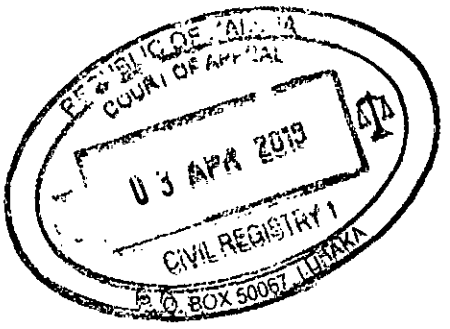
IN THE COURT OF APPEAL OF ZAMBIA **App. No. 43/2018**

HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

CHARLES KAJIMANGA **APPELLANT**

AND

RICHARD BORNFACE CHILUBA **RESPONDENTS**
JENNIPHER MWABA CHIKWEMBE (Suing In their capacity as Administrator/ Administratrix of the Estate of the late Martmus Chilemya)

CORAM: Mulongoti, Sichinga, and Ngulube, JJA
On 16th October, 2018 and 3rd April, 2019

For the Appellant: *Mr. E. S. Silwamba, SC- Messrs Eric Silwamba, Jalasi and Linyama Legal Practitioners*
For the Respondents: *Dr. O. M. Banda- Messrs O. M. Banda & Co.*

JUDGMENT

Sichinga, JA delivered the Judgment of the Court

Cases Referred to:

1. ***Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and others (2005) ZR 138***
2. ***Khalid Mohamed v Attorney General (1982) ZR 49***

3. ***Peter Militis v Wilson Kafuko Chiwala (S.C.Z Judgment No. 3 Of 2009)***
4. ***Umeanyi v Ezeobi (1990) 3 NLR (PT.140) 621 CA***
5. ***Anne Scott v Oliver Scott (SCZ Judgment No. 3 of 2007)***
6. ***Kitwe City Council Vs William Ng'uni (2005) Z.R. 57 (S.C.)***
7. ***Valentine Webster Chansa Kayope v Attorney-General (S.C.Z Judgment No. 18 of 2011)***
8. ***In Re: Kashita (S.C.Z. Judgment No. 27 of 1982)***

Statutes Referred to:

1. ***Court of Appeal Rules, S.I. No. 65 of 2016***
2. ***Rules of the Supreme Court of England, 1965 (White Book)***

Texts Referred to:

1. ***Black's Law Dictionary (9th Ed.)***

This is an appeal against a judgment on assessment of damages by the Deputy Registrar. It was made, pursuant to the decision of the High Court in a judgment dated 16th October, 2013, which was upheld by the Supreme Court in a judgment dated 4th August, 2016, by which it was ordered that the matter should be referred to the Deputy Registrar for assessment of the amount payable as rentals which was awarded as mesne profits and interest thereon. After assessment, the Deputy Registrar awarded the amount of K376, 267.80 by a ruling dated 11th August, 2017, which is the subject of this appeal.

We will give a brief background of this matter in so far as it relates to the issues brought before the High Court and in so doing, we shall refer to the respondent herein as plaintiff, and the appellant as defendant, as they were in the High Court. The Plaintiff (now deceased) was a former employee of Namboard, a parastatal company that subsequently went into liquidation and some of its assets were consequently transferred to other organizations, including Zambia Cooperative Federation (hereinafter "ZCF"). Government then decided to offer ex-Namboard employees houses and flats as part of their terminal benefits and the plaintiff was offered Stand No. 27269 Lusaka, known as House No. 1 of Plot 145/110a Musonda Ngosa Road, Villa Elizabetha, Lusaka (hereinafter called "the subject property"), which he paid for through deductions from his terminal benefits. The plaintiff's claim before the High Court was for;

1. An order that he is the rightful and legal owner of the subject property;
2. An order of immediate vacant possession of the subject property;
3. An order to compel the defendant to paint and repair all damages caused to the said house;
4. An order to compel the defendant to settle any outstanding bills (if any);
5. An order that since the defendant was aware that the property belonged to the plaintiff, any development by the defendant was at his own risk;

6. Mesne profits in the sum of K4,250,000.00 per month from 1st October 1997 to date of surrender of the property in dispute by the Defendant to the Plaintiff;
7. Damages for trauma and inconvenience;
8. Interests and costs.

