IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(*Civil Jurisdiction*)

Appeal No. 208 of 2022

BETWEEN:

FOOD RESERVE AGENCY Appellant

AND

CHARLES MPUNDU Respondent

CORAM: Chashi, Sichinga and Sharpe-Phiri, JJA
on 19 June 2024 and 26 August 2024

For the Appellant: Mr. W. Silwimba with Mr. M. Mwanza, In-house Counsel
For the Respondent: Mr. B. Sitali of Messrs Buttler and Company Legal Practitioners with Mr. C. Chungu of Messrs Nsapato & Company

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J U D G M E N T

SHARPE-PHIRI, JA, delivered the judgment of the Court.

Cases referred to:

1. *G.F. Construction [1976] Limited v Rudnap (Z) Limited and Another (1999) Z.R. 134.*
2. *Tuesday Mulenga and Wendy Tembo Mutambo – SCZ Appeal No. 123 of 2009*
3. *Edson Mwanza v Chibuluma Chati Farms Limited and Others – Court of Appeal 186 of 2019*
4. *Kunda v Konkola Copper Mines Plc, Supreme Court Appeal No. 48 of 2005 (unreported)*
5. *Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172*
6. *Peter Militis v Wilson Kafulo Chiwala SCZ Judgment No. 3 of 2009*

Other authorities

1. *Bryan A. Garner Black's Law Dictionary, 8th Edition, page 260*
2. *Halsbury's Laws of England, 4th Edition, Volume 27, paragraph 255*

1.0 INTRODUCTION

1.0 This appeal relates to a judgment delivered by Justice Mwikisa of the High Court on 11 May 2022. Charles Mpundu (now the Respondent) was the Plaintiff, and Food Reserve Agency (now the Appellant) was the Defendant in the lower Court.

1.1 The parties will be identified by their designations in the lower Court for the initial portion of this judgment and by their designations in this appeal for the subsequent portion.

2.0 BACKGROUND

2.1 This matter was initiated by a writ of summons and statement of claim on 19 December 2018. The Plaintiff alleged that he had entered into a written lease agreement with the Defendant on 12 December 2014 for a term of twelve months, effective from 1 January 2015 to 31 December 2015, at a monthly rental of K15,778.00. He further asserted that under the terms of the lease, the Defendant could terminate the agreement by providing three months' notice in writing and, pursuant to clause 1 (xii), the Defendant was obligated to yield the demised premises, including all fittings and fixtures, in a tenantable repair and condition.

2.2 The Plaintiff further averred that by letter dated 10 November 2016, the Defendant expressed its intention to renew the lease agreement. However, this decision was subsequently retracted by the Defendant in a letter dated 22 November 2016. The Plaintiff contended that, following the Defendant's notice of non-renewal, the Defendant was obligated to return

the demised premises in a tenantable state of repair. Despite a joint inspection identifying the necessary repairs, the Defendant failed to undertake these repairs and continued to retain possession of the keys to the premises.

2.3 The Plaintiff contended that the Defendant failed to surrender the demised premises in a tenantable state of repair until October 2017, when the rehabilitation works were completed. The Plaintiff further averred that, for the ten-month period, from 31 December 2016 to October 2017, the Defendant did not remit any rental payment to him.

2.4 The Plaintiff asserted that the Defendant has refused, neglected or otherwise failed to remit the sum of K157,780.00 despite numerous reminders. As a result, the Plaintiff claimed to have suffered loss and damage. The Plaintiff sought the following reliefs:

i) Mesne profits for the loss of use of the demised premises caused by the Defendant, amounting to Kl57,780.00 for period from January 2017 to October 2017, calculated at the rate of K15,778.00 per month;

ii) Interest on all amounts adjudged to be due;

iii) Costs of and incidental to the proceedings; and

iv) Such other reliefs as the Court may deem appropriate.

