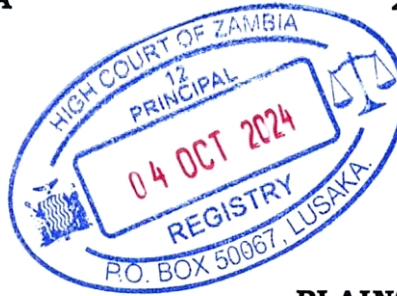


IN THE HIGH COURT FOR ZAMBIA

2017/HP/0617

AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil jurisdiction)



BETWEEN:

MIKE MICHELO

PLAINTIFF

AND

NATIONAL HOUSING AUTHORITY

DEFENDANT

Before the Hon. Mr. Justice M.D. Bowa on 4th of October, 2024

For the Plaintiff: Mr. I. Tindi of Zambezi Chambers

For the Defendant: Mr. M.E Mwiinga of Kaumbu, Mwondela Legal Practitioners

JUDGMENT

Cases referred to:

1. Allan Muyambango Vs Clement Banda selected judgment No 30 of 2016
2. Photo Bank Limited v Sherigo Holding Limited SCZ No. 10 of 2008
3. Livingstone v Ra yard (1880) UKHL 3
4. Attorney General v DG Mpundu (1984) ZR6
5. Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd (1915) AC 847
6. Clement Elalio v Round Traffic and Safety Agency Appeal No 85 of 2020, 2021 ZMCA 104
7. Albert Hampoko vs NHA S.C.Z Judgment No. 11 of 1988
8. Letang v Cooper (1965) 1QB232
9. William David Caelsie Wise V.E.F Hervey Limited (1985) ZR 179
10. African Life Financial Services Limited v Faith Simbao & Others 2009/HK/307 unreported

Legislation referred to:

1. The Rent Act Chap 206 of the Laws of Zambia
2. The White Book 1999 Edition

Other materials referred to:

1. Halsbury's Laws of England volume 13 at paragraph 206 on page 110
2. Winfield and Jolowicz on tort 11th edition



3. *Mudenda F "Land Law in Zambia: cases and Materials" UNZA press 2007 at P559*

4. *Land Law in Zambia: cases and Materials" UNZA press 2007 at P559*

1. Introduction

1.1 This action was commenced by writ of summons and statement of claim dated 12th April 2017. By amended writ dated 13th of April 2017 the Plaintiff claims the following reliefs:

- (i) *K182,017.00 being the value of goods seized wrongfully and subsequently sold.*
- (ii) *Any other relief as the court might deem fit*
- (iii) *Costs of and incidental to these proceedings*

1.2 The Defendant disputed the Plaintiffs claims by its Defence dated 28th of April 2017. In its counterclaim the Defendant prays for the following:

- 1) Damages for trespass arising from the Plaintiff's illegal occupation of the Defendant's premises without any license.
- 2) Damages for illegal occupation and loss of use of money arising from the Plaintiff's use of the Defendant's property without paying rent.

- 3) Payment of the sum of K22,291.48 being unrecovered rental arrears plus interest at prevailing commercial bank rates.
- 4) Payment of the sum of K1,000.00 being water bill refund plus interest at prevailing commercial bank rates.
- 5) The sum of K25,000.00 being the costs of repairs carried out to the premises to restore the said premises to a tenable condition.
- 6) Any other relief the court may deem fit.
- 7) Costs.

1.2 In his reply and Defence to counter claim dated 18th of May 2018, the Plaintiff disputed all the claims.

2. Trial

2.1 Trial in the matter commenced on the 24th of March 2020.

PW1 was Mike Michelo, the Plaintiff in the matter. He recalled that in the year 2015, he was looking for a house to rent. He received a call from a lady in Nyumba Yanga area that intimated she had a house to rent out. He was taken to view the house and the lady said she wanted K3000 as the monthly payable rental.

2.2 He negotiated for and succeeded to have the amount brought down to K2800, payable 3 months in advance with a security deposit. He arranged for the money and paid the lady. He paid a total of K11,200. It was agreed that the tenancy agreement was to be sent to him later by email. The Plaintiff then moved into the house and lived there for close to a year.

2.3 In the month of December of 2015, he received a call from his maid advising that there was a truck that had come to his home and was loading his household goods. He dashed to the house and found some officers who advised him that the house actually belonged to the National Housing Authority, the Defendant in this matter. They told him they were giving him up to 17:00 hours to retrieve only his clothing. He tried to reason with the officers and explained that he had rented the house from one Exhildah Mutekenya. This disclosure did not move the officers who insisted they were going to seize his goods and that if he had any queries he could go for answers at their offices.

