IN THE HIGH COURT FOR ZAMBIA **2006/HP/0534**
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

A-DIAKITE INVESTMENT LIMITED **PLAINTIFF**

AND

LUSAKA CITY COUNCIL **1st DEFENDANT**
ROSEMARY MADADZA(FEMALE) **2nd DEFENDANT**

Before : E.M. Hamaundu, J

For the Plaintiff : Mr. G.D. Chibangula & Mr H. Chongo, Messrs GDC Chambers
For the 1st Defendant: Mrs E.M Bupe, Legal Officer
For the 2nd Defendant: In Person

JUDGMENT

The plaintiff's claim is for a declaration that it is the absolute lawful tenant or lessee of plot no. B 66 Garden, Overspill, Lusaka for a term of thirty years and that the purported re-entry by the 1st defendant was null and void. Consequent to these two claims, the plaintiff claims an order for cancellation of any deed of title that

may have been issued to the 2nd defendant and damages as against the 2nd defendant for trespass to the said plot. In the alternative, the plaintiff seeks from the 1st defendant compensation for the deprivation of that plot.

According to the statement of claim, the plaintiff was offered plot B66 Garden Overspill II by the 1st defendant on the 19th February, 1998. The plaintiff paid for all the service charges. The plaintiff then applied and was given planning permission to erect structures on the plot by September, 2001. The plaintiff then proceeded to erect a boundary wall around the plot, a slab for the main shops and a two-roomed structure; all valued at about K200,000,000(un-rabased). On the 23rd December, 2001 the 1st defendant issued a notice to re-enter on the plot alleging that the plaintiff had abandoned the plot and that the plot, had remained undeveloped from the time it was allocated in 1998. The notice was not served on the plaintiff. On the 11th July, 2005, the 1st defendant offered the plot to the 2nd defendant for a term of thirty years. The 2nd defendant then went on to the plot and demolished the structures that the plaintiff had erected and started buildings its own structures. Hence this claim.

The 1st defendant filed a defence. According to that defence, the plaintiff was indeed offered plot member B66 Garden Overspill. However the plaintiff abandoned the plot for five years. The 1st defendant then issued a notice of re-entry and, subsequently, a certificate of re-entry. The 2nd respondent was subsequently offered the plot that had been re-entered.

The 2nd defendant, also, filed a defence. According to that defence, the disputed plot lay idle without any development or other activities, prompting the 1st defendant to re-enter it. The 2nd defendant is now possessed of the plot as the title holder.

At the hearing, the plaintiff called one witness. The witness was Davis Mwamba, the plaintiff's Administration and Projects Manager. His testimony was as follows: In 1997, the plaintiff identified vacant land in Garden Township in Lusaka. The plaintiff applied for the land, whereupon the 1st respondent offered the land to the plaintiff. The plaintiff paid service charges. A surveyor from the 1st defendant surveyed the land and marketed it into a plot. The plaintiff submitted plans for its intended structures. The plans were approved. The plaintiff then erected a boundary wall partially around the plot. Three sides of the plot were closed by the wall but the front side was open. The plaintiff then dug the foundation for the proposed shops. This was fully back-filled and read for the slab to be erected thereon. The plaintiff then erected a two-roomed structure up to roof-plate level. At this stage the Chief Executive Officer of the plaintiff fell ill. This was around 2004. The plaintiff, thereafter fell into financial difficulties. The Chief Executive officer came back to work after one year. The plaintiff went back on the plot to continue with the project but was shocked to find that there was a trespasser on it. The trespasser had demolished the two-roomed structure and was extending the boundary wall. The trespasser had even put a metal gate where the plaintiff had left space for the gate. The trespasser said that the 1st defendant had

given her the plot. When the plaintiff went to check at the 1st defendant's registry it found a re-entry on account of failure to develop the plot. The plaintiff had never received such documents even though the 1st defendant had the plaintiff's fixed business address. The period within which the development should have been made was not given but the plaintiff had put up sufficient structures within 18 months.

In cross-examination, the witness said that the plaintiff had been up to date with payments for ground rent.

That was the close of the plaintiff's case.

The 1st defendant called one witness, the witness was Mabuku Malumo, a legal assistant in the defendant's employ. His testimony was this: The plot in dispute had been given to the plaintiff company in 1998. The plaintiff paid the service charges. However, in 2004, the 1st defendant's Director of Legal Services issued a notice to re-enter. The witness did not know the circumstances under which the notice was issued. In March, 2005 the actual re-entry was effected. Subsequently, the plot was offered to the 2nd defendant.

According to the witness, his testimony was based on the information contained on the plot's file, since he did not handle the matter personally.

In cross-examination, the witness said that according to the documents on record the reason for the re-entry was that the plaintiff did not build within a specified period.

That was the case for the 1st defendant.

The 2nd defendant did not adduce *viva voce* evidence owing to her absence at the hearing.

