintiff removed items from house in our absence. We took things to Russian Centre.

After a day, Plaintiff went to Russian Centre requesting that Mr. Ngoma goes back to the house. He refused. This upset Mr.

Muyangwa who threw the keys back at them. Later in March, they took keys to his farm. He was very upset and chased them from his farm, but they left the keys on the mat.

They next heard from the Plaintiff in September, 1999 vide letter at page 7.

The notice was irrelevant as they had already been evicted. They left a guard there and the Plaintiff should know when the guard left because he was informed about removal of guard.

Cross examined by Plaintiff **DW2** stated that Plaintiff wanted more money for subsequent year, when he had been paid rent upfront. He was there when Mr. Ngoma took the keys to Mr. Muyangwa at his farm. He was the one driving and he heard everything that transpired because he was near.

The repairs cost up to K3million; this was recovered. Mu brother Kakusa J, subsequently surrendered the file to the judge in charge for transfer of the case to another judge due to heavy workload of election petitions and his pending retirement.

The matter was subsequently handled by my brother Dr. Matibini, J, SC. The parties agreed to render written submissions and the court to render a judgment on the basis of the material before it. Before a judgment could be done – the judge resigned to take up the seat of speaker of National Assembly.

The Plaintiff and 1st and 2nd Defendants filed in written submissions. It was then that I was assigned to take up this matter.

Ordinarily I should have heard the matter de novo. But I was informed that the Plaintiff was ill and was having memory lapses. It was the agreed position that I had to render a judgment on the basis of the material before me.

I therefore admit that this was a difficult challenge I faced where I was called upon to render a judgment not having heard the and observed the witnesses give their testimony. I had no opportunity to assess the credibility of the witnesses and relied entirely on the notes of my brother Kakusa, J. who heard the matter in evaluating this evidence.

The Plaintiff's in a nutshell submitted that under clause 2(e) of the tenancy, the Plaintiff as a landlord had a right to inspect the premises. It was submitted that the tenant refused the landlord to inspect the premises and the Plaintiff was obliged to take an action in cause no. 1999/HP/1889 in 1999 to enforce his right to inspect the premises

(ii) That Landlord (Plaintiff) only succeeded to inspect the premises following the order of the court dated 4th February, 2000.

(iii) It was further submitted that the tenant was in breach of clause 2 (c) of the Tenancy and failed to keep the premises

in good tenable repair and condition (fair tear and wear and damage by fire not caused by fire nor any omission or default on the part of the tenant and damage by storm and tempest excepted) he prayed that the tenant must be made to make good any damage caused b their fault.

(iv) It was submitted that the Defendant was in breach of clause 2 (g) prohibited the use of the provisions only for purposes of a dwelling house. It was therefore argued that the Defendant could not be entitled to damages for loss of business. They cannot rely on their own wrong which would have the effect the wrongdoer benefiting on the wrongdoing.

He called in aid the case of ***HINA Furnishing Lusaka Ltd v Mwaiseni Properties Limited (1983) ZR 40 at page 41*** where it was held:

> *"The court will not grant the remedy in favor of a Tenant where Tenancy Agreement is subject to a condition precedent which has not been performed ..... or who is in breach of a term of the agreement..... for he who comes to equity must do so with clean hands".*

He finally submitted that the Plaintiff must succeed on all the claims in the statement of claim. Learned Counsel for the 1st and 2nd Defendants submitted that

(1)The Plaintiff cannot enforce the provisions of the Tenancy agreement for lack of presidential consent.

He relied on section 5 of the Lands Act cap 184 which provides that:-

Section 5 (1) *"A person shall not sell, transfer or assign any land without the consent of the president and shall accordingly apply for that consent before doing so".*

He called in aid the case of ***Mutwale v Professional Services Ltd 1984 ZR 72*** where the court considered the provisions of section 13 (1) of the Act which prohibited any person from letting premises without consent. The court held that because section 13 (1) prohibited any person from letting premises without consent the whole contract including the provision for payment of rent was unenforceable.

He brought the case of ***Naik Motors Ltd v Agnes Mutwale***[3] to the attention of the court where the Supreme Court held that

(i) The prohibition against letting premises without presidential consent applies primarily to the landlord. In the absence of any wrongdoing on the part of the tenant, and is therefore for the landlord to obtain consent and to suffer from any illegality arising from the failure to obtain consent.

A tenant who is not in default does not lose the protection of the Rent Act as a result of the landlord's failure to obtain presidential consent".

