IN THE HIGH COURT FOR ZAMBIA **2015/HP/A063**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

KAMIMA MSIMUKO **APPELLANT**

AND

ALLAN NDONGWE **RESPONDENT**

BEFORE HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Appellant: *Mr. Kamima Msimuko (In person)*

For the Respondent: *Ms Valarie Chita, (Legal Aid Board Assistant)*

JUDGMENT ON APPEAL

Cases referred to:

1. *Holmes Limited v. Buildwell Construction Company Limited (1973) ZR 97 (HC)*
2. *L'estrange v. F. Graucob [1934] 2 KB 394*
3. *Stanbic Bank Plc and Savenda Management Services Appeal No. 16/2017*
4. *Augustine Kapembwa v. Danny Maimbolwa v. Attorney General (1981) ZR121 (SC)*

This is an appeal launched by the Appellant against the Judgment of the Learned Trial Magistrate dated 13th August, 2015. The Lower

Court inter alia (i) rejected the Appellants contention that he had spent K28, 000 on renovations; (ii) that the document which was signed by the parties constituted a valid contract; (iii) that the Appellant was owing a sum of K10, 200 in unpaid rents; (iv) that the renovations reputedly undertaken by the Appellant were done without the consent of the Respondent and as such the renovations were at the peril of the Appellant; (v) that costs be for the Respondent.

The Appellant filed 5 grounds of appeal namely:

(1)That the Learned trial Magistrate erred both in fact and law when she made a finding that the renovations of shops number 156 and 157 at Kaunda Square Stage II market in Lusaka were to be carried out within the K300 monthly rentals for one of the shops in the face of evidence to the effect that the said rentals were actually meant to offset the cost of the said renovations as expressly agreed between the Appellant and the Respondent.

(2)That the lower Court erred in fact when she made a finding that the renovations were to be carried out within the k300 rentals when the said amount was not even enough to carry out basic renovations.

(3)That the Court erred both in law and in fact when she dismissed the Applicants counterclaim for K28, 000 spent on carrying out renovations of the two shops on account of

insufficient evidence when she did not even consider appropriate to visit the premises in question to see for herself the developments which had been carried out by the Appellant.

(4) That the Court misdirected itself both in fact and in law when she made a finding that the said renovations were made without the approval of the Respondent in the face of evidence to the contrary as evidenced by the Tenancy Agreement dated 15th April, 2013 made between the Appellant and the Respondent which was to the effect that the rentals for one shop to be used to offset the cost of renovations.

(5) That the Court erred both in law and in fact in finding that there was a valid Tenancy Agreement made between the Appellant and the Respondent when the evidence clearly showed that the Respondent had vehemently refused to include the length of time in the agreement.

The Appellant filed in detailed heads of arguments and skeleton arguments while the Respondent filed in Respondents heads of arguments.

I acknowledge with admiration the relevant judicial precedents that the parties alluded to in their submissions. I propose to deal with the appeal by interrogating all the grounds of appeal one by one. State the arguments for and against and contemporaneously proceed to dispose of each ground.

Ground 1 discord to the finding by the Court below that renovations for 2 shops at Kaunda Square were to be carried out within the K300 monthly rentals payable to the Respondent from one of the shops in the face of the evidence that the rentals were to be offset from the costs as agreed in the Tenancy Agreement of 15th April, 2015, it was argued that the Learned trial Magistrate fell in error in not restricting herself to the interpretation of the Tenancy Agreement literally but extended the interpretation into the realm of conjecture and introduced and implied into the Tenancy Agreement which were not there.

Reference was made to the case of ***Holmes Limited v. Buildwell Construction Company Limited***[1], where it was held that

> *"(1) Where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally admissible to add, vary, subtract from a contract the terms of a written contract.*
>
> *(2) By way of exception to the above rule, extrinsic evidence may be admitted to show that the written instrument was not intended to express the whole agreement between the parties"*

It was submitted that the lower court fell in error when it held that the renovations of shop no. 156 and 157 at Kaunda Square Stage II market Lusaka were to be carried out within the K300 monthly rentals payable to the Respondent from one of the shops and that the said rentals were to offset the expressly agreed terms.

It was pointed out that the Appellant had spent a sum of K28, 000 on renovating the shops. It was his argument that the term "offset" mean "compensate" or "reimburse" and as such he ought to be reimbursed the sum of K28, 000 he allegedly spent on the renovations of this shop.

Understandably the Respondent countered that ground. He hailed the lower Courts findings as correct and on firm ground. It was pointed out that the minor renovations to be undertaken were to be paid from the incoming rent from the shop which was K300.00.

Further, if any renovations were to be made, had to be agreed to by the Respondent.

In this case there was no agreement and therefore any renovations unilaterally done were at the peril of the Appellant. In any event, it was submitted that there was no evidence of expenditure of K28,00 on alleged renovations.

Reference was then made to the case of ***L'estrange V F Graucob***[2] where the Court found that the exclusion clause formed part of the contract. *"It was immaterial that L'estrange had not read the clause. The fact that she signed meant that she was bound by it. She is deemed to have read and agreed to the terms of the contract"*.

It was submitted that the Appellant having signed the agreement with the clause stating that he will not pay rentals for one shop of which the said rentals would be used to facilitate works after consultation with the Respondent he is bound by these terms and

therefore he is liable to pay rentals as rightly found by the lower Court.

Turning to the ***Holmes Limited v. Buildwell Construction Company Limited***, it was submitted that the Learned trial Magistrate was on firm ground when she found that the renovations of the shop were to be carried out within the K300 and did not use any extrinsic evidence but merely relied on the terms of the contract that the plaintiff had agreed to.

