IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.437 OF 1993

BETWEEN:

IQBAL BASHIR AND RAFIK A.K. MUSSA ..... PLAINTIFFS

- and -

UNIVERSAL MOTORS ..... DEFENDANT

CORAM: MWAUNGULU, REGISTRAR

Mhone, Counsel for the Plaintiffs
Chirwa, Counsel for the Defendant

O R D E R

This is an originating summons by a landlord against his tenant. The summons was first taken out on the 6th of April, 1993 before Justice Msosa. The application was made under Order 113 of the Rules of the Supreme Court. The Judge, on observing that the summons should have been before a Master, transferred the summons to me for hearing in Chambers. The summons came before me on April 20th, 1993.

On the 20th of April, 1993 when the matter came before me, it was quite apparent from the affidavit in support of the application that the application could not be made under the Order because the respondent was holding on to the premises after termination of a tenancy:

> "Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order" (Order 113 rule 1).

A tenant, or tenants, holding over after the determination of tenancy are clearly excluded from being summoned under the Order. Rather than dismiss the summons, I ordered that the

action be commenced on an originating summons in the normal manner. This was done.

It took quite sometime and hassle before the summons was heard. The Legal Practitioner, particularly the Legal Practitioner for the respondent, was pre-occupied with other matters in different Courts. This did necessitate some harsh remarks from the bench which of course caused some consternation at the bar. The matter was, however, concluded on the 10th of June. The ruling was reserved.

The summons, according to the Legal Practitioner for the plaintiff, asks for determination of two issues. I have to determine on the affidavit evidence before me whether the tenant is in breach of an agreement entered into in April, 1987 and renewed several times thereafter. If I find that there was such a breach then, secondly, I must decide whether the tenant must vacate the premises forthwith.

The gravemen of the plaintiffs' contention is two-fold. It is argued in the first place that in breach of Clause 3 of the lease the tenant is in arrears for rent for 3 months. It is further contended that the tenant sub-let, rented or disposed or alienated the premises or portions thereof to Discount Hardware Centre and Maulidi Garage without obtaining consent in writing from the plaintiffs in breache of Clause 10 of the lease. A finding on either of these breaches, it is prayed, entails an order for the tenant to vacate the premises.

The tenant denies that he is in breach of any covenant in the lease. According to the tenant, the arrears of rent should be off-set by monies the landlord owes to Zomba Wholesalers. It is also contended that there was no sub-letting or disposal of the premises as to amount to breach of the terms of the lease in so far as the other institutions were allowed to use the premises because they were part of the business operated by the tenant. Generally it was contended that even if there were breaches they occurred in the previous tenancy and could not be the basis of the action on a new tenancy which, according to the defendant, was entered after the expiry of the lease agreement.

It remains now to me to determine the questions raised in the summons. To do that it is important to chronicle the story as emanates from the affidavit evidence. The agreement between the parties is contained in the lease agreement of 1st April, 1987. The lease was for a fixed term of three years commencing on the 1st day of April, 1987 and terminating on the 31st day of March, 1990. Clause 9 of the agreement contains the usual provision for building, or alteration of premises. Clause 10 also contains another usual provision about leasing, renting,

disposal or alienation of premises. For reasons which will appear later, it is important to reproduce Clause 11 of the agreement:-

> "Should the tenant wish to renew this agreement, the tenant shall be required to give notice to the landlord of its intention so to renew, within a period of 90 (ninety) days after the expiry of this agreement. Such renewal shall be upon the same terms and conditions as are herein contained save and except that the rent covered by clause 3 of this agreement shall be subject to renewal from the date this agreement expires. And whereas the tenant wishes not to renew this agreement the tenant shall be required to give notice to the landlord of its intention not to renew, within a period of 90 (ninety) days after the expiry of this agreement, such notice period shall be covered by the same terms and conditions as are herein contained."

There seem to have been no problems between the landlord and the tenant in the early part of the agreements. There is no evidence of what happened at the end of the first term, that is 31st of March, 1990. The lease was, however, renewed on the 11th of March, 1992 for expiry on the 31st of March, 1993.

Problems began to show shortly after this renewal. On the 1st of May, 1992 the landlord wrote to the tenant complaining about unauthorized construction, renovations and additions that were taking place at the premises. There was also, subsequently, reference to use of premises by other institutions. There was acrimonious correspondence thereafter. The matter was, however, resolved very constructively on the 14th of September, 1992. In the letter to the tenant of that date, the landlord conceded that the construction that was taking place was of a minor nature. He in effect approved of it with a request that in future such alterations or constructions should be with prior consent of the landlord. By the same breath the landlord conceded Asphal Manufacturing Company was the tenant's Company dealing in minor woodwork by permission of the tenant. It may be convenient to dispose of this matter at this juncture. In my judgment, the second contention of the landlord that there was breach by sub-letting or renting out of the premises is untenable in view of the way the matter was resolved in the correspondence that passed between the landlord and the tenant. I think I am stating the law correctly when I say that a covenant not to assign or underlet is not broken simply because a tenant has allowed another, without giving that other legal possession, to use the premises (Chaplin v. Smith (1926) 1 KB 198). In this case Lord Justice Bankes cited the judgment in Jackson v. Simons where it was said:-

> "The defendant moreover retained the legal possession of the whole premises at all material times and, as pointed out by Romer, J. in Peebles v. Crosthwaite, a lessee who retains such possession does not commit breach of the covenant against parting with possession by allowing other people to use the premises."

In my opinion that is a correct statement of the law. It being conceded that the tenant here retained overall possession of the premises and only allowed another business of his to use the premises it cannot be said that he breached the covenant not to sub-let the premises. The way, therefore, the matter was resolved between the landlord and the tenant is impeccable. The tenant cannot be said to be in breach of the lease agreement.

