

IN HIGH COURT OF MALAWI AT BLANTYRE

CIVIL CAUSE NO. 42 OF 1979



BETWEEN:

P.K. MAMTORA PLAINTIFF

- and -

L.W.S. MPHAMBA 1ST DEFENDANT

- and -

J.H. MKUMBA 2ND DEFENDANT

Coram: JERE, J

Kaliwo of Counsel for the Plaintiff
Nakanga of Counsel for the Defendants
Kaundama - Court Clerk
Mazibuko - Court Reporter

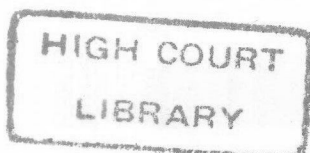
J U D G M E N T

The plaintiff by his amended statement of claim sues for the recovery of possession of premises situate on plot No. BC 199 in the City of Blantyre. Paragraph 2 of the statement of claim states that by a tenancy agreement made on the 19th day of June, 1978, between the plaintiff on the one hand and the defendant on the other hand, the plaintiff let the said premises to the defendant for a term of one year commencing from 1st June, 1978, at the yearly rent of K1,200 which term expired on the 31st day of May, 1979.

The plaintiff claims in para. 3 of statement of claim (a) possession of the said premises; (b) arrears of rent of K187; (c) mesne profits at the rate of K100 per month from the first day of June, 1979, till possession is delivered up and; (d) costs of this action.

The writ was issued on the 3rd day of August, 1979, and served on the defendant on the 30th August, 1979. In his defence the defendant pleads that a new contract had been entered into and that this contract still subsists. He denies that K187 or any amount is in arrears.

This is a civil action. It is settled since time immemorial that the burden of proof in civil actions is upon he who alleges; in this case th plaintiff. He has to prove his case before me on the balance of probabilities. However,



the defendant also carries a burden of proof for he alleges that a new tenancy agreement had been entered into. It is, therefore, incumbent on the defendant to prove the allegation that a new tenancy had been entered into between the parties.

The facts giving rise to the present litigation are that the National Bank of Malawi by a letter dated the 5th April, 1976, agreed to manage the properties of one P.K. Mamtora. The bank would receive instructions from Mr. Mamtora on what lease the bank would grant to intending tenants and what type of conditions are to be attached thereto. The bank was to be rewarded by way of commission for managing the property of Mr. Mamtora. He is himself in the United Kingdom. A schedule of the properties to be managed by the bank is attached to the letter referred above. It was tendered in court and it is Exhibit 5. The property which is the subject of the present dispute is included in Exhibit 5.

On the 19th day of June, 1978, a businessman by the name of J.H. Mkumba entered into a tenancy agreement with the National Bank of Malawi, Trustee Department. He was granted a lease. Accordingly a lease agreement was entered into between Mr. Mkumba on the one hand and the National Bank on the other hand. He took possession of premises situate on plot No. BC 199 in the City of Blantyre. As stated earlier BC 199 is included in schedule 5. The lease agreement was reduced into writing and was tendered in this court as Exhibit 6. It was to last for a term of one year commencing from the 1st day of June, 1978, and expiring on the 31st May, 1979. See clause 1 of Exhibit 6. Clause 2 states that rent will be K100 per month payable in advance on the first day of each calendar month. This agreement contains the usual clauses that regulate the relationship between a landlord and a tenant.

There is, therefore, no dispute between the parties that the defendant leased BC 199 in Blantyre from the plaintiff.

The evidence of Mr. Khonje, an employee of the National Bank of Malawi, is that the bank looks after the property of Mr. Mamtora by collecting rents from tenants and all that goes with the management of the property. He identified Exhibit 5 as a document which gives powers to the bank to look after the properties of Mr. Mamtora. He also identified Exhibit 6 as a tenancy agreement.

It was his evidence that the bank received rents from the defendant from June, to November, 1978. However, from December, 1978, to March, 1979, the bank did not receive rent from the defendant. He said the arrears as at the end of March, 1979, were K400. The defendants were asked to vacate the premises. They refused to do so. The bank approached Messrs Wilson and Morgan, a firm of lawyers in the City of Blantyre who on the instructions of the bank issued a notice to quit. This notice was tendered in court as Exhibit 1. It was dated 2nd May, 1979. By this notice, the defendants were required to vacate the premises on the 30th June, 1979, or "at the expiration of one month from the service upon you of this notice".

