

IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

APPEAL NO.132/2015
SCZ/8/181/2015

BETWEEN:

ADAM KARIF (TRADING AS M.A. BRAKE CONSTRUCTION
AND HAULAGE)

APPELLANT

AND

DORA M. CHINGO MONGA

RESPONDENT

Coram: Chibomba, Hamaundu and Kaoma, JJS.

On 3rd November, 2015 and on 28th September, 2016

For the Appellant: Mr. N. Ng'anjo, of Messrs Lewis Nathan Advocates.

For the Respondent: Mr. S.M. Sikaulu, of Messrs SLM Legal Practitioners.

J U D G M E N T

Chibomba, JS, delivered the Judgment of the Court.

Cases referred to:-

1. Banister vs. Banister (1946) 2 All ER 158.
2. Jasurber R. Naik and Naik Motors Limited vs. Agnes Chama(1985) Z.R. 227.
3. Mhango vs. Ngulube and Others (1983) Z.R. 61.
4. Rating Valuation Consortium and D.W. Zyambo & Associates (Suing as a firm) vs. The Lusaka City Council and Zambia National Tender Board (2004) Z.R. 109.
5. Krige and Another vs. Christian Council of Zambia (1975) Z.R. 199.

Legislation referred to:-

1. Rules of the Supreme Court, 1999 edition.
2. Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.
3. Land (Conversion of Titles) Act, 1975 (Repealed).
4. Rent Act, Chapter 206 of the Laws of Zambia.

Other materials referred to:-

1. Halsbury's Laws of England, 4th edition, Vol. 27 (1) at paragraph 203.

The Appellant appeals against the Ruling of the High Court dated 23rd June, 2015 in which the learned Judge held, *inter alia*, that since the lease agreement entered into between the Appellant and the Respondent was not registered in the Lands and Deeds Registry, the Appellant could not claim any relief under it.

The history of this Appeal is that the Appellant and the Respondent entered into a lease agreement for the Appellant to rent the Respondent's property known as Plot No. 1389/M/A, Leopards Hill Road, for the Appellant's block making business. The lease agreement was for a period of five years. The agreed terms as stipulated in the lease agreement were as follows:-

- "3. The tenant agrees to sink a borehole on the plot at KR10,000 which will be paid back to him by monthly deductions of KR300.
4. The tenant will tap electricity (3 phase) to the structure. The amount will be paid to him by monthly deductions from rentals (Total Amt. expenditure – K9,484)
5. The tenant will demolish the main wall fence during this period of the contract and shall re-build it at the time the tenancy expires.

6. The tenant will put up a wall fence to separate the business from the rest of the plot."

The Appellant proceeded to put up the three phase electricity; sank a borehole; put up an office and a slab for his operations. The Appellant also paid the Respondent the first three months' advance rentals which the Respondent accepted. A dispute arose between the parties resulting in the Respondent issuing to the Appellant, a Notice to vacate the leased property. The Appellant then filed a Writ of Summons accompanied by a Statement of Claim, in which the following reliefs were sought:-

- "1. A sum of ZMW102,900.00 broken down as follows:
 - 1.1. ZMW72,900.00 being the amount the Appellant spent on putting up three phase power, sinking a borehole, and office block on the premises as allowed in the lease agreement.
 - 1.2. ZMW30,000.00 being the loss of income for three months at ZMW10,000.00 per month.
2. Loss of future income had the lease been allowed to run its full year period.
3. General damages.
4. Interest on the above sums.
5. Costs.
6. And other relief the Court may deem fit."

The Respondent did not enter appearance and a judgment in default was entered which was later set aside via a Consent Order. The Respondent then filed a Defence and Counterclaim in which liability was disputed. The Respondent claimed that there was no express provision in the lease agreement for the Appellant to erect an office and a slab on the

property. She also claimed that the Appellant had refused to pay rentals for the period November, 2013 to January, 2014 and that as a consequence, she issued a Notice to terminate which was served on the Appellant. That, however, the Appellant continued to operate at the premises even when the lease was terminated and that no rentals were paid to warrant the Appellant's continued operations at the said premises.

