IT

IN THE HIGH COURT FOR ZAMBIA **2016/HP/0363**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF: **HOUSE NO. 54 KANJOKA ROAD MEDIUM RESIDENTIAL AREA, PETAUKE**

AND

IN THE MATTER OF: **RULE 3 OF THE RENT RULES AS READ WITH SECTION 4(e) (i) (ii) OF THE RENT ACT, CHAPTER 206 OF THE LAWS OF ZAMBIA**

BETWEEN:

THERESA WAPABETI TONGA **APPLICANT**

AND

FRANCIS MWALE **RESPONDENT**

BEFORE THE HONOURABLE MRS. JUSTICE M. C. KOMBE

For the Applicant: *In-Person*

For the Respondent: *Mr. K. Muzenga- Deputy Director- Legal Aid Board*

J U D G M E N T

Cases referred to:

1. **Khalid Mohammed v. The Attorney- General (1982) Z.R. 49.**
2. **Stamp Duty Commissioner v. African Farming Equipment Company Limited (1969) Z.R. 32.**
3. **Zambia Breweries Limited v. Musa- Appeal No.164/2014 (Unreported).**

4. **Anderson Kambela Mazoka, Lt General Christon Sifapi Tembo, Godfrey Kenneth Miyanda v. Levy Patrick Mwanawasa, The Electoral Commission of Zambia, The Attorney General (2005) Z.R. 138.**

Legislation referred to:

1. **The Rent Act, Chapter 206 of the Laws of Zambia.**
2. **H.G Beale QC (General Editor): Chitty on Contracts: General Principles, Volume 1, Thomas Reuters, and 2008 UK.**

This action was commenced by way of Originating Notice of Motion pursuant to the Rent Act Chapter 206 of the Laws of Zambia. The Applicant seeks the following reliefs:

i) *An order that the Respondent yields vacant possession of House No.54 Kanjoka Road Medium Residential Area, Petauke to the Applicant.*

ii) *An order that the Respondent pays the Applicant a sum of ZMW 18,200.00 rent arrears.*

iii) *An order that the Respondent renders an account of all profits derived from use of the premises as a workshop contrary to the Lease Agreement and 40% of the proceeds goes to the Applicant.*

iv) *Interest.*

v) *Damages for breach of contract.*

vi) *Costs of the proceedings.*

In the affidavit in support, the Applicant **THERESA WAPABETI TONGA** deposed that in 2011 the Respondent was given possession of House No.54 Kanjoka Road Medium residential Area, Petauke (hereinafter referred to as "The Premises") to be a caretaker.

That the said premises were at all material times the matrimonial property of the Applicant and her husband, Mr. Shadreck Tonga. A copy of the marriage certificate between the Applicant and Mr. Shadreck Tonga was marked **"TWT1"**.

That on or about the 1st of December, 2013, the Applicant's husband and the Respondent entered into a Tenancy Agreement for the premises as evidenced by **"TWT2"**, a copy of the Tenancy Agreement. It was a fundamental term that the Respondent would pay monthly rent of the sum of ZMW650.00 payable every six months in advance and further that the Respondent would use the premises for residential purposes only.

That the Applicant's husband had since surrendered the said house to the Applicant through a consent agreement so that the said premises would provide maintenance for the Applicant and the children of the family; thus the said property now vested in the Applicant. A copy of the consent agreement was marked **"TWT3".**

The Applicant further deposed that contrary to the Lease agreement, the Respondent had however failed to perform his payment obligations as stipulated in the Lease agreement in that he had not made any single payment from the date the Lease agreement was concluded between the parties and had therefore accrued rental arrears of a sum of ZMW 18,200.00.

It was further deposed that the Respondent had further violated the terms of the Lease agreement by turning the premises into a workshop without the consent of the Applicant; further that on or about the 19th November, 2015, the Applicant wrote a letter to the Respondent requesting the Respondent to yield vacant possession of the premises and settle the rental arrears. A copy of the said letter was marked **"TWT4"**.

