

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

2019/HPA/29

**IN THE MATTER OF: RULE 3 OF THE RENT ACT, CHAPTER
206 OF THE LAWS OF ZAMBIA**

AND

**IN THE MATTER OF: SECTION 4(E) (II) OF THE RENT ACT,
CHAPTER 206 OF THE LAWS OF
ZAMBIA**

AND

**IN THE MATTER OF: FLAT 387A, CHELSTONE GREEN,
LUSAKA.**

BETWEEN:

SARAH SAKACHOMA

APPLICANT

AND

HOWARD K. PHYLISS

RESPONDENT

BEFORE THE HONOURABLE JUSTICE MRS. M. C. KOMBE

*For the Appellant: Dr. O.M.M Banda - Messrs O.M.M.
Banda and Company.*

*For the Respondent: Mr. M. Chisunka - Messrs Nkusuwila
Nachalwe Advocates*

J U D G M E N T

Cases referred to:

1. Harvey v. Pratt [1965] 2 All ER 786.

2. **William Jacks & Company (Zambia) Limited v. O'Connor (In his capacity as Registrar of Lands and Deeds) and Construction & Investment Holdings Ltd (1967) Z.R 141.**
3. **Mohammed Abdi v. Amon Luswili -2013/HP/338.**
4. **Marshall v. Berridge [1881-85] All ER Rep 908.**
5. **Wilson Masauso Zulu v. Avondale Housing Project (1982) ZR 172.**
6. **Krige and Another v. Christian Council of Zambia (1975) Z.R 152 (S.C).**
7. **Ernest Kabwe Chibombe v. Sampa Kasongo Mulilo Chibombe-Appeal No. 12/2016 (Unreported).**

Legislation and other material referred to:

1. **The Rent Act, Chapter 206 of the Laws of Zambia.**
2. **Halsbury's Laws of England, 4th Edition, Volume 27(1).**
3. **The Constitution, Chapter 1 of the Laws of Zambia (as amended by Act. No.2 of 2016).**
4. **Frederick S. Mudenda, Land Law in Zambia (Cases and Materials), (UNZA Press), 2006.**

This is an appeal against the ruling of the Learned Resident Magistrate (Felix Kaoma) dated 24th January, 2019. The Ruling was made following the Appellant's (the Applicant in court below) application to raise a preliminary issue as to whether the lease agreement between the Appellant and the Respondent had a commencement date and if it did not, whether the said lease agreement was valid at law.

The Learned Magistrate dismissed the Appellant's application on the basis that the Appellant had been occupying the house and paying rent to the Respondent.

Dissatisfied with the Ruling of the Subordinate Court, the Appellant on 5th February, 2019, filed a Notice of Appeal on the following grounds:

(1) The learned Magistrate misdirected himself when he decided not to delve into the issue as to whether the purported Lease Agreement on record had a commencement date or not.

(2) The learned court below erred in law and in fact when it ruled that there was no need to delve into the issue of the commencement date of the purported lease agreement owing to the fact that the Appellant had been paying rent to the Respondent and had possession of the demised premises.

(3) The Learned court below misdirected itself when it decided not to delve into the issue of whether the purported lease agreement had a commencement date, which decision is

contrary to the requirement of the law for a court to determine all issues in contention as raised by the parties.

At the hearing of the appeal, learned counsel for the Appellant, Dr. O.M.M. Banda relied on the arguments filed in support of the appeal on 15th November, 2019.

In ground one, it was argued that the Court below erred in law and in fact when he opted to not delve into the issue of whether or not the purported lease agreement on the record had a commencement date. That the issue as to whether or not the document on record had a commencement date was crucial to determining the validity of the same and consequently whether the said document could be relied upon in the proceedings below.

It was also argued that it is settled law in our jurisdiction that a document purporting to be a lease agreement must have among others, a commencement date and where there was none, the document was null and void to the extent that it purported to be a lease agreement. The case of **Harvey v. Pratt** ⁽¹⁾ was referred to where Lord Denning stated as follows:

“It is settled beyond question that, in order for there to be a valid agreement for a lease, the essentials are that there shall be determined not only the parties, the property, the length of the term, and the rent, but also the commencement date. This is an agreement for a lease to start at some future time. The time has never been specified or agreed. There was therefore no concluded contract.”

