

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

2021/HP/0463

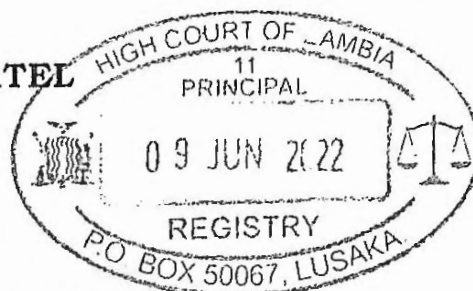
BETWEEN:

UMESHKUMAR MANILAL PATEL

BHARATI UMESH PATEL

AND

POUND STRETCHER ZAMBIA LIMITED



1ST PLAINTIFF

2ND PLAINTIFF

DEFENDANT

BEFORE HON. JUSTICE ELITA PHIRI MWIKISA

FOR THE APPLICANT: MESSRS EMK AND ASSOCIATES

FOR THE DEFENDANT: MESSRS SIMEZA SANGWA ASSOCIATES

RULING

Cases referred to:

1. *Krige and Another v Christian Council of Zambia* (1975) ZR 152
2. *Josia Tembo and Another v Peter Mukuka Chitambala* (2009) ZR
3. *Tecla Investment Limited v Examination Counsel of Zambia* Appeal No. 116/2017
4. *Digitech Computer School Limited v Pamodzi University Limited* 2014/HPC/0228
5. *Clarke v Sodhoni* (1963) EA 107
6. *Simona Rizzoti v Kenya Way Limited* (2021) Eklr
7. *Mega Garment Limited v Mistry Jadva Parbat & Co. (EPZ) Limited* (2015) Eklr

8. *Chon Jeuk Suk Kim v Kim Jong Kyu v E.J. Austin and Others* (2013) Eklr
9. *WJ Blakeman Ltd v Associated Hotel Management Services Ltd* (1985) eKLR
10. *Makanya Tobacco Limited v J&B Estates Limited Appeal No. 42* (2012)
11. *Examination Council of Zambia Pension Trust Scheme Registered Trustees and Another v Tecla Investments Limited Selected Judgment No. 39 of 2018*

Legislation referred to:

1. The Lands and Deeds Registry Act Cap 185 of the Laws of Zambia

This is the Defendant's application for an order to dispose action on a point of law pursuant to Order 14A of the Rules of the Supreme Court (1999) Edition as read together with sections 4 and 6 of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia. The Defendant raised the following issues: "whether the Lease Agreement dated 1st October, 2019, made between the plaintiffs and the Defendant is null and void for want of registration at the Registry of Deeds; and that if the said Lease Agreement is null and void, the plaintiffs' claim be dismissed with costs."

The said application is supported by an affidavit, a list of authorities and skeleton arguments all dated 3rd September, 2021.

The affidavit in support was deposed to by one Adraidah Muyumbana, who is Counsel seized with conduct of this matter. She deposed therein that on 27th April, 2021, the plaintiff's commenced an action against the Defendant for alleged breach of a lease agreement. That the Defendant filed a defence and denied liability alleging that for all intents and purposes the lease was null and void for want of registration. It was deposed that the plaintiffs' claim was wholly premised on the Lease Agreement dated 1st October, 2019. That in complete disregard of the requirement of the law, the plaintiffs neglected to register the Lease Agreement in the Registry of Deeds at the Ministry of Lands.

Counsel for the Defendant, in the skeleton arguments, submitted that the plaintiffs and the Defendant entered into a Lease Agreement wherein the plaintiffs demised unto the Defendant a portion of Plot No. 37175, Lusaka for a term of 4 years from 1st October, 2019, at a monthly rent of \$6,500.00. That by notice to quit dated 7th April, 2020, the plaintiffs terminated the Lease Agreement and later commenced an action herein against the Defendant demanding damages for alleged failure to yield the premises in good tenantable condition.

In the defence, the Defendant alleges that the Lease Agreement was for all intents and purposes null and void for want of registration at the Registry of deeds and that the same was therefore unenforceable. That the Defendant now applies to this Court for an order to dispose the plaintiff's action on a point of law, in accordance with Order 14A of the White Book.

Counsel relied on Section 4 of the Lands and Deeds Registry Act and submitted that a perusal of the Lease Agreement herein does not show any endorsements by the Registrar of the Registry of Deeds as proof of registration in accordance with section 18 of the Act which provides that:

“A memorandum signed by the Registrar shall be endorsed on every document registered, containing a sufficient reference to the number and position of the document in the Register, which memorandum shall be proof of the due registration of the document in the absence of sufficient evidence to the contrary.”