It was argued that on the basis of the ***Naik Motors v Agnes Chama3*** authority the Plaintiff has no right to claim for damages or arrears for water, electricity as well as for compensation for loss and damage or legal costs.

It was submitted that there was nothing on the part of the Tenant and therefore in the failure to obtain the necessary consent to rent and should therefore not be deprived of the statutory protection under the Rent Act as a result of the landlord's failure to obtain consent.

(i) *It was submitted that the Plaintiff without any reasonable cause evicted the Defendants from the premises when the 1st Defendant was away on 18th February, 1999 attending to a funeral. The Plaintiff threw all household and personal goods outside the premises resulting in damage and loss to the said property. He submitted that this was breach of section 5 (1) of the Landlord Tenant (Business Premises) act Chapter 193.*

(ii) *It was submitted that under section 13 of the Rent Act there is a specific procedure to be followed before a tenant can be properly evicted. Under section 13 (1) the Plaintiff must give and specify grounds set out under subparagraphs (a) to (l) to*

the Tenant. This was not done. This he did not do thus causing inconvenience to the defendants.

It was submitted that the landlord was under a liability to the tenant to afford quiet enjoyment. He referred to the case of ***Zimco Properties Ltd v Hickey Studios Ltd and Marriat and Scott (1988 – 1989) ZR 181 SC*** *where it was observed that:*
"This covenant extends, I think so as to protect the tenant in his possession and enjoyment of the demised premises from any invasion or those claiming through him".

(iii) Learned Counsel then made reference to section 27 of the Rent Act, Cap 206 which provides for criminal charges and penalties against the landlord who willfully subjects a tenant to any annoyance with the intention of inducing or compelling the tenant to vacate the property...... he submitted the Plaintiff breached the Tenants rights to quite possession.

(iv) It was submitted that the Defendants submitted and surrendered the premises in a tenantable and good condition, but the Plaintiff unreasonably refused to accept the keys from the tenant.

(v) It was submitted that the obligation to repair demised premises only extended to tenant, (Defendants) when they were in occupation in accordance with clause 2 (c) it was

argued that duty does not remain in perpetuity. In the present case the Tenant had been evicted. It was further submitted that following the eviction the Plaintiff failed to secure the premises and it became a haven of thieves that prompted a concerned neighbor Mrs. Mwape to write to the Defendant.

A report was made to Zambia Police who put a contingent of police officers to guard the house and protect it from waste and vandalism.

(vi) It was submitted that to mitigate damages business property was secured at the Russian Centre but that did not prevent the damage to the property which resulted in a claim under case number 2000/SSP/43 and an award of ZAR 87, 901.27 and ZAR 2, 439 legal fees. The Defendants were counterclaiming for those sums.

(vii) It was submitted further that an advance payment of K7, 217,000 was paid towards rentals before the Defendants were evicted and this amount was being counter claimed.

There were no submissions on the part of the 3rd Defendants.

I am indebted on the researchful industry of the advocates for the Plaintiff and the Advocates for the 1st and 2nd Defendants. As I pointed out earlier I admit to have faced difficulties in writing this

judgment to the inability of an opportunity to observe and hear the evidence of witnesses.

This judgment has been rendered on the clear agreement of the parties that the judgment be rendered on the basis of the material before me.

It will also be noted that PW1 the Plaintiff did not complete his evidence, he had opted that his son PW2 and his wife would give evidence. PW1 was not cross examined on account of ill health.

It is common cause and from the evidence on record I find the following facts:-

1. The Plaintiff and 1st and 2nd Defendants entered into a lease on lease from 1st June, 1998 to run to 31st may, 2003 (i.e 5 year period).
2. The Tenancy provided for termination by either party giving three months notice. (This clause appears in both Tenancy copies filed by the Plaintiff and 1st and 2nd Defendants respectively).
3. The lease related entirely to a dwelling house as per clause 2(g) of the Tenancy.
4. The rent was K800, 000 per month.
5. On 4th February, 2000 the court Mr. Tamula Kakusa, J. delivered a default Ruling ordering the 2nd Defendant and the occupier whoever he may be to permit the Plaintiff to inspect dwelling house No.377a/26/c Ibex Hill Lusaka on a day to be

agreed upon by the parties within 40 days of the order with costs in the cause.

The evidence of the Plaintiff as to when the Defendants vacated is scanty. He merely relied on his statement of claim and defence to counterclaim. Leaving only the evidence of PW2 his son who confessed that the transaction in respect of the tenancy was being done by his father PW1. His evidence was therefore largely hearsay, as PW2 relied on what PW1 told him.