On receipt of the notice to quit the defendant approached him and promised to pay arrears of rent. This meeting was followed up by a letter from the defendants, Exhibit 7. In this letter the defendant admits that he is in arrears. The relevant paragraph states:

".... The thing is this we should like to pay three hundred Kwacha (K300) and the balance to be paying in arrears and our aim is to remain in the building and renew our agreement, please try to help small firms of African businessmen you are one of the business people and you have seen how small businessmen are struggling for the development of this country we are not going to run you down."

They sought mercy and asked that they should not be evicted from the premises. The manager of the Trustee Department, Mr. R.J. du Plessis replied to this letter. It is dated the 7th day of June, 1979, as follows:-

"We thank you for your letter dated 4th June, 1979, and as already advised the matter is now being handled by our solicitors Messrs Wilson and Morgan.

If you would like to pay K300 are you able to pay the amount within the next few days?"

The defendant replied to this letter; it is Exhibit 9 and it is dated 12th June, 1979.

".... We intend to pay the sum of three hundred Kwacha (K300) before the month end provided you assure us that you will request your solicitors to restrain the eviction relevant to the building.

Our clients have promised us to pay their accounts before the 30th June, 1979, and we are busy preparing their accounts for the year ended 31st March, 1979, and should be grateful if you could expediate a reply.

Thanking you for your generosity."

This letter is Exhibit 9. The plaintiff answered this letter. It is a letter dated 15th June, 1979. It reads:

"We refer to your letter dated 12th June, 1979, and advise that we can only instruct our solicitors to withhold your eviction from the premises if we receive the payment of K300 and continue to receive the monthly instalments until the rentals are up-dated.

Kindly forward your remittance as soon as possible."

The defendant answered the letter dated 15th June; his letter is Exhibit 11 dated the 27th June, 1979. Paragraph 2 reads:

"For your information we should like to point out that we have started receiving some cash from our clients as the figure of three hundred kwacha (K300) has not yet been reached as we anticipated to pay the account in question before the 30th June, 1979 it would appear the days for collection of money from our clients to be short, and we therefore humbly beseech you Sir that would you please request your solicitors to give us days of Grace relating to the eviction which is due on 30th June, 1979.

The reason for this request is this if we mean to vacate the building on this date we are going to lose our money because our clients are not going to give us the money since the business will be hampered, as we stated in our letter of 4th June, 1979 that let us settle the matter amicably without going to court proceedings and without causing any bitterness to both sides as wish to remain in the building to avoid hardship if our business is going to be racked.

Please administer your fair judgment by being sympathetic to small businessmen for the development of this country, we are human beings with reasonable sense, and that we are not going to run you down in your business affairs. We sincerely hope that our request will receive your sympathetic attention and do not break our business relationship which has been existing. Please treat this as urgent.

Thanking you for your generosity."

It was the evidence of Mr. Khonje that the bank did not receive the money despite the earlier promises made by the defendants in their pleas to the bank. However, in mid-July they received K257. It was his understanding that this amount was paid to the bank. He was emphatic in stating that the bank was not negotiating another tenancy agreement with the defendants. It was his evidence in cross-examination that the defendant used to see the manager of the Trustee Department sometimes in his absence and sometimes they would be together. He said the arrears of rent are more than K600 since the defendant has been staying there after the notice to quit was issued.

Mr. Naphambo gave evidence. He said at all material times he was working for Wilson and Morgan. While so working he was instructed by the National Bank to claim possession of two rooms situate at BC 199, Haile Sellasie Road, Blantyre. He also received further instructions to claim arrears of rent. He issued a notice to quit which was served on the defendant. He said arrears of rent were K600. Mr. Mphamba came to the office and disputed that the arrears of rent were K600. He offered to pay K300. He referred the matter to the National Bank, his client. Mr. Mphamba paid K110 and

a receipt was issued, Exhibit 2. He said he wrote another letter telling Mr. Mphamba that his client does not want to enter into another agreement as a result of payment of K110. This is contained in Exhibit 3. It reads:

"We wish to point out that our receipt of this money in no way constitutes a new tenancy agreement. These are arrears which accrued before a notice to quit.

