Banda J.

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.528 OF 1985

BETWEEN:

S. MATUPA (MALE)..... PLAINTIFF

- and -

J. WALUBE (MALE)..... DEFENDANT

Coram: BANDA, J.

Ntaba of counsel for the plaintiff
Nyirenda of counsel for the defendant
Kalimbuka Gama, Official Interpreter
Longwe, Court Reporter

JUDGMENT

The claim in this case is for possession of property on Plot No. CC 258 Mudi Estate. The plaintiff is also claiming arrears of rent in the sum of K900 and there is a further claim for mesne profits at the rate of K450 per month with effect from 1st August, 1985, until possession is given up.

I should like at the outset to make an observation on some of the evidence which was adduced in this case. Evidence of allegations and counter-allegations allegedly made by either party against the other was led. There was also the evidence of meetings each party held with the officials of the District Malawi Congress Party in Blantyre and also there was evidence of meetings which the defendant held with certain members of the Police Force and the views they expressed on the merit or demerits of the dispute between the parties. I shall completely disregard all that evidence which I consider was totally irrelevant to the issue I have to determine in this case. The effect of that evidence was in my view essentially diversionary and a red herring.

The facts leading up to the 11th April 1985 are not greatly disputed. It would appear that in March 1985, the plaintiff approached Property Auctions who are Estate Agents to find a tenant for him for the property at Mudi Estate. He apparently met Mr. Jones Chirwa, a witness in this case, to whom he gave instructions. Mr. Chirwa said that those instructions were verbal and after their receipt he went to inspect the property. He stated that after inspection he wrote to the plaintiff to attend to internal decoration although he conceded that that was a duty of the previous tenant who was still in the house when he made his initial inspection. It was Mr. Chirwa's further evidence that he wanted the main house to be in a tenantable condition. He stated that the main house was substantially in a good condition except for minor touches to replace broken window panes, faulty electrical lamp holder, and a crack in the floor of the corridor. He stated that these were the repairs he was referring to in exhibit 13.

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After that initial inspection Mr. Chirwa advertised in the press indicating that the house was available for letting. He stated that among the many responses to the advert was the defendant's. He stated that the defendant came to his office on 11th April, 1985 and they, together, went to inspect the house at Mudi Estate. It was Mr. Chirwa's evidence that on the same afternoon the defendant confirmed that he was interested in the house and that he would take it. Mr. Chirwa stated that the defendant made his confirmation in writing. There can be no doubt that the confirmation to which Mr. Chirwa was referring is exhibit 14.

According to Mr. Chirwa the rental which was mentioned to the defendant and which the latter accepted to pay was K450 and that figure is mentioned in exhibit 14. Mr. Chirwa stated that the rental of K450 was on "is basis" and was not contingent upon other works being done to the property. Mr. Chirwa then drew up what he called a draft lease which the defendant signed but the plaintiff refused to sign because he felt that it was not sufficiently extensive and that he would first seek the opinion of his solicitors. It was Mr. Chirwa's evidence that the plaintiff did not give him specific terms to agree with the defendant. He stated that he sent the agreement to the plaintiff for his comments on its contents. He stated that he inserted a term of two years after he had found out from the defendant that that would be the period he would want to rent the house.

The defendant took occupation on the 1st May, 1985, and he paid rent for the month of May at the rate of K450 and in advance.

Mr. Ntaba for the plaintiff has submitted that it is essential for there to be a relationship of landlord and tenant that there should be a demise which is created by the execution of legal demise to the tenant. He contended that in that situation the Court looks to what term the landlord has created in favour of the tenant and what conditions are attached thereto. He submitted that in the present case a legal demise was lacking. He contended that it is on that basis that the plaintiff is disputing the existence of a two-year term between him and the defendant. Mr. Ntaba has pointed out that what has been produced is an agreement signed by the defendant at the offices of Property Auctions on 11th April, 1985 and which the defendant has sought to show that it was binding on the plaintiff. Mr. Ntaba has submitted that that document cannot bind the plaintiff who did not sign it. He contended therefore that there was no document or other memo signed by the plaintiff creating a term CERTAIN of 2 years. While conceding that the plaintiff gave instructions to Property Auctions to find a tenant, Mr. Ntaba submitted that where a landlord instructs an agent to merely find a tenant the agent has no authority to enter into a contract of lease.

Mr. Ntaba has further contended that as the defendant went into occupation on the 1st May, 1985, having paid rent for a period of a month, it is the entry into possession, Mr. Ntaba has argued, which created the relationship of landlord and tenant between the plaintiff and the defendant. He submitted that such tenancy in law is a tenancy at will and runs periodically in line with the period of rental which, in this case, was on monthly basis. He submitted therefore that a tenancy having been created in this manner the rights of the parties must be determined. He submitted that it is a fundamental obligation of the tenant to pay rent for the property occupied by him. He stated that apart from the rent for the month of May the defendant has not paid rent for any other month. He argued that the defendant's contention that the justification for the non-payment of rent was that the plaintiff had not carried out his obligations which were conditions precedent should be dismissed. He contended that the defendant went into the house after he had thoroughly inspected it and he immediately accepted to rent the property. He submitted that the repairs were minor as the defendant described them himself and that the fact that the period was short within which they were required to be carried out, before occupation, confirms his submission.

