IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2009/HL/91
2013/HP/1396

BETWEEN:

SARAH NCHIMUNYA	**1st PLAINTIFF**
FRANK MABETA NCHIMUNYA	**2nd PLAINTIFF**
AND	
THE ATTORNEY GENERAL	**1st DEFENDANT**
MAAMBA COLLIERIES LIMITED	**2nd DEFENDANT**

Before: ***The Hon. Mr. Justice Charles Zulu.***

For the Plaintiffs: Ms. I.E. Suba and Mr. W. Shakalima, Mesdames Suba, Tafeni & Associates.

The first Defendant: No Appearance.

For the second Defendant: Mr. J. Kalokoni, Messrs Kalokoni & Company.

J U D G M E N T

<u>*Cases referred to:*</u>

1. ***Beatrice Muimui v Sylvia Chunda (SCZ) Appeal No. 50 of 2000.***
2. ***The Attorney General v Steven Luguru (SCZ) No. 20 of 2001.***
3. ***Josephine Kabwe v Dominic Kapasa (SCZ) Appeal No. 4 of 2014.***
4. ***Valentine Webster Chansa Kayope v The Attorney General and Minister of Works and Supply (SCZ) Appeal No. 204 of 2004.***
5. ***Frank Malichupa and Others v Tanzania – Zambia Railways Authority (2008) Z.R. 112.***
6. ***Simon Lwando and Other Teachers v ZCCM Investment Holdings Plc and Simasikwe and Other (SCZ) Appeal No. 83 of 2009.***
7. ***Timothy Hamundu Muuka v Tobacco Board of Zambia (SCZ) Appeal No. 49 of 1998.***

8. Hemmings v Stoke Poges Golf Club [1920] I.K.B. 720.
9. Jones v Foley [1891] I.Q.B. 730.
10. Wilkinson v Downton [1897] 2 Q.B. 57.

Legislation referred to:

1 The Companies Act Chapter 388 of the Laws of Zambia.
2. The High Court Act Chapter 27 of the Laws of Zambia.

Works referred to:

1. Halsbury's Laws of England Fourth Edition Vol. 27 (1) Reissue (Butterworths, London 1994) paragraphs 10 & 15.

The Plaintiffs, administrator and administratrix respectively, cum beneficiaries of the estate of their late father, Mr. Josy Nchimunya, took out a writ of summons and a statement of claim dated November 12, 2009, against Maamba Hospital Board Management, and Maamba Collieries Limited seeking the following reliefs:

(i) An order directing the 1st defendant to stop evicting or interfering in any way with the Plaintiff's right to quiet enjoyment of House No. L 45, New Township, Maamba;
(ii) An Order compelling the 2nd Defendant to sale House No. L45, New Township Maamba [t]o the Plaintiffs;
(iii) Damages for loss of its items in the sum of K3, 154,500.00;
(iv) Exemplary damages for mental torture, embarrassment and inconvenience during the time of and as a result of eviction from the 1st Defendant;
(v) Consequential expenses;
(vi) Costs of this action; and
(vii) Any other relief that the Honourable Court may deem appropriate.

It must be noted that by order dated March 27, 2014, Maamba Hospital Board of Management was substituted by the Attorney General. The Plaintiffs in their statement of claim averred that, Maamba Hospital Board of Management (hereinafter referred to as "the Hospital") was the employer

of the Plaintiffs' father. And as regards the second Defendant, it was averred that, the second Defendant, Maamba Collieries Limited (MCL) was a body corporate under the ***Companies Act Chapter 388 of the Laws of Zambia***, and the landlord of House No. L45, New Township, Maamba rented out to the Hospital.

The first to testify as Plaintiff Witness Number One (PW1) was Frank Mabeta Nchimunya, the second Plaintiff, aged 35 years. He stated that his late father, Mr. Josy Nchimunya was employed by the Hospital, and occupied House No. L45 New Township Maamba. It was averred that the house was occupied by his father as an incident of his employment. And that the subject house was owned by Maamba Collieries Limited. In paragraph 6 of the statement of claim it was averred that:

> ***At the time the houses became due for sale, the deceased was still alive and occupied the house in issue as a result of which the right to purchase same accrued to him but died before he could purchase the house in issue.***

PW1 testified that his father died on March 18, 2003, when he (Plaintiff) was in the eleventh grade. He said his father and the family occupied the house since 1986. He said the family continued to occupy the house after his father's death, but were evicted by the Hospital in January 2005. He made reference to a notice of eviction by the Hospital dated January 28, 2005. The notice to vacate under the letter head of the Ministry of Health (Maamba Hospital) addressed to the administrator of the estate in part reads as follows:

> ***Management writes to inform you that following payment of the repatriation allowance, you have been given 2 weeks notice in which you have to vacate the house for the Hospital to reallocate it to the new occupants.***

PW1 said the estate was never paid repatriation allowance. He said during the eviction, done in their absence, while they were at Church, the family's property was removed from the house and taken to a garage, where they were stored. He said the items collected included: sofas, refrigerators, cupboards, a stove, and beds. He added that a lot of household goods were damaged, and were only returned after a court order.