2.5 The Defendant filed its memorandum of appearance and defence on 3 January 2019. It averred that by letter dated 22 November 2016, it withdrew its earlier notice of intention to renew the lease agreement, which communication was acknowledged and accepted by the Plaintiff in a letter

dated 17 January 2017. Furthermore, the Defendant contended that the Plaintiff subsequently engaged with it regarding the repair works to be carried out on the demised premises. The negotiations concerning the repair works spanned 10 months, as evidenced by correspondence dated 17 January 2017, 18 January 2017, 26 May 2017, 1 June 2017, 15 June 2017 and 19 June 2017.

2.6 The Defendant further contended that the repair works were subject to statutory public procurement regulations. The Defendant explained that the time lapse between receiving quotations for the repair works from the Plaintiff and the completion of the repair was only 4 months. The Defendant reiterated that it could not have initiated the repair works without first receiving quotations and adhering to the procurement processes required by law.

2.7 The Defendant highlighted the fact that during the negotiation period, the Plaintiff had also assigned the demised premises to a new tenant, thereby limiting its access to the premises for repair works.

2.8 It further contended that the repair works had been completed and that the Plaintiff had not incurred any loss or damage, as the lease agreement did not specify a timeframe for carrying out the repairs.

2.9 In a reply filed on 3 September 2020, the Plaintiff stated that the notice of non-renewal of the lease was acknowledged, and a demand for the Defendant to make payment in lieu of notice and to arrange for the handover of the premises after restoring it to a tenantable state. The Plaintiff asserted that the demand was for immediate repairs, but that the

Defendant stated it needed to follow procurement processes and its team was occupied with other projects until 4 June 2017 when a joint inspection of the premises occurred. After the inspection, the parties agreed to work with the average quotations.

2.10 The Plaintiff further alleged that the Defendant initially agreed to provide the average repair amount but later changed its position, stating it would undertake the repairs itself. The Plaintiff also claimed that a letter dated 20 June 2017, sent by their legal representatives at the time, informed the Defendant that the repairs were to be completed within three weeks, concluding by 11 July 2017, a deadline to which the Defendant did not object.

2.11 The Plaintiff also contested that they had handed over control to another tenant, indicating that the keys to the premises were under the custody of the Defendant's employees and caretakers. These keys were only returned to the Plaintiff on 8 September 2017, meaning they had no access to the premises until that date.

2.12 Furthermore, the Plaintiff claimed they became involved in providing quotations only after the Defendant had failed to promptly carry out the required works. The Plaintiff insisted on engaging other contractors for the repairs. However, the Defendant maintained that it was responsible for managing the process and adhering to its procedures and regulations.

2.13 The Plaintiff asserted that the Defendant had requested him to waive rentals post December 2016, a request he denied. Instead, he demanded that rentals would continue until the rehabilitated and tenantable property was handed

back to him. The Plaintiff claimed that after the repair works were completed and this action commenced, the Defendant paid an amount of K28,000.00 in December 2018 as part payment towards its original debt to the Plaintiff.

3.0 DECISION OF THE LOWER COURTT

3.1 Upon deliberation, the trial Judge reasoned in its judgment as shown on pages 8 to 31 of the record of appeal that for a claim of *mesne profits* to be established, the Claimant must prove that as the landlord, they suffered due to being out of possession of their land, and further, that the person in occupation of the land became a trespasser. The trial Court determined that the relationship between the parties was that of landlord and tenant, and that the tenancy agreement ended on 31 December 2016.

3.2 The trial Court deliberated on whether the Plaintiff had incurred losses due to being deprived of possession of his property following the termination of a tenancy agreement, and whether the Defendant's actions amounted to trespass, justifying a claim for *mesne profits*. In its judgment, specifically on page 25 of the record of appeal, the trial Court concluded that the Defendant was not a trespasser, as indicated by PW1, who stated that the Defendant did not access the premises without his authorization.

3.3 The trial Court also determined, as evidenced on page 27 of the record of appeal, that the Plaintiff had not substantiated his claim that the Defendant relinquished control of the demised premises to him only on 8 September 2017. The trial Judge concluded that the Plaintiff had not demonstrated that he was deprived of possession of his property until 8 September 2017.