- 2.4 After the Defendant's staff took his goods he followed through to the Defendant's offices to try and ask if he could have his property back. The Defendant refused to release the seized goods and said they wanted to recover their money from the named Exildah Mutekenya because she owed them.
- 2.5 The Defendant officers further told the Plaintiff that they had investigated the matter and established that he was Exhildah's sub tenant and revealed that she had not been remitting any money to the Authority. He explained to them that he did not know that the house belonged to the Defendant. The Defendant nonetheless insisted that the goods were not to be released until it recovered money owed to it.
- 2.6 The Plaintiff was then given an eviction notice exhibited at page 2 of the Plaintiff's bundle of documents that he contended was the only document he was availed to show the property was theirs. He dealt with a Mr. Mambwe who told him the reasons for the eviction.

- 2.7 The Plaintiff then decided to engage lawyers to write a letter demanding for the release of his goods. This was done but the Defendant still refused to budge. He then suggested that perhaps he could help to find Exhildah and present her to the Defendant . This proposal was welcomed and flexibility expressed to consider releasing the goods in such event.
- 2.8 Therefore with the aid of Woodlands Police station where the Plaintiff subsequently reported the matter, Miss Mutekenya was apprehended and locked up. The Plaintiff then went back to the Defendant offices to inform the Company that she was in custody at Woodlands police. The response he received took him aback. In an apparent complete switch of positions, The Defendant told him the Authority was not interested in this development. It was at that point that he decided to engage his present advocates with a view of seeking legal redress through the courts.
- 2.9 He testified further that a copy of the inventory of the goods that were seized was availed to him and is exhibited at pages 3 and 4 of the Plaintiff's bundle of documents. He contended that there were also a number of items seized

that were not included on the list. Among these was an aircon, some cans of paint, electrical cables and TV brackets for the bedroom and living room.

2.10 It was his further evidence that Exhildah had given him a tenancy agreement to sign which she said she was going to collect later but she never got round to doing so. The agreement is on page 1 of the Plaintiff's bundle of documents. He added that the house was situated on plot MCNY100 Godfrey Chitalu Court. It was his testimony that he believed the Defendant did not make any follow up with Exhildah whilst she was in custody.

2.11 It was his position that the Defendant should compensate him for the goods seized as he did not have any contract with it. That the Defendant had a relationship with Ms Exhildah Mutekenya. Further, that in spite of his efforts to trace and have her locked up, the Defendant retained his goods which the Plaintiff now seeks compensation for.

2.12 He testified further that his goods cost about ZMW 182,013 as per page 6 of his bundle of pleadings. He added that he went through emotional stress with his family due to the

wrongful eviction that he had been subjected to. He also prayed for the reliefs as set out in the originating process and such other relief the court may deem fit.

2.13 In specific response to the counterclaim, the Plaintiff testified that he believed the rented property was Exhildah Mutekenya's house until the day of his eviction. He would have gone elsewhere had he known different. He explained that he offered to offset the arrears of K950 owed by Exhildah with the hope that the Defendant would then give him a direct lease but they did not accept his proposal. He later learnt that Mr. Mambwe occupied the house after he was evicted.

2.14 When cross examined, the Plaintiff confirmed that he occupied the property in June of 2015 up to December 2015 when he was evicted. At no point between June and December 2015 did he have a relationship with the Defendant. He further agreed that at no point did he enter into a tenancy agreement with the Defendant. In addition, that he never paid any money to the Defendant.

2.15 He learnt about the property through a gentleman over the phone who in turn linked him to Exhildah. To satisfy himself that she owned the property, the Plaintiff made inquiry from the neighbor who told him he believed she was the owner as she had occupied the house for a long time. He was also satisfied she owned the house as he visited her at the house she lived in with her family and it had family photographs on the wall. He added that Exhildah also presented him with a Zesco bill in her name with the house number of the property.

2.16 Questioned further, he explained that he was not receiving bills but topped up on power using the prepaid meter installed at the property. He did not conduct a search at Lands and Deeds registry. Further, he did not sue Exildah as he was advised the party that erred was the Defendant that had proceeded to auction his goods.

2.17 Pressed further, the Plaintiff testified that he had not had any contact with her and could not recall when he last spoke with her. When referred to paragraph 3 of his statement of claim, he testified that the averment in the

said paragraph that suggested that the sub lease was with the knowledge and consent of the Defendant was not accurate. Further that it was also not correct as stated in paragraph 4 that he paid monthly rental to Exhildah for onward transmission to the Defendant.

2.18 He testified that the Defendant had no knowledge about the sub lease. However he believed from the wording of the eviction notice that the Defendant did eventually learn about the sub base.

2.19 Questioned further, the Plaintiff stated that he learnt about the rental arrears through the eviction order dated 1/12/15. He confirmed that contrary to the averment at paragraph 5 of his statement of claim, he was not given any assurances by the Defendant. He insisted that he learnt that his goods were auctioned through the media although his name was not mentioned. The listed items looked similar to what was seized from him.

2.20 The Defendant's case

2.21 DW1 was Mukosha Noel Mambwe a property manager in the Defendant's employ. He testified that as estates

manager, he oversees the maintenance of the Defendant's property and ensures that lease agreements are executed and performed by the parties. He is further responsible for collection of rentals .