That the said letter was simply one of the numerous attempts made by the Applicant to have the Respondent yield vacant possession of the premises and settle the rental arrears; that notwithstanding the numerous attempts, the Respondent had refused, ignored and/or neglected to comply to the aforesaid and the Applicant had consequently suffered unnecessary costs and loss and damage as the proceeds were meant to provide for her and the children.

The Respondent **FRANCIS MWALE** filed an affidavit in opposition which he deposed to. He deposed that contrary to what the Applicant alleged, he continued being a Caretaker to the extent that they agreed with the owner of the house Mr. Shadreck Tonga to renovate the house in contention.

That he did renovate the said house and sued the afore-mentioned for non-payment wherein the two entered into consent judgment in the Subordinate Court in Petauke district and obtained a Court order; that it was ordered by the court that he could only vacate the house after Mr. Shadreck Tonga paid the amount of the renovation in full which he had failed and or neglected to do.

Further that he never entered into a Tenancy agreement with the Applicant's husband as he was merely a caretaker; that contrary to what the Applicant had deposed to, he was the one who had continued to suffer unnecessary costs, loss and damage due to the hardship he underwent to renovate the house in question and issue court process to recover money which he had up to date not recovered.

He added that the Applicant was abusing court process as this matter was already resolved in the court below.

In the affidavit in reply, the Applicant deposed that there was no written agreement or any agreement to the effect that the Respondent was to renovate the property in question save for the covenant placed on the Respondent to keep the interior and exterior of the demised property in a tenantable repair.

She further deposed that the Consent order that the Respondent had referred to was not exhibited; that she travelled to Petauke to conduct a search at the Subordinate Court Registry which revealed that there was a Court Order in which the Respondent was ordered to vacate the house in issue as it now belonged to the Applicant. A copy of the said Order was marked **"TWT1".**

It was also deposed that all rights relating to the house in issue now vested in the Applicant and the children. A copy of the Certificate of title was exhibited and marked **"TWT2"**; that this had been brought to the attention of the Respondent who had refused to yield vacant possession of the property; that there had been no renovations on the property and the Respondent never availed any proof of renovations or costs thereof.

A further affidavit in support was filed with leave of the Court after the Respondent failed to attend Court and to respond to the application to file a further affidavit.

The Applicant explained that following the issue and service of court process, the Respondent without notice moved out of the house and left the keys with the Subordinate Court; that she was handed possession of the house by the Clerk of Court. A copy of the handover certificate was exhibited and marked **"TWT1"**.

That since she was not around at the time the Respondent vacated the house, she requested and was issued with an Inspection Report which highlighted the state of the property as shown by exhibit **"TWT2"**. Further that **"TWT3"** was a copy of an assessment report prepared and obtained from the Ministry of Works and Supply which showed the repairs required to be effected to the house in the sum of K32, 820. 00.

That there was an outstanding water bill of K1, 099.65 and electricity bill in the sum of K902.89 as shown by exhibits marked **"TWT4"** and **"TWT5".** She further deposed that the Respondent left the house in a deplorable state which rendered it inhabitable until renovation works were done. Pictures of the house in a deplorable state were exhibited as **"TWT6".**

At the hearing of the matter, the Respondent and his counsel were not present. Considering the fact that the Applicant had filed proof of service, I allowed the Applicant to proceed with the application as

I was satisfied that the Respondent was aware of the hearing date and had deliberately neglected to attend Court.

The Applicant relied on the affidavits filed before Court. These were supplemented by brief oral submissions. She submitted that she was entitled to the reliefs sought because of the evidence she adduced before Court.

The Applicant reiterated what was deposed to in the affidavits filed and submitted that on the first relief, the Respondent had already yielded vacant possession. However, according to the assessment and inspection report she obtained, the Respondent was owing the Applicant K32, 820.00 and a K902.89 for the outstanding electricity bill and K1, 099.65 for the water bills.

