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IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 49/2015**
HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

JAMES ONWUKA	**APPELLANT**
AND	
JOYCE SIANDWAZI REID	**1ST RESPONDENT**
RUTH CHATWIKO	**2ND RESPONDENT**
COTRIVER SIACHIKA	**3RD RESPONDENT**
THOMAS NASILELE	**4TH RESPONDENT**

Coram: Wood, Malila and Kaoma, JJS

On 10th October, 2017 and 21st November, 2017

For the Appellant: *No Appearance*

For the Respondent: *No Appearance*

JUDGMENT

Wood, JS delivered the judgment of the court.

Cases referred to:

1. *Attorney General v Marcus Kampumba Achiume (1983) Z.R.1*
2. *Central Newbury Car Auction v Unity Finance Limited (1975) 1 Q.B 371*
3. *SPA v Feed Products (1887) 2 Lloyds Reports 14*

4. *Mususu Kalenga Building Limited and Winnie Kalenga v Richmans Money Lenders Enterprises (1999) Z.R. 27.*
5. *Nevers Sekwila Mumba v Muhabi Lungu SJ No. 55 of 2014*

LEGISLATION REFERRED TO:

1. *Section 5 (3) of the Land and Deeds Registry Act Cap 185 of the Laws of Zambia.*
2. *Section 13 of the Rent Act Cap 206 of the Laws of Zambia.*
3. *Order 59/ 10/ 10 of the Rules of the Supreme Court.*

The question in this appeal is: who is a landlord under the Rent Act Cap 206?

The facts leading to this appeal are these. On 1st January, 2008, the appellant entered into a lease relating to Stand No. 6874 Bende Road Olympia Extension, Lusaka with the 2nd, 3rd, and 4th respondents. At the time the appellant took possession of the premises, it was quite evident that it was in a state of disrepair. The appellant agreed with the 2nd, 3rd and 4th respondents to carry out certain repairs and improvements so as to make it habitable. It was further agreed that the expenses for the repairs would be deducted from the rent as and when it was paid.

In 2012, the 1st respondent appeared on the scene and introduced herself to the appellant that she had been appointed as administratrix of the estate of the late Catherine Siandwazi Stand No. 6874 Bende Road, Olympia Extension, Lusaka formed part of the late Catherine Siandwazi's estate. The 1st respondent informed the appellant that she was in charge of the property and that all dealings regarding the property should be done through her. She mentioned that she was based in the United Kingdom. At a meeting with the appellant, the 1st respondent requested for an advance payment of K3,000.00 to pay medical bills for her mother who is the 2nd respondent. The appellant gave the 1st respondent the money. The 1st respondent was not seen again after 4th August, 2012 and the appellant reverted to dealing with the 2nd and 3rd respondents in connection with the property and continued to pay the rent.

Sometime in February, 2014, the 1st respondent called the appellant and requested to have a meeting with him to inspect and revalue the premises. On 20th March, 2014, the 1st respondent gave the appellant notice to vacate the premises by

midday 20th April, 2014. The reason given for the notice was that it was due to circumstances beyond her control. As a result, the appellant filed an originating notice of motion pursuant to Section 13 of the Rent Act, Cap 206 of the Laws of Zambia seeking a declaration that the notice to quit was null and void and that he was the rightful tenant of Stand No. 6874 Bende Road, Olympia Extension, Lusaka. Needless to say, he also claimed damages for breach of contract, interest and costs.

The 1st respondent filed an affidavit in opposition to the notice of motion on 17th June, 2014. She stated in her affidavit that she had been appointed the administratrix of the estate of the late Catherine Siandwazi who died intestate on 23rd July, 1998. She exhibited a Local Court Order of appointment dated 12th September, 1998. She informed the appellant on 4th September, 2012 that the house he was occupying formed part of the estate of the late Catherine Siandwazi. She also requested him to enter into a tenancy agreement with her in her capacity as administratrix but he refused to execute the agreement she had drawn up for him to sign. She disclosed in her affidavit in

opposition that the appellant gave her K3,000.00 as rent which she used for her mother's medication.