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Mr. Mtaba has also submitted that the refusal by the defendant to pay rent to the plaintiff was a breach which entitled the plaintiff to terminate the tenancy by giving proper notice. He contended that proper notice was duly given to the defendant commencing from 1st July, 1985. He submitted that for periodic tenancies the proper notice is the period of the rent.

Mr. Nyirenda has submitted that there was an agreement for a lease and that this is supported by the agreement which was signed by the defendant on 11th April, 1985. While conceding that the plaintiff did not sign the agreement, Mr. Nyirenda contended that that fact did not mean that some of the terms contained in the agreement were not agreed upon. Mr. Nyirenda pointed out that the agreement was drawn by the plaintiff's own agent and the issue of whether the agent had authority or not was a matter between the plaintiff and the agent and that as far as the defendant was concerned the agent had held himself out as having the necessary authority to prepare the tenancy. Mr. Nyirenda contended that from the facts of this case the plaintiff must have ratified the agent's action because he received the agreement before the defendant entered into possession and that the defendant had not been told by the plaintiff that the agent had no authority. Mr. Nyirenda further submitted that the plaintiff allowed the defendant to take occupation without saying that the tenancy agreement was unacceptable to him. Mr. Nyirenda has argued that the defendant took occupation on the basis that it was a two-year lease. Mr. Nyirenda submitted that the only reason the plaintiff gave for not accepting the lease was that it was not comprehensive enough. It was, therefore, Mr. Nyirenda's contention that at its most favourable interpretation to the plaintiff there was a consensus on the period if no agreement was agreed on the other terms. With greatest respect to Mr. Nyirenda, I find that it would be a contusion of facts to draw such a conclusion from the available evidence and say that although there was no agreement on other terms there was certainly an agreement on the period of the tenancy. I can find no facts which would support such a conclusion.

Mr. Nyirenda has further submitted that there was an undertaking regarding repairs and that it was upon that undertaking that the defendant indicated his willingness to enter and did enter into the tenancy agreement with the plaintiff. Mr. Nyirenda has contended that exhibit 14, a letter written by the defendant soon after he had inspected the property, clearly shows that the reason the defendant could not take occupation on the 11th April, 1985 was because of certain works which had to be done. He submitted that it was the defendant's understanding that by 1st May 1985 the paint work and repairs would have been made and that he would be required to pay a rental of K450. Mr. Nyirenda conceded that exhibit 14 does refer to minor repairs but he contended that the letter should not be looked at in isolation. He argued that the plaintiff agreed that there were major repairs to be done in April. He contended that by 30th April the agreed repairs and paint work had not been done. Mr. Nyirenda has submitted therefore that the defendant's version of the story should be accepted. He has argued that the defendant entered into the house because he had reached a position when he could not claim his money back and that the only choice left to him was to enter into occupation and renegotiate with the plaintiff while the repairs would be carried out when he was already in the house.

On the defendant's evidence it would appear that although major repairs to the house had not been done as undertaken by the plaintiff, the defendant nevertheless occupied the house. In my view that situation can only be described, for the moment, as curious.

I have carefully considered the submission which both counsel have made before me and I have considered the authorities which they cited to me. A considerable amount of evidence was adduced at this trial but in my view the main issue of contention between the parties and which I must determine is a simple one. That issue is whether the payment of rental at the rate of K450 was contingent on repairs being made to the house. There are, of course, other issues which are raised and which I will consider but the hub of the case and from which other issues spread is whether the payment of K450 rental was contingent on the repairs being made.

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After listening to counsel's submission and after reviewing the evidence, I am satisfied that there was no legal demise between the parties. The plaintiff cannot be bound by the agreement which he never signed and in which the agent had no authority to make. I find that the only instruction given to Mr. Chirwa of Property Auctions was to find a tenant for the plaintiff. In those circumstances, Mr. Ntaba's contention must be correct when he submits that Mr. Chirwa had no authority to enter into a contract of lease. The plaintiff cannot be bound by it; Vide Keen v. Mear (1920) 2 Ch 574 at 579. However, even if it is accepted and I am able to find that there was a binding contract of lease between the plaintiff and the defendant, it seems to me that a contract of lease per se does not amount to a legal demise. It is only an undertaking by the landlord that he will grant a lease of terms stipulated coupled with an undertaking by the leasee or tenant that he will take the property subject to a proper lease being drawn; Vide Swain v. Ayres (1888) 21 Q.B. 289. I am satisfied and I find that it was the entry into possession on 1st May 1985 by the defendant and his payment of one month rent which created the relationship of landlord and tenant between him and the plaintiff. That relationship which was then created between them was a tenancy at will which runs periodically in line with the period of the rental which in this case was on monthly basis. On that basis I am satisfied and I find that the defendant was properly served with a notice to quit with effect from 1st August 1985.

When there is an undertaking to repair in consideration of which a party agrees to take a tenancy of the premises the undertaking is a collateral agreement. The tenant will not necessarily be regarded as disentitling himself to damages by continuing to use premises pending the carrying out of repairs.