Counsel also added that the lands register exhibited and marked “AM4” in the affidavit confirms that as at 4th May, 2021, the Lease Agreement was not registered. Further that this fact has gone unchallenged in the plaintiffs' pleadings which indisputably translates into an admission.

Counsel went on to contend that the effect of non-registration is stated in section 6 of the Lands and Deeds Registry Act. That the Supreme Court in the case of **Krige and Another v Christian Council of Zambia (1975) ZR 152¹** ably guided on this position when it stated inter alia, that the effect of non-registration is that the agreement is null and void for all purposes whatsoever. Counsel also cited the case of **Josia Tembo and Another v Peter Mukuka Chitambala (2009) ZR²** to support the position. Counsel urged the Court to therefore find that the Lease Agreement in question is null and void for want of registration and that the same is for all intents and purposes, unenforceable.

In relation to the second issue raised, Counsel contended that the Lease Agreement is a dominant feature of the plaintiffs' claim. That in the case of **Krige and Another v Christian Council of Zambia supra**, the Supreme Court stated that where a lease agreement is null and void for want of registration, its provisions cannot be relied upon as giving contractual rights and entitlements. Counsel went on to submit that the plaintiffs' claim is wholly anchored on the provisions of the null and void Lease Agreement. Counsel submitted that the matter is thus suitable for disposal at this stage of the proceedings without full trial.

On the other hand, Counsel for the plaintiffs submitted that on 27th April, 2021, the plaintiffs commenced this action seeking damages for breach of covenant to keep in good and substantial repair and condition and to yield up the demised premises and all fixtures and additions in good tenantable repair.

Counsel in opposing the application contended that the application under Order 14A of the RSC is misconceived as the question of law raised by the Defendant is not suitable for determination under Order 14A as it does not meet all the requisites set out. Counsel submitted that the application before court did not seek to determine the substantive matter on the merits as it is in fact a procedural issue. That the answer to the question whether the Lease Agreement dated 1st October, 2019, made between the Plaintiff and the Defendant is null and void for want of registration at the registry of Deeds, does not resolve the dispute before this Court on merit as required by Order 14A.

That the issue before this Court as evidenced by the pleadings and reliefs sought by the plaintiffs herein is whether the Defendant was in breach of its covenant to keep in good condition and repair, as well as to yield up the demised premises in good tenantable repair or whether the Defendant should pay damages for its failure to

repair the demised premises. That to resolve the issue to finality, the Court would have to address the claim for repairs to the premises which the plaintiffs have pleaded. Counsel contended that the question posed by the Defendant in this application whether or not non registration of a lease renders it null and void does not address the claim by the plaintiffs as pleaded and the answer to this question will not therefore finally determine the rights of the parties in this action.

Counsel cited Atkin's Court Forms Vol 29 at page 252-253 and quoted it as follows:

"The object of the order is that finality should be achieved at an interlocutory stage. It is therefore fundamental to the question of whether or not an application under Order 14A is appropriate is that the determination of the question of law or matter of construction placed before the court should terminate the whole action or some claim or issue contained in the action."

That the procedure under Order 14A of the RSC virtually replaces the trial process and the determination by the court Under Order 14A goes to the merits of the substantive action and should dispose a matter without the need for trial.

Counsel submitted that the plaintiffs do not dispute the fact that the Lease Agreement was not registered with the Lands and Deeds

Registry Act. That the plaintiffs take the position that a periodic tenancy existed between the parties as held in **Tecla Investment Limited v Examination Counsel of Zambia Appeal No. 116/2017³**.

Counsel also cited the case of **Digitech Computer School Limited v Pamodzi University Limited 2014/HPC/0228⁴** and submitted that according to that case, where a lease agreement is not registered as provided under the Lands and Deeds Registry Act, what is created is a contract to grant a lease. That the parties can rely on the covenants of such an agreement and can sue upon them if there is breach of any of the covenants.

That in the case of **Clarke v Sodhoni (1963) EA 107⁵**, the Court stated as follows:

“The principle that a lease for a period exceeding one year shall be invalid unless registered does not exclude the use of the unregistered lease to show the terms of the contract between the parties.”

Counsel submitted that the mere fact that the lease agreement was not registered does not preclude the plaintiffs from using it to show the terms of the contract between the parties. Counsel argued that the plaintiffs are at liberty to rely on the terms of the lease agreement so as to demonstrate to this Court the obligations of the

Defendant in relation to the requirement to repair the premises at the end of the tenancy.