However, the trial Judge found that the Defendant retained control of the subject property only until January 2017, as affirmed by its correspondence to the Plaintiff dated 23 May 2017.

3. 4 The trial Court also ruled, as indicated on page 28 of the record of appeal, that she could not overlook the obligation for the Defendant to surrender the premises in a tenantable condition according to the terms of the lease agreement. She noted that this point was undisputed and further highlighted that the demised premises were indeed restored by 1 November 2017, as confirmed by the completion certificate dated that day and submitted to the trial Court.

3.5 The trial Court remarked that this delay in repairs deprived the Plaintiff of rental income from other tenants. It concluded that the Defendant had taken an excessive amount of time to carry out the necessary repairs on the warehouse, which was contrary to clause 2(ix) of the lease agreement stipulating that the Defendant must surrender the premises in a tenantable repair and condition.

3.6 The trial Court also addressed the Defendant's argument regarding the lengthy procurement process. At page 30 of the record of appeal, the trial Judge expressed the opinion that this excuse was insufficient to deprive the Plaintiff, as the landlord of his property rights. The Judge noted that although the Defendant was a Government Agency, she believed that mechanisms should be in place to handle such cases promptly to prevent harm to individuals, as was the case here.

4.0 THE APPEAL

4.1 Being dissatisfied with the judgment rendered by Mwikisa J on 11 May 2022, the Defendant, (hereinafter 'the Appellant') lodged a notice of appeal and memorandum of appeal on 20 May 2022, citing the following three grounds of appeal:

1. ***The learned trial Judge erred both in law and fact in holding that "the Plaintiff was deprived of rental income as the Defendant took long to repair the premises in issue...", and that the Plaintiff was therefore entitled to an order for payment of mesne profits for loss of use of the demised premises occasioned by the Defendant amounting to K157,780.00 for 10 months from January 2017 to October 2017 at the rate of K15,778.00 per month; plus interest at the average of the short-term deposit rate per annum prevailing from date of Writ to date of Judgment and thereafter at current bank lending rate as determined by the Bank of Zambia to date of payment, despite finding:***

   a. ***That the Defendant had not trespassed the premises in issue;***
   b. ***That the Plaintiff had failed to prove that the Defendant had held over the property until September 2017; and***
   c. ***That the Plaintiff had failed to prove that he was out of possession of his property until 8th September 2017.***

2. ***The learned Judge erred in law and fact in awarding the Plaintiff payment of 10 months rentals from December 2016 to October 2017 despite the evidence on record showing that the Defendant paid the Plaintiff 3 months rentals amounting to K28,000 from December***

2016 to March 2017 and that the Plaintiff had leased out the premises to a third-party from September 2017.

3. ***Further or in the alternative, the Honourable Trial Judge erred in law and fact by failing to consider the evidence on record which clearly states that the delay in repairs to the premises in issue was partly caused by the Plaintiff himself in that between January 2017 and June 2017 there were negotiations between the parties the purpose of which was to assess the damage and repairs to be executed.***

5.0 HEARING OF THE APPEAL

5.1 The appeal was heard on 19 June 2024, with both the Appellants and the Respondent represented by their respective counsel as indicated above. Counsel relied on their heads of argument dated 7 September 2022, 10 October 2022 and 17 October 2022, respectively. The arguments presented by the parties will not be restated here but will be referred to in the subsequent analysis section as needed.

6.0 OUR DECISION ON THE APPEAL

6.1 We have conducted a thorough review of the evidence on record, the judgment under scrutiny, the grounds of appeal, and the arguments put forth by the parties.

6.2 In the first ground of appeal, the Appellant contends that the trial Judge erred in law and fact by awarding the Respondent *mesne profits* amounting to K157,780.00, equivalent to 10 months' rent from January 2017 to

October 2017. This award was based on the finding that the Appellant took an excessive amount of time to complete repairs to the demised premises.