PW1 stated that the family was not given the offer to buy the house at the time houses were being sold by MCL. He said other neigbhouring houses were sold, save the subject house, where he was residing. He said the subject house was located two (2) kilometers away from the Hospital. He added that the house was not attached to the Hospital's housing units.

In cross examination, he stated that his father was a civil servant, employed as a Laboratory Technician in the Ministry of Health. He said after his father was transferred from Macha to Maamba in 1986, he was accommodated by Maamba Collieries Limited. He said at the time, there was no government hospital, except a mine clinic that was run by Maamba Collieries Limited. According to him, when his father moved to Maamba, he worked for Maamba Collieries Limited on secondment. He said the houses were owned by Maamba Collieries Limited and that by virtue of his father's employment, his father was allowed to occupy the house. He admitted that he had no evidence to prove that his father applied to purchase the house; neither did he (Plaintiff) apply to purchase the house in his capacity as administrator of the estate.

And as regards the claim of K3, 154, 500.00, he said it represented the value of the properties that got damaged due to mishandling when they were evicted from the house by the Hospital.

PW2 was Abraham Banda, a civil servant, Inspector of Housing in the Ministry of Works and Supply. He recounted that he was once a Vice Secretary on the Sale of Government Pool Houses (Committee). He explained that initially government houses earmarked for sale were pool houses, available to sitting tenants working for the government. He said the second category represented institutional houses. He said institutional houses belonged to particular Ministries, and could only be sold by the controlling officer of that Ministry after declassification of the houses, and thereby making them available for sale. He said the procedure for sale of houses was contained in the Handbook on *The Civil Service Home Ownership Scheme*, issued by Cabinet Office in September 1996.

PW2 briefly summarized the procedure for sale of institutional houses. And using the Ministry of Education as an example, he stated that if a teacher who was a sitting tenant and was interested to purchase an institutional house, he/she had to first apply to his/her supervisor (the headmaster), and if the headmaster was agreeable, the headmaster would write to the District Education Board Secretary (DEBS). He said the DEBS would then write to the Provincial Education Officer, who would then write to the Permanent Secretary within the Ministry. He said if the Permanent Secretary was agreeable, he/she would then make a recommendation to the Permanent Secretary, Ministry of Works and Supply.

He further explained that once in receipt of the letter, the Permanent Secretary, Ministry of Works and Supply would then present the application to the Committee for approval. He said thereafter the Secretariat would then go on the ground to have a physical inspection of the property and value the property, and then ask the applicant to apply. He said once the Committee, comprising the Deputy Minister as the

Chairperson assisted by two permanent secretaries was satisfied; a letter was generated to the Ministry of Lands to issue the letter of offer.

Having regard to houses that were owned by Zambia Consolidated Copper Mines (ZCCM), PW2 said those were sold according to Cabinet Office Circular No. 12 of 1996 and the Handbook.

In the case of Maamba Collieries Limited houses, he said according to what he knew, the houses were sold following presidential pronouncements made by President Rupiah Banda in March 2011. He said it did not matter if the applicant was an employee of Maamba Collieries Limited or not, but whether or not the applicant was a sitting tenant. He said houses were sold to people that were sitting tenants, but did not necessarily work for the government, and gave examples of ZAFFICO, Muchinji Railways, Nitrogen Chemicals of Zambia, and Kafue Textiles. He added that houses belonging to these institutions were also sold to sitting tenants who were not employees of the said institutions.

In cross examination, he stated that before an institutional house was available for sale, it had to be declassified by the Permanent Secretary. He added that without an application, one could not buy. In reference to the sale of institutional houses to non-civil servants, but sitting tenants, PW2 said, there was no amendment made to the Handbook, except what was followed was President Banda's speech in which the pronouncement was made. In re-examination he said the effect of the pronouncement on the subject Circular was such that anybody as long as he/she was a Zambian and a sitting tenant was eligible to purchase. He further explained that, initially institutional houses were not supposed to be sold, but were sold after declassification during the sale of government pool houses in 1996.

There was no attendance on the part of the 'first Defendant', but Maamba Collieries Limited called one witness, Mr. Hyden Chimense, the Community Development Officer in the employ of Maamba Collieries Limited.

