

**IN THE COURT OF APPEAL OF ZAMBIA**

**APPEAL No. 82/2023**

**HOLDEN AT NDOLA**

(Civil Jurisdiction)

**SAM KAPEMBWA**

**APPELLANT**

**AND**

**NATIONAL PENSION SCHEME  
AUTHORITY LIMITED (NAPSA)**



**RESPONDENT**

**CORAM: Siavwapa, JP, Chishimba and Banda-Bobo, JJA  
On: 20<sup>th</sup> February, 2024 and on 28<sup>th</sup> February, 2024**

**For the Appellant: Mr. Emmanuel B. Mwansa S.C. of Messrs EBM  
Chambers Lusaka**

**For the Respondent: Mr. L. Lumela and Mr. Francis M. Banda both in house  
legal Counsel for NAPSA**

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**JUDGMENT**

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***BANDA-BOBO JA, delivered the Judgment of the Court***

**Cases referred to:**

1. *Wafwa Gondwe v Supa Baking (2001) Z.R. 57*
2. *Attorney-General v Marcus Kapumpe Achiume (S.C.Z Judgment No.2 of 1983)*
3. *Mohamed v Attorney-General (1982) ZR 49 (S.C.)*
4. *Kariba North Bank Company Limited vs Zambia State Insurance Corporation Limited (1980) Z.R. 94 (H.C.)*
5. *Kitwe City Council v. William Ng'uni (2005) ZR 57*

**Legislation and Other Works referred to:**

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Rent Act Chapter 206 of the Laws of Zambia*

**1.0. INTRODUCTION**

1.1. This is an appeal against the Judgment of Honourable Lady Justice B.G. Shonga delivered in the High Court of Zambia, Commercial Division on 13<sup>th</sup> January, 2023. The Appellant was the Respondent in the Court below while the Respondent was the Applicant. They will be referred to as they appear in this Court.

**2.0. BRIEF BACKGROUND**

2.1. The Appellant and Respondent had entered into a lease agreement, where the Appellant was to occupy the Respondent's premises for three months at a monthly rental of K2,500. Prior to that agreement, there had been an erroneous sale of the property to the Appellant's sister by the Respondent. Before the sale was reversed, the Appellant had been allowed to stay in the property by his sister.

2.2. The Appellant's sister, Loveness Kapembwa had previously rented the premises from the Respondent as an employee of the Respondent. The Respondent had, and still holds a lease

agreement with the Agricultural Show Society of Zambia on the same property.

2.3. However, the Respondent alleges that Ms. Loveness Kapembwa without obtaining consent from the Respondent, demised to her brother, who is the Appellant in *casu*, the subject property and left the country. As a consequence of the above, the Appellant and the Respondent entered into an agreement as tabulated on page 50 of the record of appeal. The Respondent alleges that the Appellant failed to pay rent and the outstanding arrears. It is as a result of the foregoing that the Respondent commenced proceedings against the Appellant by way of Originating Notice of Motion filed on 12<sup>th</sup> November, 2015 seeking the following reliefs:

- i. Payment of K236,322.45, being rental arrears allegedly owed by the Appellant to the Respondent as of 5<sup>th</sup> March 2021, in respect of the rental of Stand No.2374/2, off Nangwenya Road, Showground, Lusaka;
- ii. An Order that the Appellant pays all rental arrears due to the Respondent up to the date that the Appellant vacates the premises;

- iii. An Order for leave to issue a warrant of distress against the Appellant;
- iv. An Order that the Appellant yield vacant possession of the premises;
- v. Interest on all amounts found due; and
- vi. Costs.

2.4. The Appellant denied owing the Respondent the amounts and averred that the Respondent has failed to adhere to the requirements pertaining to rent increment in accordance with the Rent Act.

### 3.0. **DECISION OF THE LOWER COURT**

3.1. The learned Judge, in the judgment delivered on 13<sup>th</sup> January, 2023 determined that the parties agreed that the Appellant would occupy the demised premises for three months at a monthly rent of K2,500.00 after which he would vacate the said premises. She found that the three month's period of occupation was to begin on the date that the Respondent would refund the purchase price of K400,000.00 which (Ms. Loveness Kapembwa) would have paid for the premises before the contract was rescinded. She found that

the period of three months in which the Appellant was to occupy the premises did in fact expire.

3.2. The learned Judge found that there was in existence a lease agreement between the two parties as defined in **Section 2 of the Rent Act**. Specifically, she found that the Appellant and Respondent had entered into a periodic tenancy agreement. This was because the Appellant continued to occupy the premises and to pay rent, even though the payments were sporadic and less than the agreed rent. She found that the tenancy was renewed from month to month.