2.22 He recalled that he was employed in November 2014 as a graduate trainee and estate officer. The collection of rent fell under his portfolio. He was given an assignment at the time to monitor all rental collections for residential properties. The property in issue in this case, was identified to be one among several that had fallen in long outstanding rental arrears.

2.23 Reminder notices were sent out to the legal tenant who to the best of his knowledge as far as the records showed, was listed as Exhildah Mutekenya. He stated that each tenant has a file and rental account which is created by the operations systems. He explained that Exhildah Mutekenya was offered to rent the subject property on temporal basis as the property was on sale. That according to the records, Exhildah was offered the property on the 1st of August 2008 .

2.24 He added that there is no other record which shows that there was any other person who was offered the property after that date. He referred the court to an offer of transit or temporary accommodation to Miss Mutekenya on pages 1 and 2 of the Defendant's bundle of documents in support of this averment.

2.25 He testified that the house fell into arrears of about K30,000 which amounted to a breach of the conditions of the lease. That the lease on page 1 and 2 shows that the rent was to be paid monthly in advance. The rental was therefore in arrears of almost 2 years and this is what his department was tasked to collect. To be specific, that page 4 of the Defendant's bundle shows that the amount due was K36,341.48.

2.26 It was DW1's further testimony that during that period, the Defendant was facing challenges in meeting its statutory obligations, wages for employees as well as to cater for operational costs. His department therefore sent out remainders to tenants advising what was due. One such

reminder is at page 3 of the Defendant's bundle of documents which was served on 22nd May 2015.

2.27 He added that at the time of the notices being sent out, the Defendant also established that there was an outstanding water bill of K1007.35 as per page 5 of the Defendant's bundle of documents being a reminder of payment to the tenant from the Lusaka Water and Sewerage Company. According to the witness, it was the responsibility of tenants occupying residential properties to settle all utility bills. The bill was only collected at the premises in this case after the authority assumed possession of the property.

2.28 The Defendant took up the liability as the previous tenant did not settle the bill. He explained that since no response was received to the reminders sent to the tenant when still in occupation, the Defendant went on to issue an eviction notice.

2.29 He testified further that as at 18th of November 2015 the date of the notice, the rental arrear had grown to K36,341.48 clearly shown on page 7 of the Defendant's bundle of documents. He added that the notice was

received by one Lilian Malambo whom it was assumed was the agent of the legal tenant. This was on 19th November 2015.

2.30 The actual eviction order was then generated and signed by the CEO on the 1st December 2015. Instructions issued were to take possession of all goods lying on the demised property and to ensure such occupiers peacefully surrender the property to the Defendant.

2.31 He testified that the eviction exercise was carried out by the Defendant's officers in the presence of State police on the 2nd of December 2015. That Page 9 of the Defendant's bundle will confirm that the address of execution was MCNY/100 in relation to outstanding arrears of K36,341.48 levied on Exhildah Mutekenya at 15:00 hours. The property at that point, became vacant.

2.32 DW1 testified further, that a number of items were seized from the premises with a view of conducting a public auction in the event that the legal tenant failed to pay what was due. The Defendant proceeded to advertise a notice for the Auction sale which was published in print media on

Friday 25th December 2015 on page 11 and 12 of the Defendant's bundle of documents. That the document shows the intent that the Defendant had to recover its rentals from all defaulting tenants at the time. It informed all tenants from whom seizures had been conducted that the Defendant intended to proceed with the sale by public auction. He explained that the notice was published almost 3 weeks after the seizure.

2.33 He testified further that the auction was carried out on 26th of December 2015 and all the seized goods were sold. The Defendant managed to recover in full from some tenants whilst it did not with others. He was not in a position to confirm how much was recovered in Exhildah Mutenkenya's case.

2.34 Giving evidence in support of the counterclaim, it was DW1's evidence that the rental arrears were not fully recovered. He added that the Defendant had to incur additional expenses to rehabilitate the property which included painting both the interior and exterior of the house. Further that the Defendant incurred expenses

replacing the damaged geyser and changing the bath tab among other related expenses. He added that there was also as indicated earlier, an unpaid utility bill of K1007.35 for water that the Defendant had to pay.

2.35 In response to the Plaintiff's claim that he was a sub tenant, it was DW1's testimony that the Defendant does not deal with third parties or third party transactions. That there was no record to confirm the existence of a sub tenant on the property. Further that all the transactions pertaining to the subject property at all material times were between the Defendant and the legal tenant Miss Exhildah Mutenkenya.

2.36 In response to the Plaintiff's averment that the property was sublet to him with the Defendant's knowledge, DW1 testified that the Defendant's records will show it has never been aware of any transactions between Exhildah and the Plaintiff. He maintained that the Authority was not aware of the sub lease. He further maintained that the Defendant had at all material times, the right to enforce against the property for collection of rental arrears. That the execution was not in that sense wrongful as asserted by the Plaintiff.

