

**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

2009/HP/1332



BETWEEN:

**JESSY CHABINGA AND TWELVE OTHERS**

**PLAINTIFFS**

AND

**LUSAKA CITY COUNCIL**

**DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 23<sup>rd</sup> DAY OF  
JUNE, 2017**

*For the Plaintiffs : Mr A. Banda, LM Chambers*

*For the Defendant : No appearance*

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

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LEGISLATION REFERRED TO:

1. *The Market and Bus Stations Act No 7 of 2007*

OTHER WORKS REFERRED TO:

1. *The Law of Real Property by Robert Megarry, 6<sup>th</sup> Edition, Sweet and Maxwell, 2000*

The Plaintiffs commenced this action on 28<sup>th</sup> October, 2009 by way of writ of summons claiming;

1. *a declaration that the Plaintiffs are the legitimate and rightful owners of their respective plots/ stands offered to them by the Defendant.*

2. *an order of specific performance of letters of offer dated 23<sup>rd</sup> October, 2006 for the Chilenje South market plots/stands.*
3. *an order of interim injunction restraining the Defendant council by itself, servants, agents or whomsoever from evicting, entering, repossessing and or demolishing or reallocating the plots/stands/structures allocated to the Plaintiff to other persons as shown in these proceedings until determination of the matter.*
4. *Costs.*
5. *any other relief that the court may deem fit.*

The statement of claim shows that by letters of offer dated 23<sup>rd</sup> October, 2006 the Defendant offered the Plaintiffs stands at Chilenje South market situated in Lusaka, which offers the Plaintiffs accepted. That it was a condition of the said offers for the Plaintiffs to execute formal lease agreements between each plaintiff and the defendant on various dates in the year 2006.

It is also stated in the statement of claim that it was a condition of the leases that each allocate was to pay ZMW250.00 towards the construction of the ablution block, and for the connection of water at the market.

Paragraph 6 of the statement of claim states that each of the Plaintiffs paid the ZMW250.00 to the Defendant, which monies were acknowledged through receipts that the Defendant issued to the Plaintiffs between September and December, 2006.

However in February, 2007, without justifiable cause the Defendant advised the Plaintiffs to halt construction at the market, and thereafter passed a resolution to repossess the said stands in dispute, and to

demolish the said stands, without regard to the leases that were executed, which it had not terminated officially.

That the Defendant is consequently in breach of the lease agreements, and the Plaintiffs have suffered loss and damage, and claim an order of specific performance of the lease agreements, a declaration that they are the rightful owners of the stands, and an order restraining the Defendant from evicting, repossessing, and or demolishing or re-allocating the stands/plots/structures built by the Plaintiffs at the Chilenje South market, until the matter is determined.

The Defendant filed a defence on 23<sup>rd</sup> November, 2009 in which it admits paragraphs 2, 3, 4, 5 and 6 of the statement of claim. That the contents of paragraph 7 of the statement of claim are admitted only to the extent that the Plaintiffs were advised to halt the construction. The Defendant denies having passed any illegal resolution, and in paragraph 5 of the defence states that lease agreements entered into with the Plaintiffs have not been terminated, and it has therefore not breached the contracts.

The defence also states that the Defendant admits not having sent the Plaintiffs official communication of termination of the lease agreements, and denies the contents of paragraph 11 of the statement of claim stating that the Plaintiffs are not entitled to any of the claims or at all.

At the hearing the Plaintiffs called two witnesses, while the Defendant did not appear. The first witness for the Plaintiffs was William Chongo. His evidence was that sometime in 2004 the Plaintiffs had applied in writing to the Defendant for the allocation of a market place, which letter is on page 1 of the Plaintiff's bundle of documents. That the Defendant had responded to the same in January 2004 indicating that it would offer them the plot, and that it would come up with a design of the plot. The

letter on page 2 of the Plaintiffs bundle of documents is the said letter from the Defendant.

PW1 testified that the Defendant later through the Department of Engineering provided a plan for the market, indicating that the market stalls should be constructed according to the plan, and that the construction would be supervised by officers from the Council. He further testified that thereafter the Plaintiffs were given the offer letters, and he identified the offer letter at page 5 of the Plaintiff's bundle of documents as the standard offer letter.

It was stated that there were 549 shops, and most of them were offered the leases, including the 13 Plaintiffs. He told the court that they had to pay ZMW250.00, which they did, and receipts were issued to them. That is how they started constructing the respective stands. He identified the document on page 20 of the Plaintiffs' bundle of documents as one of the lease agreements that were executed, by each of the Plaintiffs with the Defendant.

PW1's evidence was that to their surprise, sometime in 2007 the Defendant passed a resolution to demolish the structures that the Plaintiffs had built, with the reason advanced that it wanted to change the plan, that was earlier made. He stated that this was not fair as a lot of people had already built the structures, and others were at an advanced level. It was added that the lease agreements that the Plaintiffs had entered into were not terminated.