Faced with such a situation, I therefore have to resort to the documents on the file.

1) ***When did the Plaintiffs yield vacant possession***

The submissions by the Plaintiff on this point are that the Plaintiff took possession following the order of the court dated 4th February, 2000. On the contrary, DW1 (the 1st Defendant) testified that he was evicted on 18th February, 1999 whilst he was away attending a funeral in Mtendere. He received report to the effect that the Landlord (PW1) was throwing the goods from the premises.

DW1 went to the premises and found the goods were thrown out. He was allowed a day in which to remove the items. He took the goods to the Russian Centre.

A couple of days later the Plaintiff wet not the Russian Centre, he was apologetic, he begged the 1st Defendant to go back to the

premises. The 1st Defendant declined where upon the Plaintiff became very hostile and threw the keys for the premises back to the 1st Defendant who had earlier handed, then back to the Plaintiff.

On 16th March, 1999 Messrs LC & Co. the Advocates for the 1st and 2nd Defendants had written to the Plaintiff (see letter at page 5 of the 1st and 2nd Defendants bundle of documents) advising that the Plaintiff had evicted their clients without giving the 3 months requisite notice and they were demanding for K7,200,000 which should be paid before handing over the keys.

The Plaintiff did not respond until 10th September, 1999. He alluded to the letter of 16th March, 1999, in which he purported to give 3 months notice to terminate tenancy with effect from 10th September, 1999.

It is worth noting that, the Plaintiff did not dispute that he had evicted the 1st Defendant and he did not comment on the 1st Defendants claim for K7, 200,000 in respect of the advance rent – having been in the premises for only 9 months.

In the circumstances, I find as a fact (FACT NUMBER 6) that the Plaintiff arbitrarily evicted the Defendants premises on 16th March, 1999 without giving the 1st and 2nd Defendants the requisite 3 months notice to terminate.

The purported notice to terminate issued given in the letter dated 16th March, 1999 was of no effect and an afterthought, having

arbitrarily evicted the 1st and 2nd Defendants from the demised premises.

2) ***The issue of the keys to the demised premises***

I accept the evidence of DW1and DW2 to the effect that the Plaintiff was handed the keys at the Russian Centre by the 1st Defendant but immediately threw them back at DW1 and DW2 when they refused to reoccupy the premises. This evidence was not challenged. The Plaintiff was from the time he evicted the 1st and 2nd Defendants constructively in occupation.

I also accept the evidence of DW1 and DW2 that at one time they went to the Plaintiffs farm and left the keys on a reed mat when the uncompromising Plaintiff refused to accept the same, in the presence of DW1's wife.

My brother Kakusa J, in his notes had observed that PW1 was defiant and could not be guided nor accept advice on what was necessary to prove his case. The Plaintiff (PW1) had intimated that he would call his wife as witness; he did not. It is for these reasons that I preferred the evidence of DW1 and DW2 on this aspect.

3) ***The Status of the Order of court dated 4th February, 2000*** *(appearing at pages 13 – 16 of the 1st and 2nd Defendants Supplementary bundle of documents)*

The Plaintiff launched an action in 1999 as reflected by the cause number, presumably after his letter to the 1st and 2nd Defendants Advocates dated 10th September, 1999. It I worth noting that at

page 15 of the said Ruling under paragraph 2 (c) the Plaintiff had pleaded as follows:

> *"That the said tenant and the said occupier pay the cost of this order and damages due to delayed and defective reversion of the said property".*

I understand this to mean that the Plaintiff was admitting that the property had actually been reverted to him but that the reversion was defective. This is from the background evidence by DW1 and DW2 the premises became a haven of thieves and the police had to move in to provide security and prevent further damage to the premises from which the 1st and 2nd Defendants had been evicted.

There is evidence at page 19 of the 1st and 2nd Defendants Supplementary Bundle of Documents which is a letter dated 16th May, 2000 from (one Mrs. Grace Chibwa) a concerned neighbor alluding to the insecurity at the premises after the Ruling of the court dated 4th February, 2000.

The order of the court directed the Defendant, Bengo Enterprises Limited and the occupier whoever he may be to permit the inspection of the premises.

The evidence is that at this time the 3rd Defendant had placed a contingency of officers for purposes of protecting the property from further waste. The order did not state that it was the 1st or the 2nd Defendants who were in occupation of the premises.

