

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

2016/HP/2320



BETWEEN:

AONGOLA SIYOLWE

(Suing on behalf of other beneficiaries in the
Estate of John Namuyamba Siyolwe deceased)

1st PLAINTIFF**ROSE SIYOLWE KATANEKWA****2nd PLAINTIFF**

AND

PHONICIA INTERNATIONAL LIMITED

(T/A Kadodoura Construction Limited)

1st DEFENDANT**AHMED YASSAR KADOURA****2nd DEFENDANT****THE ADMINISTRATOR GENERAL****3rd DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 25th
DAY OF FEBRUARY, 2020**

For the Plaintiffs : Messrs Chombo and Partners.

For the 1st and 2nd Defendants : Ms N. Nawa, K.Mwale and Company

For the 3rd Defendant : Ms P.C. Hampungani, Principal Legal Officer

R U L I N G

CASES REFERRED TO:

1. *William David Carlisle v E.F. Harvey Limited* 1985 ZR 179
2. *Administrator General v Paul Meyn* SCZ No 8 of 1990
3. *Arthur Lubinda Wina and others v The Attorney General* 1990-1992 ZR 95
4. *Mpande Nchimunya v Stephen Hibwani Michelo* SCZ No 12 of 1997
5. *Irene Chinjavata and the Administrator-General* 2004 ZR 184

6. *Frank Bwalya v Attorney General and Katele Kalumba 2010/HP/630*
7. *Attorney General v Seong San Company Limited SCZ/16/2013*

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court of England, 1999 edition*
2. *Administrator General Act, Chapter 58 of the Laws of Zambia*
3. *Intestate Succession Act, Chapter 59 of the Laws of Zambia*
4. *Wills and Administration of Estates Act, Chapter 60 of the Laws of Zambia*

OTHER WORKS REFERRED TO:

1. *Black's Law Dictionary*
2. *Concise Oxford English Dictionary*
3. *Cora Hoexter, Constitutional and Administrative Law*
4. *Odger's Principles of Pleadings and Practice*
5. *Tristram and Coote's Probate Practice, 24th Edition*

This is a ruling on a notice to raise preliminary issues that was filed by the 3rd defendant on 5th December, 2019, pursuant to Order 14A of the Rules of the Supreme Court of England, 1999 edition. When the matter came up for the hearing of the notice of motion on 5th February, 2020, Counsel for the plaintiffs was not before court, but the plaintiffs were in person.

I noted that Counsel for the plaintiffs was served the application two months earlier, and I allowed Counsel for the 3rd defendant to proceed with the application. In making the application, Counsel for the 3rd defendant stated that they relied on the affidavit filed in support of the notice of motion on 5th December, 2019, as well as the skeleton arguments of even date. Counsel further stated that it was their prayer that this action be dismissed with costs, as the court would note from the statement of claim that was filed in this matter, that it does not disclose any relief being sought against the defendants.

That as could be seen from the affidavit filed in support of the notice of motion, the property had since been vested in the plaintiffs as beneficiaries of the estate, and the former administrators were thus not connected with the same.

Counsel for the 1st and 2nd defendants also in support of the notice of motion, submitted that they relied on the affidavit filed in support of the notice of motion by the 3rd defendant, as well as the skeleton arguments that they had filed on 29th January, 2020. Counsel also reiterated the prayer that the action be dismissed, but asked that the court hears the 1st and 2nd defendants on the counterclaim against the plaintiffs.

I have considered the notice of motion. It was brought pursuant to Order 14A of the Rules of the Supreme Court of England, 1999 edition. The Order provides that;

“(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just”.

Under this Order, the court may consider any question of law or the construction of any document, if it considers that the same is suitable for determination without a full trial of the action, and the issues raised once considered will determine the matter, subject only to appeal. The 3rd defendant's notice of motion relates to whether there is a cause of action that has been revealed by the pleadings against the defendants.