3.3. The learned Judge further found that the Appellant had accrued rental arrears, and that he acquiesced to the increase of rent in the amount K2,825.00. She found that the Appellant owed rental arrears of K191,925.00 to the Respondent as at 31<sup>st</sup> December, 2016. She ordered the Appellant to pay the sum of K191,925.00 being rental arrears due to the Respondent as at 31<sup>st</sup> December, 2016. She further ordered that from 1<sup>st</sup> January, 2017 to date the Appellant should pay rental arrears at the rate of K2,825.00 per month less all sums paid by the Appellant. She ordered the Appellant to pay 8 % interest on sums due from the date of Writ

to that of Judgment. The learned Judge also ordered that the Judgment debt attract an interest of 5 % per annum from date of Judgment to full and final settlement.

3.4. The learned Judge put the Appellant on one months' notice and ordered him to yield vacant possession of the premises one month from the date of service of the Judgment.

3.5. The learned Judge granted the Respondent leave to secure the right to distrain by seizing whatever moveables would be found on the premises, to hold them until the arrears were paid off. Lastly, she ordered that the cost of the proceedings in the Court below be borne by the Appellant, to be taxed in default of agreement.

4.0. **THE APPEAL**

4.1. The Appellant, dissatisfied with the Judgment, has now appealed to this Court on the following eight grounds:

*(1). That the lower Court misdirected itself in law and fact to have held that the Appellant has accrued rental arrears;*

*(2). That the lower Court misdirected itself in law and fact to have held that K2,500.00 was not standard rent and*

*as such section 11 of the Rental Act does not apply to the increase of rent;*

- (3). The lower Court misdirected itself in law and fact to have held that the Appellant elected to ignore the rental increase without making application to Court at its own peril;*
- (4). The lower Court misdirected itself in law and fact to have held that the Appellant voluntarily signed the tenancy agreement of September, 2007;*
- (5). The lower Court misdirected itself in law and fact to have held that the rent arrears stood at K191,925.00 as of December, 2016 as indicated in exhibit "ACM2"*
- (6). The lower Court misdirected itself in Law and fact to have not ordered the Respondent to refund the Appellant the sum of K400,000,000.00 (unrebased);*
- (7). The lower Court misdirected itself in law and fact to not have taken into consideration the many legal issues raised in the Respondent's final submissions;*

***(8). The lower Court misdirected itself in law and fact to have ordered that the Appellant shall yield vacant possession of the premises to the Respondent.***

**5.0. ARGUMENTS IN SUPPORT**

5.1. Counsel for the Appellant filed heads of argument on 20<sup>th</sup> March, 2023 and submitted that grounds 1,2,4,5, and 8 would be argued together. In these combined arguments, Counsel submitted that Loveness Kapembwa, the previous tenant who occupied the premises before the Appellant, had three tenants who occupied the demised premises. He submitted that the standard rent should have been K1,000.00 per month and not K2,500.00 per month which the Respondent imposed on the Appellant when it became the Landlord.

5.2. He argued that there should have been a standard rent rate imposed in line with **section 11(1) and (2) of the Rent Act, Chapter 206 of the Laws of Zambia (the Rent Act)**. That therefore, the increase of K1000.00 to K2,500 by the Landlord without improvement or structural alteration to the premises was not in line with the law. Further, that the Landlord failed to consider the cost of repairs the Appellant had incurred, and did



not refund him. Therefore, Counsel argued, that the lower Court misdirected itself when it held tht the Appellant accrued rental arrears of K191,925.00 and contended that this increment was illegal and wrongful. Further, that the order to yield vacant possession was also a misdirection considering that the Appellant had always paid the monthly rent of K1,000.00.

- 5.3. Counsel submitted that the reasons given by the Respondent for increasing rent such as inflation, demand and supply and the appreciating market values of the demised premises in its location were not recognized by the **Rent Act** and thus could not be used to justify the rental increment by the Respondent.
- 5.4. Under grounds 3, 6 and 7 Counsel submitted that the **Rent Act** protects the Tenant and that in *casu*, the Respondent failed to comply with the **Rent Act** before increasing rent and that there was no need for the Appellant to apply to Court to determine the new rent.
- 5.5. Counsel contended that despite the lower Court recognizing the tenancy agreement, the Court neglected or failed to order the Respondent to pay the sum of K400,000.00 (rebased) to the Appellant which was part of the tenancy agreement.