At the time of commencement of the matter, the defendant was occupying the subject property and refused to vacate it. He alleged in his counter claim that the plaintiff procured the property by fraud or fraudulent representations by submitting fake ZCF conditions of service to government to present an inflated terminal benefit package. The defendant stated further that he occupied the subject property by virtue of his employment position as Board Secretary/ Legal Counsel of ZCF. The Government, through the Attorney General as intervener, essentially supported the plaintiff's position. The High Court found that the plaintiff was the rightful and legal owner of the subject property and made a declaration to this effect. The defendant was ordered to vacate the said house within 30 days from 16th October, 2013.

With regards to the claim for mesne profits, the High Court declined to award the same in the absence of documentary proof of rentals realized from 1st October 1997 to the date of surrender. Instead, the learned trial Judge ordered that the matter be referred to the Deputy Registrar for assessment of the amount payable as rentals to be awarded as mesne profits and interest thereon at the average short term deposit rate from the date of filing of the Writ of

Summons to date of judgment and thereafter at the Bank of Zambia average lending rate up to the date of payment.

The defendant appealed to the Supreme Court, which upheld the decision of the High Court, stating that the plaintiff was not entitled to purchase the said house, and that he had never been an employee of Namboard. The Supreme Court considered a letter dated 20th January 1999 authored by the Director of State Enterprises at ZCF, allowing the appellant to remain in lawful occupation of the subject property for 30 days from the date of the said letter, and it held that after expiration of this period, the respondent could recover mesne profits. Consequently, it was ordered by the Supreme Court that the respondent must recover mesne profits in respect of the period the appellant remained in occupation of the house after the notice had expired, and accordingly referred the matter to the Deputy Registrar for assessment of the mesne profits for the said period.

In her Judgment on Assessment of Damages, the learned Deputy Registrar stated as regards the appellant's arguments challenging the respondent's entitlement to mesne profits that she had no jurisdiction to vary decisions made by judges either in chambers or in open court. In arriving at the figure of K376, 267.80 as damages on assessment, the learned Deputy Registrar considered the valuation report presented by the appellant because the firm that prepared the valuation report on behalf of the respondent was not registered or licensed for the 2016/2017 financial year. The

appellant has now appealed before this Court on the following grounds:

1. The learned Deputy Registrar erred in law and in fact when she sustained the plaintiff's claim for mesne profits in the absence of evidence adduced on behalf of the plaintiff.
2. The learned Deputy Registrar misdirected herself when she failed to take into consideration that the plaintiff did not suffer any loss or damages for being out of possession of the house and failed to accept that the plaintiff would be unjustly enriched if he was awarded mesne profits as he did not incur any costs when he lived in the flat on Saise Road, Longacres, free of charge as one of his benefits of employment.
3. The learned Deputy Registrar misdirected herself when she stated that the Defendant's argument that the plaintiff's claim for mesne profits would amount to unjust enrichment was in conflict with his decision to submit a valuation report prepared by D. W. Zyambo and Associates.
4. The learned Deputy Registrar erred in law and fact by holding that it was not in order to include in the defendant's submissions, issues that had already been adjudicated upon and settled by the High Court and Supreme Court judgments when an assessment is a re-hearing of evidence and determined on its merits
5. The learned Deputy Registrar misdirected herself when she ignored the correct law on mesne profits.

The appellant filed heads of argument dated 15th March, 2018 wherein arguments for grounds one, four and five are combined, as are those relating to grounds two and three. Under grounds one, four and five, the appellant submits that at a hearing of an assessment, parties are at liberty to call witnesses and lead evidence in aid of their cases, and that the onus was on the Respondents to submit evidence on the mesne profits they were claiming, which they lamentably failed to do.

Furthermore, the appellant contends that since an assessment is a re-hearing of evidence that should be heard on its merits, the appellant was well within his rights to include in his submissions issues that had already been adjudicated upon by the High Court and Supreme Court, and the learned Deputy Registrar was duty bound to adjudicate on the issue of rentals.