Such question, once determined, may determine the matter, subject only to an appeal. It is therefore suitable for determination under Order 14A of the Rules of the Supreme Court of England, 1999 edition. In the affidavit in support of the notice of motion, the deponent, Monica Songwe Mutale, a State Advocate avers that the 3rd defendant was appointed as personal representative to administer the estate of the late John Namuyamba Siyolwe. She also deposes that the plaintiffs are beneficiaries under that estate.

That the property known as Farm No 396a/6 situate in Makeni Lusaka which is the subject of this action, formed part of the estate of the late John Namuyamba Siyolwe, and was administered by the 3rd defendant. It is deposed that by a lease agreement entered into by the defendants on 19th July, 2012, the property, known as Farm No 396a/6 situate in Makeni Lusaka, was leased to the 2nd defendant by the 3rd defendant, for a term of five (5) years, as shown on the lease agreement exhibited as 'MSM1' to the affidavit.

It is averred that the lease was performed according to the terms and conditions set out therein. That the plaintiffs commenced this action on 26th October, 2016, by way of writ of summons and statement of claim before the lease expired on 31st July, 2017. The affidavit further states that among the reliefs sought is a claim for specific performance for

breach of the lease agreement in issue, and an injunction restraining the defendants from removing any items from the premises.

However, the averment is that such claims are unwarranted as neither the 1st nor 2nd defendants or indeed the 3rd defendant at any time removed items from the premises. Further, that the claim for the payment of rentals for twelve (12) months in the amount of K60, 000, 000.00 has not been substantiated, as the same was made good to all the beneficiaries, as shown on exhibit 'MSM3' to the affidavit, a letter in which the 1st plaintiff acknowledged the payment.

Further, that the K60, 000, 000.00 was paid by the 2nd defendant through the 3rd defendant before the lease agreement was terminated. The deponent deposes that a perusal of the statement of claim shows that the claim relates to only the 1st and 2nd defendants, and not the 3rd defendant with whom the lease agreement was entered into, and the plaintiffs as seen from the letter exhibited as 'MSM4' to the affidavit dated 24th November, 2016 were accordingly advised.

It is also deposed that following the expiry of the lease agreement in July, 2017, the 3rd defendant upon vesting the property in issue in all the beneficiaries, ceased to act as the personal representative of the late John Namuyamba Siyolwe. Exhibited as 'MSM5' and 'MSM6' to the affidavit, is the letter dated 1st November, 2017 from the 3rd defendant to the plaintiffs' advocates, and the documents for lodgment.

It is stated that the plaintiffs have no claim against the 3rd defendant, and that they have no locus standi with regard to the capacity in which they have commenced this action.

In the skeleton arguments, the 3rd defendant with reference to the case of **Frank Bwalya v Attorney General and Katele Kalumba** ⁽⁶⁾ argues that it was stated in that case that the issue of standing is one that is to be decided in limine. Reference is made to **Black's Law Dictionary** at page 960 which defines locus standi as;

"The right to bring an action or to be heard in a given forum".

The definition of locus standi in the **Concise Oxford English Dictionary** at page 837 is also referred to, and the argument is that locus standi is intertwined with the issue of disclosing a reasonable cause of action. Thus, for one to bring an action before the court, they must demonstrate that they have a reasonable cause of action. On what constitutes a reasonable cause of action, **Odger's Principles of Pleadings and Practice** at page 148 is relied on. It defines a reasonable cause of action as ***"a cause of action with some chance of success"***.

That the book goes further to state that only the allegations in the pleadings are considered, and that if they are examined, and they do not disclose a cause of action, the statement of claim should be struck out. Therefore, only when a reasonable cause of action is disclosed does a plaintiff have locus standi. It is argued that the plaintiffs have no reasonable cause of action against the 3rd defendant, hence they lack locus standi.

Still on the issue of locus standi, the 3rd defendant argues that any person who has an interest in an estate must sue through a personal representative, who is the only person that is authorized to represent the estate. That according to **Cora Hoexter, Constitutional and Administrative Law**, page 256, the common law does not recognize

“actions popularizes” or class actions. Therefore, as a general rule, no one can act on behalf of others, regardless of the interest possessed by the others.