She contended that in 2011 it was agreed that the Respondent takes care of the house but that after her husband left, he refused to vacate the house; that he was now a tenant and it was agreed that he would be paying K650 per month by six (6) months in advance. It was her argument that he never paid any of the agreed amount and a sum K18, 200. 00 was outstanding from 1st December 2013 to February 2016.

She further submitted that the Respondent was told not to use the rented premises for any purpose other than that of a dwelling house but he turned it into a workshop for business purposes. She contended that the profits derived from using the house as a workshop were never shared with her and that consequently, the family suffered.

She submitted that she left relief number (iv) and number (v) to the discretion of the Court. The Applicant contended that the total rentals arrears from December 2013 up to the time the Respondent amounted to K23, 350.00 and that she was claiming K60, 171. 00 in total.

I am grateful to the Applicant for her submissions. Although the Respondent was not present at the hearing of the matter, I will proceed to determine this matter on the evidence before me. This is in accordance with what the Supreme Court stated in the case of **Khalid Mohammed v. The Attorney- General** [1] a plaintiff cannot automatically succeed whenever a defence has failed; he must prove his case.

I will consider the reliefs as they appear in the Originating summons.

The first and second reliefs sought are for the Respondent to yield vacant possession of No. 54 Kanjoka Road Medium Residential Area Petauke and to pay rent arrears of ZMW 18, 200.00

On the claim for vacant possession, it is clear from the evidence that the Respondent yielded vacant possession of House No. 34 Kanjoka Road on 30th January, 2017. It is therefore not necessary for this Court to pronounce itself on this claim.

In relation to the claim for the recovery of rental arrears, the Applicant contends that she is the landlord or owner of the demised premises and that the Respondent is a tenant and not a caretaker as he alleges. This is why this action has been commenced under the Rent Act, Chapter 206 of the Laws of Zambia as the court has powers under the Act to order recovery of rentals lawfully due.

The Applicant contends that the Respondent now owes her a total amount of K23, 820.00 in outstanding rentals from December 2013 to January, 2017.

According to the affidavit in opposition filed on 8 July, 2016, the Respondent contends that contrary to the Applicant's assertion, he was a caretaker of the property in question to the extent that he had agreed with the owner of the house Mr. Shadreck Tonga that he

renovates the house in contention. He further contends that he renovated the house and sued Mr. Tonga for non-payment wherein they entered consent judgment in the Subordinate Court in Petauke district and obtained a Court order in which Mr. Tonga was ordered to pay the Respondent. However, this Court order was not exhibited.

The Respondent also denied to have entered into a Tenancy agreement with the Applicant's husband and that he was the one who had continued to suffer unnecessary costs, loss and damage due to the hardship he underwent to renovate the house in question among other things.

It is clear that the Applicant claims payment of rentals because she contends that there was a relationship of landlord and tenant between her husband and the Respondent. The Respondent has denied this and contends that he was just a caretaker.

What evidence has the Applicant adduced to prove this relationship?

To begin with, from the evidence adduced, the Applicant's husband surrendered the house in question to the Applicant as maintenance through a consent agreement. She produced the letter which is marked as **"TWT3".** Further, she produced a copy of the Certificate of Title which is marked as **"TWT2"** in the affidavit in reply.

Based on the agreement and the Certificate of title it is clear to me and I find that the Applicant is the registered owner of House No. 54 Kanjoka Road medium residential area.

The Applicant in her affidavit in support produced a lease agreement dated 1st December, 2013 which was exhibited as **'TWT2'**. I have carefully examined this agreement. This lease shows that the landlord was the Applicant's husband and the tenant the Respondent; that the Respondent was supposed to be paying K650.00 per month for occupying the premises. However, the exhibited agreement shows that it was signed by the Applicant's husband, but it does not show the part on which the Respondent signed.

I should pause here and point out that a lease apart from being a proprietary interest in land, is also a contract. This means that it is an agreement between the landlord and the tenant and is subject to the principles of contract law.