Counsel also referred the Court to the case of William Jacks & Company (Zambia) Limited v. O'Connor (In his capacity as Registrar of Lands and Deeds) and Construction & Investment Holdings Limited ⁽²⁾ where the Court of Appeal of Zambia held as follows:

“An alleged agreement for lease which contains no commencement date is not, in fact, an agreement for lease, nor does it resemble one sufficiently to be accepted as purporting to be an agreement for lease.”

It was submitted that it was clear from the authorities that it was a mandatory requirement for a lease agreement to contain a commencement date.

Counsel further referred the Court to the High Court decision in the case of **Mohammed Abdi v. Amon Luswili** ⁽³⁾ where it was held that:

“Turning to the case in casu, it is a fact that it has no commencement date. In applying the case of William Jacks & Co v. O’Connor it is clear that one of the essential elements is lacking which is the date of the commencement of the proposed lease and description of the property farm number left blank. I find as a fact that the document before me was not a valid lease agreement.”

It was submitted in this regard that the document executed by the Appellant and the Respondent purporting to be a lease agreement was not a valid lease.

It was further argued that the commencement date was not the same as the date of document purporting to be a lease. That the Court in **Marshall V. Berridge**⁽⁴⁾ set out the position of the law and in so doing confirmed the position canvassed by the learned authors of Halsbury’s Laws of England, 4th Edition, at page 70 in para 60 that:

“The Court will not imply a term that the lease is to commence at a reasonable time or at the date of the agreement.”

In the premises, it was submitted that the court below erred in law and in fact when it opted not to decide on whether the document on record had a commencement date. That the parties were in abeyance as to whether the document on record was a lease agreement or not. It was contended that the document on record did not contain a commencement date and did not qualify as a lease agreement, with the effect that it should be declared null and void.

In ground two, it was submitted that the court below erred in law and in fact when it ruled that there was no need to delve into the issue of the commencement date since the Appellant was paying rentals and was in possession of the demised premises.

That the question for determination before the court below was whether the subject document qualified as a lease agreement despite not having a commencement date and not whether there was a relationship of landlord and tenant between the Appellant and the Respondent. That this was separate as to whether the document executed between the parties qualified as a lease

agreement. That the Court below therefore proceeded on the wrong premise that once the document in issue was held to not be a lease, then there would be no relationship of landlord and tenant as between the parties, which position was not supported by law.

Counsel submitted that the Rent Act was clear regarding the manner in which a relationship of landlord and tenant was established. Section 2 of the Rent Act defined a lease as follows:

“Includes any agreement, whether written or verbal and howsoever described, whereunder the tenant obtains the right to possession of the premises for a consideration in money or money’s worth, and whether or not such agreement”

That in the context of this matter, since the Appellant was paying rentals and in possession of the demised premises, it followed that even if the subject document was to be declared null and void, there would still be a relationship of landlord and tenant between the Appellant and the Respondent in the manner of a statutory lease.

• That it was a misdirection for the court below to opt not to decide on the issue. Counsel therefore urged the Court to reverse the decision of the court below.

In ground three, it was submitted that by opting to not decide on whether or not the purported lease agreement had a commencement date, the court below erred in law and in fact in that it failed to determine the issue which was in contention between the parties. The settled position of the law was that a court had the duty to determine all issues in contention between the parties. Reliance was placed on the case of **Wilson Masauso Zulu v. Avondale Housing Project Limited** ⁽⁵⁾ where the Court held that:

“The trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality. A decision which, because of the uncertainty or want of finality leaves the doors open for further litigation over the same issues between the same parties can and should be avoided.”

It was submitted that the court below did not adjudicate upon the issue as to whether the document purporting to be a lease agreement had a commencement date. That the effect of not

determining the issue of the subject document was that the parties were in abeyance as to whether the document qualified to be a lease agreement and whether it could be relied upon by the parties. Counsel urged the court to reverse the decision of the court below.

In his oral submissions, counsel for the Appellant argued that the issue of locus standi did not arise anywhere in the court below and if there was any intention to raise it, there should have been an application to that effect.

In response, learned counsel for the Respondent, Mr. M. Chisunka relied on the heads of arguments in opposition filed on 18th November, 2019.

It was submitted that this appeal was before this Court following the ruling of the court below dismissing two preliminary issues, one raised by the Appellant on the premise that the lease agreement forming the subject matter of the action did not bear a commencement date and therefore void. The other issue raised by the Respondent on the premise that the matter commenced by the Appellant disclosed no cause of action due to the fact that the lease agreement upon which the action was anchored was no longer in

effect as it came to an end by way of effluxion of time and the Appellant therefore had no locus to sustain the action.

