

IN THE SUBORDINATE COURT OF THE FIRST      2016/CRMP/640  
CLASS FOR THE LUSAKA DISTRICT  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

BETWEEN:

**OWEN S. LISWANISO**

**PLAINTIFF**

**AND**

**YONA MUSUKWA**

**DEFENDANT**

*Before: Mrs Mwaaka Chigali Mikalile - PRM*

Parties in person

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## **JUDGMENT**

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**Case referred to:**

Indeni Petroleum Refinery Company Limited v. V.G. Limited SCZ No.  
22 of 2007

The plaintiff commenced this action on 31<sup>st</sup> May, 2016 by Default Writ of Summons and is claiming the sum of K 20,300.00 being and in respect of rental arrears from October, 2015 to May, 2016. He is also claiming interest and costs.

The default writ is accompanied by an affidavit verifying debt deposed to by the plaintiff. The plaintiff avers that on 27<sup>th</sup> March, 2015, he and the defendant entered into an agreement regarding plot number F/609/H/142/3 Avondale, Lusaka whereby the defendant was to rent the said property at K 3,500.00 per month. According to the plaintiff,

the defendant has neglected his responsibility of keeping the house and its surrounding in a conducive state and further he has not paid rentals for 6 months for the period October, 2015 to May, 2016, hence the claim for K 20,300.00. Exhibited to the affidavit is the lease agreement between the Liswaniso family and the defendant.

The defendant filed an affidavit in opposition dated 15<sup>th</sup> June, 2016 in which he avers that the lease agreement was entered into on 27<sup>th</sup> March, 2014 and the agreed rental per month was K 3,000.00. He exhibited the said lease agreement marked "YM1". The defendant also averred that the house was in a deplorable state thus it was agreed that he renovates the house and all costs incurred would be deducted from the rentals. It was further agreed that the defendant would only start paying rentals after the expenses incurred were offset. According to the defendant, the initial renovations costed him K 25,190.35 as per receipts exhibited and marked "YM2" collectively. Out of courtesy and goodwill, however, the defendant agreed to pay an amount towards the rentals because other family members relied entirely on income from the house. In support of this assertion, the defendant exhibited to his affidavit the said payments marked "YM3". Further renovations cost K 3,750.00 as per receipts marked "YM4". It was also the defendant's averment that unbeknownst to him, the plaintiff owed City Council rate arrears and as a result of this, council bailiffs seized his household goods as shown by seizure form exhibited and marked "YM5". It took the plaintiff 2 months to make good of the payment at Council and this left him and his family embarrassed and traumatised. The defendant further averred that he paid rentals for the months of December, 2015 and January, 2016 as per exhibit "YM5". Later, the plaintiff increased the rentals and wrote a letter to that effect. He again wrote another letter ("YM7") stating that he was terminating the tenancy agreement. Finally, the defendant denied the claim of K 20,300 but admitted only owing K 3,500.00.

The plaintiff filed an affidavit in reply on 26<sup>th</sup> July, 2016 in which he denied the defendant's assertions contained in the affidavit in opposition. He denied knowledge of the further expenses in the sum of K 3,750.00 saying they were not presented to him. The plaintiff averred that as at July, 2016, the defendant in fact owed K 27,300.00. For October and November, 2015, he owed K 6,300.00 because K 700.00 was deducted to cater for any damages to the seized goods.

The matter was re-allocated to me from another court in September, 2016 and was first heard on 23<sup>rd</sup> November, 2016. Both parties gave viva voce evidence and the plaintiff called one other witness. The defendant did not call any other witnesses. The following is the evidence heard.

The plaintiff (PW1) testified in line with his affidavit evidence and added that the renovations worth K 25, 190.35 were agreed upon and it was agreed that K 4,000.00 would be knocked off the rentals of K 6,000.00 for every two months until the K 25,190.35 was cleared. K 2,000.00 was to be paid by the defendant in order to meet school expenses for the plaintiff's siblings. According to the plaintiff, they were able to pay off all that was owed to the defendant by 2<sup>nd</sup> April, 2015. A new contract was entered into in March, 2015 where rentals were increased to K 3,500.00 payable two months in advance. According to the plaintiff, the defendant did not pay for October and November, 2015 because his good had been seized two months earlier due to rate arrears. The plaintiff said the arrears accumulated due to the erratic payment of rentals by the defendant and also because the defendant failed or neglected to alert the plaintiff about the notice from council. It was the plaintiff's testimony that when the defendant's goods were finally retrieved from the bailiffs and handed back to the defendant, he knocked off K 700.00 from the rentals due for October and November, 2015. This meant that the defendant was expected to pay only K 6,300.00 but he refused to pay it saying he was