We mention that we are still going ahead with legal action in this matter."

It was his evidence that the amount was understated and Mr. Mphamba paid a further amount on the 3rd January, 1980. See Exhibit 4. It was his evidence that there was still a balance which is represented by the amount claimed. He agreed that the amount received so far is K413.

Mr. Mphamba gave evidence on behalf of the defendant. He said he is in partnership with Mr. Mkumba and that they are carrying on business at the premises in dispute. He admitted that they were in arrears and he said the amount owing was K300. He said that the plaintiff had issued a notice to quit. He had asked them to give them time. According to him the plaintiff agreed that the defendant can stay on at the premises provided they pay K300. He said Exhibit 10 was such a letter. It was his evidence that this amount had been fully paid. He identified all the documents upon which payment was made. Such documents were tendered in evidence. He denied any amount as arrears in the sum of K187. He said all sums of money were paid to Munthali, Nakanga & Company, his lawyers, for onward transmission to Wilson and Morgan.

In cross examination he said that at first the payment was done at the beginning of the month but later they could not pay because their clients failed to pay them in time, hence the arrears. He admitted that they paid rent up to December, 1979 but it was his evidence that the arrears have now been paid. He said the money has been paid to his lawyers, Munthali, Nakanga & Company. He said the letter dated 7th June, constitutes a new agreement.

Mr. Mkumba gave evidence. He agreed that he entered into an agreement with the plaintiff and occupied the premises in question. He said a notice to quit was served on him but he went to discuss the matter with the bank manager. It was agreed that they could stay there if the arrears of rent were paid. He said they were occupying the premises because they were told to stay there as long as the rent was paid.

What is clear in this case is that the parties had originally entered into a tenancy agreement. This tenancy agreement is evidenced by Exhibit 6. Clauses 1 and 2 stipulate both the period and the rentals to be paid. Clause 3(x) states:

"to yield up the said premises and the fixtures and additions thereof at the determination of the tenancy in good and tenantable repair, condition and decoration in accordance with its covenants hereinbefore contained."

This clause merely confirmed the fact that at the expiration of the period of one year the tenants should handover the premises. The tenancy agreement, therefore, would be determined at the end of the period, namely, one year. The tenancy would be determined by effluxion of time; see Hill and Redman's law of Landlord and Tenant, 11th Edition page 415; paragraph 335 states:

"EXPIRATION OF TERM: When a lease is granted for a term of years or other fixed period, then at common law upon the expiration of the last day of the term, the tenancy ends without notice to quit or other formality."

The learned authors base this principle on a long line of cases; unfortunately these are not before me. The principle however is clear and correct.

So on the 31st May, 1979, this tenancy agreement had been determined. It is clear to this court that at that time the defendants were in arrears. They were in breach of clause 3(i) of the agreement. Indeed the plaintiff seems to have taken this breach seriously and it is in my view the reason for the issuance of Exhibit 1. This is not a matter of speculation although no grounds are given in Exhibit 1; they are however perfectly entitled to issue a notice to quit without giving any reasons. See Chapman v. Honig (1963) 2 All E.R. page 513.

There seems to be some confusion as to the exact amount of arrears. I think confusion arises because the parties seem not to be sure as to whether the amount in arrears is up to March, 1979, or from March onwards. There must be a dividing line and such dividing line comes at a time when they wrote a letter seeking for the arrears. This is March, 1979. As at that date the amount owing was K400. The total amount paid is K413. Mr. Kaliwo submits that the amount owing in arrears is only K44. I find it difficult to see how he arrives at K44. I think he does arrive at K44 by taking into account the month of May. He was surprised that a cheque for K153 had been paid. As I pointed out earlier, neither the bank keeps a record of the amounts paid nor Mr. Mphamba, an accountant. So the bank, a financial organisation that is supposed to keep correct records cannot keep a true and clear record. Mr. Mphamba, a man who is an advisor on book-keeping and accounting services cannot keep also such a record; they all come to this court and throw the matter up to the court. What then is the court expected to do? The cardinal principle remains; that it is not enough to allege; one has to prove. In these circumstances, the plaintiff has failed to prove that the defendant owes them K187 in arrears. It seems to me that the plaintiff had two causes of action; (1) that the lease had been determined, and (2) that the defendants were in breach of contract.