In the Counterclaim, the Respondent claimed for the rental arrears and mesne profits from 14th May, 2014; damages for breach of contract; damages for mental anguish; trauma; and inconvenience suffered as a consequence of issuance of a Writ of Fida; interest; any other reliefs the court may deem fit; and costs.

On 2nd October, 2014 the Respondent filed a Notice of Motion to Raise Preliminary Issues. The Notice of Motion was filed pursuant to Order 14A as read together with Order 33/3 and 7 of the **Rules of the Supreme Court (RSC)**, 1999 edition. The Notice of Motion was supported by an Affidavit and Skeleton Arguments.

The issues raised by the Respondent in the said Notice are as follows:-

- "i. That the Appellant cannot claim any of the reliefs being sought against the Respondent because the lease agreement which the Appellant is relying on for his claims against the Respondent purports to create a lease for Five (5) years but was not executed as

a deed and registered at the Lands and Deeds Registry as required by the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia; and

- ii. That the Appellant has no cause of action against the Respondent and therefore the Appellant's claim may be dismissed with costs to the Respondent."

After hearing the parties and upon considering the Affidavits before her and the arguments in the Skeleton Arguments and the oral submissions by learned Counsel for the parties, the learned Judge came to the conclusion that the preliminary issues raised were valid. She held that the lease agreement was null and void on ground that it was not registered contrary to Section 4(1) of the **Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia**. Hence, the Appellant could not rely on it in any court of law. She, thus, dismissed the Appellant's case with costs to the Respondent.

Dissatisfied with the Ruling of the court below, the Appellant appealed to this Court advancing three Grounds of Appeal in the Memorandum of Appeal as follows:-

"GROUND ONE

The Court below erred in Law and fact when it did not take into account that the Appellant had put up development on the Respondent's property, which the Appellant needed to be compensated when it held that the Appellant could not claim any relief from the Respondent because the lease signed between the Appellant and Respondent was not registered under Sections 4(1), 5 and 6 of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia.

GROUND TWO

The Court below erred in Law and fact when it did not take into account that not allowing the Appellant to be compensated by the Respondent for the development he put on the Respondent's property would result in the Appellant unjustly enriching the Respondent.

GROUND THREE

The Court below erred in Law and fact when it failed to take into account that the Respondent had also had the obligation to register the lease, and therefore, she could not rely on her own default as well as to claim that the lease was null and void for non-registration under Sections 4(1), 5 and 6 of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia. Further Grounds will follow later."

In support of this Appeal, the learned Counsel for the Appellant, Mr. Ng'anjo, relied on the Appellant's Heads of Argument in Support and those filed in reply. In the Heads of Argument in Support, Mr. Ng'anjo argued Grounds one and two together on ground that they were related, while Ground three was argued separately.

In arguing Grounds one and two of this Appeal which attack the learned trial Judge for not taking into account the fact that the Appellant had put up developments on the Respondent's property for which the Appellant was not compensated as the court below held that the Appellant could not claim any relief from the Respondent because the lease agreement was not registered, it was argued that this would result into unjust enrichment of the Respondent. Counsel argued that by not allowing the Appellant to claim any relief from the Respondent for the developments

he had put up on the Respondent's property, this was unconscionable, unjust, and unfair.

To buttress the above submissions, the case of **Banister vs. Banister**¹ was cited in which it was held that a party will not be allowed to rely on the absence of statutory formalities if to do so will be unconscionable and unfair. We were, accordingly, urged to uphold Grounds one and two of this Appeal.

Ground three of this Appeal attacks the learned Judge for not taking into account that the Respondent also had an obligation to register the lease. It was argued that the Respondent should not be allowed to rely on her own default to claim that the lease was null and void for non-registration. In support of this argument, Counsel for the Appellant referred to Sections 4 (1), 5 and 6 of the **Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia (the Act)**. It was submitted that **the Act** is silent on who should register a lease. According to Counsel, this means that both the landlord and the tenant had the obligation to register the lease. Counsel argued that according to paragraph 1 of the Appellant's Affidavit in Opposition, the Certificate of Title for the property in question was in the Respondent's possession. That as such, the Respondent is the

one who was in a better position to register the lease. Therefore, the Appellant was not at fault.