In this vein, it is the appellant's submission that the learned Deputy Registrar erred in law when she proceeded to sustain the respondents' claim for mesne profits in the absence of evidence adduced on the respondent's behalf. The appellant relies on the principle that the burden of proof lies on the party who substantially asserts the affirmative of the issue, and in this regard calls in aid the cases of ***Anderson Kambela Mazoka and Others v Levy Patrick Mwanawasa and others***[1] and ***Khalid Mohamed v Attorney General***[2], *inter alia.*

With regards to the argument that the learned Deputy Registrar misdirected herself when she ignored the correct law on mesne

profits, our attention is drawn to some authorities wherein the Supreme Court defined what mesne profits are and when they are due. One such case is ***Peter Militis v Wilson Kafuko Chiwala***[3] where the Court stated as follows:

> ***"What is mesne profits and when are they due? In Halsbury's Laws of England, Vol. 28, 3rd Edition at page 561, paragraph 1230, the legal position is that the landlord may recover in an action for mesne profits damages which he has suffered through being out of possession of the land. Mesne profits, being damages for trespass, can only be claimed from the date when the defendant ceased to hold the premises as a tenant and became a trespasser. The action for mesne profits does not lie unless either the landlord has recovered possession or the tenant's interest in the land has come to an end."***

The appellant submits that the relationship of landlord and tenant is a *sine qua non* for the award of mesne profit. Reference is made to ***Black's Law Dictionary (9th Ed.)*** which defines mesne profits as; *"the profits of an estate received by a tenant in wrongful possession between two dates."* On this premise, it is the submission of learned counsel for the appellant that the Deputy Registrar ignored the correct law on mesne profits as there was no landlord and tenant relationship between the appellant and the 1st respondent, nor did there exist a tenancy agreement. For persuasive value, we are

invited to consider how the Courts in the Federal Republic of Nigeria have adjudicated on mesne profits, of which we have taken note. One such case is ***Umeanyi v Ezeobi***[4] where the Court stated when it defined mesne profits in a passage cited by counsel that;

> ***"...it is the value or compensation (or damages) for wrongful use and occupation of another's land which would have been otherwise rightly in the owner's possession, and which is sometimes measured in terms of loss of rents by the landlord. It is technically a form of damages for trespass in a relationship that could have been that of landlord and tenant, save that there is no agreement for a tenancy or that the formerly subsisting agreement had expired."***

The appellant submits in this regard that for mesne profits to be payable, there must exist a relationship of landlord and tenant, a tenancy agreement, and that tenancy agreement must have expired. it is the appellant's position that in the matter at hand, there is no evidence of a landlord and tenant relationship between the appellant and the deceased, nor was a tenancy agreement executed between the parties, and that this is a proper case for this Court to set aside the award of damages made by the Deputy Registrar, in accordance with several cases wherein an appellate court has disturbed the award for damages, including ***Anne Scott v Oliver Scott.***[5]

With regards to grounds two and three, the appellant's argument is that the respondent did not suffer any damages for being out of possession of the house, as he had lived on the subject property by virtue of his employment, and his claim for mesne profits is therefore tantamount to unjust enrichment, as there was no landlord and tenant relationship that existed between the parties and therefore no lease agreement. That further, seeing as the respondent was not paying rent, the onus was on the respondent to demonstrate liability for mesne profits. On the principal of unjust enrichment, counsel for the appellant has cited six authorities, the most recent among them being ***Kitwe City Council v William Ng'uni,***[6] wherein the Supreme Court, in determining an issue based on employment, stated that:

> ***".....we have said in several of our decisions that you cannot award a salary or pension benefits, for that matter, for a period not worked for because such an award has not been earned and might be properly termed as unjust enrichment. The order of the learned Judge is accordingly reversed and in its place the defendant is ordered to refund the contributions the plaintiff made to the Superannuation Fund under the LASF Act, minus the defendant's contributions."***

Based on the foregoing, it is the appellant's submission that the respondents have been unjustly enriched by the Deputy Registrar's

award of mesne profits when the deceased conceded that he did not incur costs when he lived elsewhere free of charge as one of his benefits of employment.

At the hearing of this appeal, we asked Mr. Silwamba SC whether the appellant was attacking the judgment of the Supreme Court with regards to grounds four and five on mesne profits, and his response was that his client is not attacking liability at all. He stated further that the Notice of Motion by the respondent is grossly misconceived, as it is anchored on ***Order VII Rule I of the Court of Appeal Rules***[1], which regulated interlocutory appeals, and that the appellant seems to raise a preliminary application through the back door. On the other hand, Dr. Banda submitted that the Respondent would rely on the documents on record.

1. There are no arguments on behalf of the Respondent in opposition to this appeal. However, on 10th October 2018, the Respondent did file a Notice of Motion for an order to dismiss the main appeal for abuse of Court process and irregularity, pursuant to Order ***VII Rule I of the Court of Appeal Rules***[1], as read together with ***Order 18 Rule 19 (18) of the Rules of the Supreme Court of England***[2]. The Notice of Motion is accompanied by an affidavit in support, whose contents are summarized under the grounds stated therein as follows:

1. The main appeal is irregular, at sea and an abuse of court process, as the record clearly shows that this appeal is misconceived because it appears to be in total disregard of the

judgment of the Supreme Court which granted the mesne profits and definitely not the Deputy Registrar whose only sole mandate was to assess the amount of mesne profits. However, the appellant's grounds of appeal have neglected to focus on an appeal against the amount assessed as mesne profits.