2.37 He added that the Plaintiff engaged the Defendant to try to find a way of settling the matter after the execution was done. He made it clear to the Defendant that he was going to take up the liability of settling the rental arrears and that he would do so before the goods were auctioned. He did not settle the bill and proceeded to commence this action instead.

2.38 When cross examined, DW1 testified that the tenant was expected to meet her obligations. He did not personally ascertain why the rentals were not being paid. He agreed that there was no document before court that confirms how the notices were supposed to be effected on the tenant. He nonetheless maintained that any dealing in respect of the property is supposed to be in writing.

2.39 He agreed that there was nothing in the bundle to show how much was realized from the auction sale. There was further no list of the damaged items in the house before the court. He insisted that the Defendant did not know the Plaintiff lived at the house and only did so when effecting the eviction and seizure of the goods. He agreed that the

Plaintiff went to engage the Defendant before the auction of the goods to negotiate. He declined ever having been called to the police over this issue. The negotiations had with the Plaintiff were not reduced in writing. It was all verbal and precisely because he was not a legal tenant.

2.40 When questioned further, DW1 confirmed that he is the one that is presently occupying the property. He explained that the house was offered to members of staff after the Plaintiff was evicted. Initially Mr. George Chisanga occupied it and eventually by himself. He agreed that on page 9 of the Plaintiff's bundle of documents is a list of seized goods and that the Plaintiff's name appears as the person signing to confirm the seizure.

2.41 Exhildah did not appear to try to redeem the property following the seizure. He contended further that documents are served on the property and not necessarily on the tenant personally although there was no document before court confirming that position.

2.42 It was his position that the Defendant believed that the property seized and auctioned belonged to Exhildah

Mutekenya. He added that he did not know at the time all this was happening that he would eventually be assigned the property and purchase it as a sitting tenant. He therefore denied as untrue that he was resolved to evict the Plaintiff at all costs for his own benefit.

2.43 He agreed that there was no document before court showing how the Defendant's staff buy houses. He was quick to add that the matter before court was not about the sale of the property but recovery of the rent on the property and the seizure of the goods that the Plaintiff takes issue with.

2.44 When referred to the eviction notice and paragraph 1 in particular, the witness confirmed that the reason stated for the eviction was subletting. He nonetheless insisted that the Defendant was unaware of the subletting and that the notice could just be a typo hence explaining the discrepancy between his testimony and the content of the notice.

2.45 Questioned further, DW1 agreed that the eviction order was directed to him as estates officer. He disputed the suggestion that he ignored the typo because he wanted the

property for himself. He maintained that he did not carry out the eviction himself.

2.46 DW2 was Justin Nchimunya an estates officer in the Defendant company. He testified that his duties as estates officer include invoicing of all tenants and reconciling accounts. He explained that when the Defendant enters into a lease agreement with a tenant, an account is opened. Every time the tenant is billed an entry is made in the record of the statement. Such entries are also made whenever a payment is done. The bills are prepared quarterly.

2.47 He testified that the Defendant had a tenant in Nyumba Yanga by the name of Exhildah Mutekenya who defaulted on her rentals and was evicted .He confirmed there was a rental account statement for Exhildah Mutekenya before the court on page 4 of the Defendant's bundles of documents.

2.48 He testified that the statement shows that at the time of its preparation, Miss. Mutekenya had been billed a total of K54,191.48 and had paid K17,850.00. The outstanding

balance was therefore K36,341.48 which was a debit balance owed to the Defendant.

2.49 It was his evidence that the tenant was aware of these invoices as the statement will show payment was being made towards the invoices. He further confirmed that there was a reminder notice and eviction notice that was given to the tenant on pages 3 and 7 of the Plaintiff's bundle of documents respectively.

2.50 He explained that notices are served on tenants at the rented property some of whom do not acknowledge receipt. He added that the authority nonetheless does all it can to ensure the notice reaches the intended persons. Notices are sometimes left under the doors of the houses. He was not aware if there was any other person interacting with the account rather than Miss Mutekenya.

2.51 He repeated the evidence of DW1 about what followed the eviction. Notably, the advertisement in the print media and resultant auction. He added that about K15,000 was realized from the auction which was reconciled against the balance.

2.52 When cross examined, DW2 stated that procedure was followed when evicting Exhildah Mutekenya. He did not have the documents of the seizure and auction at the time the bundle was being prepared as the documents were not ready.

2.53 He insisted that procedure was followed when auctioning the seized items. He agreed that before a warrant of distress is issued, leave of court is required. As far as he was concerned all necessary permissions were sought as they had a court order he believed was on page 8 of the Defendant's bundle of document which is distinct from the eviction notice on page 7.

2.54 Pressed further, he agreed that the order was issued by the Defendant and not by the court. He agreed that there was no other document in the bundle that was issued by the court. He agreed that the Defendant's bundle was compiled 3 years after the auction had taken place. He however insisted that even as late as 5 years post auction they did not have the information for inclusion in the bundle

although he agreed that the information on the auction sale was within the Defendant's premises.