In support of this argument, Mr. Ng'anjo cited the case of **Jasurber R. Naik and Naik Motors Limited vs. Agnes Chama**² in which the tenant had applied for the grant of a new tenancy of a business premises. When the application was heard, a preliminary point was raised that consent to assign was not obtained under Section 11 of the **Land (Conversion of Titles) Act, 1973** when the original tenancy was granted. In that case we held that the prohibition against letting premises without Consent applies primarily to the landlord and that in the absence of any wrong doing on the part of the tenant, it is for the landlord to obtain Consent and to suffer any illegality arising from the failure to obtain such Consent and that a tenant who is not in default himself does not lose protection of the **Rent Act** as a result of the landlord's failure to obtain the Consent.

Counsel argued that in the case in *casu* and in line with the decision in the above cited case, the Respondent is the one who should suffer the consequences of non-registration of the lease as she cannot rely on her own failure to register the lease as an excuse to claim that the lease was not registered. We were, accordingly, urged to uphold this Appeal.

In opposing this Appeal, the learned Counsel for the Respondent, Mr. Sikaulu, also relied on the Respondent's Heads of Argument filed. In response to grounds one and two of this Appeal, Mr. Sikaulu submitted that the only issue for determination before this Court is whether the lease agreement between the parties was void for want of registration and the effect of a void lease. Counsel argued that the preliminary points raised by the Respondent relate to the lawfulness of relying on a lease agreement that needed to be executed as a Deed and which fell short of the strict statutory requirement of registration upon which the reliefs sought by the Appellant were based. Hence, the court below, having found that the lease agreement was null and void for want of registration, it was not necessary for it to address the issues of compensation and/or unjust enrichment. That as such, the Respondent's contention is that a party cannot obtain reliefs from a lease that is unlawful on account of flagrant breach of an express statutory provision.

Counsel argued that in any event, there was no evidence to support the Appellant's claim of unjust enrichment. And that the Record shows that the Appellant has neither proved the existence of the improvements nor did he adduce evidence of their value. Therefore, that the learned trial Judge

had no basis upon which she could have granted the claims by the Appellant unless the matter had proceeded to trial.

In support of the above argument, Mr. Sikaulu cited the case of **Mhango vs. Ngulube and Others**³ in which we reaffirmed the need to support a claim with concrete evidence. He submitted that in the current case, the court below could not have taken into account the Appellant's claim that he had put up developments without any evidence being led to that effect which could have been tested by cross-examination so that the trial court could have made a determination on the balance of probabilities.

Counsel further argued that the issue of developments was irrelevant to the preliminary issues raised. To buttress this point, he cited the case of **Rating Valuation Consortium and D.W. Zyambo & Associates (Suing as a firm) vs. The Lusaka City Council and Zambia National Tender Board**⁴ in which we held that where in construing a statute, the contract is rendered illegal and unenforceable or void by a provision in a statute, the court will not enforce such a contract.

In response to Ground three, Mr. Sikaulu submitted that the learned trial Judge was on firm ground and correctly construed the provisions of Section 4 (1), 5 and 6 of the **Lands and Deeds Registry Act** when she held that the lease in question was null and void for non-registration.

Counsel contended that the manner in which the above provisions are couched, does not place any iota of responsibility on a landlord as they only guide that a document purporting to convey land or any interest in land for more than a period of one year must be registered within the given time. Hence, the path being sought by the Appellant to entirely have the Respondent bear the burden of registration amounts to injection of words in a statute, which words were neither intended nor envisaged by the legislators.

In response to the case of **Jasurber R. Naik and Naik Motors Limited vs. Agnes Chama**² relied upon by Counsel for the Appellant and the argument in support thereof, Mr. Sikaulu argued that the decision in that case shoots the Appellant in the foot as that was *obiter* by way of an exception that there may be circumstances where a tenant himself is in default and that if he assures the landlord that he himself will obtain the necessary Consent to assign and in the event that he defaults, that might deprive him of protection.