- 5.6. Counsel contended that the lower Court misdirected itself in law and fact to have not taken into consideration the many legal issues contained in the Appellant's final submissions, especially that the lower Court ordered the parties to file written submissions.
- 5.7. He argued that the Respondent did not comply with **section 19(1) (2) and (3) of the Rent Act** which requires the Landlord to keep or cause to be kept, in respect of the premises, a rent book which the Landlord should supply a copy of, to the tenant.
- 5.8. Counsel submitted that the Respondent came to the Court of law and equity with dirty hands and as such this matter ought to have been dismissed by the lower Court for breach of the **Rent Act** and other provisions of the law like having failed to have a valid trading licence. To buttress the foregoing, he cited the case of **Wafwa Gondwe v Supa Baking**<sup>1</sup> in driving home the principle that a party cannot profit from his own default or circumstance brought on by himself.
- 5.9. In conclusion, Counsel submitted that the Respondent exhibited lawlessness by disregarding the provisions of the **Rent Act** which governs the relationship between the Appellant and the Respondent. He submitted that this Court should protect the

Appellant from being exploited by the Respondent by allowing this appeal with costs.

**6.0. HEARING**

6.1. At the hearing the Respondent Counsel made an application for leave to file their heads of arguments out of time. Counsel submitted that the parties filed a Consent Order on 9<sup>th</sup> February, 2024, to that effect.

6.2. We declined to grant the application as we were not satisfied with the reasons advanced by Counsel for the Respondent for not filing within the stipulated timeframe and of seeking leave later. We proceeded to hear the appeal without the participation of the Respondent. Both Counsel for the Appellant relied on the record of appeal and heads of argument filed into Court.

**7.0. DECISION OF THIS COURT**

7.1. We have considered the appeal, the evidence in the Lower Court, the impugned Judgment, the heads of arguments and list of authorities filed by learned Counsel for the Appellant.

7.2. We will follow the same sequence of arguing the grounds of appeal as did the Appellant. Grounds 1,2,4,5, and 8, will thus be argued together. The issue to be resolved in the combined grounds is

whether the lower Court misdirected itself in its findings of fact on whether the Appellant accrued rental arrears, whether the Appellant voluntarily signed the tenancy agreement, and whether the lower Court should not have ordered the Appellant to yield vacant possession.

7.3. In our view, the issues in contention largely revolve around the upsetting of findings of facts by the learned Judge in the Court below. In this regard, we are of the considered view that the case of **Attorney-General v Marcus Kapumpe Achiume**<sup>2</sup> where the Supreme Court held as follows is apt:

**"The appeal court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly can reasonably make.**

**An unbalanced evaluation of the evidence, where only the flaws of one side but not the other are considered, is**

**a misdirection which no trial court should make, and entitles the appeal court to interfere."**

7.4. The Supreme Court has guided on when an appellate Court can reverse findings of fact by a lower Court. This was in the case of **Mohamed v Attorney-General**<sup>3</sup>, where Ngulube, DCJ, as he then was, held inter alia that:

**"The appellate court may draw its own inferences in opposition to those drawn by the trial court although it may not lightly reverse the findings of primary facts."**

7.5. In addressing the issues to be resolved, we consider **Section 4 (e) (I) and (II) of the Rent Act**, which provides as follows:

**"The court shall have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in particular shall have power:**

**(e) subject to the provisions of section thirteen, to make either or both of the following orders, that is to say:**

**(i) an order for the recovery of possession of premises, whether in the occupation of a tenant or any other person; and**

**(ii) an order for the recovery of arrears of standard rent, mesne profits and a charge for services."**

7.6. Further, **Section 13 (1) (a) of The Rent Act** provides for circumstances upon which possession may be granted. It provides as follows: -

***"No order for the recovery of possession of any premises or for the ejection of a tenant therefrom shall be made unless-***  
***(a) some rent lawfully due from the tenant has not been paid, or some other obligation of the tenancy (whether under a contract of tenancy or under this Act) so far as the same is consistent with the provisions of this Act, has been broken or not performed "***

7.7. In addition, **Section 13 (2) of The Rent Act** provides that the Court will only order recovery of possession if it considers the same reasonable, in the circumstances of the case. It is couched in the following manner:

***"... no order for recovery of possession of premises shall be made unless the Court considers it reasonable to make such order."***

7.8. In our view, the learned Judge was entitled to make findings of fact after considering the evidence as presented. She rightly found that the letter dated 6<sup>th</sup> September, 2007, appearing at page 193, record of appeal, constituted an agreement as stipulated and therefore that there was a tenancy agreement between the parties. The Appellant signed his acceptance of the terms of the agreement, as appear at page 194 record of appeal. It is trite that the duty of the Court is to enforce what parties have agreed to in their contracts. Therefore, the Appellant, in our view is bound by the agreement he signed, as his signature signified his acceptance of the terms of the agreement. We can therefore not fault the learned Judge for finding as she did.