As to the current status of the structures constructed by the Plaintiffs, PW1 told the court that they are still there. He testified that they have invested a lot in the market, and they would like to be declared the legitimate owners of the market stands, and asked the court to grant any

other relief that it may deem fit, taking into account the amount of time that has been wasted.

He also asked that they be allowed to continue with the leases, adding that the new plan cannot work as there has been no mention of compensating the Plaintiffs that have already constructed their stands.

The second witness was Veronica Kauseni. Her evidence was that the land was bare when they asked the Defendant if they could construct there, as they were just selling by the road. That the Defendant had indicated to them that the land was earmarked for a market, and that is how they had applied in writing for the land, and the application was accepted.

She also testified that they paid for the site, and the land was surveyed, and they started constructing the market stalls. She identified the document on page 103 of the Plaintiffs bundle of documents as one of the receipts that was issued by the Defendant for the payment of the ZMW250.00 that each Plaintiff was required to pay. She like PW1 testified that the Defendant later informed them that it wanted to redesign the market, but they were against this as they had paid and built structures.

I have considered the evidence. It is not in dispute in this matter that the Plaintiffs executed lease agreements with the Defendant in 2006. The lease agreement executed by the 1<sup>st</sup> Plaintiff is on page 20 of the Plaintiff's bundle of documents. The said lease relates to Stand No A 15 Chilenje South market in Lusaka, and was executed on 23<sup>rd</sup> October 2006. The lease was executed in pursuance of the Markets Act, Chapter 290 of the Laws of Zambia which gives control and management of markets to the Defendant.

The lease provides that the Defendant as landlord had established the Chilenje South market, and the 1<sup>st</sup> Plaintiff as tenant had agreed to rent Stand No A 15 at the said Chilenje market. The other twelve Plaintiffs had signed the same lease agreements individually with the Defendant as seen on page 28 of the Plaintiff's bundle of documents, which is the lease executed by Bornface Mulimbika on 19<sup>th</sup> October, 2006, and on page 35 of the bundles for Charles Chisha, signed on 19<sup>th</sup> October, 2006.

Others are for Joy Mangamu signed 23<sup>rd</sup> October, 2006 which is on page 42 of the bundles, for Kennedy Sichone signed on 23<sup>rd</sup> October, 2006 which is on page 50 of the bundles, for Robby Mulimbika also executed on 23<sup>rd</sup> October, 2006 and which is on page 58 of the Plaintiff's bundle of documents, and for William Chongo dated 23<sup>rd</sup> October, 2006 which is on page 66 of the Plaintiff's bundles.

There is also the one signed by Wilson Mulimbika dated 19<sup>th</sup> October, 2006 on page 74 of the Plaintiffs bundle of documents, the one for Lameck Kamanga dated 23<sup>rd</sup> October, 2006, which is on page 80 of the Plaintiff's bundles, the one for Barbra Mapoloto dated 23<sup>rd</sup> October, 2006 which is on page 88 of the Plaintiff's bundles. The lease agreements signed stipulate the rights and responsibilities of both the Defendant as landlord, and the Plaintiffs as tenants.

Among the landlords responsibilities and rights are that the market shops shall remain the property of the Defendant, but shall be managed in partnership with the community. Further that no individual title deeds shall be issued by the Defendant to the tenants for the shops that would be constructed. That the tenants shall pay market levy of ZMW2.00 per day or ZMW60.00 a month, after a period of six months after receipt of the offer letters, which was the time frame set for construction of the stalls or shops.

The Defendant under the lease had the right to ensure that construction of the shops was done in accordance with the plan that it had approved, and that the construction would be monitored and inspected by the Defendant at all the stipulated stages. Further that the cost of construction and maintenance of the facilities would be shared by the Defendant and the Plaintiffs, and that where there was failure to abide by the regulations, the Defendant would immediately close and repossess the shops, and the partnership would be null and void.

The Defendant under the lease agreements had a right to revoke the offer letters of any Plaintiffs that did not construct the shops within six months, and also to repossess any unfinished stalls that lay idle for a period of more than ninety days without notifying the tenant.

The Plaintiffs as tenant had among their rights and responsibilities, to be responsible for the construction of the shops in line with the plan approved by the Defendant. That the Plaintiffs would transfer ownership of the completed shops to the Defendant to the Defendant after five years of being allocated the shops.

Other responsibilities placed on the Plaintiffs were to pay the market levies for the shops, effect no change to the offers without the approval of the Defendant, contribute ZMW250.00 towards the construction of the ablution block and water connection, once they obtained the offers.

The first claim by the Plaintiffs is for a declaration that they are legitimate and rightful owners of their respective stands that the Defendant offered them. As can be seen from the terms of the lease agreements that were executed by the Plaintiffs with the Defendant, the Plaintiffs were offered to construct the shops for which they would pay market levies after six months of the construction. The agreement in the

lease is that the Defendant would become the owner of the shops after five years from the date of construction.

*The Law of Real Property by Robert Megarry 6<sup>th</sup> Edition, Sweet and Maxwell Limited 2000* defines a lease as **“a contract for exclusive possession and profit of land for some determinate period”**. Going by this definition and the terms of the lease agreements that were signed, the Plaintiffs were offered to construct and rent the shops for a period of five years, after which the Defendant would become the absolute owner.

Section 3 of the Market and Bus Stations Act No 7 of 2007 provides that;

***“(3) A local authority, may enter into public-private partnerships, with the prior approval of the Minister given in writing.***

In Section 4 of the said Act it states that;

***“(4) Any public – private partnership entered into shall not be for a period longer than fourteen years”.***

The leases that the Plaintiffs in this matter entered into with the Defendant were executed in 2006. However the Market and Bus Stations Act No 7 of 2007 applies to the said leases by virtue of Section 34 of that Act. It states that;

***“34. (1) The Markets Act is hereby repealed.***

***(2) Notwithstanding the repeal of the Markets Act, any market established before the commencement of this Act shall be deemed to have been established under this Act.***

***(3) A lease made under the repealed Markets Act and subsisting immediately before the commencement of this Act***

***shall, until replaced, be deemed to be a lease made under this Act”.***

Looking at the law and the leases that were executed, the Plaintiffs were tenants under the lease, and the lease did not confer any rights to the Plaintiffs of ownership of the said shops. Therefore a claim for a declaration of ownership of the plots cannot succeed, and it is accordingly dismissed.

The second claim is for an order of specific performance of the leases that were offered to the Plaintiffs. The evidence of PW1 and PW2 was that after some of the Plaintiffs had completed the shops, and others were yet to complete the construction, the Defendant directed the Plaintiffs to stop the construction. It was PW1 and PW2's evidence that in 2007 the Defendant passed a resolution to demolish the structures, as it wanted to change the plan that was earlier given to the Plaintiffs.

In the defence that was filed on 23<sup>rd</sup> November, 2009 the Defendant denied having passed an illegal resolution, and that it had terminated the leases with the Plaintiffs. The Defendant has not in the defence advanced any reason why it instructed the Plaintiffs to halt the construction. The Plaintiffs in their evidence have shown that they complied with the conditions given to them in the lease by paying the ZMW250.00 each for the construction of the ablution block and water connection as evidenced on the receipts on pages 96 to 106 of the Plaintiffs bundle of documents, as well the commencement of construction of the shops.

There is no allegation by the Defendant that any of the Plaintiffs breached the conditions of the lease, or that the construction of the said shops was not done in line with the plan that the Defendant had given,

such that it would have been entitled to revoke the offers. There is therefore no basis that has been advanced by the Defendant for directing the Plaintiffs to stop the construction of the shops, and I find that this is an appropriate case where specific performance of the lease agreements ought to be ordered, taking into account the fact that the Plaintiffs invested resources in pursuance of the lease, and are not at fault in any way.

Section 8 of the Market and Bus Stations Act No 7 of 2007 provides that;

***“8. (1) A local authority, in consultation with the Minister, may demolish, reconstruct, abolish, close or move a market or a bus station.***

***(2) Notwithstanding subsection (1), a local authority shall, before demolishing, reconstructing, abolishing, closing or moving a market or a bus station, notify, in writing, any person who is managing the market or bus station”.***

The evidence as given by PW1 and PW2 is that reason advanced by the Defendant for halting the construction is that it wished to demolish the structures that had been built, as it wanted to come up with a new plan for the area, even though this is not pleaded in the defence. Taking into account the fact the Defendant owns the property, and is responsible for its development, and it has done so in partnership with the community, equity demands that if indeed it wishes to change the plan, and in doing so will have to demolish the structures constructed by the Plaintiffs, such demolition will be done at a cost of compensating the Plaintiffs for what they have spent on the construction.

The amount spent on the said construction shall be assessed by the Registrar, and amounts found due on assessment shall attract interest at the average short term deposit rate from the date of issue of the writ

until the date of assessment, and thereafter at a rate of six percent per annum. Therefore the claim for specific performance of the leases agreements succeeds as they were not terminated.

The leases not having been terminated, shall be specifically performed in line with the leases executed, and if demolition is to take place, the said specific performance shall commence after the Plaintiffs are compensated, within a period of six months from today. The Plaintiffs are awarded costs to be taxed in default of agreement. Leave to appeal is granted.

**DATED THE 23<sup>rd</sup> DAY OF JUNE, 2017**

*S. Kaunda*

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**S. KAUNDA NEWA  
HIGH COURT JUDGE**