The following facts are not in dispute:

By letter of 19th February, 1998, the 1st defendant offered to the plaintiff plot B66 Garden Overspill II. The plaintiff paid service charges and went as far as applying for planning authority to erect a building on the plot in 2001. On 23rd December, 2004, the 1st Defendant purportedly issued a notice to the plaintiff stating that it intended to re-enter the plot on the ground that the plaintiff had failed to develop the plot within the stipulated period of 18 months. The 1st defendant gave the plaintiff a period of three months within which to erect a good and substantial building to the value assessed by the 1st defendant. On 11th July, 2005, the 1st defendant offered the plot to the 2nd defendant. The offer to the 2nd defendant even stipulated the conditions upon which it was made; and also stated that the plot would be for a lease of 30 years. One of the conditions stipulated that the defendant was to erect, within 18 months, buildings of the minimum value of K35million (un-rebased). The 1st defendant subsequently issued an Occupancy Licence, numbered 21532, together with the accompanying terms of the occupancy to the 2nd defendant. This was in October, 2005. The 2nd defendant then moved on to the plot to commence construction. That gave rise to the current dispute between her and the plaintiff.

I find the foregoing as facts.

On those facts, the plaintiff now seeks to annul the lease between the 1st defendant and the 2nd defendant on the ground that

the purported re-entry was void; having never been brought to the attention of the plaintiff.

As between the plaintiff and the 2nd defendant, the former only received a letter of offer from the 1st defendant. The latter, on the other hand, was granted a lease of 30 years and was given a document evidencing title in the form of an Occupancy Licence. I will first resolve the dispute as between the plaintiff and the 2nd defendant.

Regulation 35 of the **Housing (Statutory and Improvement Areas) Regulations, Chapter 194** of the **Laws of Zambia** provides as follows:

> **"The following sections of the Act shall apply** *Mutatis Mutandis* **to Improvement Areas so declared by the Minister, that is to say: Sections eight to twenty-five inclusive, and sections thirty-three to thirty-six inclusive; and where any one or more of such sections refers to land or an interest in land, the same shall be read and construed as referring to the rights and duties under an occupancy licence."**

Section 8(1) of the mother Act, **The Housing (Statutory and Improvement Areas) Act, Chapter 94** of the **Laws of Zambia** provides:

> **"The council certificate of title issued by the registrar to any transferee of land shall not be subject to challenge, except on the ground of fraud, misrepresentation or mistake."**

According to *regulation 35,* the provisions of this section equally apply to occupancy licences. Therefore, the starting point in the dispute between the plaintiff and the 2nd defendant is the legal position that the 2nd defendant's occupancy licence cannot be challenged except on the ground of fraud, misrepresentation or mistake. Contrary to the plaintiff's allegation that the 2nd defendant connived with an official named Nkhata, who fraudulently issued a

notice to re-enter, the facts and documents show that it was in fact the Director of Legal Services who issued the notice to re-enter. According to the notice, the Director took that step on the ground that the plaintiff had failed to erect on the plot a good and substantial building to the value that met the approval of the 1st defendant. Clearly, there was no fraud, misrepresentation or mistake in the approach that the 1st defendant took. Whether the said re-entry was valid or wrongful in the circumstances of this case is another matter. What matters is that the 2nd defendant's occupancy licence was not obtained by mistake, or misrepresentation or fraud. In the circumstances, there are no grounds upon which the 2nd defendant's occupancy licence can be challenged. Therefore, all the plaintiff's claims must fail. The 2nd defendant will be entitled to recover from the plaintiff her costs of this action.

Coming to the claim as between the plaintiff and the 1st defendant, two documents on the record are pivotal in resolving the dispute. The first is a letter dated 19th February, 1998. This letter was from the Director of Legal Services to the plaintiff, informing the letter that the 1st defendant had offered the plot in dispute. The letter also stated that the service charges would be communicated to the plaintiff after the 1st defendant had calculated them. The second document is the letter dated 28th October, 1999 from the 1st defendant to the plaintiff. The letter informed the plaintiff that the service charges were K200,000 (un-rebased). The letter contained a condition that the sum of money was to be paid within 30 days

failing which the 1st defendant would withdraw the offer. There were no other conditions stipulated in the letter. The plaintiff duly paid that sum of money thereby meeting the condition. There is no evidence on record to show that the 1st defendant did proceed to grant a lease of 30 years. Unlike the subsequent letter of offer to the 2nd defendant which informed her that the lease would be subject to several conditions, including a condition that she should complete the foundation within 6 months and the whole structure within 18 months, the letter of offer to the plaintiff contained no such condition other than the requirement to pay service charges within 30 days; the plaintiff met this condition. Therefore, the ball was still in the 1st defendant's court to formally grant the plaintiff a 30-year lease by way of an occupancy licence, whereupon the conditions attached to that lease, such as the one on erection of structures would start to apply. It was, in my view, absurd for the 1st defendant to purport to re-enter a plot that it had not formally and legally given to the plaintiff. As I have said, at that stage the only condition that the plaintiff was required to meet was to pay the service charges. It was, therefore, wrong for the 1st defendant to offer the plot to somebody else when the plaintiff had met that condition and was waiting for the 1st defendant to take the next obvious step; that is to issue an occupancy licence. Since the plaintiff cannot recover the plot from the 2nd defendant, the only avenue left for me is to grant the alternative claim for damages against the 1st defendant.

Therefore, the plaintiff's claim as against the 1st defendant in so far as it is for damages, succeeds. I award the plaintiff damages, to be assessed by the Deputy Registrar. The 1st defendant will be condemned in costs for the plaintiff's action

Dated the...28th.. day of .....August.....2017.

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E.M. HAMAUNDU
JUDGE