It is trite law that a contract is a legally binding agreement. Therefore, to be enforceable in court, the following should happen:

(i) *One party must offer terms and the other party must accept;*

(ii) *The parties must exchange something of value, such as money (consideration);*

(iii) *The parties must intend to be legally bound by the terms of the agreement.*

An intention to be bound by the terms of the agreement can be proved if the other party accepts the offer and signs the agreement. Intention can also be proved through the conduct of the parties. For example, the other party may start work or conduct themselves in a way that suggests they have accepted.

If the contract is not signed, the Court of Appeal, the forerunner to the Supreme Court in the case of **Stamp Duty Commissioner v. African Farming Equipment Company Limited**[2] held that:

> **'It is not necessary that an agreement should be signed by both or all the parties for it to be operative against a party who has signed it.**

This holding was re-echoed by the Supreme Court in the case of **Zambian Breweries PLC v. Stanley K. Musa** [3] when it held that:

> **'The general principle regarding written contracts is that for such contracts to be enforceable against any party, that party must have signed it. It is enforceable on the party who has signed it notwithstanding the fact that the**

other party may not have signed it. By implication therefore, a contract is not enforceable against a party who has not signed it...In relation to this appeal, there is therefore no doubt that the MOA is operative or enforceable against the Plaintiff. The same is not the case as it relates to the Defendant on account of want of execution on its part.'

In the present case, the Respondent has not raised the non-execution of the lease agreement in his affidavit in opposition but has denied that he entered into an agreement. I have however considered this issue for the sake of completeness in relation to the opposition raised.

It is not in dispute that when the Respondent entered the property in 2011, he was a caretaker. However, according to the Applicant, her former husband entered into a lease agreement with the Respondent in 2013.

In court, she stated that when she went to the house in 2013 so that the Respondent could yield vacant possession, he refused but instead a produced a tenancy agreement which was signed by her husband and a witness from the office of the President by the name of Mr. Mfune; that the Respondent agreed that he would pay K650.00 for six months. That when she came back to Lusaka, she

waited for the payments but there was nothing; that he went back and he agreed orally to pay her K650.00 based on the tenancy agreement that was given to her by her husband.

As I have mentioned, the lease agreement relied upon by the Applicant, was not signed by the Respondent against whom the Applicant seeks this Court to enforce it but by the Applicant's husband and his witness. That notwithstanding, can it be enforced against the Respondent?

The Supreme Court in the same case of ***Zambia Breweries v. Musa*** provided guidance on this issue when it stated that it can be enforced against a party who has not signed it on the ground of estoppel. It went on and cited Chitty on Contracts-General Principles at page 207 where it was stated that:

> **'Conversely an agreement which originally lacked contractual force for want of execution of the formal document may acquire such force by reason of supervening events. This could for example be the position where it can be objectively ascertained that the continuing intention [not to be bound until execution of the document] has changed or...subsequent events have occurred whereby the non-executing party is estopped by relying on his non-existence.'**

Based on foregoing, the Supreme Court took the view that subsequent to the parties agreeing the terms and the Plaintiff executing the contract, there were subsequent and supervening events that altered the Defendant's position. These subsequent and supervening events were the fact that the Defendant started to enjoy the benefits of the MOA as a consequence of the Plaintiff performing his obligation to deliver the Defendant's products. This fact therefore barred the Defendant from relying on the non-execution of the MOA to assail it as being unenforceable. The MOA was thus held to be enforceable against the Plaintiff and the Defendant even though the Defendant had not signed it.

In view of what the Supreme Court stated in the above case, is there any evidence which bars the Respondent from relying on the lease agreement? Put another way, is there any evidence which shows that there was an intention by the parties to create a legal relationship and be bound by the terms of the agreement even though the Respondent had not signed the agreement?

As I have already stated, the Respondent denied that he entered into this agreement. He maintained that he was not a tenant but a caretaker of the property in question.

In an attempt to prove that there was a lease agreement, the Applicant at the hearing contended that the Respondent handed her a tenancy agreement and that he agreed orally to pay K650.00 as monthly rentals.