6.3 The Appellant argued that the trial Judge erred by awarding *mesne profits* to the Respondent despite holding that:

a. *That the Appellant had not trespassed the premises in issue;*
b. *That the Respondent had failed to prove that the Defendant had held over the property until September 2017; and*
c. *That the Respondent had failed to prove that he was out of possession of his property until 8 September 2017.*

6.4 The Appellant contended that the assertion that it held over the subject premises for an extended period, leading to delayed repairs, lacked merit and was misconceived. It contended that the damages applicable for late repairs, if any, are distinct from *mesne profits*, and the Respondent had not pleaded for such damages. The Appellant further argued that the Respondent could not, without leave of Court below, expand the scope of his claim to include damages for repairs not originally sought.

6.5 In response, the Respondent argued that a tenant who remains in possession of the property after the expiration of the lease, as in this case, is liable to pay *mesne profits* to the landlord. The Respondent disputed the Appellant's interpretation of the trial Judge's findings that the Appellant was not a trespasser due to the existence of a prior lease agreement. The Respondent maintained that he was entitled to *mesne profits* since the Appellant had admitted to retaining possession of the demised premises after the termination of the lease.

6.6 When evaluating a claim for *mesne profits*, it is crucial to examine their nature and the circumstances under which they become due and payable. The learned authors of **Black's Law Dictionary** page 1246 define '*mesne profits*' as ***'the profits of an estate received by a tenant in wrongful possession between two dates.'***

6.7 The Supreme Court of Zambia provided guidance in the case of **G F Construction (1976) Limited v Rudnap (Zambia) Limited and Unitechan Limited,**[1] regarding *mesne profits*, elucidating that they '... ***are damages awarded to a landlord for holding over a tenancy by a tenant.'***

6.8 In **Halsbury's Laws of England,** paragraph 255 of Volume 27 of the 4th Edition, the learned authors also define *mesne profits* as follows:

> ***"Mesne Profits – The landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the land or if he can prove no actual damage caused by him by the Defendant's trespass, the landlord may recover as mesne profits the amount of the open market value of the premises for the period of the Defendant's wrongful occupation. In most cases the rent paid under any expired tenancy will be strong evidence as to the open market value. Mesne profits being a type of damages for trespass can only be recovered in respect of the Defendant's continued occupation after the expiry of his legal right to occupy the premises. The landlord is not limited to a claim for the profits which the Defendant has received from the land or those which he himself has lost."***

6.9 The foregoing authorities elucidate that *mesne profits* refer to the benefits derived from a property by a person wrongfully in possession thereof. Consequently, *mesne profits* constitute the compensation that an individual wrongfully occupying another's property may be required to pay to the owner for such use and occupation, in such circumstances, the owner may be entitled to *mesne profits* for the duration of the wrongful occupation.

6.10 The Supreme Court expressed in the case of **Tuesday Mulenga and Wendy Tembo Mutambo**[2] that the case law cited and other referenced authorities emphasize two distinct circumstances under which a landlord is entitled to recover *mesne profits* as a form of relief: firstly, where the evidence establishes the existence of a *de facto* landlord-tenant relationship between the parties; and secondly, where the landlord has been unjustifiably denied vacant possession of the property.

6.11 Also, in the case of **Edson Mwanza v Chibuluma Chati Farms Limited and others,**[3] we stated that: ***'It is clear from the foregoing authority that mesne profits can only be awarded to a landlord where tenant overstays after the end of the tenancy and becomes a trespasser.'***

6.12 The central question, therefore, is whether the Plaintiff (Respondent in this matter) successfully discharged the burden of proof and established that, as the landlord, he was unjustifiably deprived of possession of his property. This aligns with established judicial precedent, which consistently underscores the requirement for a party to substantiate its claim to be entitled to a favourable judgment.

6.13 In the cases of **Kunda v Konkola Copper Mines Pic and Kankomba v Chilanga Cement**,[4] the established legal principle is that the burden of proof rests with the party who asserts the claim. Similarly, in **Masauso Zulu v Avondale Housing Project,**[5] it was held that a claimant who fails to prove their allegations cannot be granted a judgment in their favour.