Further that in the case of **Simona Rizzoti v Kenya Way Limited (2021) Eklr⁶**, the Court stated that:

“Turning to the validity of the agreement dated 7th June 2013, in my view, its existence is not in doubt. The contention raised by the Defendant is as regards the fact that being a lease agreement for a period exceeding one year, it ought to have been registered; there is no opposition to this position as it is indeed the position of the law. However, be that as it may, the lack of registration is not fatal, the terms contained in such an unregistered document were enforceable, however it is worth repeating that covenants and stipulations in such document are enforceable inter parties.”

Counsel went further to contend that the Court in that case went further to state that:

“In the instant suit, it is not in doubt that it was intended by the parties that the agreement of 7th June 2013 serve as a lease agreement. However, it was a term of the agreement that the leased term be five years and one month. As such, it was a requirement of the law that such lease be registered in order to be recognised as such. It was not. Nonetheless, as espoused in the authorities I have adverted to, I find that while the agreement of 7th June 2013 does not pass as a valid lease agreement owing to its non-registration, it is still enforceable as a contract between the parties and is thus a proper benchmark to determine the contractual terms in the relations between the parties.”

Counsel then submitted that even though the Lease Agreement may not have been registered, the terms of the unregistered

document are enforceable between the parties but not any third party. Counsel relied on the Kenyan case of **Mega Garment Limited v Mistry Jadva Parbat & Co. (EPZ) Limited (2015) Eklr⁷** and reproduced it as follows:

“The time-honoured decision of this court in Bachelor’s Bakery Ltd v Westlands Securities Ltd (1982) KLR 366 which has been followed in a long line of subsequent decisions elucidates the status of an unregistered lease. It reiterates and confirms the firmly settled law, first that a lease for immovable property for a term exceeding one year can only be made by a registered instrument; that a document merely created a right to obtain another document, like the one in this dispute, does not require to be registered to be enforceable; that such an agreement is valid inter parties even in the absence of registration, but gives no protection against the rights of third parties.”

That in the case of **Chon Jeuk Suk Kim v Kim Jong Kyu v E.J. Austin and Others (2013) Eklr⁸** the Court held that:

“An agreement of a lease or unregistered lease where the statute requires registration, though not conferring any legal or equitable estate was nevertheless enforceable as a contract between the parties for the period stated in the document and the non-registration does not preclude the use of the document to show the terms of contract between the parties.”

Counsel further argued that even if the lease was not registered in accordance with the provisions of the Lands and Deeds Registry Act, the same was still valid and was enforceable as a contract for a lease. Counsel made reference to Woodfall, Landlord and Tenant

Vol.1 27th Edition at page 132, and stated that contract for lease or an agreement for lease is defined therein as:

“A contract for a lease is an agreement enforceable by law whereby one party agrees to grant and another to take lease. The expression ‘contract for lease’ and ‘agreement for lease’ are usually inter-changeable, but ‘contract for lease’ is preferred as being more definite, agreement frequently meaning one of many stipulations in a contract. A contract for a lease, is to be distinguished because lease is actually a conveyance of an estate in land, whereas contract for a lease is merely an agreement that such a conveyance shall be entered into at a future date.”

Counsel submitted that non registration of the lease can therefore not attract the penalty of dismissal of this action when the plaintiff is seeking damages for the defendant’s failure to repair the property it rented from the plaintiff at the end of the lease period.

The case of **WJ Blakeman Ltd v Associated Hotel Management Services Ltd (1985) eKLR⁹** was also cited as follows:

“...the appellant took possession of the premises, and it was later contended that the unregistered agreement was ineffectual to create any estate or interest and the contract to pay rent was unenforceable. It was held that whereas the agreement could not operate as a lease, it could operate as an agreement inter parties which if followed by possession and payment creates a tenancy from month to month.”

Counsel also relied on the case of **Makanya Tobacco Limited v J&B Estates Limited Appeal No. 42 (2012)¹⁰** and submitted that a party to an unregistered lease can only obtain assistance of the

Court if they can show that a tenancy exists independent of the void lease agreement through evidence that possession of the premises was taken and rentals were paid by the tenant and accepted by the landlord.

It was Counsel's contention that by virtue of the Defendant taking possession of the premises with the plaintiffs' consent and payment of monthly rental of USD 6,500, there existed a contract to grant a lease between the parties. That it is on this premise that the plaintiffs claim for breach of covenant to leave the demised premises in good tenantable condition.

It was also Counsel's submission that the Defendant's application to dispose of the matter on a point of law is misplaced as the plaintiffs can enforce the terms of the said contract. That the Defendant cannot therefore escape liability that stems from the contract by arguing that the lease agreement was unenforceable. Counsel concluded by stating that this was not a proper case for an application under Order 14A of the RSC.