Mr. Chimense said he started work with MCL in 1985. He said he knew the Nchimunya family (Plaintiffs) as their father was a Laboratory Technician at Maamba General Hospital. He stated that the late Mr. Nchimunya was employed by the Ministry of Health, and he was categorical that the late never worked for MCL. He said the late only occupied the house by virtue of him first working at the Clinic. He said after the Hospital was built in 1997-1998, following the collapse of the Clinic due to floods, the late continued to work for the Ministry of Health based at the Hospital. He said the subject house was rented out by MCL to the Ministry of Health, and not to the late as an individual.

He recounted that MCL houses were built in 1971, by MCL, and occupied in 1972. He said government officers from the Police, Ministry of Health, Agriculture, and ZANACO were accommodated by MCL. According to him, the above institutions were renting from MCL. He explained that MCL was sold by the Government in 2010 to Nova Bharat. He said in 1996, MCL housing stock was not available for sale. He explained that all houses occupied by staff from Ministry of Health, Police, and ZANACO were not available for sale, because they were core-assets, including those occupied by MCL managers and directors. He added that a house that was occupied by a miner working for MCL was a non-core asset. He said all houses occupied by non-miners neighboring the subject house were not sold, because they were core-assets. He also stated that as a core-asset, the subject house could not be sold to the Plaintiffs. He stated that he was not in possession of a document categorizing core-assets from non-core assets.

He, however, made reference to a Special Resolution by the Board of Directors of MCL dated February 8, 2001, wherein it was recorded:

> ***Following the resolution passed at the 16th Special Cabinet meeting held on 5th November 1998, at which Cabinet recommended and authorized the transfer of all parastatal housing stock under the custody of Zambia Privatization Agency to the Ministry of Finance and Economic Development. It is hereby resolved that non core residential housing stock of Maamba Collieries Limited are henceforth transferred to the Ministry of Finance and Economic Development for onward sale by the Presidential Housing Initiative under the on-going Government Programmee for sale of parastatal housing stock.***

According to Mr. Chimense, the minutes of the said Board took precedence over the Handbook. But he admitted that he did not sit on the MCL Board.

The parties, thus the Plaintiff and the second Defendant through their respective Counsel filed their written submissions. The Plaintiffs' Counsel kindled the submissions by stating that the spirit of Cabinet Office Circular No. 12 of 1996 was to empower Zambians who were civil servants and were sitting tenants of houses owned by the Government and parastatals. And it was noted that the operative words are "***all Government Houses shall be sold...***".

It was argued that at the time, Cabinet Office Circular No. 12 of 1996 was issued, the late Mr. Nchimunya was entitled to buy the subject house, and paragraph 2.2(a)(ii) of the Circular was cited which provides:

> ***(ii) a spouse or children of a civil servant who died but was not paid death/ terminal benefits and are sitting tenants in a government pool house shall be entitled to purchase the house they are occupying as part of the package. They should follow the procedure outlined in paragraph 3.1 of the Handbook on the Civil Service Home Ownership Scheme when applying to purchase the house;...***

The Plaintiff's Counsel made reference to section 1.0 of the Handbook which provides:

> ***The Government has decided to sell all its pool houses except VIP and some institutional houses...***

It was argued that the decision to empower Zambian civil servants cum sitting tenants to own houses was made clear by pronouncements made by the fourth President, Mr. Rupiah Banda to extend the application of the Circular to include all sitting tenants that occupied government and parastatal houses. And that it was no longer necessary for one to work for a particular institution in order to qualify. It was acknowledged that, the extension of the pronouncement did not involve the amendment of an enabling Circular, but by *modus operandi.* It was argued that since there was no time limit within which to apply to purchase the house, the Plaintiffs were still at liberty to apply. Counsel submitted that although the Circular was not amended following the 2011 presidential pronouncements, the application of the Circular was extensively varied, to effectuate the spirit with which Cabinet resolved to empower Zambians.