The contention by the defendant was that the agreed rental of K450 per month was only payable on condition that the plaintiff effected the repairs. The description by the defendant of the nature of repairs which were required to be done portrayed to the Court a picture of a house which was almost unhabitable. This Court was, however, invited by the defendant to visit the house and inspected it both externally and internally. After the visit to the property I find that the outside walls of the main house could do with a coat of painting so too the walls of the fence. The crack in the floor of the corridor did not measure up to the description given by the defendant. Although the crack was visible it was not large or as serious as the defendant tried to portray it. The pieces of paper on the wall of the defendant's present main bedroom could not in my judgment give the room a clumsy look. Indeed, the pieces of paper on the wall were so small that I could not believe they were the pieces of paper the defendant described as giving a clumsy look to the room. It is indeed curious to note that although the defendant described the room as clumsy because of the pieces of paper on the wall, he chose it to be his main bedroom. It is clear in my judgment that the pieces of paper on the wall did not offend his sight nor did they deprive him of the full enjoyment of the room. The repairs we found could not in my view be described, by any stretch of imagination, as major repair work. One toilet needed a handle which could achieve a full fulcrum; the second toilet only needed fixing the seat so that it does not move about but was being used. And stopping the leakage in the toilet could not be described as a major repair. The peeling of paint in the kitchen was not in my view a serious problem and I certainly did not accept the defendant's assertion that the condition of the kitchen floor was in the same condition as he found it 18 months ago. The defendant agreed that the kitchen is used everyday. The defendant's assertion therefore cannot be true.

There were gravel stones in the yard of the house and there was also an old engine in the garage. The engine was of a small size and it could not interfere with the parking of a car in it. If the defendant's contention is that the presence of the gravel stones in the yard deprived him full enjoyment of the facilities the house was able to offer then there was no evidence to show that he is a man who likes good surroundings about him. There was no evidence of any flowers and all flower beds in the yard were without any flowers. To be fair to the defendant he told the court that gardening was not a fascination of his.

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I am satisfied, on further view of the property, that there was a desperate need of painting the servant's kitchen and bathroom. It is conceded by the defendant that some repair work was done perhaps not competently but done nevertheless. Similarly, some painting work was done and there can be no doubt on the evidence before me that the plaintiff was willing to do the necessary repair and paint work. I am satisfied and I find that the repairs which were required to be done to the house were minor. I am also satisfied and I find that the defendant did not take occupation of the house in consideration of any undertaking to repair. The defendant on his own evidence was in desperate need of accommodation and he was not, in my judgment, in a position to insist on any collateral agreement for repair before he could take occupation. I find that the paint work and the repairs could not be completed because of the un-cooperative attitude of the defendant. I find that he refused a painter to draw water from his house and I find that he refused to move his car from the garage to enable a painter to do his work and that he rebuked the plaintiff for using the defendant's servant to off-load a bag of lime which was to be used in the painting of the house. I accept, of course, that the defendant's attitude was due to the events which occured on 12th June 1985 when the relations between the plaintiff and defendant became extremely bitter. In my view the defendant's attitude made it extremely difficult for the plaintiff to carry out the repairs and the paintwork. I am satisfied that if the relationship between the plaintiff and the defendant did not go bad the plaintiff would also have removed the gravel stones and the engine.

I am satisfied that the repairs were minor and they did not interfere with or diminish the defendant's full enjoyment of the facilities of the house. The defendant has continued to live in the house for the past 18 months. I am satisfied that the payment of K450 per month was not contingent on the repairs and painting work being done. If it were so the defendant, a very intelligent man, would have included it in his own letter which he wrote himself soon after he had inspected the property.

On the evidence before me I am satisfied that there is insufficient evidence to show that the defendant had put the house to improper use, nor was there any evidence to show wanton use of the house. But I am satisfied that the plaintiff have proved their case against the defendant on a balance of probability, on the claim for possession, arrears of rent and on the claim for mesne profits.

The defendant has counterclaimed against the plaintiff for specific performance that the plaintiff be ordered to carry the repair works. The defendant has also counter-claimed in the alternative for damages for deprivation of full enjoyment of the value of the premises. I have already found that the minor repairs which were required to be done to the house (and it should be noted some were done) did not deprive the defendant from the full enjoyment of the house as up to this time he continues to live in the house.

Specific performance is an equitable remedy and a party seeking it must have per-formed his obligation. "He who comes to equity must come with clean hands". The defendant was in breach of his fundamental obligation to pay rent and he cannot be heard to say that the plaintiff must carry out the agreement for repairs when he himself is in breach of his obligation. Indeed I have already found that there was no collateral agreement for repair. I would therefore dismiss the defendant's counterclaim with costs as having no merit. There will therefore be judgment for the plaintiff for possession of the property, for arrears of rent in the sum of K900 and for mesne profits at the rate of K450 from 1st August 1985 till possession is given up and costs of this action. It is ordered that the defendant should give up possession on or before the 12th January, 1987.

PRONOUNCED in open Court on this 12th day of December, 1986 at Blantyre.

R. A. Banda
JUDGE