However, although this evidence graced the court record, I have attached no weight to it for the following reasons:

(i) This matter was commenced by way of originating notice of motion and supported by an affidavit. What this means is that all the evidence to be adduced in Court was supposed to be by way of affidavit evidence. This evidence was not adduced in the affidavit in support but at the hearing. Thus the Respondent was not afforded an opportunity to respond to that evidence in his affidavit in opposition.

(ii) Even when it was clear to the Applicant that the Respondent had denied that he was a tenant, she did not rebut his evidence in her affidavit in reply that apart from the written lease agreement she had produced, the Respondent actually agreed orally to be paying rentals.

In this regard, I find that the evidence that the Respondent agreed orally to be paying rentals of K650.00 a month is an afterthought and I do not accept it.

Furthermore, from the affidavit evidence that has been adduced by both parties, there is nothing to show that there were any subsequent events that happened when the purported lease agreement was signed from which it can be inferred that Respondent derived a benefit from the lease agreement. I say this because it is not in dispute that the Respondent started deriving a benefit from staying in the house when he moved in as a caretaker. The Respondent continued enjoying this benefit as a caretaker up to the time when he vacated the house in 2017.

If there was evidence that the Respondent had at one point paid the rentals or had started enjoying some other benefit different from what he had been enjoying when he entered the house as a caretaker, he would have been estopped from claiming that no tenancy agreement existed between him and the Applicant's former husband.

However, the evidence by the Applicant is that from the time the purported lease agreement was executed, the Respondent had not paid any rentals and he had continued to derive the same benefit of

occupying the house. In my view, he had not been paying any rentals because the parties had not agreed on any rentals to be paid.

I am fortified in holding this view based on the contents of the letter of demand which was exhibited as **'TWT4'.** In that letter, the Respondent was informed that if the reasons for the nonpayment of the rentals was because he was a caretaker, then what he just needed to do was yield vacant possession.

If at all the Applicant was satisfied and clear in her demands that the Respondent was a tenant who ought to have been paying rentals, she would not have given this option to the Respondent to just yield vacant possession. What I have inferred from this is that the Applicant was not certain that there was actually an intention to change the status of the Respondent who was initially a care taker to that of a tenant.

For the reasons I have highlighted above, I find that the Applicant has not proved to the satisfaction of this Court that there was a lease agreement which had been entered into with the Applicant's former husband and the Respondent and that the parties intended be bound by the terms of that lease agreement. I further find that

the Respondent was not a tenant but a caretaker from the time he started occupying the house until he vacated the house in 2017.

The net results of these finding is that the Applicant has failed to prove that she is entitled to payment of rental arrears. This claim is therefore fails as it lacks merit.

Having made the above finding, consequently reliefs (iii), (iv) and (v) lack merit as they are anchored on the said lease agreement. They are accordingly dismissed.

I now turn to consider the Applicant's additional claims for K32, 820.00 being the cost of renovations and claim for K1, 009.95 being outstanding electricity bill and K902. 89 being outstanding ZESCO bill.

According to the further affidavit in support of the application, the Applicant obtained an assessment and inspection report after the Respondent vacated the premises without her knowledge as the Respondent left the premises in a deplorable and uninhabitable state. She further deposed that the Respondent was owing K902.89 for the outstanding electricity bill and K1, 099. 65 for the water bills.

The question I am faced with is whether in the circumstances, the Applicant can make these claims that were not initially pleaded for in the Originating Notice of Motion.

In making a determination, I am guided by the Supreme Court decision in the case of **Anderson Kambela Mazoka, Lt General Christon Sifapi Tembo, and Godfrey Kenneth Miyanda v. Levy Patrick Mwanawasa, The Electoral Commission of Zambia, and The Attorney General** [4] in which it held *inter alia* that:

> **"Where any matter not pleaded is let in evidence, and not objected to by the other side, the court is not and should not be precluded from considering it. The resolution of the issue will depend on the weight the Court will attach to the evidence of unpleaded issues."**

The Court in this case went further to say:

> **"In our considered opinion, the respondents having not objected to the evidence immediately it adduced, this Court is not precluded from considering that evidence. At the end of the day, the issue will depend on the weight the Court will attach to the evidence which was let in on unpleaded issues. At this late stage, we cannot therefor exclude the evidence adduced and allowed without objection. This, however, does not mean that we condone in any**

way shoddy and incomplete pleadings. Each case must be considered on its own facts. In a proper case, the court will always exclude matters not pleaded more so where an objection has been raised."