That the record would show that the lower court dismissed the application of the Appellant due to the fact that the Court did in fact find that there was a commencement date of the lease and on this premise decided not to delve into the question as to whether or not there was a commencement date.

The Respondent therefore responded to the three grounds of appeal by responding to the ground hereunder that:

“The Learned Court below was on firm ground when it held that there was in fact a commencement date of the lease agreement and in turn chose not to delve into the issue as to whether there was a commencement date.”

In his arguments counsel referred the Court to the definition of a lease in section 2 of the Rent Act. It was submitted that from the definition of a lease in the Act, the commencement date of a lease need not be communicated in written form but could be from the actions of the parties involved or even verbally. That the action referred to above was the right to obtain possession of the

premises. Counsel submitted that they were of the firm view that the lease agreement forming the subject matter of this action in fact bore a commencement date contrary to the assertions of the Appellant or the ruling of the court that deemed the commencement date to be the day that the Appellant took possession of the premises.

It was contended that even in the absence of a specified date of commencement, section 2 was instructive as to when a landlord and tenant relationship could be deemed to be created. That this in itself relinquished the need for the court to delve into the issue as it was straight forward given the circumstances.

It was submitted that the dictum in the case of **Harvey v. Pratt**, referred to by the Appellant while constituting good law was distinguishable from the case before the Court. That this was due to the fact that the document forming the subject matter of that action neither contained a commencement date or could a commencement date be inferred from the language in the document nor the actions of the parties as Mr. Pratt in that case never took possession of the premises.

Furthermore, counsel submitted that the lease agreement in this case bore the date of 15th October, 2017 and should the Court be of an alternative view, the lease commenced on the date the Appellant took possession of the premises in line with the provisions of section 2 of the Rent Act.

Counsel further argued that the cases of **Harvey v Pratt, William Jacks & Company (Zambia) Limited v O'Connor and Marshall v. Berridge** cited by the Appellant were distinguishable from this case. Secondly, they were overtaken by the provisions of the Rent Act which came into effect on 30th March, 1972 and amended in 1994 and thus recognised that not all lease agreements were contained completely in writing but could be formed verbally and by conduct.

That the case of **Mohamed Abdi v. Amon Luswili** was also distinguishable from this case as the agreement forming subject matter of that case showed that there was no commencement date as the terms merely stated that "the contract will begin running when business starts". That while the authorities cited by the Appellant were good law, they were inapplicable to the case in casu.

Further, that despite the lower court not mentioning the reason for not delving into the issue of the commencement date, the record would show that in the affidavit in support of the Originating Notice Motion under paragraph 3 of the same the Appellant stated:

“That by Tenancy Agreement duly entered into by the parties and dated 5th October, 2017, the Respondent demised unto the Applicant the residential property and premises at and known as Flat No.387A Chelstone Green, Lusaka for a renewable term of one (1) year with effect from 5th October, 2017 at the monthly rate of ZMW 3,000.00 only payable three (3) months in advance.”

That from the above excerpt, it was clear that the Appellant was aware of the commencement date and the length of the lease and that there was a meeting of the minds concerning the same. That on that premise, the court below was on firm ground when it decided not to delve into the issue of the commencement date.

Counsel also raised a ground of appeal in which it was stated that the learned court below erred in law and fact when it dismissed the Respondent’s application to dismiss the matter for failure to disclose a cause of action.

- (i) Whether the Lease Agreement which was executed between the Applicant and the Respondent has a commencement date as required by law; and**
- (ii) If the Lease Agreement which was executed between the Applicant and the Respondent does not have a commencement date, whether the said Lease Agreement is valid at law.**

It was argued by the Applicant (Appellant herein) that the Lease Agreement had no commencement date and therefore it was not valid at law and could not be relied upon.

I have read the ruling delivered by the trial court in relation to these issues that were raised. The trial court first started by outlining the law on the five (5) elements to be included in a valid lease agreement. These are (i) parties; (ii) the property; (iii) length of term; (iv) rent; and (v) commencement date of term.

In this regard, he stated that it followed that for any lease agreement to be valid at law, it must have a commencement date among other items.