It is clear from the statement of claim that the present action is based on the tenancy agreement. Para. 2 of the amended statement of claim makes this beyond doubt that the plaintiff is alleging that the tenancy agreement had expired.

In fact the tenancy agreement had expired and, therefore, the defendants have no standing.

However, the defendants put their case thus; the arrears of rent were not owing and the plaintiff issued a notice to quit. According to them, although this is not stated in the notice to quit, the main reason for the issuance of the notice to quit was because the defendants had not paid their rents punctually. They further state that they pleaded with the plaintiff and they asked the plaintiff not to evict them and that they would be paying the arrears by instalments. The defendants stated that this was accepted by the plaintiff. However, the plaintiff refused to receive the rents and they were directed to pay it to their lawyers. Their evidence is that Exhibit 10 constitutes a new tenancy agreement and the whole behaviour of the plaintiff is such as to recognise a new tenancy agreement had been entered into.

The most interesting aspect of this defence is the admission by the defendants that they were in breach. However, what the defendants overlook completely is clause 2 of Exhibit 6 that by the 31st May, 1979, their tenancy agreement had elapsed. What the defendants seem to think is that the major problem was the rent and insofar as they were willing to pay the rent they should be entitled to stay in the premises indefinitely.

The first point to resolve is whether the defendants' allegation that the plaintiff had agreed that the defendants should remain in the premises so long as rent is paid can be supported on the evidence before me. In my view there is no evidence to support this allegation. The plaintiff denies this. However, even if the statement was accepted by the plaintiff such a provision would be ill-founded. The defendants seem to argue that the plaintiff waived their right to evict them by acceptance of rent. In my view, this is a complete misunderstanding of the situation. The plaintiff was emphatic that the receipt of the rent which in any event were in arrears did not mean that they were entering into a new tenancy agreement.

I now consider the allegation that a new tenancy agreement had been reached between the parties by reason of Exhibit 10.

All the correspondence in this case must be read together so as to see whether the parties intended to enter into another agreement; if you take Exhibit 10 which asked for the payment of K300 as soon as possible and an earlier letter which asked whether the amount can be paid within the next few days. Such amount was never paid. The defendants had not paid the rent. The defendants were indeed asking for days of grace still labouring under the impression that the plaintiff was acting on the basis that the defendants were in breach of the covenant by reason of their failure to pay the necessary rent and the arrears were not paid by the 8th December until some time in 1980. In my view Exhibit 10 in no way constitutes a new tenancy agreement. After all the entire line of correspondence starting from the letter dated the 4th June, 1979, up to the letter dated 8th December, 1979, the defendants wanted to pay the amount by instalments. There was no conduct out of which a contract can be spelled out. It is clear that if a party is going to rely on the acceptance of rent as constituting or evidencing a new tenancy agreement it must be clear that the other party also intended that such should be the case. Where the other party does not intend the payment to constitute a new tenancy agreement the courts cannot spell out an agreement by unilateral act of a party to a contract. See Clarke v Grant and Another (1950) K.B. page 104. So it is clear in this case that the plaintiff had at no stage wanted a new tenancy agreement to be entered into. They had issued a writ on the 3rd August, 1979,; it cannot be said that the plaintiff wanted and intended that a new tenancy agreement should be created between the parties. It is my view that the tenancy had been determined on the 31st May, 1979, and no new tenancy agreement had been reached. In these circumstances the plaintiff succeeds.

I give judgment for the plaintiff that the plaintiff should recover possession of the premises situate at BC 199.

I have already dismissed the plaintiff's claim for K187 due to the confused evidence. The plaintiff has failed to prove that the amount of K187 is due and owing to them by the defendants.

The plaintiff is entitled to mesne profits from 1st June, 1979, to 25th November, 1981. I give costs to the plaintiff.

PRONOUNCED in open court this 25th day of November, 1981, at Blantyre.


N. S. JERE
JERE