2. Grounds one to five should be dismissed for abuse of court process, as they are attacking the Supreme Court judgment on record, where the Chief Justice and two other Supreme Court judges held that; *"The matter should be referred to the Deputy Registrar for assessment of the mesne profits for the period the appellant remained in occupation of the house after the notice to vacate expired."*
3. The appellant is coming to equity with dirty hands as the learned appellant and his advocates have deliberately failed to challenge the amount assessed as mesne profits, which mesne profits were already granted by a more superior court to this Honourable Court, as can be observed from the Supreme Court judgment shown at page 192 of the record of appeal and the fact that the Deputy Registrar was guided by the valuation report produced as evidence by the appellant.
4. This appeal in its entirety is misconceived and should be dismissed as it defeats the purpose of the application by the appellant to pay the mesne profits in instalments, which application was awarded by the Deputy Registrar.

The Notice of Motion was opposed by the appellant in an affidavit on opposition dated 15th October, 2018, deposed by one Mwape

Chileshe. It is stated therein that pursuant to a Consent Order executed by the parties and signed by Makungu, JA on 8th May, 2018, the respondents should have filed their heads of argument 30 days after receipt of the appellant's supplementary heads of argument, and that following the Judgment on Assessment, the appellant has continued to pay the judgment sum timeously, as evidenced by the Standard Chartered Local Remittance application forms exhibited. The deponent further stated that the purported Notice of Motion is a preliminary objection in disguise, which the respondents were trying to present through the back door, as the respondents should have challenged the merits of the appeal by filing heads of argument.

We have considered all the arguments, submissions and authorities in support of this appeal. As we go ahead to consider and determine the first, fourth and fifth grounds, we would like to point out what appears to be a misapprehension of fact on the part of the appellant under the first ground of appeal, relating to the argument that the Deputy Registrar erred when she sustained the respondent's claim for mesne profits, yet the record shows that it was in fact the High Court that referred the issue of mesne profits for assessment. The record also shows that the Supreme Court upheld this position of the High Court, and the duty of the Deputy Registrar in this case was merely to give effect to the orders of the High Court and Supreme Court.

the preserve of the High Court and subsequently the Supreme Court on appeal. Owing to the trite legal principle of *stare decisis*, we are precluded from even so much as considering submissions that are likely to have the effect of altering the position of the Supreme Court.

We find that the appellant's counsel's argument herein is tantamount to duplicity of action, and we agree with the respondent's Notice of Motion to the extent that this argument constitutes abuse of court process, as it has already been determined that the respondent is entitled to mesne profits from the date of expiration of the 30 days' notice to the day the appellant vacated the subject property.

For the reasons stated above relating to the appellant's apparent attack of the respondent's entitlement to mesne profits, we are in agreement with the Deputy Registrar, and we find that she was on firm ground when she disregarded the appellant's submissions bordering on the respondent's entitlement to mesne profits. Ground four therefore fails and it is accordingly dismissed.

As regards the appellant's argument that there ought to have been a landlord and tenant relationship between the parties for the respondent to have been rightly entitled to mesne profits, we do not wish to dwell much on this issue, as it is one that has long been determined by the High Court and Supreme Court. Decisions of the Supreme Court are final, and it is the only Court that can change the decisions made by it. Arguments relating to the absence of a

tenancy agreement between the parties were dealt with by the Supreme Court, whose decisions, as we have already stated, are final. Therefore, for us to give effect to the appellant's arguments on mesne profits would be tantamount to us varying or reviewing the Supreme Court's judgment, which is absurd to say the least.