4) ***Refusal by 1st and 2nd Defendant to allow Plaintiff to inspect premises***

It was submitted that the 1st and 2nd Defendants had refused the Plaintiff the inspection right pursuant to clause 2 (c). This submission is not supported by evidence. The evidence from DW1 and DW2 is that the Plaintiff infact was demanding to be paid further rent outside the contract and pointed out that he had another prospective tenant who was ready to pay more rent. The Plaintiff also disclosed that he was intending to sell the demised property.

PW2 – the son to PW1 could not authoritatively assist the court because he was not the one handling the tenancy transaction. There can be therefore no sustainable claim under this head.

5) ***Rent / Rent arrears***

The Plaintiff claimed under this head a sum of K8, 836, 410 particulars of loss and damage as follows:-

(i)	Rent arrears	K48, 232, 250.05
(ii)	Loss of "dilapidated works"	K30, 804,160
(iii)	Loss of rent during repairs	K 4, 800,000
	Total	**K83, 836,410.05**

The evidence on record is that the 1st and 2nd Defendants were in occupation of the demised premises for 9 months from June 1988 to February 1999 when they were evicted. By that time the 1st and

2nd Defendants had paid a sum of K11, 470,000 towards rentals renovations bringing the total to K14, 417,000.

The rent payable for 9 months at K800, 000 per month is K7, 200,000.00. The credit balance due to the 1st and 2nd Defendants is therefore K7, 200,000.00.

I enter judgment in the said sum of K7, 200, 000 in favor of the 1st and 2nd Defendants. This amount is to attract interest at short term deposit from the 18th February, 1999 to date of judgment thereafter at bank lending rate, but not to exceed the Bank of Zambia lending rate until liquidation of the judgment debt.

For purposes of clarity the K7, 217,000 (principal) shall attract interest on short term deposit rate up to judgment date. To the principal the interest up to date of judgment shall be added to form the judgment debt which will then attract interest at bank lending rate aforesaid till debt is liquidated.

3(i) ***Loss of Meisne Profits***

There cannot be loss of meisne profits when it was the Plaintiff who evicted the Defendants from his premises.

3(ii) ***Rent Arrears to Plaintiff***

For the same reason above there can be no rent arrears, the Plaintiff having unilaterally terminated the Tenancy by evicting the Tenants in February, 1999.

3(iii) ***The cost towards "dilapidated works"***

This claim cannot succeed. The evidence is that the Defendants carried out repair works and a sum of K3, 000,000 was incurred before the premises could be habitable. There was no inventory taken at the time the Plaintiff elected to evict the tenants. The sum of K30, 804,160 is therefore ill fated and irrecoverable. Reference to a document dated 20th February, 2003 from Zambia National building society is of no consequence. It was generated long after the Defendant was evicted in February, 1999.

3(iv) **Loss of rent during repair K4, 800, 000, 000**

This claim is unsustainable for the same reasons advanced above. The loss was self inflicted as the Plaintiff opted to evict the tenants without due notice and unceremoniously.

6) ***Order for possession***

This claim has been overridden by events in that the Plaintiff had taken over his premises by evicting the Tenants in February, 1999. At one point in time the Zambia Police came into play to safeguard the Plaintiffs property when the premises became a haven of thieves.

The claim was further extinguished when the court on 4th February, 2000 ordered the inspection and possession from whosoever was in occupation of the said premises.

7) ***A declaration for payment of electricity and water***

There is no evidence that the Defendant failed to pay for any rendered bill by either Zambia Electricity Supply Corporation Limited or Kafue Water and Sewerage Company Limited or evidence that infact the Plaintiff has settled the said bills for 9 months period when the 1st and 2nd Defendants were in occupation of the premises from June 1998 to February, 1999. This claim cannot be sustained.

8) ***Declaration for pecuniary compensation in the sum of K83,836,410.05***

It is trite law that he who alleges must prove. It is generally for the one alleging to prove the allegations no matter what might b said of the Defendants defence. When a Plaintiff fails to prove his case, then in such a case there would be no need for the Defendant to provide a defence. This was clearly dealt with in the case of ***Masauso v Avondale Hosing Project Limited***[4].

There is no basis for this claim, not only is it unattainable but it is frivolous and vexatious. It was the Plaintiff who unlawfully evicted his tenants. He cannot benefit from his wrong. The damage if any is self inflicted. The decision to evict the tenants was at the Plaintiff's peril. This claim is rejected and dismissed.

9) ***Legal costs***

The costs ordinarily follow the event. I will consider this item wholistically after dealing with the counterclaim.

Counter Claim

(a) *Refund for K7, 217,000;*

This head has already been dealt with in the judgment above.

