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

**2014/HPC/0228**



**BETWEEN:**

**DIGITECH COMPUTER SCHOOL LIMITED**

**PLAINTIFF**

**AND**

**PAMODZI UNIVERSITY LIMITED**

**DEFENDANT**

*Before the Honourable Mr Justice W. S. Mweemba in Chambers at Lusaka.*

*For the Plaintiff : Mr K. Nchito – Messrs N. Makayi & Co.*

*For the Defendant : Mr P. Songolo – Messrs Philsong & Partners*

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## **J U D G M E N T**

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### **WORKS REFERRED TO:**

- 1. Meggery & Wade. The Law of Real Property 6<sup>th</sup> Edition.*
- 2. Woodfull, Landlord & Tenant Vol.1, 27<sup>th</sup> Edition.*
- 3. Treitel, Law of Contracts, 13<sup>th</sup> Edition.*

### **CASES REFERRED TO:**

- 1. Cheall v Association of Professional Executive Clerical and Computer Staff (1982) ALL ER 884.*
- 2. Mwaiseni Properties Ltd (1983) Z. R 40.*
- 3. Rodgers Ponde & 4 Ors v ZSIC (2004) ZR. 151 (SC).*
- 4. BOC Gases Plc v Phesto Musonda (2005) Z.R. 119. (SC).*

5. *ZIMCO Properties Ltd V Hickey Studios Ltd & Marryat & Scott Zambia Ltd (1988-1989) ZR 181.*
6. *Owen V Gould (1965) 2 QB99.*
7. *Hudson V Cripps (1896) 1 Ch. 265.*

By Amended Writ of Summons taken out on 29<sup>th</sup> January 2015, the Plaintiff is claiming the following:-

- (i) *Immediate payment of K440,000.00 the amount owing which is due and payable.*
- (ii) *Damages for breach of contract to grant a Lease.*
- (iii) *Damages for loss of rental income.*
- (iv) *Damages for loss of business.*
- (v) *Interest.*
- (vi) *Costs.*

According to the Amended Statement of Claim, by a Lease Agreement dated 21<sup>st</sup> May 2012, entered into by the parties it was agreed that the Defendant would lease the Plaintiff's property known as Digitech College situated at Stand No. 10876, Downtown Lusaka.

However this Lease Agreement was not registered in accordance with S4 of the Lands and Deeds Registry Act and therefore culminated into a "Contract to Grant a Lease" when the Defendants took possession of the premises with the consent of the Plaintiff and paid the rental.

This Contract to Grant A lease was for a period of 5 years and the Rent was to be paid in the following manner:

- i. *From June to December 2012, the rental was fixed at K60,715 monthly.*
- ii. *From January to December, 2013 the rental was fixed at K95,000.00 per month.*
- iii. *From January to December 2014 the rental was fixed at K95,000.00 per month.*
- iv. *For the remaining 2 years the rental was to be reviewed by the parties.*

It is also stated that the Defendant only paid K30,000.00 towards the rental in 2012 and that it had now accrued to K440,000.00 which the Defendant had refused to pay.

Further that at the time of entering into the Contract to Grant a Lease, the Defendant knew that it was reasonably expected to pay the agreed rental on the agreed date of each month.

That in breach of the Contract to Grant a Lease, the Defendant neglected to pay the rent when it fell due and the Plaintiff wrote several letters to the Defendant demanding that the rent due be paid immediately.

It is also stated that by a letter dated on or about 9<sup>th</sup> October 2012 the Defendant wrote to the Plaintiff and made an



undertaking to pay the rent but despite this, the Defendant had failed to pay the sum owed.

Moreover that the Defendant had since vacated the premises despite having signed a 5 year Contract to Grant a Lease and the Plaintiff had not been able to find a new Tenant.

The Defendant filed an Amended Defence on 11<sup>th</sup> February, 2015 where it was averred that although the parties had entered into a Written Lease Agreement on 21<sup>st</sup> May, 2012 it only came into effect on 1<sup>st</sup> June, 2012 for a period of 5 years.