inconvenienced. He then paid K 7,000.00 for December, 2015 and January, 2016 and that was the last amount received from him. The plaintiff further testified that the contract was due to end in March, 2016 but the defendant asked for an extension. According to the plaintiff, he wrote two letters on the same date, one was for renewal of the lease if he was agreeable to an upward adjustment to K 4,000 per month and the other was for termination. He met the defendant and explained the two options. He asked to discuss with his wife and as such went away with both letters. His feedback was that he would leave at the end of the lease and would pay the amount due as well as renovate the house. In March, 2016, however, he sought an extension saying he was having financial challenges. The defendant was allowed to stay on for an extra two months as he, in any case, owed some money. He stayed on up to July, 2016 and left without paying for February/March, April/May and June/July which amounts to K 21,000.00. The total outstanding is thus K 27,300.00 inclusive of the K 6,300.00 for October/November, 2015.

When cross examined, the plaintiff denied offering the defendant K 10,000.00 following the seizure of his goods. He stated that the money the defendant paid for the water bill was deducted from the rentals due. He also denied offering a 10% discount on rentals because of the bailiff's seizure.

PW2 was Eunice Munali Nyimba, the plaintiff's mother. She testified that she met the defendant in 2014 when he was looking for a house to rent. He was happy to rent the house in issue and renovated it by putting a gate, a wire fence and tiles in the house at a cost of K 25,000.00 plus. He initially paid K 6,000.00 for April/May, 2014 and then started deducting the renovation money. In September, 2015, the bailiff's took the defendant's goods and he was asked to pay the bailiffs in order to recover his goods but he failed. According to PW2, because the goods were kept for a long time, the defendant was told to

knock off 10% from the rentals in order to repair the damages caused to them. The defendant however refused to pay for October/November for the reason that his goods were still with the bailiffs. He then paid for December and January and thereafter it was one story after another. In May, 2016, she agreed with her son to sue for the rental arrears. He was served and to PW2's surprise, he only admitted K 3,500.00. After vacating the house in July, 2016, he stopped answering his phone. According to PW2, he left the house in a bad state.

When cross examined, PW2 stated that she and the defendant agreed that she would be getting K 2,000 of the K 6,000.00. She said she does not know what he and the plaintiff agreed on in the contract. PW2 denied receiving K 7,000.00 from the defendant in October, 2015 stating that that was the time goods were seized and the defendant refused to pay. She, however, admitted receiving K 7,000.00 for December and January, 2016.

In his defence, the defendant testified that at the time he came across the property in issue, he was looking for a place to rent for purposes of breeding dogs. The said house was dilapidated and had not been occupied for a long period of time. The owners, however, were not for the idea of it being a breeding space only and PW2 begged him to make it his residence. The plaintiff made it known to him that the family was willing to take out a loan to renovate the house. After discussions with the plaintiff, the defendant agreed to renovate the house with his own money and take up residence. It was greed firstly that rentals would be K 3,000.00 per month with no increment for two years. Secondly, the agreement was effective the day he was to occupy the house. Thirdly, the defendant was to begin paying rentals once costs were recovered and lastly, that the defendant was to build a wall fence with interest on costs at 30%. It was the defendant's evidence that he paid K 6,000.00 before moving in on 10<sup>th</sup> April, 2014.

Upon moving, he discovered that there was a water bill of K 3,800.00 which he paid. The house still did not get water as it had been disconnected by Lusaka Water. Almost two months in occupation, the plaintiff presented a lease agreement which did not contain the items they had agreed upon. The plaintiff explained that the house belonged to many people and that the lease meant nothing before the costs were recovered. It would only be effected after two years. According to the defendant, with this explanation, he willingly signed. On 2<sup>nd</sup> June, 2014, he made his second payment of K 4,000.00. The third payment of K 4,000.00 was on 4<sup>th</sup> August, 2014. Subsequent payments of K 2,000.00 were made in October and December, 2014 as well as in March and April of 2015. On 4<sup>th</sup> June, 2015, he paid K 3,500.00 and on 4<sup>th</sup> August, 2015, he paid K 7,000.00. In September, 2015, the bailiffs seized goods ("YM5") worth K 11,000.00 for none payment of ground rates. According to the defendant, the plaintiff was very much aware of the notice issued before the seizure but neglected to pay the outstanding sum. Thus, when a demand was made for rentals two months after the last payment he had made, he refused to pay.