7.9. The next issue to resolve is the contention by the Appellant that the initial rent of the premises was K1000.00 per month and that the increment of K2,500.00 by the Respondent was not in compliance with **section 2 (1) of the Rent Act**. That therefore, the lower Court misdirected itself since the rental increment was illegal and wrongful as were the accrued rentals.

7.10. The learned Judge's Judgment on page 33 of the record of appeal she found that every time the Appellant paid rent of K1,000.00

when the monthly rent of K2,500.00, and subsequently K2,825.00 was due, fell into rent arrears for the balance not paid.

7.11. In addition, at page 34, lines 5-15 of the record of appeal, the learned Judge had this to say:

***“...the Respondent admitted to having been put on notice with respect to the first increment of 13% to K2,825.00 from August 2014 to December 2016. I accept that the Respondent took issue with the increment. However, he elected to continue staying in the premises without applying to Court for the determination of standard rent, as an interested party. Section 4 (a) of the Rent act clearly gives the Court to determine the standard rent of any premises on the application of any person interested. In my view, the Respondent elected to ignore the rental increase without making an application to Court at his own peril”.***

7.12. The Appellant in our view, cannot cry foul regarding the issue of standard rent, as he acquiesced to the agreement regarding rental increment. More importantly, he failed to make an application to Court as required by the Rent Act for the determination of the standard rent. The learned Judge cannot be faulted.



7.13. Moving to the issue of vacant possession, the lower Court having found that some rent was lawfully due from the tenant, and which had not been paid, it cannot be faulted for ordering the Appellant to yield vacant possession.

7.14. In our view, the learned Judge rightly evaluated the evidence before her and her findings of fact cannot be faulted. We find that this is not a fit and proper case for this Court to reverse the learned trial Judge's Judgment. The Appellant has failed to demonstrate why this Court should reverse the findings of fact. The only time the findings of fact by a trial Court can be upset is if they are not supported by the evidence proffered or that they are perverse. Therefore, ground 1,2,4,5 and 8 are bereft of merit.

7.15. Grounds 3,6, and 7 were argued together. In these grounds the issue to be resolved is whether the Respondent breached the Rent Act.

7.16. Our view is that the learned Judge, having found that the Appellant was in arrears per the rental payments in the schedule, it follows that the lower Court cannot be faulted in finding that the Appellant, ignoring the rental increment without making an application to Court for the standard rate, did so at his own peril.

7.17. The Appellant vehemently contended that the Respondent breached the Rent Act by not complying with section 19(1)(2) and (3) of the Rent Act which requires the Landlord to keep or cause to be kept in respect of premises, a rent book.

7.18. Our response to this is that this issue is coming up for the first time on appeal, as it was not pleaded. The essence of pleadings is to inform the other side of the nature of the case that they had to meet and to prevent them from being taken by surprise. Pleadings are also intended to allow the other side to know what evidence to put together in readiness for trial as per the case of **Kariba North Bank Company Limited v Zambia State Insurance Corporation Limited**<sup>4</sup>.

7.19. A Perusal of the pleadings in this matter together with the evidence adduced in the Court below has clearly shown that the Appellant did not plead the claims in Grounds 6 and 7 of this Appeal, nor did he adduce evidence in support of the said claims. As a result, the learned trial Judge did not rule on those issues. It is therefore not competent for the Appellant to raise issues that were neither pleaded nor raised in the Court below and which the trial Judge did not rule on.

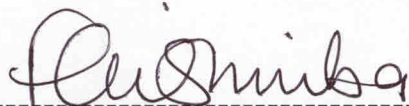
7.20. As regards the contention that the learned Judge did not consider the many legal issues in the final submissions, the case of **Kitwe City Council v. William Ng'uni**<sup>5</sup> clearly guides that the Court is not bound to consider Counsel's submissions, as the same are only meant to assist the Court in arriving at a Judgment. In our view, the decision arrived at by the trial Court shows clearly how she arrived at her decision. These grounds lack merit and are dismissed.

8.0. **CONCLUSION**

8.1. For the reasons we have stated above, we uphold the lower Court's decision. We find that all grounds of appeal are unsuccessful. The appeal is dismissed with costs to the Respondent to be taxed in default.



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**M.J. SIAVWAPA**  
**JUDGE PRESIDENT**



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**F.M. CHISHIMBA**  
**COURT OF APPEAL JUDGE**



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**A.M. BANDA-BOBO**  
**COURT OF APPEAL JUDGE**