In agreement with the judgment of the Supreme Court that is subject to this appeal, we wish to refer to the case of ***Valentine Webster Chansa Kayope v Attorney-General*** [7], the appellant therein was a Cabinet Minister in the Zambian Government, who occupied the house in dispute by virtue of his post. When he ceased to be a Minister, he was required to vacate the house and hand it over to the Government. At his request, he was allowed to stay in the house for one month, but he remained in the house up to two years, when he was evicted. After his eviction, the respondent sued for mesne profits. The Supreme Court upheld the claim of mesne profits, even in the absence of a lease agreement between the parties. It (Supreme Court) stated in this regard that:

> ***"...We uphold the learned trial judge's finding of fact that the period 1st January, 2002, to 30th November, 2004, the appellant had no legal right to occupy the respondent's house. We would add that he kept the respondent out of the house, without lawful justification. In the premises, the law governing mesne profits states that he must pay the mesne profits to the***

respondent for his continued occupation of the house, after the expiry of his legal right to occupy it..."

The law governing mesne profits demands that the appellant must pay the mesne profits to the respondent for his continued occupation of the house after the expiry of his legal right to occupy it, which in this case is from the date of expiration of the 30 days' notice period to the date on which the appellant vacated the subject property. This ground of appeal is therefore misconceived, as it is challenging something that was beyond the learned Deputy Registrar's jurisdiction. To this extent, we agree with grounds one and two of the respondent's Notice of Motion, and we accordingly uphold them.

Under the second ground of appeal, it appears to us that counsel for the appellant has the notion that since the respondent was living in another house belonging to his former employer free of charge while the appellant occupied the subject property after the expiration of the 30 days' notice period, the respondent did not suffer any loss for being denied possession of the subject property, as this would amount to unjust enrichment. Under the law relating to mesne profits, it is immaterial whether or not the respondent incurred costs of occupying alternative premises during the period in which the appellant continued to be in occupation of the premises after the expiry of his legal right to do so. What is material is that the respondent was denied possession of the

subject property when his legal right of possession arose, that is; after he had purchased it through deductions from his pension benefits. In any event, contrary to the submission of Mr. Silwamba, SC it appears that this argument is attacking the respondent's entitlement to mesne profits, an issue which has long since been determined by the superior courts, and has nothing to do with the quantum of damages that the respondent is entitled to by way of mesne profits. Ground two therefore fails for the reasons set out, and it is accordingly dismissed.

We will now address our minds to the criteria used by the learned Deputy Registrar to come up with K376, 267.80 as the amount of mesne profits awarded to the respondent. The record shows that the learned Deputy Registrar disregarded the valuation report submitted by the respondent because it was prepared by a firm of valuation surveyors that was not registered for the year 2016/2017. For this reason, she adopted the valuation report submitted by the appellant. In arriving at the sum of K376, 267.80 as mesne profits, the learned Deputy Registrar stated as follows:

> ***"....It is the view of this Court that the defendant could only occupy the house up to 19th February, 1999. Therefore, assessment of mesne profits should start from 20th February, till the day vacant possession was given to the plaintiff. According to the defendant's heads of argument in opposition to***

summons to assess mesne profits, the defendant handed over the house on the evening of 29th September, 2016. Therefore, the assessment will be for the period 20th February 1999 to 29th September, 2016, since keys were only handed over in the evening."

With regards to the appellant's argument that this is a proper case to set aside an award of damages by the Deputy Registrar, we are guided by the Supreme Court in the case of ***In Re: Kashita,***[8] where it was stated that:

"In dealing with appeals against assessments of damages this court has frequently been guided by the principle that an appellate court should not interfere with the finding of the trial court as to the amount of damages unless it is shown that the trial court has applied a wrong principle or has misapprehended the facts or that the award was so high or so low as to be utterly unreasonable or was an entirely erroneous estimate of the damages."

From the analysis of the evidence on record, especially relating to the manner in which the learned Deputy Registrar arrived at the sum of K376, 267.80, our view is that she was quite thorough and transparent, as she had a balanced evaluation of the evidence before her, so much that she actually tabulated the estimate of

rentals for the period in question based on the appellant's valuation report. As regards the appellant's arguments to the effect that an assessment is a re-hearing of evidence, an assessment is a hearing to determine what is due to the successful party or what was awarded. It is not for the Deputy Registrar on assessment to rehear the case and possibly reverse findings of fact which were made by the High Court and upheld by the Supreme Court. The third ground of appeal therefore fails for lack of merit.

In conclusion, all the grounds of appeal fail for the reasons set out under the respective grounds. This appeal therefore lacks merit and we accordingly dismiss it. We award costs of this appeal to the respondents, to be taxed in default of agreement.

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J. Z. Mulongoti
COURT OF APPEAL JUDGE

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D. L. Y. Sichinga
COURT OF APPEAL JUDGE

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P. C. M. Ngulube
COURT OF APPEAL JUDGE