It was the defendant's further testimony that due to the numerous problems they encountered, he decided to vacate the house as soon as he recovered the money he had put in which included interest on the costs. According to his calculation, he was going to recover in full by March, 2016 and he brought this to the attention of the plaintiff. The plaintiff then asked him to pay for two months thus in November, 2015, he paid K 7,000.00. In January, 2016, the plaintiff wrote the two letters ("YM7") one to increase rentals and the other to terminate the lease. The defendant said he did not feel the need to respond as they had already agreed on him moving out in May, 2016.

As he was preparing to move out in May, 2016, the plaintiff served him with the writ claiming K 20,000.00 from October, 2015 to May,

2016. According to the defendant, he refused to pay for October and November because of the goods seized by the bailiff. For December, 2015 and January, 2016, he paid according to "YM5". February and March, 2016 were catered for by the 30% interest on the K 25,000. April/May was catered for by the cost of the wall fence plus interest. Receipts for the same are marked "YM4". The defendant further told court that he was advised by the court marshal against moving out and that is why he agreed to pay K 3,500 into court. He then moved out in June, 2016 leaving behind the freezer and fridge which were returned to him in non-working order. In conclusion, the defendant praised himself as being a good tenant who endured two years of no water and said the least the plaintiff can do is pay him the interest.

There was no cross examination as the plaintiff had absented himself and no reason was advanced for his absence. This was actually the third time he had not appeared hence proceeding to receive the defence in his absence. .

Having considered the evidence, I must now state my findings of fact. I am satisfied that the parties herein entered into a lease agreement for property known as F/609/H/142/3 situate in Avondale, Lusaka from 1<sup>st</sup> April, 2014. It is not in dispute that the initial amount agreed on was K 3,000.00 per month and the rentals were subsequently increased to K 3,500.00. According to the plaintiff, this was after the lapse of one year. The defendant did not dispute this claim. As such, I find that the rentals were increased effective April, 2015. It is also not in dispute that the house needed some work and as such the parties agreed that the defendant would foot the cost of renovating it and further that the costs would be offset from the rentals. Both the plaintiff and his witness, PW2, told court that the defendant vacated in July, 2016 but the defendant said it was in June. I am however satisfied that it was in July not only because the two witnesses corroborated each other but also because the affidavit in reply sworn

by the plaintiff on 26<sup>th</sup> July, 2016 indicates that the defendant was still in occupation and implored court to order him to vacate by 31<sup>st</sup> July.

What ought to be determined, therefore, is whether or not the plaintiff is owed rental arrears as claimed.

It is important to note at this stage that in civil matters he who alleges must prove and proof is on a balance of probabilities. Thus, the party with the more probable story carries the day.

I have carefully considered all of the evidence. I must mention that the evidence regarding the rentals paid is not very clear. The deposits exhibited by the defendant only amount to K 22,000.00. Clearly therefore, some payments have no proof. What is clear, however, is the fact that the defendant last made payment in December, 2015 when he paid for that month and the month of January, 2016. Further, he does not dispute the fact that he did not pay K 7,000.00 for the months of October and November, 2015. The payments summary that he produced during his evidence proves this fact. According to the defendant, he did not pay for February and March, 2016 because of the K 7,000.00 interest on the first phase of renovations worth over K 25,000.00 that he was owed by the plaintiff. It is also his evidence that he did not pay for April and May, 2016 due to the second phase renovations costing K 3750.00 plus interest in the sum of K 1,125.00. The defendant also said he paid K 500.00 and later on K 3,500.00 into court.

I will first address the rentals for the months of October and November, 2015. I note from the evidence that the plaintiff knocked off K 700.00 in order for the defendant to attend to any damages that could have been occasioned to the goods seized by the bailiffs but the

defendant totally refused to pay. The question I ask myself is – was he justified to do that?

After careful analysis of the evidence, I find that he was not. Firstly, he could have mitigated his loss by paying the rentals on time which in turn could have been used to retrieve the goods from the bailiffs without much ado but he chose not. Secondly, the defendant did not counterclaim for damages as a result of the seized goods which would have been properly assessed by court. Without a counterclaim, I cannot just assume that the damages caused by the seizure are worth two months rentals. In any case, I am of the view that the K 700.00 knocked off by the plaintiff is sufficient under the circumstances. As such, I find in favour of the plaintiff that rentals in the sum of K 6,300.00 for October and November, 2015 are due.