That due to various breaches of the Contract to grant a Lease the rentals payable were varied to take into account the breaches and failure by the Plaintiff to allow the Defendant any peaceful enjoyment of the demised premises.

Further that due to the said breaches, the rentals for the period 1<sup>st</sup> June 2012 to December, 2012 were reduced to ZMW30,000.00 per month and that the agreement was subsequently terminated without notice barely 5 months into the 5 year Contract to Grant a Lease by the Plaintiff in October 2012 when it allowed Barclays Bank Zambia Plc to take over the demised premises as mortgagee in possession.

It is also stated by the Defendant that it had never ever refused to settle the rentals due to the Plaintiff whenever it had peaceful

enjoyment of the premises and that when it did it was due to the Plaintiff's breaches of the contract to grant a lease as follows:

- (i) *Leasing the demised premises to other organisations among others churches and collecting rentals from them.*
- (ii) *Hiring out the main hall of the demised premises to the Tanzanian Embassy.*
- (iii) *Collecting cash meant for the Defendant from programs conducted on the demised premises by University of Zambia, Ridgeway Campus.*
- (iv) *Continuing to collect rentals from the use of the Restaurant when it was part of the demised premises.*
- (v) *The Plaintiff's continued use of offices on the demised premises without paying rent.*
- (vi) *Failure to remove material and other office furniture belonging to the Plaintiff left in two offices on the demised premises which led to the failure by the Defendant to make any use of them during the period of the Contract to Grant a Lease.*
- (vii) *Taking over the demised premises during the subsistence of the Contract to Grant a Lease by a Mortgagee in Possession namely Barclays Bank Zambia Plc for the debts of the Plaintiff thereby leaving the Defendant with no quiet enjoyment of the demised premises.*

It is also averred that the Advocates of the Plaintiff in a letter to Barclays dated 6<sup>th</sup> May, 2014 admitted that the Plaintiff was in serious breach of the Contract to Grant a Lease with the Defendant when they allowed Barclays to take over the property

with the result that the Defendant was entitled to refuse to pay the rentals to the Plaintiff.

It is also stated that the Defendant never agreed to pay the sums claimed by the Plaintiff and that it agreed to engage the Plaintiff to discuss the various breaches itemised in the said letter of 9<sup>th</sup> October, 2012.

Moreover that the Defendant only made an undertaking to pay a fair reduced rental given the itemized breaches and that it declined to pay anything when it realised that the Plaintiff had completely failed to honour its end of the bargain which was to provide a conducive environment for education purposes as agreed or in default drastically reduce the rentals to reflect the breaches of the Contract to Grant a Lease.

The Defendant also averred that the Plaintiff terminated the Contract to Grant a Lease with the Defendant without notice when it allowed Barclays as Mortgagee to in possession to take over the demised premises thus the Defendant could not be responsible for the Plaintiff's failure to find a replacement tenant.

The Defendant also counterclaimed and stated that barely 5 months into a five year Contract to Grant a Lease, the Plaintiff terminated the said Contract without Notice to the Defendant in October, 2012 by allowing Barclays Bank Zambia Plc to take over the demised premises as Mortgagee in possession.



Further that by reason of the aforesaid inconsistent breaches to the Contract to Grant a Lease and the subsequent termination of the same contract by the Plaintiff without notice, the Defendant had suffered loss and damage and now counterclaimed for:

- (i) Damages for breach of the common law Contract to Grant a Lease between the Plaintiff and the Defendant.*
- (ii) Damages for inconvenience.*
- (iii) Damages for loss of business.*
- (iv) Six months rentals in lieu of notice.*
- (v) Interest on all sums found due to the Defendant.*
- (vi) Costs.*
- (vii) Any other relief that the Court shall deem fit.*

The Plaintiff filed a Reply and Defence to the Counter claim on 24<sup>th</sup> April, 2015. In replying it stated that there had been no agreement to reduce the rentals for the period June 2012 to December, 2012 or any reduced rental for any period or at all.

The Plaintiff also denied all the alleged breaches stated in the Defence of the Defendant. The Plaintiff further stated that the Defendant had deliberately misrepresented the context in which the letters of 11<sup>th</sup> October, 2012 as well as that of 6<sup>th</sup> May, 2014 were written.

Moreover that Barclays actually took over the premises on 14<sup>th</sup> September, 2014. It was also stated that there was no agreement between the parties to discuss the various breaches or any

breaches at all. The Plaintiff also responded and stated that it did not terminate the Contract to Grant a Lease with the Defendants and it did not allow Barclays Bank as Mortgagee in Possession to take over the premises at the material time.

Whilst in its Defence to the Counterclaim, the Plaintiff averred that it did not terminate the Contract with the Defendant as Barclays Bank did not take over the premises as Mortgagee in Possession at the material time.

Moreover that there was no breach of contract and the Defendant vacated the premises on its own volition. That as a matter of fact the Defendant had not suffered any loss or damage and was not entitled to any of the reliefs counterclaimed or any relief or at all.

During trial on 26<sup>th</sup> May, 2015, the Plaintiff filed one Witness Statement on record. The Plaintiff's Managing Director, Mr Sambu Mumba testified as PW1. He stated that the Plaintiff signed a Lease Agreement with the Defendant which commenced on 1<sup>st</sup> June, 2012 and the monthly rentals were K60,715 from June to December, 2012, K95,000.00 from January, to December, 2013 and K95,000.00 from January to December, 2014.

He also stated that the Defendant only paid K30, 000.00 towards the rentals which was not in accordance with the Lease Agreement. On October, 4<sup>th</sup> 2012 the Plaintiff wrote to them expressing its dissatisfaction in the manner they were failing to



pay rent and on 9<sup>th</sup> October, 2012 the Defendant responded and stated that Pamodzi University agreed to pay rentals in full in two batches in the sum of K125,000.00 in June and K30,000.00 in December, 2012 which translated into the sum of K60,715 per month.

PW1 testified further that on 22<sup>nd</sup> October 2012 Hammer and Tongues Auctioneers advertised the Plaintiff property as repossessed and on sale. However the property was only repossessed by Barclays on 10<sup>th</sup> September, 2014.

It was also his evidence that on 15<sup>th</sup> November, 2012 Digitech's debt collectors wrote to Pamodzi and indicated that Pamodzi was aware at all times that the rentals were required to repay the loan at Barclays Bank and their failure to pay put Digitech in a difficult position with the Bank.

Further that by a letter dated 26<sup>th</sup> November, 2012 the Defendant acknowledged owing the Plaintiff the sum of K210,000.00 and made an undertaking to start paying the money from 30<sup>th</sup> January, 2013 in monthly instalments of K10,000.00.

It was also his testimony that the Defendant's position that the Agreement had terminated barely 5 months into the 5 year contract in October, 2012 to allow Barclays Bank to take over the demised premises as Mortgagee in possession is false. Barclays Bank only took over the premises as Mortgagee in possession on

10<sup>th</sup> September, 2014 as shown by the Writ of Possession in the Bundle of Documents.

In Cross Examination PW1 told the Court that the Contract to Grant a Lease was for an initial period of 2 years from June 2012 and renewable. It was part of the agreement that the Defendant would have peaceful enjoyment with the exception of few offices.

The excepted offices were the cafeteria, internet café and Manager's office. Moreover, that when it came to exceptions there was an email to one of the Defendants Directors.

PW1 also stated that the Plaintiff continued using the cafeteria as initially agreed before the Lease Agreement was signed. Further that the Lease Agreement was only based on the remaining offices that is why they did not include it in the lease. He also added that the main hall was part of the Leased premises and that it was never leased to the Tanzanian Embassy.

Moreover that the University of Zambia never used their premises but that their goods were stored in the excepted rooms. In addition that before the Lease Agreement was signed the Defendant was aware that there were 2 churches that met on Sundays and had paid rentals up to December, 2012 and these had been informed of the tenancy agreement with the Defendant and they were to vacate the premises at the end of December, 2012.

It was also PW1's testimony that it had been verbally agreed with the Defendant that there was no need to kick them out as their activities would not disrupt the running of the school. It was agreed that after December, 2012 the Defendant should begin getting rent from the Church.

Further that the issue of giving notice to the churches in June, 2012 had been discussed with the Defendant who took possession of the premises but the churches had paid in advance although they did not credit the Defendant with the rentals paid by the Church.

He also testified that Barclays Bank did not take over the Premises although there was an advert that the Bank had taken it over. He also acknowledged that if he was running a University and a Bank advertised taking it over he would be apprehensive as prospective students would stay away.

He further stated that the Defendants were aware of the pending issues with Barclays Bank. That this had not been included in the lease agreement but structured the payment to accommodate indebtedness with the bank.

PW1 also testified that the rental for the first 7 months was to offset a Consent Judgment that the Plaintiff had entered into with Barclays Bank. Moreover, that the Defendant was aware of this and its payments were meant to cover what was due from the Plaintiff to Barclays Bank.



PW1 further stated that Barclays Bank did not give notice to the Plaintiff about taking over the premises and the Defendant was not a party to the Consent Order. It was also his evidence that the advertisement by Barclays took them by surprise.

Moreover that the Defendant was also not given any notice about the Bank's impending taking over of the premises but that the Defendant left the premises in January 2013 without giving notice.

He also stated that the Defendant did not negotiate any reduction in rentals and that he had expected that the Defendant would remain on the premises because the arrears of rentals were to be paid to Barclays Bank. Further that the Bank only took over the premises two years after the advertisement.

It was also his testimony that the Defendant did not leave the premises in October, 2012.

In Re- examination, PW1 told the Court that the period of the lease was June 2012 to December 2016 which is a period of 5 years. Further that the excepted rooms were the Cafeteria, the Internet Café and Manager's office.

Moreover that income from these was for payment regarding utilities as the income from the Defendant was to be paid to Barclays Bank. He also confirmed that the income from the

churches was collected in April, 2012 but the Defendant only came in June, 2012.

The Defendant equally only filed one Witness Statement from David Nyimbili a School Manager at Lake Road PTA School. DW1 told the Court that on 21<sup>st</sup> May, 2012 the Defendant entered into a Contract to Grant a Lease with the Plaintiff for a period of 5 years from 1<sup>st</sup> June, 2012. It was an express agreement that the premises were leased out strictly for educational purposes.

He testified that the initial rental for the property was agreed to be ZMW60,715.00 per month to last for a period of six months from 1<sup>st</sup> June to 1<sup>st</sup> December 2012.

However, after only two months and due to various breaches of the said Contract to Grant a Lease, the rentals payable were revised downwards to account for breaches such as the leasing and hiring out of part of the demised premises to church and other organisations, collecting rentals and cash meant for the Defendant, continued use of offices after leasing them out to the Defendant, failure to remove the Plaintiff's furniture from the demised premises and failure by the Plaintiff to allow the Defendant any peaceful enjoyment of the demised premises whatsoever.

That due to this the rentals payable were reduced to K30,000 monthly from 1<sup>st</sup> August, 2012. That despite this reduction in rentals problems still continued and the last straw was the action

by Barclays Bank Zambia Plc who took over the premises as Mortgagee in Possession thereby effectively terminating the Agreement to Grant a Lease without giving proper notice.

He also testified that Barclays took over the property as mortgagee in possession and issued notices in the newspaper to that effect which negatively affected the standing of the University as most students concluded that it was closed or had serious financial problems which led not only to loss of reputation but also income for the Defendant.

That the challenge the Plaintiff was having with Barclays Bank over the demised premises was even acknowledged by the Plaintiff in a letter dated 11<sup>th</sup> October, 2012.

Further that the challenges posed by the action taken by Barclays made it impossible for the Defendant to continue with the agreement and it left the premises in October 2012 having accrued a bill in the sum of ZMW211,430.00 made up as follows:

<i>June Rental</i>	<i>ZMW60,715.00</i>
<i>July Rental</i>	<i>ZMW60,715.00</i>
<i>August Rental</i>	<i>ZMW30,000.00</i>
<i>September Rental</i>	<i>ZMW30,000.00</i>
<i>October Rental</i>	<i>ZMW30,000.00</i>
<b><i>Total</i></b>	<b><i>K211,430.00</i></b>



DW1 also testified that after further consideration of the relationship and experiences suffered by the Defendant, it refused to settle the amount owing as it was realised that the Plaintiff had completely failed to honour its end of the bargain namely to provide premises and a conducive environment for education purposes as agreed.

In Cross examination, DW1 stated that he was the Director of Pamodzi University Limited and that the rental was K60,715.00 per month payable three months in advance.

Further that they were to pay K125,000.00 in June, 2012 at the signing of the contract and that the agreement to revise the rental downwards was verbal. That there was no proof that the Plaintiff was collecting rentals from church organisations.

Moreover that rentals were reduced to K30,000.00 monthly from 1<sup>st</sup> August, 2012 and that as of 15<sup>th</sup> November, 2012 the Defendant was still in possession of the leased premises.

It was also his testimony in cross examination that it would not be wrong to state that Barclays Bank only took possession of the premises on 10<sup>th</sup> September, 2014 and that no one asked the Defendant to leave the premises.

He further stated that the Defendant left the premises between November and December 2012 and that he did not see anyone

from Barclays who came to take over the property. That the advert by Barclays did not mention Pamodzi University.

Moreover that the letter dated 11<sup>th</sup> October, 2012 was written because the Defendant had not paid the rentals due and that the property was not auctioned in October, 2012.

He also acknowledged that the Defendant owed the Plaintiff the sum of K210,000.00 and that they did not pay the instalments of K10,000.00 monthly as stated in the letter dated 26<sup>th</sup> November, 2012.

He also stated that the Defendant failed to pay the debt because of financial challenges and that the counterclaim against the Plaintiff was not an afterthought as it had been raised before these proceedings.

In Re examination, DW1 told the Court that he admitted that the Defendant owed the Plaintiff K211, 430.00.

Counsel for the Plaintiff made some written submissions where he cited the learned authors of Woodfall Landlord and Tenant Vol.1 (27<sup>th</sup> Ed) at page 132 who define a Contract to Grant a Lease or Agreement to Grant a Lease as:

***“A contract for Lease is an Agreement enforceable by Law whereby one party agrees to grant and... to take Lease. The expression ‘Contract for Lease’ and***

***'Agreement for Lease' are usually interchangeable but 'Contract for lease' is preferred as more definite Agreement frequently meaning one of many stipulations in a Contract***".

Counsel also cited Meggary and Wade, the Law of Real Property (16<sup>th</sup> Ed) at page 753 who have opined the following regarding a Lease:

***"Although a Lease is usually an Estate, it is a Contract. The consideration for the grant of a Lease is normally the payment of rent"***.

Counsel then contended that there was a Contract to Grant a Lease between the Plaintiff and the Defendant. The Defendants in the Lease Agreement agreed to pay rentals of K60, 715.00 for an agreed period until it was reviewed. However, the Defendants had only paid K30, 000.00 towards the agreed rentals.

It was also Counsel's argument that the Defendant was in breach of the Agreement to Grant a Lease and that the learned authors of Treitel Law of Contracts, 13<sup>th</sup> Edition at paragraph 17-049 stated the following regarding breach:

***"A breach of Contract is committed when a party without lawful excuse fails or refuses to perform what is due from him under the Contract, or performs defectively or incapacitates himself from performing"***.



According to Counsel the Defendant was in breach for the following reasons:

Firstly, that there was a **'Contract to Grant a Lease'** between the Plaintiff and the Defendant which provided for how rentals were to be paid and was to run for 5 years.