6.14 The record discloses that the Appellant was a tenant of the Respondent from 1 January to 31 December 2016. Page 75 of the record of appeal contains correspondence from the Appellant to the Respondent, indicating the Appellant's decision not to renew the tenancy agreement beyond 31 December 2016. In response, as evidenced by a letter dated 17 January 2016 and found at page 77 of the record of appeal, the Respondent acknowledged the Appellant's decision not to renew the tenancy, confirming that 31 December 2016 was the last day of the Appellant's occupation of the leased premises.

6.15 In subsequent correspondence, the Respondent urged the Appellant to arrange for the restoration and repair of the premises, along with a formal handover. In another letter, detailed at page 81 of the record of appeal, the Appellant informed the Respondent that it had occupied the demised premises until January 2017. The Appellant committed to arranging for its technical representative to inspect the premises separately to assess the necessary repair works.

6.16 We have noted that the trial Judge, in the judgment recorded on pages J16 and J17 (as reflected on pages 22 and 23 of the record of appeal), properly addressed the definition of *mesne profits*. The Judge referred to the Supreme Court decision in **Peter Militis v Wilkinson Kafuko Chiwala**,[6]

wherein it was held that ***'mesne profits, being damages for trespass, can only be claimed from the date when a Defendant ceased to hold the premises of a tenant and became a trespasser'***. The trial Court correctly interpreted this to mean that, for a successful claim for *mesne profits,* the landlord must demonstrate that they suffered a loss due to being unjustly deprived of possession of their property and that the occupant had assumed the status of a trespasser.

6.17 Regarding the issue of whether the Defendant (now Appellant) continued to occupy and use the subject property after the termination of the lease agreement as a trespasser without the landlord's authorization, the Judge made the following findings, as reflected on pages 25 to 28 of the Record of Appeal:

> *'In relation to the question whether the Defendant was a trespasser, I find that the Defendant herein was not a trespasser as PW1 clearly indicated that the Defendant did not access the premises without his authority.*
>
> *In relation to whether or not the Defendant herein held over thereby depriving the Plaintiff possession of his property, PW1, the Plaintiff herein, in his examination in chief testified that the Defendant did not hand over on 31st December 2016, when the lease agreement was terminated. He testified that he followed up the same by letter dated 17th January 2017. A perusal of the said letter, at page 16 of the Plaintiffs bundle of documents, shows the following statement: 'Action required - arrange to restore the property immediately to tenantable levels and arrange for a formal handover. I am on*

standby if you can indicate a firm date for the inspection and handover.'

The last paragraph of the same letter stated: 'I look forward to your handover of the property and payment of the amounts due.'

PW1, in examination in chief, also testified that the Defendant's caretaker had the keys to the premises in issue up to 8 September 2017, when they then arranged for the keys to be retrieved from the said caretaker. PW1 testified that when the keys were being handed over in September 2017, there were signed for by representatives of the parties herein and the would-be new tenants of the premises. I note that PW1 however failed to produce the said signed documents to corroborate his testimony and he conceded to this in cross-examination. As stated, the burden was on the Plaintiff to produce the said document which was signed to show that indeed the keys were only handed over to the Plaintiff or his representatives by the Defendant in September 2017. I find no other evidence on record to corroborate the evidence given by PW1 in relation to this.

In addition, DW2 testified, during examination in chief, that the lease was up to December 2017, but that the Defendant vacated the premises in issue in November 2017, after it removed all its stock and that the keys were then handed over to one Mr. Alfred Mpundu. This evidence was not challenged by the Plaintiff during cross-examination.

In light of the foregoing, I find that the Plaintiff herein has failed to prove that the Defendant only handed over the keys to the premises in issue on 8th September 2017, thereby entailing that the Defendant held over the property until September 2017. I am therefore of the considered view that the Plaintiff has not shown that he was out of possession of his property until 8th September 2017.