2.55 Cross examined further, he testified that although visits were routinely done to the property in issue, the officers would not find madam Mutekenya there. He repeated DW1's averment that the Defendant only came to know about the Plaintiff after the items were seized. It was his evidence that if the Defendant had known about the sub tenancy, they would not have executed.

2.56 When referred to the notice on page 8 of the Defendant's bundle that made reference to a subletting, it was DW1's evidence that he could not tell if the Defendant knew about the sub tenancy at the time in spite of the wording of the document. He confirmed that the Plaintiff's name appears as tenant on the documents on page 9 and 10 of the Plaintiff's bundle and that it was his goods that were seized.

2.57 DW3 was Mr. George Chisanga, a senior contracts officer in the Defendant's employ. He testified that in the year 2015 he received a call from his boss instructing him to go to

Nyumba Yanga house No MCNY100 for maintenance work.

He was advised the materials for use were already on site.

2.58 He went to the house with his maintenance team the next morning and found the following materials. A 90 liter Geyser, a bath tab 3x20 liters PVA paint, 2x5 liters gross paint, 4 mortice locks, 2 double sockets, 1x9 liter thinners and 2 roller brushes. He proceeded to go through the house to check on the damage to the house. He found that there were locks requiring fitting, the geyser required replacement, the bathtub also needed replacement as well as all the items that had been bought. The maintenance team started carrying out the work but there was no document before the court to confirm what was done. He did not personally buy the materials and just found them on site. He testified that the house was vacant at the time that his team went there.

2.59 When cross examined Mr. Chisanga testified that he did not know the tenant that had been evicted from the house. He confirmed that the house was new when first occupied. Further that there was no other previous tenant before the

evicted one that had occupied the house. He was not aware that the tenant had sublet the property at some point.

2.60 He agreed that the legal tenant is the one liable to pay for any damage occasioned to the rented property. In this case, he agreed that the Defendant could only claim from Exhildah Mutekenya for any damage to the house. He did not know the state of the house at the time the sub tenant occupied it. He acknowledged that being an established institution there must be some record of the items purchased within the Defendant Company

2.61 He however did not have any document before the court to show that these materials were bought. He equally did not have any record of the extent of the damage that his team were fixing. He was nonetheless in a position to confirm the work was done as he was the one that did it.

3. Plaintiff's submissions

3.1 The Plaintiff submitted that the Defendant failed to prove that it had obtained court authority to conduct the distress of rent recovery, rendering its recovery effort void and illegitimate. That the Defendant's authority came from a

Notice of Eviction which referred to the Rent Act but was endorsed by the Defendant's Chief Executive Officer.

- 3.2 The court's attention was drawn to section 14 of the Rent Act Chap 206 of the Laws of Zambia which provides that:

"No distress for recoveries of rent in respect of any premises shall be levied except with leave of court."

- 3.3 Reference was further made to the case of **Allan Muyambango Vs Clement Banda**¹ wherein the Supreme Court in construing the above section observed that:

"It is clear in this case that the Respondent did not obtain leave of court for him to distrain on the Appellants property. Therefore, his action was unlawful and exposed him to liability in damages for unlawful distress."

- 3.4 The Plaintiff also relied on Halsbury's laws of England 4th Edition, volume 13 para 308 at page 183 wherein the authors state:

"An illegal distress is one which is wrongful at the outset, that is to say either where there was no right to distrain or where a wrongful act was committed at the beginning of the levy invalidating all subsequent procedure in such a case the

distraîner is trespasser ab initio and it is no defence that the goods have been applied in discharge of the rent. As he has himself had no right to seize the particular chattels, he can confer no title to them upon a person to whom, under color of distress, they may purport to have been sold."

3.5 It was submitted that having proven that the Defendant executed distress under the Rent Act, such execution was illegal since it was not carried out in accordance with section 14 of the Act requiring the courts endorsement. This entitles the Plaintiff to the claims sought.

3.6 Making submissions in response to the Defendant's counterclaim the Plaintiff made reference to Order 15 rule 2 of the White Book that provides:

"A counter claim is substantially a cross-action, not merely a defence to the Plaintiffs claim. It must be of such a nature that the court would have jurisdiction to entertain it as a separate action."

3.7 Further reference was made to the case of **Photo Bank Limited v Sherigo Holding Limited**² in which the Supreme Court commented on the essence of a counterclaim. It was

argued that the Defendant had in this instance failed to establish its counterclaim and proposed 2 grounds as the basis of this argument.

3.8 Firstly, that the rational for damages is to put the claimant in a position he or she would have been had the wrong not been occasioned. The cases of **Livingstone v Ra yard**³ and **Attorney General v DG Mpundu**⁴ were cited in aid of this proposition. No specific argument was advanced beyond the reference to the authorities cited in this regard.