The 1st respondent later returned to the United Kingdom where she continued persuading him by telephone to process all dealings relating to the house through her. Despite the reminders, the appellant signed another lease with the 2nd, 3rd and 4th respondents in March, 2013. She stated that the 2nd, 3rd and 4th respondents were not administrators of the estate. Her search at the Lands and Deed Registry revealed that no lease had been registered while her inspection of the property revealed that the property was dilapidated and that the appellant was using it as a business premises and not as a dwelling house. In addition, the appellant and his wife were very aggressive and it was not possible to have a landlord and tenant relationship. On 20th March, 2014, she gave the appellant one month's notice to vacate the house.

The learned judge found that, on the evidence before him, the 1st respondent was appointed administratrix of the estate of

the late Catherine Siandwazi. He also found that Stand No. 6874, Bende Road, Olympia Extension is part of the estate of the late Catherine Siandwazi. The learned judge further found that the appellant was in possession of the property on the basis of a tenancy agreement signed with the 2nd, 3rd and 4th respondents in 2013. This followed the expiry of an agreement he had signed with them in 2008. It was also his finding that just before or at or soon after the appellant took possession of the property, a number of renovations were made to it. The learned judge in addition found that it was not in dispute that even though the 1st respondent's appointment as administratrix was in 1998, the appellant only became aware of the appointment in September, 2012. The appellant and 1st respondent then entered into negotiations for a tenancy but did not conclude it before the 1st respondent returned to the United Kingdom. The learned judge also found that during the period when the applicant was in occupation he paid rent to the 2nd, 3rd and 4th respondents. Finally, the learned judge found that on one occasion the 1st respondent collected an advance on the rent in the sum of K3,00.00 from the appellant.

According to the learned Judge, what was in dispute was whether the 1st respondent informed the appellant not to deal with the 2nd, 3rd and 4th respondents in relation to the property. Related to this, was the issue of whether the 1st respondent continued to communicate with the appellant when she returned to the United Kingdom on the need to enter into a new lease with her. The last issue in dispute was the nature of the renovations that were made to the property and if they were made with the consent of the 2nd, 3rd or 4th respondents.

The learned judge disbelieved the appellant's claim that the 1st respondent did not communicate with him when she left the country and that he "renewed" the lease with the 2nd, 3rd and 4th respondents because she did not tell him not to deal with her. The learned judge wondered why the 1st respondent had approached the appellant, introduced the subject of a new tenancy agreement and gone away without contacting him when a new lease had not been signed. He reasoned that by the time the appellant entered into the 2013 lease he knew that the 1st respondent was the administratrix. He added that the appellant

had a responsibility to find out if the other respondents had authority to enter into a new lease. In the circumstances, the learned judge held that the 1st respondent was entitled to refuse to be bound by a lease entered into by the 2nd, 3rd and 4th respondents. The learned judge then discounted the advance payment of K3,000.00 as being of no legal effect as it was collected at the time the 2008 tenancy was still in subsistence and had no bearing on the 2013 tenancy agreement.

The learned judge concluded that the lease signed on 1st February, 2013 by the appellant and the 2nd, 3rd and 4th respondents was null and void and of no legal effect. The learned judge then dismissed the appellant's claim and ordered him to refund the balance for renovations in the sum of K4,672.00. He also ordered him to vacate the premises. Lastly although the learned judge held that the lease the appellant had entered into with the 2nd, 3rd and 4th respondents in 2013 was not valid, he ordered the appellant to pay the rent set out in it for his stay in the house up to 12th February, 2015 as it would have been unjust to allow him to stay rent free because there was no valid lease.

Dissatisfied with the judgment, the appellant has now appealed to this court and has advanced four grounds of appeal. The first ground is that the learned judge erred in fact when he made the finding that the appellant had deliberately refused to enter into a lease with the 1st respondent and that the 1st respondent did not break off communication with him without any relevant evidence to support this finding and that this was a finding which no court properly addressing the facts would reasonably arrive at.

The second ground is that the learned judge erred in law by stating that the lease ought to have been signed by the appellant with the 1st respondent when it was in fact established that the 1st respondent was not the registered proprietor of Stand No. 6874 Bende Road, Lusaka.