It is further argued that in this case, the plaintiffs have not disclosed the capacity in which they have brought this action to prove that they have locus standi, and therefore, they cannot proceed with the action. Reliance is placed on the cases of **William David Carlisle v E.F. Harvey Limited** ⁽¹⁾ and **Mpande Nchimunya v Stephen Hibwani Michelo** ⁽⁴⁾ on what constitutes a reasonable cause of action. It is argued that the plaintiffs have not disclosed any facts upon which liability can attach to the 3rd defendant, and therefore no reasonable cause of action has been disclosed against the 3rd defendant.

On the plaintiffs having abused the court process in commencing the action, reliance is placed on Order 18 Rule 19 (d), Order 18 (19) (18) and Order 18 (19) (20) of the Rules of the Supreme Court of England, 1999 edition. That going by those provisions, there has been abuse of court process in this matter, and that the plaintiffs wish to use the machinery of the court as a means of vexation and oppression, as they have no reasonable cause of action against the 3rd defendant.

In the skeleton arguments filed by the 1st and 2nd defendants on 29th January, 2020, the definition of locus standi in **Black's Law Dictionary** as stated by the 3rd defendant is repeated. The cases of **William David Carlisle v E.F. Harvey Limited** ⁽¹⁾ and **Mpande Nchimunya v Stephen Hibwani Michelo** ⁽⁴⁾ are also relied on with regard to what constitutes a cause of action.

The 1st and 2nd defendants also refer to the case of **Arthur Lubinda Wina and others v The Attorney General** ⁽³⁾ where it was stated that;

“To be "legally aggrieved" a person must be not merely dissatisfied with or even prejudiced by an action or decision. He must also have been deprived of or refused something to which he was legally entitled..... He must be able to point to some 'encroachment or vested rights.....'”

That from this, it is clear that in order for a party to sue, there must be some facts that give rise to a claim of right before the courts of law, and which rights are enforceable by the courts. That similarly, a party bringing an action must have legal standing to bring the action before the court. That in this case, the plaintiffs have no claim of right to launch the action before this court which is enforceable.

Further, that the plaintiffs have no locus standi to commence the action, adding that the court will note that the plaintiffs have sued on behalf of the beneficiaries of the estate of the late John Namuyamba Siyolwe, seeking enforcement of the lease agreement for Farm No 396a, Makeni Lusaka, and for an order to yield vacant possession of the property. Additionally, the plaintiffs claim payment of rent in the amount of K60,000.00 together with rates and electricity bills against the 1st and 2nd defendants.

It is argued that the plaintiffs have not disclosed a cause of action upon which the court can grant them the reliefs claimed, as there was no contractual relationship between the plaintiffs and the 1st and 2nd defendants, but rather the contractual relationship that the 1st and 2nd defendants had, was with the 3rd defendant, as shown on the lease

agreement exhibited as 'MSM1' to the 3rd defendant's affidavit in support of the notice of motion.

Therefore, the 3rd defendant who was appointed as administrator of the estate of the late John Namuyamba Siyolwe, in October, 2009, is the party that is competent to commence the action. Further, that the doctrine of privity of contract applies, as the plaintiffs seek to enforce rights under the lease agreement. The case of **Attorney General v Seong San Company Limited** ⁽⁷⁾ is relied, arguing that it was held in that case that;

"We agree with Counsel that the common law doctrine of privity of contract in general does not confer rights or impose obligations on persons who are not party to it".

That as the lease agreement was between the 3rd defendant as landlord and the 1st defendant as tenant, the said lease agreement did not confer any rights upon the plaintiff that would entitle them to sue under the lease.

The 1st and 2nd defendants also relying on Order 18 Rule of the Rules of the Supreme Court of England, 1999 edition, reiterate that the plaintiffs by commencing this action, which is groundless and unfounded are abusing the court process. This is because they had no rights under the lease agreement, and further it is only the 3rd defendant, as administrator of the estate, who is clothed with authority to seek redress for any wrong done to the estate. Their prayer is that the action be dismissed.