3.9 The second argument resided in the doctrine of privity of contract. It was submitted that the Defendant established that it had an arrangement with Exildah Mutekenya. However that as stated in the eviction order on page 8 of the Defendant's bundle of documents, the Defendant was later made aware of their legitimate Tenant subletting to the Plaintiff. Reference was made to the case of **Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd**⁵ and **Clement Elalio v Round Traffic and Safety Agency**⁶ setting out the principle that a non-party to a contract is prohibited from deriving any rights or benefits to it.

3.10 It was argued that the Defendant had admitted to having a subsisting agreement with Exhilda Mutekenga whilst the Plaintiff had established that he was paying monthly rentals to Exhildah Mutekenya as per pages 11, 5 and 6 of the Plaintiff's bundle of documents.

3.11 That there had been no wrong doing by the Plaintiff that would entitle the Defendant to be awarded damages. That the Defendant must seek reimbursement from Exhildah for all the claims specified in the counterclaim. Further that if the Defendant is awarded damages, the Plaintiff would have been paid twice for his occupation which is unjust.

3.12 The Defendant's submissions

3.13 It was submitted that as a starting point there was the need to establish whether there was in the first place a legal relationship between the Plaintiff and the Defendant to sustain a claim for illegal evictions. The Defendant's position in this regard is that both the Plaintiff and Defendant's pleadings and testimonies established that the only legal relationship that was subsisting was between the Defendant and the recognised tenant, Exhildah

Mutekenya. Further, that the applicable law in this regard is the Rent Act Chapter 206 of the Laws of Zambia and the Rent (Amendment) Act (No 12) of 1974.

3.14 It was submitted that although the Rent Act recognizes subletting as a form of tenancy, it requires that the subletting be done with the consent in writing of the landlord. In this regard that section 26 of the Rent Act Provides that:

26. (1) Notwithstanding anything contained in this Act, the tenant of any dwelling-house may- Subletting by tenant

(a) with the consent in writing of the landlord (which consent shall not be unreasonably withheld); or

(b) in any case where, in the opinion of the court, the consent of the landlord has been unreasonably withheld, with the consent of the court;

sublet for a period of not more than six months (which period may with the consent of the landlord or of the court be extended for a further period of three months) any dwelling-house of which the tenant is in personal occupation; and upon the expiration of the period for which such dwelling-house has been sublet, the tenant shall be entitled to resume personal occupation of the dwelling-house.”

3.15 It was submitted that the Plaintiff had not adduced any evidence to suggest that there was any consent from the Defendant allowing their tenant Exhildah Mutekenya, to sublet the property to him. That in the absence of such evidence, there is no relationship between the Defendant and the Plaintiff of either a tenancy by contract, atonement or sub tenancy giving him locus standi to bring an action against the Defendant who was exercising a right as a landlord to recover rental arrears from a defaulting tenant.

3.16 That the correct route that the Plaintiff should have followed was to interplead as a third party whose goods were seized together with the owing tenant. That instead he opted to commence this action 2 years after the goods were auctioned and after having been aware of the advert in the Post Newspaper about the impending auction.

3.17 Reference was made to section 13 (1) (a) and (g) of the Rent Act that provides that

(a) No Order for the recovery of possession of any premises or for the ejectment of a tenant there from shall be made unless 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 as the same is consistent with the provisions of this Act, has been broken or not performed, or

(g) The tenant has, without the consent in writing of the landlord, at any time after the prescribed date, assigned, sublet or parted with the possession of the premises or any part thereof.

Provided that:

- (i) A landlord who has obtained or is entitled to obtain an ejectment order on the grounds contained in this paragraph may, at his option either obtain a similar order against the occupier or treat such occupier as his tenant.”*

3.18 Also relied upon was **Halsbury's Laws of England volume 13 at paragraph 206 on page 110** in which the authors state:

“The common law right to distress for rent in arrears is the right for the landlord to seize whatever movables he finds on the premises out of which the rent or service issues, and to hold them until the rent paid or service performed.”

3.19 Relying on the case of **Albert Hampoko vs NHA**⁷, it was submitted that the rent in this case was certain and agreed between the Defendant and tenant. That the rent was also due as the tenant had fallen in arrears. Therefore that the Defendant had a right to issue distress on the occupiers of the property.

3.20 Also relied upon is section 32 A of the Rent (Amendment) Act (No. 12) of 1974 that provides that

“(1) Notwithstanding anything to the contrary contained in this Act or any other law, a local authority or the National Housing Authority as the case may be, shall have power:

(a) To evict a tenant from the premises let to him by the local authority or National Housing Authority, as the case may be, without having to institute proceedings in court in that behalf, if the tenant is in arrears of rent for a period of not less than three months.”

3.21 It was argued further that to permit the Plaintiff's claim would be to justify an illegality and defeat the honest intention of the Defendant who genuinely leased the property to the tenant that illegally sublet the property

without its consent. That it can be gleaned from the Plaintiff's testimony that he became aware of the fact that Exhidah was not the rightful landlord of the property and continued to live there and transact with the tenant to the exclusion of the Defendant.