Counsel submitted that in the case in *casu*, the tenant need not have assured or gotten the authority of the landlord in order to register the lease as the law gave him the necessary authority. And that it is clearly enunciated that in circumstances where the tenant is also in default as was

the case in the case in *casu* where he too was obliged and/or authorized to register the lease under Section 4 (1) of the **Lands and Deeds Registry Act**, the tenant has no claim as the legislators left the obligation to register open so as to allow every party to a lease agreement to have the requisite authority under the law to register. That what the law was seeking to cure was the defect where the landlord, who has little to lose by non-registration of the lease agreement, is solely granted the authority to register the lease.

In response to the Appellant's argument that the Respondent cannot rely on non-registration of the lease as a defence to this action Counsel argued that the Appellant is effectively attempting to rely on the doctrine of estoppel. Citing the case of **Krige and Another vs. Christian Council of Zambia**⁵, in which we explained that one cannot set up an estoppel against a statute, Mr. Sikaulu submitted that the Respondent stands on that authority on the effect of non-registration of a lease as this is what this Court held in that case. In that case, we put it thus:-

"The effect of the occupation of the premises and payment and acceptance of rent was to create a periodic tenancy which was either yearly or monthly. None of the express covenants in the agreement for a lease nor the purported date of termination was effective because of lack of registration."

In summing up, Counsel for the Respondent's prayer was that the Appeal in this matter should be dismissed with costs for lack of merit.

In reply, Mr. Ng'anjo relied on the Appellant's Heads of Argument in Reply. He pointed out that the Respondent's argument that the Appellant cannot claim any relief from the lease, effectively means that the developments which the Appellant put on the Respondent's property would now belong to the Respondent without the Respondent paying for them. Hence, the Appellant's argument that this amounts to unjustly enriching the Respondent and that this is against the rules of equity and is unfair, unconscionable and unjust.

In response to the Respondent's argument that the Appellant had failed to adduce evidence to support its claim for compensation, Counsel argued that had the case proceeded to trial, the Appellant could have adduced evidence to support his claim and that as long as the Appellant is not given an opportunity to go to trial to prove his case, the Respondent will reap where she did not sow, thereby, unjustly enriching herself.

In response to the Respondent's argument in opposing Ground three, Counsel argued that the court below erred as the Respondent also had an obligation to register the lease. And that the Respondent cannot therefore rely on her own default as well to claim that the lease was null and void for non-registration.

Counsel argued that the case of **Jasurber R. Naik and Naik Motors Limited vs. Agnes Chama**² should be distinguished as it dealt with Presidential Consent whilst the case in *casu* deals with non-registration of a lease. However, that it is not the facts that the Court should look at, but the principle in the earlier case which is similar to the case at hand.

Counsel further argued that despite the holding in **Krige and Another vs. Christian Council of Zambia**⁵, that one cannot set up an estoppel against a statute, the Respondent equally cannot rely on her own default to claim that the lease was null and void for non-registration. And that the Respondent in this case could have been justified if the responsibility to register the lease was entirely that of the Appellant, but that the Respondent too had a role to play and cannot now rely on her own default to claim that the lease was null and void for non-registration.

We have seriously considered this Appeal together with the arguments advanced in the respective Heads of Argument and the authorities cited. We have also considered the Ruling by the learned Judge in the Court below. It is our considered view that the central question raised in this Appeal is whether, upon finding that the lease agreement in question was null and void and not capable of being enforced on account of want of registration under Sections 4 (1), 5 and 6 of the **Lands and Deeds**

Registry Act, the learned Judge came to a wrong conclusion when she dismissed the Appellant's entire case without taking into account the developments that the Appellant alleged to have done on the Respondent's property and if by doing so, this amounted to unjust enrichment of the Respondent.

Grounds one and two of this Appeal will be considered together, then Ground three separately.