On 10th February, 1993 there is a letter from the landlord referring to a prior discussion on the possibility of renewing the lease when it expires on the 31st of March, 1993. In the spirit of the lease agreement, the rental is revised upwards. The annual rent is payable at once. The letter is written to the tenant who replies on the 5th of March, 1993 that the revised rent is wholly unreasonable with an indication that the tenancy agreement could be renewed only if the proposed rental was revised. For the first time it is mentioned that the landlord has not paid Zomba Wholesalers. On the 26th of March, 1993 the landlord wrote back. There is again reference to some discussion prior to the letter. In the letter, however, the landlord informs the tenant that what is drawn from their discussions and correspondence is that the tenant does not want to renew the lease after the 31st of March, 1994. There was an offer during the discussion that the tenant should be allowed 3 months in which to remove his personal businesses from the landlord's premises. In the letter the landlord offers the 3 months but at the rental of K8,000.00 per month. The tenant is reminded that the rentals for 3 months have not been paid. On 30th of March, 1993 the tenant wrote back to the landlord requesting for a period of 6 months at the previous rental of K3,750.00 per month. The arrears of rent are indicated to be paid when the landlord has issued a cheque for amount owing to Zomba Wholesalers. This is followed by a final letter from the landlord intimating that since the tenant in his letter of 30th of March, 1993 shows that he does not wish to renew the tenancy at the revised rental the tenancy terminated on the 31st of March, 1993. The landlord also refers to the fact that rentals had not been paid and therefore he is entitled to terminate the agreement which in the alternative he did. In effect the letter was also a notice to the tenant to vacate the premises by 5th April, 1993. A similar notice was sent by the landlord's lawyer on the 2nd of April, 1993.

At this stage it may be convenient to look at the other aspect of the breach, that is to say the rentals had not been paid. On the affidavit evidence the rentals have, in fact, not been paid for 3 months. The tenant has refused to pay until the landlord pays other monies owing to Zomba Wholesalers. I have been at pains to see the connection between a claim for rent by the landlord and a claim against the landlord by Zomba Wholesalers. Universal motors is a partnership. Presumably Zomba Wholesalers is another partnership. Most certainly the money the tenant is claiming is not due to Universal Motors who are the tenant in this action. Assuming whatever is owed could off-set a claim for rent by the landlord, I fail to see how a claim by a third party against the landlord could be a justification for a tenant not to pay arrears of rent. I would hold myself that on the affidavit evidence as is before me the tenant is in breach of the lease agreement and that he has not paid the rentals for 3 months.

It now remains to consider the legal effect of the facts as appear in the affidavit evidence. I think one must start from the premise that this was a lease for a fixed term. Such a tenancy terminates automatically upon expiration of the agreed period. In principle there is no need for a notice to quit in case of a lease for a definite term (Cobb v. Stokes (1807) 8 East 358). The lease agreement, as we have seen, was renewed for up to 31st of March, 1993. The renewal of 11th of March, 1992, in my opinion, does not create a yearly tenancy. A tenancy for a year certain is created. The period is still fixed as from the 1st of April, 1992 to the 31st March, 1993. The tenancy, therefore, was still for a fixed term. The tenancy automatically finished on the 31st of March, 1993. There was no requirement on the part of the landlord to issue a notice to quit to determine the tenancy (Cobb v. Webb, ibid). The tenant should have left the premises by mid-night of 31st March, 1993.

Against this it is contended by the tenant that there was a new tenancy agreement on construction of Clause 1(b) of the agreement and the letter of the defendant to the plaintiff dated 30th of March, 1993. As we have seen, that letter and the letters surrounding it are evidence more of no agreement than agreement. In my judgment, there was no tenancy created between the landlord and the tenant to expire in 1994. The tenant was insisting for continuation for 3 months or 6 months at the previous rentals when the landlord was insisting for continuation for 3 months at different rentals. It would be preposterous to infer an agreement where there was such chasm on the rentals. It is important to state that the agreement provided that any renewal of the lease would entail review of the rentals. The attempt to create a new tenancy did not materialize.

This leads to the second aspect of the defendant's contention. This contention is based on Clause 11 of the agreement. The provision sounds odd for it requires the tenant to apply for renewal within 3 months of the expiry of the agreement. The defendant argues that he had 3 months from the date of the expiry of the lease in which to notify the landlord of his intention to renew the lease or not to renew the lease. That notice had not been given by the time of the action. It was, however, obvious from the position taken both by the landlord and the tenant by 30th March, 1993, a day before the expiry of the lease, that there would be no renewal. Consequently, the lease expired ,as a matter of course, on 31st March, 1993. Probably the tenant still had a right to renew the lease. In my judgment, that right could not be exercised where the landlord had after the expiry of the lease indicated the lease was at an end and taken legal steps to claim possession of the premises, particularly so when it being a lease for a fixed term. There was no obligation to determine the tenancy by service of notice to quit.

The tenant was asking for extension of time in which to remove the business from the premises. In my judgment, that would have been the case if there was a requirement to give notice to quit, It is not unusual even for a lease for a fixed period to provide for notice to quit. By operation of law, therefore, the agreement expired on 31st March, 1993. It is pedantic for me to consider the reasonableness of the 3 months or 6 months requested by the tenant.

I would, therefore, find that there was breach of the tenancy agreement in relation to the arrears for rent. There was no breach in relation to the covenant not to underlet or sub-let. This being a lease for a fixed term the lease automatically expired on the 31st of March, 1993. The tenant should have left by mid-night of the 31st of March, 1993. The landlord is entitled to immediate possession of the premises.

Costs to the plaintiff.

MADE in Chambers on this 26th day of August, 1993, at Blantyre.

D.F. Mwaungulu
REGISTRAR