It seems to me perfectly plain that after reaching this conclusion, he did not consider the issues raised seriatim as would be expected when considering preliminary issues. Rather, he proceeded to answer the questions in a different way. I say this because he stated that notwithstanding the contention by the Appellant as to the commencement date in the lease agreement, he had noted that after the purported lease was signed by the Appellant, she was given possession of the flat in question and she had been paying rent to the Respondent of K3, 000.00 per month from 5/10/17 to date.

He then relied on the case of **Krige and another v. Christian Council of Zambia**⁽⁶⁾ where it was held that the effect of the occupation of the premises and payment and acceptance of rent was to create a periodic tenancy which was either yearly or monthly. Reference was also made to what Baron D.C.J stated that:

“When a person enters on premises under a void agreement for a lease, he enters without any title whatever but if any new rent is reserved and received, however small, the legal relation of a periodic tenancy is created and the tenant then

For these reasons, having considered all three grounds of appeal I find no merit in the appeal as the learned trial Magistrate was on firm ground when he dismissed the Appellant's application to raise preliminary issues.

Before I rest, the Respondent has raised a ground of appeal in her submissions that the learned court below erred in law and in fact when it dismissed the Respondent's application to dismiss the matter for failure to disclose a cause of action.

It is very clear from the submissions that counsel for the Respondent acknowledges the fact that this is an appeal by the Appellant. However, they seek this Court to consider the issue determined by the trial Magistrate in relation to the Respondent's preliminary issue in the exercise of my supervisory powers.

I should hasten to point out that Article 134 (b) of the Constitution confers on the High Court supervisory jurisdiction as prescribed. What this means is that the supervisory jurisdiction of the High Court involves a duty to keep inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires in a legal manner.

For instance, the High Court has supervisory powers under Order 53 to exercise judicial review. According to the authors of the book entitled Applications for Judicial Review: Law and Practice of the Crown Office, the basis of this supervisory power of the High Court is to make inferior courts, public bodies and tribunals do their duty and stop them from doing things which they have no power to do.

Thus, if the inferior court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it has or if it has jurisdiction, but it is being exercised in a manner that is not permitted by law and grave injustice has been occasioned, the High Court may step in in the exercise of its supervisory powers.

However, supervisory jurisdiction may be refused to be exercised if there is an alternative or efficacious remedy by way of appeal. Therefore, this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions.

Similarly, the High Court has supervisory powers in criminal cases under Section 338 of the Criminal Procedure in case of a conviction to confirm, vary or reverse the decision of the subordinate court,

or order that the person convicted be retried by a subordinate court of competent jurisdiction or by the High Court.

Furthermore, if it thinks a different sentence should have been passed, the High Court may quash the sentence passed by the subordinate court and pass such other sentence warranted in law, whether more or less severe, in substitution therefor as it thinks ought to have been passed.

In the present case, as I have mentioned, the Respondent seeks to assail the trial Magistrate's dismissal of her preliminary issue by asking this Court to exercise its supervisory jurisdiction. However, the view I hold is that this is not the correct mode as the ground raised could have been brought by way of appeal to this Court.

I am fortified in holding this view by what was stated by the Court of Appeal in the case of **Ernest Kabwe Chibombe v. Sampa Kasongo Mulilo Chibombe**⁽⁷⁾. In that case, the High Court proceeded to consider an issue which was not the subject of an appeal. Chishimba JA thus stated that:

“In ground three the issue is whether the Learned Judge erred in law and fact when he made declarations not forming part of the appeal namely

the property forms part of the matrimonial property is subject to property settlement by the Deputy Registrar and setting aside the Order of the Magistrate Court in respect of property settlement.


We agree that the Learned Judge ought not to have made the above declaration because the appeal was only in respect of the ruling refusing special leave to review. In fact we are at a loss as to how the learned Judge lost track of the actual appeal before him...”

What is evident from the above case is that an appellate court cannot determine issues that are not subject of an appeal. As I have stated, the Respondent in casu didn't appeal against the decision of the trial Magistrate. The rules of the court are very clear and counsel should not have sneaked in a ground of appeal under the guise that this Court has supervisory powers over the lower courts. This is not what is envisaged by the High Court exercising supervisory jurisdiction.

In this regard, I decline to consider this ground as there was an alternative remedy available to the Respondent by which she could have ventilated her grievance against the decision of the trial Magistrate.

In the result, I find that the appeal lacks merit and I accordingly dismiss it. Considering the circumstances of the case, I make no order as to costs.

Delivered at Lusaka this 30th day of September, 2020



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M.C. KOMBE
JUDGE