I however find that the Defendant herein held on to the property until January 2017, because it stated so in its letter to the Plaintiff dated 23rd May 2017. In response to the said letter, the Plaintiff on 1st June 2017, in the letter at page 21 of the Plaintiffs bundle of documents stated as follows:

'Our client takes note of your offer to pay 2 months rentals in lieu of notice but insists that in consideration of the rental income loss arising from their having been no proper handover as admitted by yourselves, you afford him three months rental in lieu of notice.'

I note that PW1 testified that this was made in reference to payment in lieu of notice and not holding over. I however hold the view that the Plaintiff did not dispute the assertion that the Defendant held over the property up to the end of January 2017, in its response as shown above. It is for all the reasons stated above, that I find that the Defendant herein only held over until January 2017. The Defendant, having acknowledged holding over the premises until January 2017, I find the Defendant liable in damages for mesne profits for January 2017 at the rate of K15,778.'

6.18 The question of whether the Appellant was a trespasser without authorization to be on the subject property is answered in the negative. This was acknowledged by the Respondent in paragraph four of his submissions, as shown on page 163 of the record of appeal. Additionally, paragraph 11 (ii) of the Respondent's reply confirms that the Appellant had vacated the premises. The trial Court, in its judgment found on page 25 of the record of appeal, and noted that PW1 (the Respondent) did not access the premises without the Appellant's authorization.

6.19 Despite the above finding that the Appellant was not a trespasser and that the Respondent did not access the premises without the Appellant's authorization, the trial Judge, in the concluding paragraph of the judgment on page 30 of the record of appeal, nevertheless granted the Plaintiff's claims. Specifically, the Court awarded *mesne profits* for loss of use of the demised premises caused by the Defendant, amounting to K157,780.00 for a period of 10 months from January 2017.'

6.20 The application of the legal principle regarding valid claims for *mesne profits,* together with a thorough evaluation of the evidence, suggests that the trial Court, having correctly determined that the Appellant was not a trespasser, should have dismissed the Respondent's claim for *mesne profits* equivalent to 10 months' rent from January 2017 to October 2017. This constitutes a clear misdirection by the Court, which had earlier correctly found that the Appellant was not a trespasser, thus nullifying the Respondent's entitlement to *mesne profits* for the said period. Consequently, ground one of appeal is upheld to the extent that the Respondent was not entitled to *mesne profits* from the Appellant.

6.21 The second ground of appeal asserts that the learned Judge erred in both law and fact by awarding the Plaintiff payment of 10 months' rent from December 2016 to October 2017. This is despite the evidence on record showing that the Defendant had paid the Plaintiff 3 months' rent amounting to K28,000 for the period from December 2016 to March 2017, and that the Plaintiff had leased out the premises to a third party from September 2017.

6.22 The latter part of the ground alleges that the Appellant had already paid 3 months' rent for the property and that the Respondent had subsequently leased the property to a third party. A review of the pleadings in the lower court, however, reveals that these issues were not raised therein.

6.23 The second ground of appeal concerns issues of payment in lieu of notice, which were not presented before the trial Court. In light of our determination on ground one, the second ground of appeal is therefore unsuccessful.

6.24 The third ground of appeal contends that the trial Judge erred by failing to consider evidence indicating that the delay in repairing the premises was partly attributable to the Plaintiff. The record shows that between January 2017 and June 2017, the parties were engaged in negotiations to assess the damage and determine the necessary repairs. This ground pertains to claims that could have been made on an alleged breach of contract to maintain the premises in a tenantable condition, an issue that was not pleaded in the lower Court as previously noted. Consequently, the third ground of appeal is unsuccessful for the same reason.

7.0 **CONCLUSION**

7.1 In conclusion, the Appellant having succeeded with the first ground of appeal, we accordingly allow the appeal and make the following orders and direct as follows:

i. The decision of the trial Court to award the Respondent *mesne profits* of 10 months' rent to be paid by the Appellant to the Respondent is hereby set aside.

ii. The costs of this appeal be borne by the Respondent.

J. Chashi
COURT OF APPEAL JUDGE

D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE

N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE