IN THE HIGH COURT FOR ZAMBIA **2011/HB/06**

AT THE DISTRICT REGISTRY

HOLDEN AT KABWE

(CIVIL JURISDICTION)

B E T W E E N:

EDWARD PHIRI T/A SHABBACH FASHIONS AND GENERAL DEALERS **APPLICANT**

AND

DR. JOSEPH CHIPETA **1ST RESPONDENT**

ANNA CHIPETA **2ND RESPONDENT**

SUED AS ADMINISTRATOR OF ESTATE OF THE LATE (DR. ARTHUR PETRO CHIPETA)

Before the Honourable Madam Justice M.S. Mulenga in Chambers on the 2nd day of March 2011.

For the Applicant: Mr. T.S. Ngulube
of Chisunka and Company

For the Respondent: In person

JUDGMENT

CASES CITED

1. ZIMCO PROPERTIES LTD V. DINALA RADDY ENTERPRISES T/A EMPIRE GHEMA (1989) SR 114
2. APPOLLOS REGRIGERATION V. FARMERS COOPERATIVE LTD (1985) ZR 182
3. BILES V. CAESAR (1957) IW.L.R.156

The matter was brought by way of Originating Notice of Motion by the Applicant seeking the orders that:-

1. He be granted a new tenancy by the court of shop No. 3 at 693 Machile Street, Kabwe.
2. He be refunded the difference between old rentals and new rentals that were paid in anticipation of renovations that were to be made to the landlord but which were not done.
3. An injunction restraining the Respondents interfering with the tenancy or from evicting him pending the determination of the main matter.
4. Costs for the Application.

The Applicant filed in an affidavit in support of Originating Summons. An interim injunction was granted pending the determination of the main matter.

The facts that are not in dispute are that the Applicant was a tenant of shop No. 3 at Stand693 Machile Street, the premises being owned by the late Dr. A. Chipeta who also run a private clinic on the premises. The tenancy commenced sometime prior to November, 2007 and was a yearly tenancy. In January, 2010 the Applicant signed a 10 year tenancy agreement with the late landlord on 2nd January, but this was shortly after negated by the landlord to revert back to yearly tenancy. The two other tenants agreed to the reversal and signed the new yearly tenancy agreements while the Applicant refused to sign citing some unfavourable terms such as the requirement for a security deposit. He however,

accepted the reversion to the yearly tenancy in principle as can be seen from the conduct of both parties and the subsequent request for renewal of yearly tenancy.

In May, 2010, Dr. A. Chipeta died. The Respondents as co-administrators of his estate took over the management of both the clinic and the entire property, the 1st Respondent also being a medical doctor. In July, 2010 the Applicant was given a 6 months notice of termination of tenancy effective 20th January 2011 and requesting him to give written indication within 2 months on whether or not he was willing to give up possession of the premises on the stated date. The Applicant verbally agreed to vacate on the date stated in the notice but later purported to indicate willingness to continue and sent a request for a new tenancy in January, 2011 which the Respondents rejected citing reasons given in the notice to terminate. I must state here that the request was invalid as the Act specifically provides in Section 6 that a tenant cannot request for a new tenancy where the landlord has already given notice to terminate under Section 5. The only available recourse in such cases is to apply to the court for grant of a new tenancy.

On 10th January, 2011, the Applicant through his advocates attempted to pay rentals for the period January to March, 2011, which rentals were rejected by the Respondent save for K800,000 to cover 1st to 20th January, 2011 in line with the notice. The Applicant then brought the application

for the court to grant him a new tenancy which is now the subject matter.

At the hearing, both parties relied on their affidavits and made oral submissions elaborating on the affidavits. Counsel for the Applicant submitted that the applicant should be granted a new tenancy in accordance with the Landlord and Tenants (Business Premises) Act Chapter 185 which was governing the Applicant and Respondents relationship. He further argued that tenancy could not be terminated as the notice did not conform to the Act which required it to be given under Section 11(1)(e) and not Section 5 and the reasons advanced were not recognized by the Act. He cited the cases of **ZIMCO PROPERTIES LTD V. DINALA RADDY ENTERPRISES T/A EMPIRE GHEMA (1989) SR 114** and **APPOLLOS REGRIGERATION V. FARMERS COOPERATIVE LTD (1985) ZR 182** as supporting the arguments on the reasons for termination and notice under Section 5, respectively and that the valid reason would have been that the landlord desired to dispose of the whole premises, which fact was not clearly stated by the Respondents. He further argued that the 10 year tenancy was still valid and the refusal by the Applicant to sign a unilateral agreement was not a ground for termination of tenancy and that there was no evidence to show persistent delay in paying rentals but that the Applicant had been commended in 2009 for timely payment of rentals. I have already considered the issue of the 10 year tenancy above and have found that the parties had negated it and what was governing their relationship was a yearly

tenancy. I will therefore not delve into the arguments by the respondents on this aspect.

The first Respondent submitted that when he personally served the notice to terminate tenancy in July, 2010, the Applicant verbally agreed to abide by it and did not give a written notice within 2 months on whether he was unwilling to give up possession of the premises. The three reasons given in notice were:

1. Persistent failure and delay in paying rentals based on exhibited bank statement and receipts showing a pattern of late payment of rentals during the whole of 2010 and that the letter by the late Dr. Chipeta on timely payments related to that particular period not in issue.
2. The Applicant's refusal to acknowledge the landlords authority through refusal to sign a new tenancy agreement despite the Respondents waiving the requirement to pay the security deposit. He further added that the Applicant had been confrontational.
3. Intention to use the Applicants premises as part of the clinic expansion process being the shop immediately adjacent to the clinic and that the Applicant was informed of this intention when served with the notice.

Upon consideration of these grounds and the facts on record, I concur with the Applicants counsel that the second ground is not valid and the third ground has not been sufficiently proved under both Section 11(1) (e) and (g). The only valid ground therefore is the first one which falls

under Section 11(1)(b). The grounds do not need to be outlined strictly as they appear in the Act so long as they can be sufficiently identified as falling within any of the grounds specified in Section 11 according to **BILES V. CAESAR (1957) IW.L.R.156** which considered an identical provision to our Sections 11 and 5. This ground on its own was adequate to challenge this application as it has been sufficiently proved.

I am therefore satisfied that the notice to terminate tenancy was valid and met the requirements of both Sections 5 and 11. I will thus not proceed to assess in detail the arguments related to the grounds of termination and the proof of breach of the terms of the tenancy due to the finding that this application cannot be entertained as it is in breach of Section 10 of the Act. Section 10(2) provides as follows:

> "(2) **where such an application is made in consequence of a notice given by the landlord under Section five, it shall not be entertained unless the tenant has duly notified the Landlord that he will not be willing at the date of termination to give up possession of the property comprised in the tenancy.**

Subsections 3 and 4 of Section 10 further provide that no application under Section 4(1) shall be entertained unless it is made not less than 2 months nor more than 4months after giving of the Landlords notice except with prior permission of the court.

This particular application was made almost 6 months after the notice was granted and is therefore invalid and cannot be entertained. Even considering the fact that I grant permission under Section 10(4), this application can still not be entertained by reason of subsection 2 as the Applicant never notified the landlord on his unwillingness to give up possession on the date of termination. The term "dully notified" in sub section 2 means in accordance with the requirements of the Act, which in this case, is within 2 months after being served with the notice. The evidence on record is that the Applicant did not give any written or verbal indication of his unwillingness within the required period and only gave the purported notice through his advocates in a letter dated 17th November, 2010, which was over five (5) months after being given notice.

Therefore, the application for the court to grant a new tenancy is dismissed for being invalid for the reasons stated above.

The second order being sought by the Applicant is that he should be granted the difference between the old and new rentals paid in anticipation of the renovations to be made by the landlord. Although the Applicant made this claim in his affidavit and the issue was not responded to by the Respondents, I find on the documents on record that there is nowhere were such an agreement or arrangement is alluded to. What the documents show, particularly the letters from the late Dr. Chipeta exhibited by both parties show that the rentals were being increased generally and there is no

mention of the increments being attributed or tied to the renovations to be made. I therefore find that the Applicant has not proved the basis on which this court should grant him that order and I accordingly decline to make such an order as prayed.

In line with Section 23, I order that the tenancy will continue on the current terms for 3 months with effect from today to give the Applicant time to find alternative premises. The interim injunction is hereby set aside.

I award costs to the Respondents in this action and in default of agreement between the parties, the same should be taxed.

Leave to appeal is granted.

M.S. Mulenga
JUDGE