The thrust of the Appellant's arguments in support of Grounds one and two is that the learned Judge erred as she did not take into account the fact that the Appellant had put up developments on the Respondent's property which would result in unjustly enriching the Respondent as the Appellant was not compensated for the developments. And also for holding that the Appellant could not claim any relief from the Respondent as the lease agreement was null and void for non-registration under the **Lands and Deeds Registry Act**. Hence, the appellant's position is that the holding by the court below essentially precluded the Appellant from seeking any relief from the Respondent for the alleged developments effected on her land.

The kernel of the Respondent's argument in response was that once the court below found that the lease agreement was null and void for want

of registration, it was not necessary for the court to consider the issue of compensation and/or unjust enrichment because the allegation was based on the lease which was null and void.

We have considered the above arguments and the findings by the court below. As much as we agree that the lease agreement in question was not registered contrary to the provisions of Sections 4 (1) of the **Lands and Deeds Registry Act**, in the case of **Krige and Another vs. Christian Council of Zambia**⁵, we stated that the written lease and the accompanying letter constituted a valid memorandum. We noted that the memorandum should have been registered under the Lands and Deeds Registry Ordinance and that the effect of its non-registration was that it was void for all purposes whatsoever. However, we went further to observe that it was a fact that the first appellant had taken possession of the premises and paid rent which was accepted by the then landlord and thereafter, by the Respondent. And that the legal effect of the occupation of the premises and the payment and acceptance of rent was to create between the parties a periodic tenancy which was either yearly or monthly. We also stated that although none of the express covenants in the lease nor the purported date of termination was effective because of the lack of registration, however,

that the first appellant was a tenant of the premises until such time as his tenancy was terminated by proper notice to quit.

Applying the above to the facts of the case in *casu*, it follows that although the five year lease agreement was not registered under the Act, and in view of the evidence which shows that the Appellant did take possession of the land and that he did pay rentals which the Respondent accepted, there was created a periodic tenancy between the parties which could only be terminated by proper notice to quit which the law recognises.

As to what a periodic tenancy is, **paragraph 203** of **Halsbury's Laws of England, 4th edition, Vol. 27(1)**, puts it as follows: -

"A weekly or other periodic tenancy is a tenancy by the week or the period and does not expire without notice at the end of the first week or the period or at the end of each succeeding week or period, there being not a reletting at the beginning of every week or period but a springing interest which arises and which is determined only by proper notice to quit. A weekly or other periodic tenancy arises by either express agreement or presumption of law."

Therefore, from the facts of this case, it is clear that although the five-year lease agreement was not registered, there was created by presumption of law, a periodic tenancy which is evidenced by the payment by the Appellant of rentals in advance which the Respondent accepted and by the Appellant taking possession of the premises in question. Our firm view therefore, is that dismissing the Appellant's entire claim, was a

misdirection on the part of the learned Judge as the facts and the law clearly show that the Appellant had a springing interest in the premises which interest remained in place until the tenancy was determined by a proper notice to vacate the premises.

Therefore, by dismissing the Appellant's case in its entirety at that stage means that the Appellant's claims for the developments allegedly done on the Respondent's land would not be determined.

As regards Mr. Sikaulu's contention that the Appellant did not prove or adduce evidence to support the alleged improvements done on the Respondent's land, this argument cannot stand because these are issues to be determined at trial and could not be considered at that preliminary stage.

For the reasons given above, we find merit in both grounds one and two of this Appeal. We set aside the Ruling by the learned trial Judge and order that the matter be referred back to the High Court for trial before a different Judge.

As for Ground three of this Appeal which attacks the learned trial Judge for not taking into account that the Respondent also had an obligation to register the lease and that she could not therefore, rely on her own default to escape liability, in view of the position we have taken under

Grounds one and two of this Appeal, the issues raised under Ground three of appeal have become otiose primarily because we do not want to preempt the outcome of the case in the court below by making any comments.

We further order that the cost of this Appeal shall abide the outcome of the trial in the court below.



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H. Chibomba
SUPREME COURT JUDGE



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E. M. Hamaundu
SUPREME COURT JUDGE



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R. M. C. Kaoma
SUPREME COURT JUDGE