(b) *Renovation in the sum K2,400,000;*

There was evidence from DW2 that a sum of K3,000,000 had been recovered. This claim therefore fails. In any event in the reconciliation of the total rent paid to the Plaintiff the sum K3,000,000 was added to all moneys paid to the Plaintiff, less the monthly rents for 9 months. It would be double payment if the sum of K2,400,000 was to be treated separately.

(c) *Refund of ZAR 87,901.27 and ZAR 2, 439.00 costs to Paxem (PTY) Limited.*

The evidence on the part of the 1st and 2nd Defendants are that the Tenancy was for both and business premises. It was also submitted that the Landlord (Plaintiff) did not comply with the provisions of the Landlord Tenant (Business Premises) Act in particular section 5.

This argument has no leg to stand on. Clause 2(g) of the Tenancy is crystal clear. It provides as follows:

> *"not to use or permit the use of the demised premises for any purpose other than a dwelling house".*

The 1st and 2nd Defendants were therefore in breach of clause 2 (g) of the Tenancy. The claim for breach of clause 2

(g) was not specifically pleaded by the Plaintiff. I will however accommodate this claim under the claim of heading "any other relief".

The 1st Defendant has on his own admission testified that he was using the premises for business other than for residential. He has further disclosed that because of his eviction, he lost clientele. He further in his counterclaim admitted that his eviction led to a claim against them by a South African company.

As I have already indicated above, this case has taken too long to conclude and it will not be in the interest of the parties to refer the issue of assessing damages to the Learned Deputy Registrar.

I will award the sum of K7, 171, 000- in favor of the Plaintiff for breach of clause 2 (g) of the Tenancy. This amount is to attract interest at short term deposit from the 18th February, 1999 to date of judgment thereafter after interest to run at bank lending rate but not to exceed the bank of Zambia lending rate until the liquidation of the judgment debt.

The landlord Tenant (Business Premises) Act does not apply to this transaction. The limb of the counterclaim on this matter failed.

(d) Damages

(i) **Wrongful eviction**

As I have already indicated somewhere in the judgment, the eviction was wrongful. The evidence on this aspect is that to mitigate costs and damages the household goods and other items were taken to Russian Centre. The Defendants did not resist the eviction. They did not seek courts intervention of taking out an action to get the necessary injunctive relief. They only reacted when a suit was brought against them. This however does not deprive the Defendants to damages. However taking into account that this matter has taken too long, it will not be in the interest of Justice to send the matter to the Learned Deputy registrar for assessment.

I will award a global sum of K500 in respect for wrongful eviction, inconvenience, humiliation, harassment and victimization.

(ii) **Damages and loss of household personal chattels**

There is no evidence as to the inventory and alleged damaged items. As I have already indicated above the burden is on the person who alleges.

This limb on the counterclaim fails.

(iii) **Inconvenience, humiliation, harassment and victimization**.

This item has already been under item d(ii) above.

(iv) Loss of amenities and business as a result of wrongful eviction.

I have already observed and ruled that the Tenancy was in respect of a residential premise. There was a clear clause that prohibited the use of the premises other than residential. This limb of the counterclaim fails.

The Defendant has succeeded on certain claims in the counterclaims. Ordinarily cost's follow the event. The award of costs however is discretionary and the discretion must be exercised judiciously.

I take into account that this case or dispute erupted almost 16 years ago. The justice of the case is that each party bears its own costs more so that the awards to the Plaintiff equal and cancel out the awards to the 1st and 2nd Defendants.

Claim against the 3rd Defendant

The evidence is that the Attorney General or the 3rd Defendant was enjoined to the proceedings when the Plaintiff discovered that the police officers were on site at his premises. There was no complaint against the presence of the police officers. Indeed PW2 conceded that there was no complaint raised.

The evidence was that the neighbors observed that the vacant premises had turned into a haven of thieves. The police were alerted. To protect the property, the police placed a contingent of officers on the premises.

In my view, no wrong can be attributed to this action. The State has a duty to prevent crime and to protect property. Indeed in the submissions of the Plaintiffs, the claim against the Attorney General or 3rd Defendant was not addressed at all.

It is my view therefore that police presence at the Plaintiffs premises was within permissible grounds of law. I will therefore, it follows dismiss the Plaintiffs action against the 3rd Defendant.

For the reasons I have already given, I order that the costs herein shall be borne by either party.

All the respective parties are informed of their right of appeal to the Supreme Court.

Dated this ...5th... day of February, 2015.

Mwila Chitabo, SC

Judge