(i) **PAROL / EXTRINSIC EVIDENCE IN FACE OF A WRITTEN INSTRUMENT**

It is common cause and an agreed legal position that a document is conclusive and exclusive of what it talks about itself. And parol or extrinsic evidence will not be admitted to contradict or vary the term of the written contract.

The exception to the general rule is where it is established to show that the written instrument was not intended to express the whole agreement between the parties.

The starting point in resolving ground 1 of the appeal is to refer to the relevant terms of the agreement of 15th April, 2014the same are hereby reproduced.

> *"Tenants – shall pay rentals in advance of 1 month (s) (calendar) at K300 / shop per month.*

- *Shall make no alterations to the premises of any sort without consultation and approval with the Landlord.*
- *Agreed between the Landlord and Tenant that renovations done will be offset – Tenant only paying one shop monthly rentals"*

In my view the terms of the agreement are express and need no interrogation to discover the true meaning and agreement of the parties. The parties had clearly agreed that the rentals were to be offset from the rentals from one of the shops at K300.00.

The Learned trial Magistrate therefore cannot be faulted to find as she did that the renovations were to be paid from the rents accruing from one shop. A valid contract even a bad contract entered into by 'adults in full control of their mental capacities' is good and enforceable.

In the event that there were alterations to be made, such could only be done with the consent and approval of the Landlord.

In the case in casu, there is no evidence that there was such approval for alleged renovations to the extent of K28, 000. In any event, there was not even an iota of evidence to tend to show that s sum of K28, 000 had been expended on renovations.

It is settled law that he who alleges must prove. In a recent case of the superior Court of Appeal, Chisanga, JP delivering the Judgment of the Court in the case of ***Stanbic Bank Plc v. Savenda Management Services***[3], put it this way at page J34:-

"It should additionally be borne in mind that as a rule, the party who in his pleadings maintains an affirmative of the issues bears the onus to prove his allegation. A negative is usually incapable of proof. See Powell's Principles and Practice of the Law of Evidence, 10th Edition at page 134"

It follows that ground one is destitute of any merit and it fails.

Ground 2 Under this ground, it was canvassed that this Court should interfere with the finding of fact that the renovations on the shops were to be paid for through the K300 monthly rentals of one shop when such an amount was not even enough to carry out basic renovations such as fixing toilets, the roof, door frames, tiles and window frames owing to the dilapidated state the shops were in before appellant took possession.

He called in aid the case of ***Augustine Kapembwa v. Danny Maimbolwa v. Attorney Gneral***[4] for the proposition that the Appellate Court can only set aside findings of fact of a lower Court in appropriate circumstances for example the Court has taken into extraneous considerations or not taken into account considerations which ought to have been taken into account.

The brief response to ground 2 by the Respondent was that indeed the Court has in special circumstances to reverse a lower Court on findings of fact. It was however pointed out that where the terms of agreement were precise it was not open for the Appellant to invite the lower Court to determine how much was spent on renovations.

I have already observed in one of the preceding paragraphs that indeed the terms of the contract were explicit and precise and required no further investigation to discover the true meaning of the instrument signed by the parties. Ground 2 would fail on this limb alone.

Regarding the Appellate courts power to reverse a lower Courts' finding of fact, I accept that ordinarily an Appellate Court would not interfere with findings of fact unless

(i) there was no evidence to support the findings;
(ii) the findings were perverse;
(iii) the Court has taken into extraneous considerations or not taken into account relevant considerations in reaching upon the findings.

The rationale for this restrictive jurisdiction is that the Court of first instance has best opportunity to observe the demeanor of witnesses and how they present their evidence which the Court factors in, in determining the issues of credibility of a witness.

The case of ***Augustine Kapembwa v. Danny Maimbolwa v. Attorney General*** cited by the Appellant in so far as the law is stands correct.

In the case in casu, the learned trial Magistrate pronounced herself on the terms of the contract. It was not the duty of the Learned Trial Magistrate to have embarked on a voyage of inquiry and discovery as to what renovations had been carried out and the consequent cost.

The burden lay on the Appellant to demonstrate to the Court that the renovations which were specified in a contract (if at all) and the bill of quantity approved by the Respondent for example and the proof of costs of material and labor were pursuant to a contract or instrument of the parties signed. The Appellants complaint on this limb equally is destitute of substance.

Ground 4 The Appellant under this head attacked the lower court and faulted it of not having made a site visit to determine the renovations.

In the first place, the Court is not an agent of any litigant to assist a party galvanise and marshal its evidence systematically and ordinarily. The original sin is traced right to the valid contract. A close scrutiny of the Tenancy of 15th May, 2013 does not reveal that an inventory of the shops were done and state of the shops determined, nor did it indicate what renovations were to be done and at what cost.

There was no evidence for example photographic as to what physical state the shops were in at the time the Appellant took possession and the state of the shops at the time the dispute arose when the Appellant terminated payment of rent.

In the circumstances, a site visit was going to be of little or no evidential value in assisting the Court to determine what renovations if any had been made.

This ground is devoid of merit.

On the foregoing, this appeal was destined to fail and it so fails. Ordinarily a successful litigant ought to be awarded the costs unless good cause is shown why the same should be deprived of the same.

The costs however are in the discretion of the Court. And in exercising that discretion the Court should do so judiciously. In the case in casu after reviewing the evidence on record in the Court below, I am of the firm view that the justice of the case is that I make no order as costs. Put differently each party is to bear its own costs.

Leave to appeal to the Court of Appeal granted.

Delivered under my hand and seal this 19th day of December, 2017

Mwila Chitabo, SC

Judge