I have carefully considered the application and the skeleton arguments in support and in opposition thereof. The issues raised by Counsel for the Defendant herein are whether or not the Lease Agreement dated 1st October, 2019, made between the plaintiffs

and the Defendant is null and void for want of registration at the Registry of Deeds and that if the said Lease Agreement is null and void, the plaintiffs' claim be dismissed with costs.

The record shows, in the skeleton arguments in opposition, that the plaintiffs herein do not dispute the fact that the Lease Agreement was not registered with the Lands and Deeds Registry. It is on that basis that I find that the Lease Agreement in question was not registered as required by section 4(1) of the Lands and Deeds Registry Act. The said Section 4(1) of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia provides as follows:

“Every document purporting to grant, convey or transfer land or any interest in land, or to be a lease or agreement for lease or permit of occupation of land for a longer term than one year, or to create any charge upon land, whether by way of mortgage or otherwise, or which evidences the satisfaction of any mortgage or charge, and all bills of sale of personal property whereof the grantor remains in apparent possession, unless already registered pursuant to the provisions of “The North-Eastern Rhodesia Lands and Deeds Registration Regulations, 1905” or “The North-Western Rhodesia Lands and Deeds Registry Proclamation, 1910”, must be registered within the times hereinafter specified in the Registry or in a District Registry if eligible for registration in such District Registry:...”

Since the said lease was supposed to be for a term of 4 years, it should have been registered as required by Section 4 of the Lands

and Deeds Registry Act. Section 6 of the Lands and Deeds Registry Act goes further to provide inter alia:

“Any document required to be registered as aforesaid and not registered within the time specified in the last preceding section shall be null and void: ...”

In the case of **Examination Council of Zambia Pension Trust Scheme Registered Trustees and Another v Tecla Investments Limited** Selected Judgment No. 39 of 2018¹¹ the Supreme Court had occasion to determine if a lease agreement for a period of over one year, which was not registered as required by section 4 of the Lands and Deeds Registry Act was valid or null and void. The Supreme Court in that case held as follows:

“It is agreed that the lease agreement was not registered as required by Section 4(1) of the Lands and Deeds Registry Act. There can be no dispute either that section 6 of the Act provides for the consequences for failure to register any document that is required to be registered under section 4. Such document shall be null and void. In Krige and Another v Christian Council of Zambia and Makanya Tobacco Company Limited v J&B Estates Limited we dealt with the same issues and we held that the effect of non-registration of a document that is required to be registered is that it is void for all purposes whatsoever. This is well settled law.”

Pursuant to the authorities cited above, I am of the considered view and find that the subject lease agreement herein was null and void for want of registration. I am guided by the Supreme Court in the said case of **Examination Council of Zambia Pension Trust**

Scheme Registered Trustees and Another v Tecla Investments Limited *supra* that I therefore ought not to grant any of the remedies sought by the parties which were anchored on the validity of the said lease as it could not be enforced or relied upon.

The question that therefore follows is whether or not the plaintiffs' claims herein have been anchored on the validity of the lease or whether there existed between the parties a tenancy independent of the Lease Agreement under which the plaintiffs herein are entitled to anchor their claims.

In the case of **Makanya Tobacco Company Limited v J&B Estates Limited** **Selected Judgment No. 19 of 2015**, the Supreme Court quoted with approval a passage from Megarry's Manual of the Law of Real Property at pages 365 to 366 as follows:

"...A lease which did not satisfy the above requirements was void at law and passed no legal estate. However, although at law the lease was ineffective to create any tenancy, a tenancy might arise independently of the lease; for if the tenant took possession with the landlord's consent, a tenancy at will arose, and as soon as rent was paid and accepted, the tenancy at will was converted into a yearly or other periodic tenancy, depending on the way in which the rent was paid. Thus if in 1870 a lease for 99 years was granted orally or merely in writing, the largest estate which the tenant could claim in a court of law was equally a yearly tenancy; and his claim to this depended not on the lease but upon his possession and the payment and acceptance of rent."

The Supreme Court in the **Makanya** case supra, went on to hold as follows:

“Since the lease agreement entered into between the parties on 3rd September, 2009 is null and void for want of registration, none of the covenants under the lease can be enforced. However, the matter does not end here. It is common ground that the appellant took possession of the premises and paid an annual rent in advance, amounting to US\$66,000 at US\$5,500 per month for the period 2nd September, 2009 to 3rd September, 2010. The rent was accepted by the respondent. Therefore, a yearly periodic tenancy was created between the parties.”