The plaintiffs did not file an affidavit in opposition to the application, and as already indicated, Counsel for the plaintiff was not present during the

hearing of the notice of motion. However, the plaintiffs post the hearing of the notice of motion, filed submissions in opposition to the application.

In those submissions, on the issue of locus standi, the plaintiffs argue that they are children of the late John Namuyamba Siyolwe. Therefore, their interest in his estate is guaranteed as issues, which is defined in Section 3 of the ***Wills and Administration of Estates Act, Chapter 60 of the Laws of Zambia*** as;

““issue” in relation to any person means the children, grandchildren and other remoter descendants of that person;”

Therefore, the plaintiffs are entitled to claim as beneficiaries, and they have a right to bring the action in their own capacity. Reliance is placed on Sections 21 and 22 of the ***Administrator General Act, Chapter 58 of the Laws of Zambia***. That Section 22 of the said Act provides that;

“.....the Administrator-General shall be at liberty to distribute the assets or any part thereof amongst the parties entitled thereto, without having regard to the claims of persons who shall have been served with such notice, but shall have failed to comply with the requirements thereof, and he shall not be liable to any such person for the assets or any part thereof; but nothing herein contained shall prejudice the right of any such person to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively”.

Thus, as the plaintiffs have a right to the assets of their late father, they have locus standi to commence the action, whether there is an

administrator or not. Further, that where there is a situation that endangers the estate, a cause of action is revealed, as stated in the case of ***William David Carlisle Wise v E.F. Hervey Limited*** ⁽¹⁾.

The submission is that there is proof that the property was ruined, and the 1st and 2nd defendants after having entered into the lease with the 3rd defendant disappeared, and the 3rd defendant acknowledged that it was ignorant of the tenant's whereabouts. That in establishing who is liable for the destroyed property, the beneficiaries are entitled to sue the 3rd defendant as a professional, who was negligent in the duties, by allowing the situation complained of to arise.

In this regard, reliance is placed on the case of ***Administrator General v Paul Meyn*** ⁽²⁾ and the case of ***Irene Chinjavata and the Administrator-General*** ⁽⁵⁾ where it was submitted that;

“It was submitted that the sale took place in 1985; 10 years before the writ was issued. It was contended that at that time, whatever was realized, had value. It was pointed out that the negligence was the failure to release the proceeds of the sale of the house, which proceeds have now lost value; and that all the Appellants wants now are the proceeds from the sale of the house at a correct value or the return of the house itself”.

That in this matter, the 3rd defendant has not disputed that the 1st and 2nd defendants completely ruined the property, and disappeared without paying rentals for one year, and it had to take the plaintiffs to locate the tenants and collect the rental arrears for one year from July, 2015 until July, 2016. That the rentals from July, 2016 to July, 2017 remain

unpaid to date. It is also argued that the 3rd defendant cannot seek refuge in Section 30 of the **Administrator General Act**, as the said section only protects the Administrator General when duties are diligently executed.

That Section 30 of the said Act provides that;

“30. Neither the Administrator-General nor any of his agents shall be personally liable to any person in respect of goods or chattels in the possession at the time of the death of any person whose estate shall be administered by the Administrator-General which shall be sold by the Administrator-General or such agents, unless the Administrator-General or agent shall know or have actual notice before the sale that such goods or chattels were not in fact the property of the person whose estate is being administered by him, and generally neither the Administrator-General nor any agent shall be liable for any act done by him bona fide in the supposed and the intended performance of his duties, unless it shall be shown that such act was done not only illegally, but willfully or with gross negligence:”

Further reliance is placed on **Tristram and Coote’s Probate Practice, 24th Edition**, at page 394, which states that;

“Where the estate of a deceased person may be endangered by delay in administering it, the court is not bound to wait for an application by the person entitled to a grant under the

rules, but may grant letters of administration ad colligenda bona for the purposes of preserving the property”.