3.22 It was the Defendant's submission in support of its counterclaim that the damages occasioned to the property must be borne by the Plaintiff as it was he that had occupied the premises and not Exhildah who was not even a party to the proceedings. In conclusion that the matter has no merit as the Plaintiff had failed to establish any relationship with the Defendant and opted not to interplead when the property was advertised for auction. That he instead waited for 2 years to bring an action. The Defendant prayed that the action be dismissed with costs accordingly.

3.23 Plaintiff's submissions in reply

3.24 The Plaintiff filed arguments in reply dated 11th May 2022.

It was submitted that rather than the court dwelling on the invitation by the Defendant for it to consider the question whether there was a landlord Tenant relationship between

the parties, the appropriate question should be whether or not the Plaintiff has established a cause of action.

3.25 It was argued that a cause of action for trespass to goods was disclosed and established in the present case. That the Defendant converted the Plaintiff's goods without legal justification.

3.26 That trespass to goods is the direct and wrongful interference with another in the possession of goods or movables. It was submitted that in light of authorities such as **Letang v Cooper**⁸ and **William David Caelsie Wise V.E.F Hervey Limited**⁹, that define what amounts to a cause of action, the Plaintiff had disclosed and established a clear cause of action in this case. Notably, a claim for the value of his chattels which were wrongfully seized and auctioned.

3.27 Further that the Defendant has misapprehended the nature of the Plaintiff's claim. That whereas the Defendant may have been in order to evict the Plaintiff from the property without commencing proceedings in court, it acted wrongly to also levy distress for recovery of rent arrears.

3.28 The Plaintiff reiterated his earlier submission that in terms of section 14 of the Rent Act, no distress for recovery of rent in respect of any premises can be levied except with the permission of the court. That in the present case the Plaintiff had demonstrated that the Defendant acted without the leave of court.

3.29 It was submitted that section 32 A of the Rent (Amendment) Act No 12 of 1974 relates to cases of recovery of possession without court proceedings which does not extend to cases of levying distress for the recovery of rent. Therefore that as no leave of court was sought to levy distress in this case, the seizure and sale of the Plaintiffs chattels was wrongful and illegal and as such the that Plaintiff is entitled to damages.

4. Verdict

4.1 I have carefully considered the evidence before me. The facts not in dispute are that Exhildah Mutekenya was offered property MC NY100 Nyumba Yanga by the Defendant on a temporal lease basis. I also find as a fact not disputed that the said Ms Mutekenya sublet the

property to the Plaintiff and that no written authority for this was obtained from the Defendant.

4.2 It is not disputed that the Plaintiff occupied the property from June 2015 until December 2015 when the Defendant evicted him from the property and seized his personal goods. I also find as a fact that the property seized was never returned to the Plaintiff and was subsequently auctioned at a public auction to recover what the Defendant claimed to be its unsettled rent.

4.3 Both parties advance contrasting positions on what they believe to be the questions for the courts determination. However, in my estimation, the questions arising in this dispute center on whether the seizure of the Plaintiff's goods was lawful and if not, whether the Plaintiff is then entitled to the claims in damages for the wrongful seizure.

4.4 The Defendant's counterclaim resides in its contention that the Plaintiff was the person in occupation of the property albeit without its authority and that he caused damage to the property and accrued utility bills that he has to pay for. The question to interrogate in this regard is, can the

Defendant claim damage from the Plaintiff arising from a sub tenancy that it asserts it did not sanction?

- 4.5 The right to distress on uncollected rent is traced to the common law. The learned authors of **Halsbury's Laws of England Vol (13) 4th edition at paragraph 206** observe that:

"The common law right of distress for rent in arrear is a right for the landlord to seize whatever movables he finds on the premises out of which the rent or service issues, and to hold them until the rent is paid or the service is performed."

- 4.6 Mudenda F in his "**Land Law in Zambia: cases and Materials**" **UNZA press 2007 at P559** observes that in England a host of statutes have been enacted over a period of time on the subject of distress for rent. These include the Distress for Rent Act 1689; distress for Rent Act 1737, Law of Distress Amendment Act of 1888; Law of Distress Amendment Act 1895 and the Law of Distress Amendment Act 1908. The statutes are applicable to Zambia by virtue of the English Law (Extent of Application Act).

- 4.7 The learned authors of **Halsburys Laws of England (supra)** **at para 211** write further that in order that the right to distrain for rent upon a demise may arise, the relationship of landlord and tenant must exist, both when the rent becomes due and when the distress is levied and the rent must be in arrears. They emphasize that distress cannot be made until the rent is in arrear and further that there can be no distress until the day after the rent becomes due. If days of grace are given, distress cannot be levied until they have expired. Further, rent payable in advance may be distrained for on the day following that fixed for payment.
- 4.8 On the facts in the present case, I find as a fact that there was no landlord tenant relationship subsisting between the Plaintiff and the Defendant. The Plaintiff was a sub tenant and in as much as section 26 of the Rent Act makes provision for sub tenancy, the condition of such agreement being the need for the agreement to be writing and sanctioned by the landlord was not met in this case.
- 4.9 I accept that there was no sanction by the Defendant of the sub tenancy. The self-remedy available under the law of

Distress Act 1888 therefore does not apply to the present case. It was in any event never the Defendant's position that this law informed their action. The Defendant rather relies on provisions of the Rent Act as the basis of its action.