Counsel for the plaintiffs, in the skeleton arguments in opposition, submitted that there was a periodic tenancy between the parties as the Defendant took possession of the demised premises and paid a monthly rental of USD6,500 to the plaintiffs. In addition, the Defendant’s defence states that on 7th April, 2020, the plaintiffs gave the Defendant’s 6 months’ notice terminating the tenancy. From the foregoing, it is safe to conclude that the Defendant took possession of the demised premises with the plaintiff’s consent and paid the rent as required, which was accepted or received by the plaintiff. I therefore find that despite the Lease Agreement being unenforceable for want of registration, there was a periodic tenancy created between the parties herein because the record shows that the Defendant took possession of the demised premises

with the consent of the plaintiffs and paid a monthly rent of USD6,500 which rent was accepted by the plaintiffs.

In the case of **Makanya Tobacco Company Limited supra**, the Supreme Court stated that the core issue to be decided therein was whether or not there existed any tenancy between the parties under which the Respondent could anchor its claims against the Appellant. The Supreme Court held:

“...if the tenant took possession with the landlord’s consent, and rent was paid and accepted, by presumption of law, a monthly or yearly periodic tenancy arises, independently of the lease. In the latter situation, any claim in a court of law, either by the landlord or the tenant would depend not on the lease but upon the tenant’s possession and the payment and acceptance of the rent.”

The Supreme Court went on to state at J14-15 that:

“What we understand, from the Judge’s statement that a person cannot merely claim unenforceability of a lease after having been in occupation and incurred liability and had not vacated the premises fully and her reference to the case of Mohamed S Itowala v Variety Bureau De Change is that even if the lease was unenforceable, the respondent is still entitled to make his claims in a court of law.

As we have already said, since the lease agreement entered into between the parties on 3rd September, 2009, is null and void for want of registration, none of the covenants under the lease can be enforced.”

The Supreme Court went on to conclude as follows:

“On basis of the foregoing and our decision in the case of Krige and Another v Christian Council of Zambia, we conclude that there existed between the parties a yearly tenancy, independent of the lease agreement, under which the Respondent is entitled to anchor his claims in a court of law.”

I have already found that a monthly periodic tenancy was created by the parties herein and as such, the plaintiffs were entitled to anchor their claims on the said tenancy as opposed to the lease.

In casu, the plaintiffs, in the statement of claim pleaded as follows in paragraphs 4 and 5:

“By the said lease, the Defendant expressly covenanted with the plaintiffs to keep in good and substantial repair and condition the demised premises and all additions thereto and all the windows, skylights locks, latches and fasteners and the sanitary water and electricity apparatus including all pipes, cables, drains and culverts in or surrounding the building throughout the term of the lease.

By clause 3.1.18 of the said lease the Defendant was to yield up the demised premises and all fixtures and additions thereto in good tenantable repair upon determination of the lease.”

The plaintiffs' claims were inter alia for damages for breach of covenant to keep in good and substantial repair and condition and to yield up the demised premises and all fixtures and additions thereto in good tenantable repair and interest on the sums due at commercial bank rates.

A perusal of the statement of claim has revealed that the plaintiffs herein anchored their claims on the lease, as shown in paragraphs 4 and 5 reproduced above, which lease has been found to be null and void for want of registration. As per the **Makanya Tobacco Company Limited** case supra, none of the covenants under the lease can be enforced. I however find that since the plaintiff consented to the defendant's possession and also received monthly rentals amounting to USD 6,500, there was a periodic tenancy between the parties for the said duration of the lease period. I am further fortified in finding as I have, by the case earlier cited or referred to of **Clarke v Sodhoni** Supra, that:

“The principle that a lease for a period exceeding one year shall be invalid unless registered does not exclude the use of the unregistered lease to show the terms of the contract between the parties.”

I therefore agree with the Learned Counsel for the defendant that this was not a proper case for an application under order 14A of RSC, 1999 edition of white book. I am therefore of the considered view that the plaintiff is in order to demand that the defendant should yield the premises in good tenantable condition upon termination of the lease, which in actual fact is a tenancy at will as held by the Supreme Court in the case of **Makanya Tobacco Company Limited** referred to above, in that as soon as rent was

paid and accepted by the plaintiff, a contract for a periodic tenancy between the parties herein came into force.

I accordingly dismiss the defendant's application for an order to dispose of the plaintiff's action on point of law pursuant to order 14A of RSC, 1999 edition.

I award costs to the plaintiff to be taxed in default of agreement.

Leave to appeal is granted.

Dated at Lusaka the 9th day of June , 2022

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ELITA PHIRI MWIKISA
JUDGE