Reference was made to paragraph 5 of the second Defendant's Defence in which it was averred as follows:

> ***The 2nd Defendant admits paragraph 6 of the Plaintiff's statement of claim but only to the extent that the deceased was still alive and occupied the house in issue but was purely and only as an incident of the Contract of Employment with the 1st defendant and there was absolutely no employment relationship between the Plaintiff and the 2nd Defendant at all. the 1st Defendant will further state at trial that at the material time, the Presidential Housing Initiative directed the 2nd Defendant to hand over all its non-core assets to Government for sale which was done by Maamba Collieries Limited thereof, the 2nd Defendant has no houses in its possession to sell to the Plaintiff or at all.***

According to Counsel, this was in contradiction to what was deposed to by the second Defendant's Legal Counsel, Ms. Masheke, in an affidavit on the record dated March 16, 2012, in which it was stated:

> ***That the defendant Company herein does not own the house that the Plaintiff is claiming herein as the Government of the Republic of Zambia which was the then sole Shareholder in the Defendant Company had instructed the Company to handover all its non-core housing stock to the then Presidential housing initiative which the company did as can be seen from the exhibit marked "PMM1" hereto", on which we submit as follows:-***

It must be noted that exhibit marked "PMM1" relates to the Board Resolution herein-before mentioned.

The Plaintiff's Counsel contended that the subject house belongs to the Government, and not MCL. And in support of the argument that the Plaintiffs are entitled to buy the house, reference was made to a myriad of decided cases on the sale of government houses and quasi-government houses starting with the case of ***Beatrice Muimui v Sylvia Chunda (SCZ) Appeal No. 50 of 2000*** at page 5, in which the Supreme Court held:

> ***We do not subscribe to the argument that being a sitting tenant is the sole criterion in the purchasing of a government or quasi government houses in the current policy of empowering employees by the Government. We take judicial notice that the other important criterion a potential purchaser has to be an employee of the government or quasi government organization.***

Further, the case of ***Attorney General v Steven Luguru (SCZ) No. 20 of 2001*** was resorted to, in which the following remarks were quoted:

> ***.... it was the Government's Condition of Service to sell the houses to Zambian civil servants who are sitting tenants.***

It was argued that the facts in the ***Steven Luguru*** case (supra) and the present case are hugely similar. And that in the ***Steven Luguru*** case, the

Plaintiff was allowed to buy the house. Additionally, the case of ***Josephine Kabwe v Dominic Kapasa (SCZ) Appeal No. 4 of 2014)*** was vouched, in which the following quote was said to have been made:

> ***There is only one ground upon which one is eligible to purchase and that is as a result of being a sitting tenant and a Zambian as per the 1996 Government Circular.***

I wish to interpose and state that, the above quote does not exist in the said judgment. And as regard the case of ***Steven Luguru***, the complainant/respondent was in fact unsuccessful on appeal.

It was argued that the Plaintiffs herein satisfied all the prerequisites to purchase an institutional house from MCL, on the basis that:

> ***...firstly on the basis that the Circular was meant to empower Zambians to which they qualify and secondly that their father was undisputedly an employee of Maamba Clinic thereby giving them the leverage to purchase thereof.***

It was submitted that if the order was not granted compelling MCL to sell the house, a plea was instead made that an order thereof be made against the Hospital. It was contended that a declaratory order that the Plaintiffs are entitled to purchase the house was permissible under the head titled: *Any other relief that the Honourable Court may deem appropriate.* Furthermore, the memorable section 13 of the ***High Court Act Chapter 27 of the Laws of Zambia*** was cited. And I was urged to allow the Plaintiffs' claims.

In response, Counsel for the second Defendant started his submissions by making reference to the case of ***Valentine Webster Chansa Kayope v The Attorney General and Minister of Works and Supply (SCZ) Appeal No. 204/2004*** page 13, in which according to Counsel, the Plaintiff sought

to be exempted from written government policy in order to purchase an institutional house, and the Supreme Court had this to say:

> ***As a court it is our constitutional duty to enforce the law as it is on the statutes and government regulations as they appear in the relevant instruments. It is not part of our constitutional duty to countenance or encourage breaches of the law and regulations.***

Counsel submitted that the issue as regards eligibility to purchase a parastatal house was addressed in the case of ***Frank Malichupa and Others v Tanzania – Zambia Railways Authority (2008) Z.R. 112***; Counsel provided a summary of the facts as follows: that the appellants were former Zambia Police Service Officers seconded to work with the respondent, a parastatal body. And pursuant to the government's empowerment policy on house ownership, promulgated in 1996, they sought for a court order to compel the respondent to sale them its houses in which they lived, the Supreme Court held (head-notes):

> ***The law is settled that for somebody to be eligible to purchase a house from the Government of the Republic of Zambia and or a parastatal body, that somebody has to be:***
>
> ***(a) a sitting tenant and at the same time either he or she is an employee or former employee not yet paid his or her terminal benefits***
>
> ***(b) widow or child of the deceased of an employee of the government of the Republic of Zambia or parastatal, who has not yet been paid his or her terminal benefits at the time the scheme was put in place;***
>
> ***... and***
>
> ***(f) he or she is an employee occupying other type of house other than institutional.***

In the light of the above case, Counsel noted that at the time the policy was promulgated, the late Mr. Nchimunya was a civil servant, working for

the Government, and that the subject house was an institutional house for MCL, and not amenable for sale unless it was accordingly declassified.