What is evident from the foregoing is that the Court is not precluded from considering evidence not pleaded if there is no objection from the other side.

The Respondent herein was served through his counsel on record with the application to file the Further Affidavit in support of the summons. However, they did not attend Court and no reasons were advanced for their non-attendance although there was proof of service on the Respondent's advocates. I therefore considered the application in their absence as I was satisfied that they had neglected to attend Court. There being no objection, I granted the Applicant leave to file the further affidavit.

Similarly at the hearing of the matter, neither the Respondent nor his Counsel were present despite being aware of the hearing date. The Applicant's further affidavit was not opposed.

In this this vein, I am satisfied that there was no objection from the Respondent on these particular claim and therefore I see no reason why they should not be considered.

On the claim for cost for the renovations, the Applicant claims an amount of K32, 820.00. She contends that when the Respondent vacated the house in January, 2017, he left the house in a deplorable state. Thus she went and obtained an assessment report from the Ministry of Works and Supply which showed the repair works that required to be effected to the house. She also took pictures of the house. The summary of the totals is as follows:

1. Painting works -	***K7, 471.00***
2. Plumbing fittings -	***K6, 160.00***
3. Construction of Soakway and Septic Tank -	***K7, 825.00***
4. Landscaping -	***K 4,800.00***
5. Total -	***K26, 256.00***
6. Labour 25% -	***K6,564.00***
7. GRAND TOTAL -	***K32,820.00***

To begin with, I have made a finding that the Respondent in this case was a caretaker until he vacated the house in January, 2017.

In relation to the term caretaker, the concise law dictionary provides that:

'The word "caretaker" denotes looking after property/position temporarily.'

What the foregoing means is that as a caretaker, the Respondent was supposed to be looking after the property in question temporarily. However, the Applicant has not adduced any evidence to show that when the Respondent entered the house as a caretaker, it was his responsibility to take up maintenance costs of the house in terms of painting, doing landscaping and constructing a septic tank.

Furthermore, I have noted that although the Applicant produced pictures to show the state of house when the Respondent vacated the house, it is not clear to the Court in what state the house was when he entered the house.

Therefore, I am not satisfied that the Applicant has proved to the required standard that the Respondent as the caretaker was the one who was supposed to maintain the house to the extent of constructing a septic tank, painting the house and also doing landscaping.

As I have mentioned, the Respondent was not a tenant but a caretaker, thus the lease agreement which was produced by the

Applicant cannot be enforced against the Respondent as he did not sign it.

If it was the intention of the Applicant's former husband that the Respondent who was a caretaker should be responsible for the works sought to be done, evidence of such an arrangement should have been adduced to that effect. No such evidence was adduced and I find that the Applicant has failed to prove that she is entitled to this claim. This claim fails.

In relation to the water bill of K1, 099.65, and the ZESCO bill of K902.84, it is clear from the statements that the bills were incurred when the Respondent was occupying the house.

In this regard, I find that the Respondent is the one who was responsible for paying the bills since he was the one in occupation. This claim succeeds.

All in all, I find that the Applicant has failed to prove on a balance of probabilities that she is entitled to an order for the payment of rental arrears, an order that the Respondent renders an account of all profits derived from the use of the house, damages for breach of contract, interest and also payment of K32, 820.00.

The Applicant has only proved that the Respondent is supposed to pay the electricity and water bills which he incurred. In this vein, I enter judgment in favour of the Applicant and order that the Respondent pays K1, 099.65 and K902.84. Considering the circumstances of this case, I make no order as to costs.

Leave to appeal is granted.

Delivered in Lusaka this 30th Day of June, 2020.

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M.C. KOMBE
JUDGE