I now turn to the interest claimed by the defendant in the sum of K 7,000.00. As stated earlier, he who alleges must prove. The defendant, however, has failed to show that he and the plaintiff agreed on interest of 30% or at all. The lease agreement signed by both parties refers to the renovations to be undertaken but no interest is mentioned. Furthermore, it was clear that the defendant just came up with the interest issue after the relationship with the plaintiff went sour. I make this finding because the plaintiff is on record as saying that the costs of renovating were paid off in April, 2015 and I have no problem believing this assertion because the few payments made thereafter are complete payments of K 3,500.00 and K 7,000.00. Surely if there was still interest outstanding the defendant would have made lesser payments. K 3,500.00 represents a full payment for one month following the rental adjustment and K 7,000.00 represents two months' rentals.

In addition, it does not even make sense for the defendant to claim interest when he was in occupation of the house. He did not lose out.

What would have made sense is reducing the rentals payable as an incentive to the defendant for using his money. In the case of **Indeni Petroleum Refinery Company Limited v. V.G. Limited** the Supreme Court held as follows:

*(1) The position of common law, as a general rule is that interest is not payable on a debt or loan in the absence of expressed agreement or some course of dealing or custom to that effect.*

*(2) The underlying principle and the basis for an award of interest is that a defendant has kept a plaintiff out of his money and the defendant had use of it himself, so he ought to compensate the plaintiff accordingly.*

In the case at hand, there was no express agreement for interest between the parties and further, the defendant was staying in the house he spent his money on, so he cannot necessarily be said to have been kept out of his money.

In light of this, I am satisfied that the interest now claimed is an afterthought and not made in good faith. Thus, the rentals for February and March, 2016 in the sum of K 7,000.00 are still outstanding.

I now turn to the K 3,750.00 the defendant claims to have spent on the wall fence and interest in the sum of K 1,125.00. I note that the plaintiff denies this expenditure stating that he did not agree to the renovations allegedly undertaken and also he does not know where the said renovations were made. I have examined the document marked "YM2" exhibited to the defendant's affidavit in opposition which is a tabulation of the costs of renovations in the sum of K 25,190.35 all done in 2014. This document shows that the fence was done at a cost of K 4,453.10. The question is - where are the receipts exhibited and marked "YM4" dated May, 2015 coming from? Further,

then defendant has indeed not proved that the plaintiff agreed to renovations in the year 2015. Besides, had these costs been agreed upon, I have no doubt that the defendant would have sought to recover them there and then as was the case with the K 25,190.00. But as found earlier, all payments subsequent to May, 2015 were in full. In any case the receipts "YM4" do not even amount to K 3750.00. One of the receipts in the sum K 158.00 does not even clearly show what it is for but the letters 'DSTV' are quite prominent on it. One wonders how a DSTV payment is part of renovations.

In the circumstances, I find as lacking merit the defendant's claim that he made further renovations in the sum of K 3,750.00 later on accumulated interest on that amount. Therefore, rentals in the sum of K 7,000.00 for April and May are still outstanding and payable. In any case, there is no proof that the defendant made payment in the sum of K 500.00 on 17<sup>th</sup> May, 2016 as claimed.

As for the month of June, 2016, the defendant is on record (23<sup>rd</sup> November, 2016) as saying he paid it off and the plaintiff did not refute that assertion.

Rentals for July, 2016 are still outstanding and payable.

I note from the defendant's defence that he tried to bring in issues of how he was inconvenienced and even inflated certain figures to gain the court's sympathy. For instance he claims to have paid over K 3,000.00 in water bills and yet it is clear that he only paid just over K 750.00 as per his own exhibit "YM2". But the fact remains that the defendant agreed to occupy a dilapidated house and stayed on for over two years despite its alleged poor condition. As found, he had recovered the costs incurred by mid-2015 and he could have moved out then. But on his own accord he stayed on and he cannot now turn around and use the inconveniences allegedly suffered to evade

paying rentals. He was in occupation of the house and must accordingly pay for that occupancy.

In light of the foregoing, the plaintiff has proved his claim. The defendant is liable for rentals for October and November, 2015 in the sum of K 6,300.00; K 14,000.00 covering February to May, 2016 and; K 3,500.00 for July, 2016.

As such, judgment is entered in favour of the plaintiff in the sum of K 23,800.00. The same shall carry interest at current bank lending rate from date of action until judgment and thereafter at 6% per annum until full settlement.

The plaintiff is also awarded costs.

I order accordingly.

DELIVERED THIS 24<sup>TH</sup> DAY OF MAY, 2017



**PRINCIPAL RESIDENT MAGISTRATE**