In addition Counsel argued that the late Mr. Nchimunya or the Plaintiffs did not apply to purchase the house as required by sections 3.1 and 3.2 of the Handbook. It was noted that section 3.1 set out the procedure to be followed by a spouse and/or children of a deceased civil servant who *inter alia* was not paid terminal/death benefits and was a legal sitting tenant in a government pool house. It was submitted that the spouse or children of the deceased civil servant were obliged to submit an application to the Secretary to the Treasury. And in terms of section 3.2, it was noted that the same, set out the procedure to be followed by a serving civil servant who wished to purchase a government pool house. It was submitted that a civil servant intending to purchase a pool house as a sitting tenant was obliged to complete and submit an application in a prescribed form. Counsel reiterated that neither the late, Mr. Nchimunya nor the Plaintiffs applied to purchase the subject house. Counsel contended that since there was no letter of offer to purchase the subject house, there was no basis to claim an accrued right to purchase the house. Again the case of ***Frank Malichupa*** case (supra) was vouched in which the Supreme Court held:

> ***There is no law, constitutional or general law, which compels an unwilling person to sell his property to a sitting tenant.***

As regard ownership of the house in issue, it was argued that the house belonged to the then sole owner of MCL, which was the Government, and its wishes not to sale institutional houses must be respected.

I have carefully considered the evidence adduced and the submissions made thereof. I am satisfied that the late, Mr. Nchimunya was a civil servant employed by the Ministry of Health. He moved to Maamba Mine

Clinic in 1986, following his transfer from Macha Hospital. He worked at Maamba Mine Clinic as a Laboratory Technician. And when Maamba General Hospital was built following the natural calamity that demolished the Clinic, Mr. Nchimunya became part of staff working at the Hospital. I have no doubt whatsoever that at no time was the late Mr. Nchimunya an employee of MCL. In fact when there was an attempt in 1991 to transfer him from Maamba Mine Clinic to Livingstone, he protested his transfer in a letter dated July 19, 1991, addressed to the Chief Laboratory Technician, Ministry of Health. This corroborate the fact that, the late was not an employee of MCL, but the Government, through the Ministry of Health. The mere fact that he was working at Maamba Mine Clinic and Hospital respectively did not make him an employee of MCL.

It is not in dispute that from the time the late moved from Macha to work at Maamba Mine Clinic and later at the Hospital, and until his demise, he was accommodated at House No. L45 New Township Maamba. This house was owned by MCL, at the material time a parastatal body. It was never owned by the Ministry of Health. In fact the Plaintiffs in their statement of claim, in paragraph 3 admitted the fact that the house was owned by MCL, a separate legal entity, and that it was only rented out to the Ministry of Health. This averment certainly flies in the teeth of the Plaintiffs' submission that the house belonged to the Government. I believe the testimony of Mr. Chimense that this house in particular and others were severally set apart for the benefit of officers from the Ministry of Health, Zambia Police Service, and ZANACO etc., working in the mine town as part of MCL's Corporate Social Responsibility (CRS). The occupation of the house by the late, by virtue of an arrangement between MCL and the Ministry of Health, akin to a "service occupier" did not make the late an employee of MCL. It must be noted that a "service occupier" is defined as:

an employee who occupies his/his employer's premises in order to perform his/her duties as an employee (see ***Halsbury's Laws of England Fourth Edition Vol. 27 (1) para 15 page 24.***) And by the Plaintiffs' own admission in paragraph 3 of their statement of claim, the late Mr. Nchimunya was not even the legal sitting tenant, but the Ministry of Health.

Having recourse to the case the of ***Simon Lwando and Other Teachers v ZCCM Investment Holdings Plc and Simasikwe and Other SCZ Appeal No. 83 of 2009***, which is considerably on all fours with the present case, it is correct to say that the late, Mr. Nchimunya was in a category of a mere occupant or licensee, and not a legal sitting tenant. The brief facts in the ***Simon Lwando*** case (supra) are that, the appellants were teachers employed by the Ministry of Education, but teaching in ZCCM school areas, and occupied houses owned by ZCCM by virtue of a lease agreement between ZCCM (landlord) and the Ministry of Education. Following the Government directive to sell quasi-government houses to sitting tenants, ZCCM opted to offer for sale the houses occupied by the appellants to the second respondents, its ex-employees who were not sitting tenants, but were waiting to be paid their terminal benefits. After the purchase of the houses by the second respondents, the Ministry of Education advised the appellants to vacate the houses, but they refused to vacate. They took out court process in the High Court, contending that they were entitled to benefit from the Government/ZCCM policy to sale houses, but they lost, and on appeal to the Supreme Court, they again lost.

The Supreme Court in dismissing the appeal, firstly held that, the appellants were not entitled to purchase the house because they were not legal sitting tenants, but mere occupants or licencees based on their

employment with the legal tenant, the Ministry of Education. Secondly, on account that they were not employees of ZCCM, the vendor/beneficial owner, and thirdly that ZCCM never offered the houses for sale to the appellants. Furthermore, the Supreme Court reaffirmed its pronouncement stated in the case of ***Timothy Hamundu Muuka v Tobacco Board of Zambia (SCZ) Appeal No. 49 of 1998,*** to the effect that:

> ***We made it clear that despite political prouncements, the legal position has always been that a licensee is not a sitting tenant at law and as such, he had no legal right to purchase the house he was living in except where there has been a firm offer and acceptance of that offer to purchase the house.***

It should be noted that at the time Cabinet Office Circular No. 12 of 1996 on implementation of the civil service house ownership scheme was promulgated, MCL was a fully fledged parastatal body owned by the Government of the Republic of Zambia until its sale in 2010 to Nava Bharat. It is reasonably plausible that the Government in its pursuit of its house ownership empowerment policy, which included the sale of some parastatal housing stock to legal sitting tenants, Cabinet tasked MCL to transfer its non-core housing stocks to the Ministry of Finance and Economic Development for onward sale by the Presidential Housing Initiative to sitting tenants. The stock of residential houses that were transferred to the Ministry of Finance and Economic Development by MCL were those houses that were occupied by miners as sitting tenants, so as to enable the legal sitting tenants an opportunity to purchase the houses. But those occupied by non-miners, in other words non-employees of MCL were retained by MCL as core-assets, otherwise also referred to as institutional houses, and the same were not for sale. They were set apart mainly for staff drawn from the mainstream Government for continued

provision of social services as rightly pointed out by Mr. Chimense; which included health care, bank services and security. Houses also occupied by managers and directors of MCL were treated as core-assets.

When Cabinet Office Circular No. 12 of 1996 and the Handbook were promulgated in September 1996, government houses, and by extension parastatal houses were generally categorized into two parts. Firstly, pool houses, which were available for sale to Zambian civil servants who were sitting tenants. In the present case these assumed the term non-core residential housing stock, which were available to MCL workers who were sitting tenants. And the second category comprised institutional houses that were not for sale, and in respect of MCL, these were described as core-assets. Although there is no documentation drafted by MCL to specifically show this categorization, I am satisfied that the subject house in particular was a core-asset. It is, therefore, not correct that Government was selling all its residential housing stock. What is true and correct is that, some government houses were for sale (pool houses), and others were not for sale (institutional houses) unless expressly exempted or declassified. This was even embodied in the preamble of the Handbook wherein it is recorded:

> ***In the spirit of empowering Zambians to acquire their own houses, the Government has decided to sell some of its pool houses to sitting tenants who are civil servants***. (emphasis supplied).

The true aspiration of the foregoing expression was contextualized and codified in section 1 of the Handbook to the effect that:

> ***The Government decided to sell all its pool houses except VIP and some institutional houses as described below...***

Similarly, it is not unusual that back then, MCL Board of Directors meeting held on February 8 2001, in line with the directive by Cabinet to transfer all non-core residential housing assets to the Government for onward sale to sitting tenants, complied as directed.

The deposition by the legal Counsel of MCL, Ms. Masheke who deposed to an affidavit dated March 12, 2012, in support of an application to dispose of the matter on points of law; stating that the subject house belonged to the Government, does not in any way diminish the tested testimony of Mr. Chimense that the house belongs to MCL. Mr. Chimense's testimony is compatible with MCL's defence that the subject house was one of MCL's core-assets. And in fact, Ms. Masheke in that affidavit said the house was not for sale because it was an institutional house.

I firmly hold that, the late Mr. Nchimunya was not entitled to buy the house he was occupying; it was not available for sale because it was categorized as a core-asset. Even assuming that the house was available for sale, the late would still not have benefited because he was not an employee of MCL. The ***Simon Lwando*** case and ***Frank Malichupa*** case (supra) fortifies this resolve, and in the latter case, for the avoidance of doubt it was held:

> ***The law is settled that for somebody to be eligible to purchase a house from the Government of the Republic of Zambia and or a parastatal body, that somebody has to be:***
>
> ***(a) a sitting tenant and at the same time either he or she is an employee or former employee not yet paid his or her terminal benefits.***

The decided cases relied on by the Plaintiffs are distinguishable from the present case. It was submitted that the ***Steven Luguru*** case (supra) was hugely similar to the present case. However, the reality is that that case is

not similar to the present case. It involved an expatriate who worked for the Government and was occupying a government house as a sitting tenant, but was not given an offer to purchase because he was not a Zambian. He took the matter to the Lands Tribunal. The Lands Tribunal ruled in his favour, but on appeal, he lost the case because the Supreme Court held that the Government Circular thereof was meant to empower Zambians.

Similarly, the ***Josephine Kabwe*** case is not helpful to the Plaintiffs. It's distinguishable from the present case. In that case, the appellant, Josephine Kabwe worked for ZCCM in 1986 as a nurse. And in 1996, ZCCM decided to sell its houses to sitting tenants. She generally applied to purchase a ZCCM house, and was given an offer for a house in which she was not a sitting tenant. She paid the purchase price via deductions ZCCM made to her terminal benefits. However, she could not take vacant possession because the house was occupied by the respondent who had no offer from ZCCM, but wanted the Court to compel ZCCM to sell him the house. In the High Court, the respondent was successful, but on appeal the appellant was successful. The Supreme Court noted that being a sitting tenant was not the only criterion, and reaffirming the holding in the ***Frank Malichupa*** case (supra) held that, there was no law to compel unwilling person to sell his/her property to a sitting tenant.

In the present case, the late, Mr. Nchimunya was not an employee of MCL, neither was he offered to purchase the house. It is without doubt that the late, Mr. Nchimunya was not eligible to purchase the house. It follows that even the beneficiaries of his estate were not eligible to purchase the house. The Plaintiffs sought to rely on section 3.1 of the Handbook, which enables a spouse or children of a civil servant who was a sitting tenant and died without being paid his/her terminal/death or severance package to apply

to purchase the house occupied by his/her family. In addition to the reasons given that disqualified the late, the reliance on this section is equally misconceived and inapplicable because the late, Mr. Nchimunya was not an employee of MCL. The outstanding debt if any is not transferrable from the Ministry of Health to MCL, which is a separate legal entity at law.

The allegation that the late was on secondment to MCL was not proved. It is therefore apparent that, the eviction of his family after his death by the Hospital was in substance proper.

Furthermore, the Plaintiffs sought to rely on some "political pronouncements" by the then President, Mr. Rupiah Banda, allegedly made in 2011, directing the sale of the remainder of government houses to all sitting tenants irrespective of restrictions previously imposed. Equally, the reliance on this alleged pronouncement is unhelpful. Notably, the political pronouncement was never reduced in writing by way of a Cabinet Office Circular, so as to effect changes that may be deemed favourable to the Plaintiffs. It should be noted that, the argument pertaining to the said presidential pronouncements were equally advanced in the case of ***Simon Lwando*** (supra), and the said political pronouncements were discounted by the Supreme Court, by holding that:

> ***In*** *Timothy Hamundu Muuka v Tobacco Board of Zambia* ***we made it clear that despite political pronouncements, the legal position has always been that a licensee is not a sitting tenant at law and as such, he had no legal right to purchase the house he was living in except where there has been a firm offer and acceptance of that offer to purchase the house. The Appellants in the case in casu, despite the political pronouncement that they claim influenced their decision to pursue their right in court, had no legal right to purchase the houses in question, as they have never been given any offer to purchase the houses.***

Even in the present case, and bound by the doctrine of *stare decisis,* it follows, the presidential pronouncement did not in any way retrospectively change the status of the late, Mr. Nchimunya from the status of being ineligible to purchase the house to one of being eligible. Neither did it legally change the status of the subject house from a core-asset to non-core asset, transferable to the Government. Incidentally, by the time the pronouncement was allegedly made in 2011, the status of MCL by 2010, had changed, with the introduction of Nava Bharat as a shareholder, thus MCL ceased to be a fully fledged parastatal body.

The Plaintiff's Counsel raised an issue concerning the MCL resolution hereinbefore mentioned. It was argued that the resolution thereof was defective for want of quorum, and that only one board member signed the minutes instead of the two that attended the meeting. It was also argued that the resolution was not registered with the Patents and Companies Registration Agency (PACRA). According to the Plaintiffs' Counsel, the resolution or the said minutes did not add value to the process. I agree that the said resolution and the document in general is inconsequential. Even assuming it is defective as alleged, it is inconsequential because it does not affect the outcome of this case whatsoever. The document thereof relates to deliberations by the Board of Directors of MCL held on February 8, 2001, discussing the possibility of complying with Cabinet's directive to transfer all non-core residential housing assets of MCL to the Ministry of Finance and Economic Development. The transfer of non-core assets is not an issue; neither does the Plaintiffs seem to suggest that the subject property ought to have been transferred to the Government. Nevertheless, the evidential value to be tapped from the said document is that, it has probative value to support Mr. Chimense's testimony that non-core housing assets of MCL were transferred to the Ministry of Finance and

Economic Development, and that it is those assets that were available for sale to sitting tenants and employees of MCL or its ex-employees not paid terminal benefits.

I agree with Mr. Kalokoni's submissions that the late, Mr. Nchimunya or/and his estate, via his children, the Plaintiffs herein are in all respect not entitled to purchase the subject house for the reason aforestated.

I now turn to the claim of K3, 154, 500.00 (un-rebased) to cover for damages in respect of alleged injuries the Hospital occasioned to the Plaintiffs household goods during the process of eviction. Having held that the late was a licensee or otherwise called a "service occupier" *mutatis mutandis,* no rights accrued to the beneficiaries of the estate to remain in occupation of the house after the death of their father. I have resource to ***Halsbury's Laws of England Fourth Edition Vol. 27 (1) para 10 page 27***, wherein it was recorded:

> ***A mere licence does not create any estate or interest in the property to which it relates;... A purely personal licence is not assignable. A gratuitious licence is revocable by notice at any time, and is revoked by the death of either party.... or by an assignment of the land over which the licence is granted.***

Furthermore, under paragraph 15 of ***Halsbury's Laws of England Fourth Edition Vol. 27 (1).***

> ***Where a service occupancy exists, the employer is regarded as occupying the property vicariously through the employee. An employee has neither estate nor interest in the premises which he occupies in that capacity. Where an employee is entitled as part of his remuneration to occupy premises as a licencee, his right of occupation is a term of his contract and ceases upon cessation of that employment.***

Notably, after the death of their father, the Plaintiffs were duly given 14 days notice to vacate by February 14, 2005, but they chose at their own peril to remain in the house, after expiry of the grace period.

It is trite that at common law the Plaintiffs were assuredly amenable to eviction having voluntarily refused to give up possession (see ***Hemmings v Stoke Poges Golf Club [1920] I.K.B. 720***). And no law or government policy whatsoever gave the Plaintiffs immunity from eviction or re-entry either by the Hospital or MCL. The Plaintiffs' eviction was lawful. Therefore, the Defendants either jointly or severally are not liable in damages in terms of alleged damage to goods. I am fortified in this resolve by having recourse to the case of ***Jones v Foley [1891] I.Q.B. 730***, which Day J., had this to say:

> ***The Plaintiff had no right whatsoever to be in the house, he was a tresspasser. Any injury that happened to his furniture was not due to an unlawful act of the defendant, but was the result of his own obstinacy in unlawfully insisting upon remaining where he was, and he must put up with the consequences.***

Therefore, the claim for K3,154,500.00 is untenable, and above all lacks certainty and particularity on the balance of probabilities. When special damages are pleaded, it is not enough to merely say the claim was not traversed. There is no certainty as to how the said sum was arrived at, and no particularity as to show that the damage was willful and malicious. In fact the removal of the Plaintiffs was necessary in order for the Hospital to have possession of the house for the benefit of another "service occupier" in the employ of the Hospital.

The Plaintiffs' also made a claim for exemplary damages for mental torture, embarrassment and inconvenience as a result of their eviction by the first

Defendant. As regards this claim, one can comparably glean some useful guidance from the case ***Wilkinson v Downton [1897] 2 Q.B. 57***

> ***The Court gave three requirements for an action in mental shock. Firstly, there must be conduct that is outrageous or extreme. Secondly, there must be actual or constructive intent to cause psychological harm. Thirdly, the victim must suffer from actual harm resulting from the Defendant's conduct.***

In the present case, no evidence was adduced to specifically show arbitrariness or outrageous conduct on the part of the Hospital or/and MCL. Similarly, no evidence was adduced to prove what was alleged to be "consequential expenses"; as such the same are dismissed.

Finally, the claim by the Plaintiffs to declare their alleged "entitlement" to purchase the subject house is totally untenable and stand dismissed. It follows an order sought to permanently stop their eviction from House No. L45, New Township, Maamba District is concomitantly dismissed. The Plaintiffs' claims are entirely dismissed. The Plaintiffs should vacate the house within 30 days from the date of this judgment

I make no order as to costs. Leave to appeal granted.

DATED THIS 4TH DAY OF JUNE, 2020.

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THE HON. MR. JUSTICE CHARLES ZULU