The submission is that interested parties are legally entitled to take steps to protect property going by the above, and therefore the plaintiffs have locus standi in this matter. Further, arising from the fact that the 3rd defendant had passed over the authority to the plaintiffs to administer the estate, as stated in the letter dated 24th November, 2016, the plaintiffs have locus standi.

That in paragraphs 1 and 2 of that letter, the 3rd defendant acknowledged that the 1st and 2nd defendant had abandoned the premises, and were in breach of the lease agreement. The 3rd defendant even advised the plaintiffs to take up action to remedy the breach. The plaintiffs rely on Section 18 of the Administrator General Act to argue that upon the issuance of the new letters of administration, the Administrator General ceased to be the administrator, and the plaintiffs started administering the estate.

It is submitted that the first steps that the plaintiffs took in their mandate was to look for and find the 1st defendant, and make it pay the rentals arrears from July, 2015 to July, 2016. That out of that money, the 3rd defendant obtained its commission, and the remaining amounts from July, 2016 to July, 2017 are still outstanding, and the 3rd defendant cannot allege that the plaintiffs have no locus standi.

Thus, the submission is that the plaintiffs are properly before the court as beneficiaries, and persons who were later vested with power to administer the estate, which was destroyed and neglected while under

the 3rd defendant's administration. On that basis, the prayer is that the application be dismissed.

The notice of motion seeks the determination of two questions, namely;

- i. Whether the cause discloses the plaintiffs' locus standi.*
- ii. Whether the commencement of this action by the plaintiffs before this honourable court in the circumstances amounts to abuse of the court process.*

The background leading to the application is that the 1st plaintiff commenced this action on 26th October, 2016, by writ of summons accompanied with a statement of claim against the 1st and 2nd defendants initially, claiming;

- 1. An order for specific performance for breach of the lease agreement on Farm No 396a Makeni, Lusaka.*
- 2. An order of interim injunction restraining the defendants from removing any items from the premises.*
- 3. An order that the 1st defendant yields up to the plaintiff vacant possession of the said premises.*
- 4. Payment of rent for 12 months amounting to K60, 000.00.*
- 5. Payment of rates and electricity bills.*
- 6. Costs.*
- 7. Any other relief that the court may deem fit.*

No appearance was entered or any defences filed by the 1st and 2nd defendants, and on 20th January, 2017, the Deputy Registrar entered judgment in default of appearance for the reliefs claimed. On 27th

January, 2017, the 1st and 2nd defendants filed summons to set aside the default judgment, as well as to stay execution of the said judgment. The judgment in default of appearance and defence was set aside on 3rd February, 2017. Then on 15th February, 2017, the plaintiffs applied to join the Administrator General as plaintiff in the proceedings.

On 4th April, 2017, the 2nd plaintiff applied to be joined to the proceedings, and as can be seen from the affidavit filed in support of that application, it was on the basis that she is a beneficiary under the estate of the late John Namuyamba Siyolwe. In the meantime, on 7th March, 2017, I had referred the matter to mediation, during the mediation settlement week scheduled to be held from 19th to 25th April, 2017.

On 19th April, 2017, the 1st and 2nd defendants filed a defence and counterclaim, and on 21st April, 2017, the Deputy Registrar joined Rose Siyolwe Katanekwa as the 2nd plaintiff, and the Administrator General as the 3rd defendant. The matter next came up before me on 4th October, 2017, and I noted that a settlement was not reached at mediation. Further that the 2nd plaintiff and the 3rd defendant had been joined to the proceedings.

I then issued orders for directions in light to the joinder of the parties directing the 3rd defendant to file a defence. On 29th January, 2018, when the matter came up for a status conference, Counsel for the 1st and 2nd defendants informed me that they had filed a judgment in default of defence with respect to the counterclaim, and that they had not received a reply with respect to the defence.

He stated that those issues were holding up progress of the matter. Counsel had further indicated that the parties wished to settle the matter

excuria and that is how I adjourned the matter. On 16th February, 2018, the Deputy Registrar entered judgment in default of appearance and defence to the counterclaim. Then on 9th April, 2018, the plaintiffs applied to set aside the default judgment that was entered on the counterclaim. The application was heard on 13th June, 2018 and the said default judgment was set aside on the same day.

In light of the default judgment being set aside, I varied the orders for directions on 10th May, 2018, so that they took into account the filing of the defence to the counterclaim. On 13th August, 2018, the Deputy Registrar again entered judgment in default of defence to the counterclaim. An application to set aside the default judgment was filed on 21st September, 2018, and on 20th March, 2019, the application was dismissed for want of prosecution.

On 17th May, 2019, I noted that as the application had been dismissed, the parties should comply with the orders for directions, or else the matter would be dismissed for want of prosecution. The plaintiffs and the 1st and 2nd defendant complied with the orders for directions. The 3rd defendant on 5th December, 2019 filed the notice of motion, which is subject of determination.

In the affidavit in support of the said notice of motion, it has been seen that 3rd defendant was appointed as the personal representative of the estate of the late John Namuyamba Siyolwe. In administering the estate, the 3rd defendant entered into a lease agreement with the 1st defendant for the property known as Farm No 396a Makeni Lusaka, with the 1st defendant as tenant of the premises, for a period of five (5) years from 1st July, 2012, at a monthly rental of ZMW5, 000.00, as seen from the lease exhibited as 'MSM1' to the affidavit.

The plaintiffs commenced this action before the lease expired in July 2017, claiming specific performance of the lease agreement, payment of rentals of K60, 000.00, and an injunction restraining the defendants from removing items from the property. The 3rd defendant in paragraph 13 of the affidavit in support of the notice of motion, deposes that the K60, 000.00 rental arrears were paid by the 1st and 2nd defendants, through the 3rd defendant, before the lease was terminated.

Further, as seen from the letter exhibited as 'MSM5' and 'MSM6' to the affidavit, dated 1st November, 2017, the 3rd defendant ceased to administer the estate, and vested the property in the plaintiffs as administrators of the estate.

The argument is that the plaintiffs had no locus standi to commence the action, as the property in contention forms part of the estate of the late John Namuyamba Siyolwe, which the 3rd defendant was administering. Further, that the lease agreement was between the 3rd defendant as personal representative of the estate, and the 1st defendant, and the plaintiffs could only sue through the 3rd defendant, as beneficiaries of the estate, for any wrong done to the estate.

It is also argued, the writ of summons discloses no cause of action against the 3rd defendant. The fact that the property known as subdivision 6 of Farm 396a Makeni Lusaka, which formed part of the estate of the late John Namuyamba Siyolwe, was being administered by the 3rd defendant as personal representative is not in contention. It is also not in contention that the plaintiffs commenced this action on 26th October, 2016 as beneficiaries under the estate initially claiming reliefs against the 1st and 2nd defendants, under the lease agreement.

At the point that the plaintiff commenced the action as beneficiaries under the estate, the 3rd defendant was the personal representative of the estate. Section 24 (1) of the ***Intestate Succession Act, Chapter 59 of the Laws of Zambia*** provides that;

“24. (1) Subject to any limitations and exceptions contained in a grant of letters of administration the grant entitles the administrator to all rights belonging to the deceased as if the administration had been granted at the moment after his death except that letters of administration shall not render valid any intermediate acts of the administrator tending to the diminution or damage of an intestate's estate”.

Therefore, on the letters of administration being granted under the estate of the late John Namuyamba Siyolwe, the administrator of the estate is the only person that is clothed with authority to commence and defend any legal actions on behalf of the estate. In this case, the plaintiffs allege that the 1st defendant as tenant of the premises leased under the estate, breached the tenancy agreement, by abandoning the rented premises and not paying rentals for the said premises.

This, the 3rd defendant, admitted in the letter exhibited as ‘MSM4’ to the affidavit in support of the notice of motion. Clearly, some wrong was done to the estate. It therefore followed, that the 3rd defendant as administrator of the estate is the party that had locus standi to commence the action against the 1st and 2nd defendants for breach of the tenancy agreement, going by the reliefs sought in the writ of summons and statement of claim, as the wrong was pursuant to an agreement between the 3rd defendant and the 1st defendant. To that extent, the plaintiffs had no locus standi to commence the action.

However, as rightly submitted by the plaintiffs, and as can be seen from the authorities that they have cited, beneficiaries of an estate can sue a personal representative for breach of any duties of that capacity. It is noteworthy, as submitted by the defendants that the claims as pleaded, do not show a cause of action against the 3rd defendant, as the claims are against the 1st and 2nd defendants.

It will further be noted that when the proceedings were filed, and the 1st and 2nd defendants did not enter appearance and file a defence and a default judgment was entered by the Deputy Registrar on 20th January, 2017. The 1st and 2nd defendants applied to set aside the default judgment on 27th January, 2017. When that application came up for hearing on 3rd February, 2017, the 2nd defendant informed the Deputy Registrar that they had paid the K60, 000.00 owing as rentals to the beneficiaries under the estate, through the 3rd defendant, who had at that point not yet been joined to the proceedings.

The 1st plaintiff however stated that he had not yet been paid the money, as what the defendant was saying, was that he paid the arrears for the period 19th December, 2015 to 18th December, 2016, which was paid a year later. He went to state that the monies up to 19th January, 2017, had not been paid, and rentals were to be paid three (3) months in advance, and it was very hard to locate the defendant.

The Deputy Registrar observed that the arrears for rent had been paid, and what was owed was just for one month. She went further to state that the writ of summons has a claim for K60, 000.00 as rent, and the default judgment was silent on the monies owing, but stated that the defendant should vacate the premises. The Deputy Registrar directed that the defendant be heard on the claim to vacate the premises before

she could make an order to stay execution of the judgment. She set aside the default judgment.

In the defence and counterclaim that was filed on 19th April, 2017, the defendant denied having abandoning the premises. The defendants claimed that the plaintiffs in or around November/December, 2016 ordered them to vacate the premises, and they locked up the buildings where the defendants had put the spare parts for its construction and earth moving equipment. That for four (4) months they could not access the building, and the plaintiffs detained their property, resulting in them suffering loss.

They counter claimed that the plaintiffs had no locus standi to evict from the premises, and they claimed damages for loss of business, as well as for loss of hire of the tipper truck, for loss of a block making machine, an electrical motor for a concrete mixer, and for the detention of spare parts locked in the storeroom.

I have stated that a default judgment was entered on the counterclaim on 16th February, 2018, and it was set aside on 13th June, 2018. I issued orders for directions on 10th May, 2018, and again a default judgment on the counterclaim was entered, on 13th August, 2018. The plaintiffs applied to set it aside on 13th September, 2018, and the application was dismissed for want of prosecution on 20th March, 2019.

I am to proceed to trial for the claim for specific performance of the lease agreement. The 3rd defendant avers that the 1st and 2nd defendant have vacated the property under the lease. As such, as specific performance entails performing an act, and the 1st and 2nd defendant's having vacated the premises, that claim cannot stand. There is no claim in the

alternative for damages, and the rental arrears having been paid for the period claimed in the writ of summons, after the default judgment was set aside, the plaintiffs' claims have been attended to.

Further, while the plaintiffs alleged breach of duty on the part of the 3rd defendant in administering the estate, there is nothing in the pleadings to that effect. The interlocutory judgment in default of appearance to the counterclaim, granted the 1st and 2nd defendants' relief in the amount of K35, 000.00 for loss of the block making machine and concrete mixer and for damages to be assessed.

The claims by the 1st and 2nd defendants should therefore proceed to assessment. As it is, the claim for specific performance on the lease agreement having been overtaken, there is nothing to try on the claims filed by the plaintiffs. Further, there is no claim against the 3rd defendant to defend, and the proceedings against the 3rd defendant are accordingly set aside.

I direct that the matter proceeds for assessment of the reliefs granted to the 1st and 2nd defendants by the default judgment. Costs of the application go to the defendants to be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THIS 25th DAY OF FEBRUARY, 2020

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**