4.10 The Plaintiff's firm argument is that section 14 of the Rent Act relied upon by the Defendant requires the leave of court to be obtained before a warrant can issue. *Allan Muyambangu vs Clement Banda (supra)* is resorted to in further support of this argument.

4.11 I find as a fact that no leave of court was obtained in this case. However, the Defendant falls back on section **32 A of the Rent (Amendment) Act (No 12) of 1974** which amended the Rent Act Cap 438 that reads:

“32A (1) Notwithstanding anything to the contrary contained in this Act or my other law, a local authority or the National Housing Authority, as the case may be, shall have powers.

(a) To evict a tenant from the premises let to him by the local authority or the National Housing Authority as the case may be, without having to institute proceedings in court in tenant

is in arrears of rent for a period of not less than three months.”

4.12 This provision undoubtedly absolves the Defendant from the need to commence proceedings to obtain leave to distrain. I further accept on the basis of evidence that is on record, that the Defendant’s tenant Exildah Mutekenya had accumulated arrears in unpaid rentals for a period exceeding 3 months and amounting to K36 341.48 There was therefore I find, nothing illegal about the eviction of the Plaintiff.

4.13 The learned authors of **Halsbury’s Laws of England vol (13) 4th edition at para 206** observe that:

“The common Law right of distress for rent in arrear is a right for the landlord to seize whatever movables he finds on the premises out of which the rent or service issues and to hold them until the rent is paid or service is performed.”

4.14 In paragraph 227 the authors commenting on goods liable to be distrained upon write:

“Under the common law, a landlord can prima facie seize and distrain for rent in arrear all goods and chattels found on the

premises out of which the rent issues of the goods and chattels may be the property of the tenant or of a stranger, the landlord being entitled to have recourse to all chattels actually on his tenants premises without reference to their ownership”.

4.15 The High Court was thus in the case of **African Life Financial Services Limited v Faith Simbao & Others**¹⁰

per Chali J, prepared to uphold the seizure of property by distress belonging to a claimant interpleader. I endorse my late elder brother's findings and conclude that there was nothing illegal about the eviction and distaining on the Plaintiffs goods notwithstanding his status as sub tenant.

4.16 There is of course, credence in the suggestion in spite of DW1's denial, that NHA subsequently became aware of the sub tenancy. On page 8 of the Defendant's bundle of documents, the eviction order issued by the Defendant to the Plaintiff specifically states the reason for the eviction was subletting and rental arrears.

4.17 This however does not materially water down the Defendant's right to evict the unsanctioned sub tenancy or to distrain on the Plaintiff's goods. the Defendant's failure to

render an account of the subsequent auction of the Plaintiff's goods is a different matter altogether. In *Albert Hampoko v National Housing Authority (Supra)* the Supreme Court held obiter that ***"a Plaintiff has the right to replevy the goods distrained by the Defendant, and should it be discovered that there was anything the matter with the way the distress has been handled by the Defendant, it would be the subject matter a cause of action..."***

4.18 No doubt had I found something amiss about the distress, the Plaintiff would have a cause of action for damages. I have as stated, above not made such finding or conclusion. I do however note that no account was rendered on the goods that were sold. This should have been done. I would accordingly order that an account be rendered to the court through the Deputy Registrar within 60 days of this judgment.

4.19 The Plaintiff's claims regarding the alleged unlawful seizure of his property fails. His loss can be recovered from Ms Exhilda Matekenya the person who granted the sublease and by all indications that was not remitting the rent paid

to her to the Defendant hence the accumulation of the arrears leading to the distress.

4.20 Moving on to the Defendant's counterclaim and as stated earlier, the question is, can the Defendant stake his claim for damages from the Plaintiff in this case. It must be recalled that it has been the Defendant's consistent position that it has no relationship with the Plaintiff. That is settled. It cannot therefore on the one hand seek to be shielded by that fact and turn around to claim damages from the party that was not its tenant.

4.21 The Defendant's claims if any should lie against Exhildah Mutekenya the person that was its tenant and that sublet the property to the Plaintiff without its sanction. It is she that must meet the damage for the repairs. I would for the above reasons dismiss the Defendant's counterclaims in total.

5. Conclusion

5.1 I find nothing unlawful about the eviction and distress levied on the Plaintiff but I order the Defendant to render an account on the public auction of the Plaintiff's goods within

60 days from date of judgment. The counterclaims fails and is dismissed. As no party outrightly emerges victor, I order that each party will bear its own costs.

Dated at Lusaka this ^{4th}.....day of ^{October}.....2024


HON. JUSTICE M.D BOWA