The third ground of appeal is that the learned judge erred in law and in fact when he ignored the fact that the 1st respondent continued to relate to the appellant as a tenant at Stand No. 6874 Bende Road, Lusaka even after the lease with the 2nd, 3rd and 4th

respondents had been signed and that the learned judge ought to have treated the appellant's arrangement as an equitable lease.

The fourth and last ground of appeal is that the learned judge erred in fact when he found and ordered that the appellant should pay rent in respect of his occupation when in fact all rent was duly paid as and when it fell due and that the learned judge further erred in law in attempting to enforce the payment of rent at a rate contained in a lease that he had ordered illegal.

Both the appellant and the 1st respondent filed heads of argument and notices of non- attendance. We did not receive any heads of argument from the other respondents.

We propose to summarize the heads of argument individually as argued by each side but we will consider all of them together.

The appellant, in arguing the first ground of appeal, pointed out that the evidence in paragraph 11 of the affidavit in support of the originating notice of motion clearly shows that after she had been in occupation of the house for a period of five years, the

1st respondent appeared and indicated that she was in charge of the property and that all dealings should be done through her. The appellant further deposed that the 1st respondent mentioned that she had been based in the United Kingdom previously and as such she had been unable to deal with the property. In fact it was the appellant's evidence that the 1st respondent had assured him that she had relocated to Zambia.

The appellant argued that he acceded to the 1st respondent's demand to see the lease and inspect the property. The 1st respondent then went on to ask for an advance payment of rent in the sum of K3,000.00 to pay medical bills for her mother. The appellant further deposed that after 4th August, 2012, the 1st respondent disappeared and he did not have any contract with her and in the circumstances he reverted to dealing with the 2nd and 3rd respondents with whom he had previously dealt with and had the lease renewed for a further two years after it expired in 2012. The appellant submitted that from the evidence it was clear that he entered into a lease with the 2nd and the 3rd respondents because the 1st respondent had disappeared soon

after introducing herself as the administratrix of the estate of the late Catherine Siandwazi. The appellant argued that in point of fact, there was no relevant evidence that would have led the court below to the conclusion that the appellant declined to enter into a lease with the 1st respondent and further that the 1st respondent had kept in constant communication with the appellant after she returned to the United Kingdom. The appellant then cited the case of *Attorney General v Marcus Kampumba Achiume*[1] to illustrate that the findings made by the learned judge did not meet the threshold set out in the *Achiume* case and as such the findings of fact could be classified as perverse or were made in the absence of any relevant evidence or upon a misapprehension of facts or that they were findings which on a proper view of the evidence, no trial court acting correctly can reasonably make and were thus liable to be reversed by this Court.

The appellant has in support of his second ground of appeal argued that the 1st respondent was not the registered proprietor of Stand No. 6874 Bende Road, Olympia Extension, Lusaka. The evidence on record showed that the registered proprietor is the

late Catherine Siandwazi. The appellant went on to argue that neither the 1st respondent nor any of the other respondents in the action had registered any interest whatsoever relating to the said property. This, the appellant argued, was contrary to section 5 (3) of the Lands and Deeds Registry Act which states that:

> "5. *(3) Probate of a will affecting land or any interest in land shall be registered within twelve months of the grant thereof or the sealing thereof under the provisions of the Probates (Resealing) Act, as the case may be."*

The appellant argued that the first duty of a personal representative is to take possession of the assets of the deceased by assuming control over the assets with as much due diligence as he possibly can. In the case of land, any interest in the land including but not limited to letters of administration must be registered at the Lands and Deeds Registry within twelve months from the date of the grant. The failure to register the letters of administration against the land within the mandatory time made the grant void against such property. The failure by the 1st respondent to adhere to section 5 (3) of the Lands and Deeds Registry Act meant that no legal estate or interest in the property

was conveyed to the 1st respondent as such the 1st respondent could not claim the protection afforded by the law. He urged us to uphold this argument.

In his third ground of appeal, the appellant argued that it was clear that some sort of relationship existed between the appellant and the 1st respondent. He drew the attention of the Court to the undisputed fact that on 4th September, 2012, the appellant gave the 1st respondent the sum of K3,000.00 as an advance on rent. This payment was confirmed by the 3rd respondent. The appellant argued that from a reading of the facts and the sequence of events expressed in the affidavits filed in the court below, it was evident that the 1st respondent knew about the arrangement between the appellant and the 2nd , 3rd and 4th respondents and the 1st respondent physically and mentally acknowledged the appellant as the tenant. The receipt of the K3,000.00 by the 1st respondent from the appellant on 4th September, 2012 was an act of approval and all the earlier arrangements by the 2nd, 3rd and 4th respondents were implicitly approved. According to the appellant, the 1st respondent had

effectively conducted herself in a manner which suggested that the appellant was an acknowledged tenant of the premises in issue and as such was estopped from going back on the representation. For this proposition he relied on the case of *Central Newbury Car Auction v Unity Finance Limited*[2] in which Lord Denning explained the doctrine of estoppel in the following terms at page 379;

> *"Seeing that here we are considering the doctrine of estoppel by conduct, I would like to state that the basis of it is this; you start with an innocent person who has been led to believe in a state of affairs which he takes to be correct (in this case the purchaser has been led to believe that the rogue was the owner of the car), and has acted on it. Then you ask yourself how has this innocent person been led into this belief? If it has been brought about by the conduct of another (in this case by the conduct of the original owner), who though not solely responsible, nevertheless has contributed so large a part to it that it would be unfair or unjust to allow him to depart from it, then he is not allowed to go back on it so as to prejudice the innocent person who has acted on it."*

The appellant also relied on the case of *SPA v Feed Products*[3] in which it was held that in order to discern the clear intentions of the parties to create a legally binding agreement between themselves it was important to look at the correspondence and

the conduct of the parties as a whole. It was argued by the appellant that even in the notice to quit the 1st respondent did not dispute the appellant's tenancy as the reason for termination was attributed to circumstances beyond the control of the 1st respondent.

In his last ground of appeal, the appellant argued that he had paid all the rent as and when it fell due and there was no rent outstanding as could be seen from the record of appeal. In any event, the appellant argued that the learned judge erred when he attempted to enforce the payment of rent at a rate contained in a lease that he had found to be illegal as a court cannot enforce an illegal contract.

The 1st respondent has in response to the first ground of appeal supported the learned judge's finding that the appellant deliberately refused to enter into a lease with the 1st respondent and that the 1st respondent did not break off communication with the appellant. The 1st respondent referred the court to paragraphs 9 and 10 of her affidavit in opposition to the notice of motion in which she had stated that she had informed the

appellant that he should deal with her in relation to the property as administratrix of the estate of the late Catherine Siandwazi. In addition to that, she had drawn up a lease which the appellant had refused to execute. She was also in communication with the appellant even though she was in the United Kingdom. The appellant was therefore aware in March, 2013 when he entered into a new lease with the 2nd, 3rd and 4th respondents that they had no authority to enter into a lease in relation to the property. The 1st respondent argued that the evidence she had highlighted is sufficient to demonstrate that the appellant deliberately refused to enter into a lease with the 1st respondent as administratrix. There was therefore no absence of relevant evidence or a misapprehension of the facts to move this Court to reverse the findings of fact made by the lower court in this case. To the contrary, there was adequate evidence which was not in any way misunderstood or misapprehended by the lower court that the appellant knew that he needed to sign a lease with the 1st respondent and that he refused to do so and that the 1st respondent did not break off communication with the appellant.

With regard to the second ground of appeal, the 1st respondent has argued that the registration of the administratrix under section 5 (3) of the Lands and Deeds Registry Act, Cap 185 was not raised in the court below. It cannot therefore be raised in this court. The 1st respondent relied on our decision in the case of *Mususu Kalenga Building Limited and Winnie Kalenga v Richmans Money Lenders Enterprises*[4] in which we held that where an issue was not raised in the Court below it is not competent for any party to raise it in this Court. The 1st respondent further argued in the alternative that should this Court find that the matter could be addressed at the appeal stage, then the learned judge had reached the correct decision when he held that the appellant ought to have signed the lease with the 1st respondent as the undisputed evidence showed that the registered proprietor was deceased and the 1st respondent had been appointed as administratrix. Connected to this argument, was the argument that the absence of the registration at the Lands and Deeds Registry of the 1st respondent's appointment did not entitle the appellant to enter into a lease with the 2nd, 3rd and 4th respondents as they were neither administrators nor persons

with a registered interest in the property in question. The 1st respondent has argued that the 2nd, 3rd and 4th respondents were not the landlords within the definition of the Rent Act, Cap 206 of the Laws of Zambia. The only landlord under the Rent Act was the 1st respondent. In the alternative, the appellant should prove that he entered into the lease with the right people.

The 1st respondent's response to the third ground was that the learned judge was on firm ground when he ignored the fact that the 1st respondent related to the appellant as the tenant of the house in question and when he did not treat the appellant's occupation of the house as an equitable lease. This was because the reference to the appellant as a tenant merely showed the 1st respondent's intention to create a landlord and tenant relationship. Further, the fact that the 1st respondent referred to the appellant as the tenant of the house in question was irrelevant to the question of the illegality of the appellant's occupation of the house. The evidence before the court showed that the 1st respondent's intentions were not to remove the appellant from the house. The evidence showed that the 1st

respondent wanted to correct and legalise the arrangement that she found existing. The 1st respondent further submitted that the appellant did not qualify as an innocent person who had been led to believe in the state of affairs which he believed to be correct and acted on it. The appellant was aware that the registered owner was deceased. He was also aware that the 1st respondent was the administratrix and that he had to deal with her. As such, the learned judge did not err in law and in fact by not treating the appellant's occupation of the house as an equitable lease. In any event, the issue of an equitable lease did not arise in the court below.

We have considered all the grounds of appeal, the record of appeal and the arguments relating to this appeal. From the record, it is not in dispute that the appellant had entered into a lease relating to Stand No. 6874, Bende Road, Olympia Extension, Lusaka with the 2nd and 3rd respondent initially for a term of two years from 1st January, 2008. The lease was subsequently renewed and at the time the appellant commenced proceedings under the Rent Act on 8th April, 2014, he had been in

occupation of the dwelling house for slightly over six years. There is also evidence on record which shows that while he was in occupation he regularly paid his rent as and when it fell due and he also undertook repairs to rehabilitate the dwelling house for which he was given credit by way of extended occupation of the dwelling house. This arrangement continued uninterrupted for a period of five years. In 2012, the respondent appeared from the United Kingdom and introduced herself as the administratrix of the estate of the late Catherine Siandwazi who was the owner of the property in issue. The 1st respondent demanded to see the lease and also requested an advance payment of the sum of K3,000.00 from the appellant to enable her to cover her mother's medical bills. The appellant gave the 1st respondent the money.

While we reaffirm the principle in the *Achiume*[1] case in relation to findings of fact made by a lower court, we must ask ourselves whether, given all the evidence surrounding this matter, the findings of the court below in relation to the first ground of appeal should be reversed. In attempting to resolve the issue of whether or not the 1st respondent did not communicate with the

appellant, the learned judge wondered why the 1st respondent had approached the appellant, introduced the subject of a new tenancy agreement and went away without contacting the appellant when a new lease had not been signed. The learned judge does not seem to have taken into account the dispassionate affidavit in reply of the 3rd respondent which states in paragraphs 30 and 31 that the discussions for the new lease agreement were not concluded and that the respondent left for the United Kingdom two days after the discussions without having resolved the issue relating to the lease. The affidavits of both the 2nd and 4th respondents acknowledge receipt of rent from the appellant as beneficiaries but disingenuously deny that they entered into a lease with the appellant. Having had the benefit of the rent and having held themselves out as landlords they cannot now be heard to argue that they were mere beneficiaries and that the appellant should have dealt with the 1st respondent as administratrix. The 1st respondent was aware all along for a period of five years that the appellant was a tenant and was in fact paying rent to the 2nd, 3rd and 4th respondents. It is difficult to simply accept the 1st respondent's evidence that she had

prepared a draft lease for the appellant's approval and signature when there is no evidence of the draft lease. It is equally, difficult to accept the 1st respondent's evidence with regard to the phone calls she is alleged to have made to the appellant without even producing a printout of the various phone calls made. When the 1st respondent came to Zambia from United Kingdom, she asked the appellant for K3,000.00 as an advance against the rent due so that she could take care of the 2nd respondent's medical needs. She was given the money. This further confirms the status and recognition of the appellant as tenant. In any event, the definition of landlord in the Rent Act, Cap 406 is so wide that it includes all the respondents. The Rent Act defines landlord as follows:

> *"landlord" includes, in relation to the premises, any persons, other than the tenant in possession, who is or would but for the provisions of the Act, be entitled to possession of the premises and any person from time to time deriving title under the original landlord, and any person deemed to be a landlord by virtue of the meaning ascribed in this subsection to the expression "lease";*

Lease is defined as follows:

"lease" includes any agreement whether written or verbal and howsoever described whereunder the tenant obtains the right to possession of the premises for a consideration in money or money's worth, and whether or not such agreement includes an option to purchase the said premises or the building of which the said premises form part; and the grantor and grantee of any such right to possession shall, for the purpose of this Act, be deemed to be a landlord and tenant respectively;"

A perusal of what the late Catherine Siandwazi termed as her Will shows that she intended to leave the house to the 2nd and 4th respondent. In addition, they admitted receiving rent from the appellant and executed the lease which makes them landlords under the definition of lease in the Rent Act.

It is therefore quite clear from the above definitions of landlord and lease that the 1st, 2nd and 4th respondents qualify to be described as such. In addition, there is overwhelming evidence of acceptance of various sums of money as rent as well as recognition that the appellant had undertaken some repairs and improvement to the premises which were duly credited as rent.

We are therefore of the view that when all the evidence is taken into consideration, there is merit in the first ground of

appeal that there was no evidence to support the finding that the respondent did not break off communication with the appellant. There was also no evidence to show that the appellant declined to enter into a lease with the 1st respondent.

In the second ground the appellant has argued that the 1st respondent is not the registered proprietor of Stand No. 6874, Bende Road, Olympia Extension Lusaka and as such the lease could not have been signed by the 1st respondent. This is a self-defeating argument by the appellant since the appellant had earlier on argued that there was a landlord and tenant relationship with the respondents. Be that as it may, there is some merit in the argument that even assuming that the 1st respondent was claiming to be the administratrix and was recognized as such by the other respondents, she had not registered her interest in terms of section 5 (3) of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia which provides that:

> *"5. (3) Probate of a will affecting land or any interest in land shall be registered within twelve months of the grant thereof or the sealing*

thereof under the provisions of the probate (Resealing) Act, as the case may be."

There is no evidence which shows that the 1st respondent applied for probate and registered her interest within twelve months or that she had applied out of time to do so. She cannot therefore rely on the fact that since she is recognized as administratrix then she can deal with the property as such. She needs to formalize her appointment by applying for probate and having her appointment registered in the Lands and Deeds Register for her to be in a position to legally deal with the property.

We accept the argument by the 1st respondent based on the authority of *Mususu Kalenga Building and another v Richman's Money Lenders Enterprises*[4] that where an issue was not raised in the court below it is not competent for any party to raise it on appeal. A closer reading of Order 59/10/10 of the Rules of the Supreme Court, however, shows that this stringent principle has very limited exceptions. Order 59/10/10 RSC reads as follows:

"Allowing a case to be made though not raised in the court below-" 'A point, not taken at the trial, and presented for the first time in the court of Appeal....ought to be most jealously scrutinized.... A court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it had before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them in the witness box" ..... Even though there is some evidence upon the matter, "the rule is that, if a point was taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility could prevent the point from succeeding, it cannot be taken afterwards."...A point as to jurisdiction may be taken at any stage if all the facts are before the court.... A new argument maybe raised on one and the same matter if the whole matter was before the court.....But the rule stated at the head of this note is strictly applied.... In addition, at the discretion of the court a party maybe debarred from raising a point which was pleaded but deliberately omitted from the argument in the court below or from arguing a case totally inconsistent with and contradictory to the case previously argued... A party may be precluded, by his method of conducting his case, from raising a different case on appeal; and a party may be debarred from raising an objection to mere procedure, not raised below."

In this case the point being made by the appellant is that the 1st respondent had not complied with the statutory requirements of Section 5 (3) of the Lands and Deeds Registry

Act. The fact that the issue was not argued in the court below does not legitimize it as it is a statutory requirement to comply with Section 5 (3). *In Nevers Sekwila Mumba v Muhabi Lungu,* we held as follows with regard to the argument that an issue had not been argued in the court below:

> *"It would indeed be calamitous were we to accept the arguments implied in the respondent's counsel's submission that any legal arguments, and authority not advanced before a lower court cannot be made before this court."*

It follows therefore that the arguments raised by the 1st respondent in connection with Section 5 (3) of the Lands and Deeds Registry Act comes within the limited scope of Order 59/10/10 RSC. In the circumstances we reject the 1st respondent's argument on this point.

We wish to state in passing even though the point was not argued, that under section 43 (2) of the Intestate Succession Act Cap 59, the appointment of the administratrix in relation to the estate in general would have been invalid as the Local Courts jurisdiction is limited to K50.00.

Section 43 (2) states as follows:

"(2) A Local Court shall have and may exercise jurisdiction in matters relating to succession if the value of the estate does not exceed Fifty Thousand Kwacha." (Un-rebased).

Section 43 (2) may seem archaic given the fact that there is hardly any estate in Zambia worth K50.00 but it is nevertheless the law for the time being in force. We are aware that the majority of estates in Zambia are administered by facilitation of letters of administration given by the Local Courts. There is therefore urgent need for the relevant authorities to take necessary steps to amend section 43 to the Intestate Succession Act so as to increase the jurisdiction of the Local Courts in relation to estates.

We mentioned earlier on in this judgment that the 1st respondent had received the sum of K3,000.00 as advance rent and that the appellant was recognized as a tenant by the 1st respondent.

The appellant has argued that the learned Judge ought to have treated the appellant's occupation arrangement as an

equitable lease. We agree with this argument because equity recognizes and enforces rights which are sometimes referred to as 'equities of possession' so as to restrict the revocation of licences to occupy or use premises which at common law would be regarded as revocable. According to paragraph 14 of Volume 27 (1) of Halbury's Laws of England 4th Edition, equity of possession can come to the aid of the tenant. The relevant part of paragraph 14 reads as follows:

> *"This restriction occurs where a person who is occupying or using land has acted in reliance upon the representation or the acquiescence of the person having a proprietary interest in respect of that land. Where a person has established an express or implied licence to occupy premises, the role of equity is supportive and supplementary, but, if the legal relationship between the parties is such that the true arrangement between them will be frustrated if they are left to their legal rights and duties at law, an equity will arise notwithstanding that there has been no agreement (so that there is no contractual licence), and notwithstanding that the representation made or the belief which has been acted upon is so imprecise as not to define the duration of the right to occupy or use the premises; in such circumstances, it is for the court to determine what period of occupation or use is sufficient to satisfy the equity. Such rights arise by operation of the principles of equitable estoppel."*

There is merit in the third ground of appeal and we allow it as well.

The fourth ground of appeal takes issue with the finding by the learned Judge that rent was due when it had been paid. A perusal of the record of appeal shows that the appellant was consistent in his rent payments. There is evidence that the 2nd, 3rd and 4th respondents acknowledged the payments made to them. The record of appeal also shows that the appellant continued paying the rent into court after he commenced the action in the High Court. There is also evidence of a payment out of court by the 1st respondent's advocates made on 23rd January, 2015. In the circumstances, quite apart from contradicting himself by declaring the lease invalid and ordering the appellant to pay rent at the same time, the learned Judge fell into error in ordering the appellant to pay rent which he had in fact paid. We find merit in the fourth ground of appeal and allow it.

For the foregoing reasons, the judgment of the High Court is set aside. This appeal is allowed with costs to the appellant to be agreed or taxed in default of agreement.

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A.M.WOOD
SUPREME COURT JUDGE

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M. MALILA, SC
SUPREME COURT JUDGE

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R.M.C.KAOMA
SUPREME COURT JUDGE