Further that the agreed rentals for the initial period were K60,175.00 per month and the Defendant only paid K30,000.00. Moreover that although the Defendant claimed that rentals had been reduced to K30,000.00 per month they had not provided any proof to this effect.

Moreover, that the Defendant vacated the premises in October, 2012 of their own accord as no one asked them to leave. The Defendant's claim that they vacated the premises because Barclays took over the premises has failed because the Defendant's acknowledged that it only took over the property on 10<sup>th</sup> September, 2014, two years after the Defendant vacated the property.

It was also stated that the Plaintiff's failure to pay the rent resulted in the Bank advertising the property as repossessed and on sale. By 4<sup>th</sup> October, 2012 the Defendant had still not paid the rent as agreed.

On this basis Counsel contended that the Plaintiff had shown that the Defendant was in breach of the "Contract to Grant a Lease."

Counsel further stated that the Defendant induced Barclays into advertising the property as 'repossessed and on sale' due to their failure to pay rent which was required to service the loan with Barclays Bank.

Counsel then argued that the Defendant having induced the breach could not rely on it. He then cited the case of **CHEALL V ASSOCIATION OF PROFESSIONAL EXECUTIVE CLERICAL AND COMPUTER STAFF (1)** where it was held that:

*"It is a basic principal of law that no man may rely on his own wrong".*

Counsel then argued that since it had been shown that the Defendant was in breach of the 'Contract to Grant a Lease' the Plaintiff was entitled to damages.

He also relied on the learned author of Treitel who stated that:

*"A breach of contract may entitle the injured party to claim damages, the agreed upon sum, specific performance or injunction".*

It was also contended that due to the Defendant's breach the Plaintiff had suffered loss of K440,000.00 and according to Treitel "for the present purposes, loss includes any harm to the person or property of the claimant and any other injury to his economic position in the wider sense now recognised by the Courts."

Counsel for the Plaintiff also stated that the Defendant had admitted owing the Plaintiff K211,430.00 and that they failed to pay rentals due to financial challenges. Thus it was not proper for them to now claim that their failure to pay rent was as a result of the Plaintiff's failure to honour its end of the bargain by providing a conducive environment for education.

Counsel went on to argue that the Counterclaim of the Defendant could not be sustained as it was an afterthought and was unsupported by evidence. Moreover the counterclaim could not be sustained because the Plaintiff was in breach of the 'Contract to Grant a Lease'.

According to Counsel the case of **MWAISENI PROPERTIES LTD (2)** was persuasive in this matter and in that case it was stated that:

*"the Court will not grant the remedy in favour of a tenant whose Tenancy Agreement is subject to a condition precedent which has not been performed in i.e. obtaining presidential consent who is in breach of a term of the agreement i.e arrears of rent; for he who comes to equity must do so with clean hands".*



Based on this Counsel argued that the Defendant was in breach of the Contract to Grant a Lease and it acknowledged having rental arrears which had not been paid. Thus the Defendant did not have clean hands in order to sustain a Counterclaim.

The Defendant's Counsel also filed written submissions. He relied on the case of **RODGERS PONDE & 4 ORS V ZSIC (3)** where it was stated that:

*“Parole evidence is inadmissible because it tends to add, vary or contradict the terms of a written agreement validly conclude by the parties”.*

Whilst in **BOC GASES PLC V PHESTO MUSONDA (4)** the Supreme Court clarified this position when they stated:

*“It is a fundamental rule of English law that extrinsic evidence is not admissible to vary or contradict the terms of a written document. To this basic proposition an important exception exists. Where owing to some error a written document fails to record accurately the terms of the parties, the true agreement, equity will rectify the document to make it accord with their agreement”.*

According to Counsel for the Defendant it was evident that the Contract to Grant a Lease clearly failed to record accurately the

true agreement as concluded by the parties. Thus this case clearly fell outside the general rule on parole evidence.

Counsel also submitted that the action by Barclays Bank who began to enforce its rights as Mortgagee in possession was the last straw for the Defendant. That anybody would be apprehensive if adverts suddenly appeared in the newspapers placed by a reputable bank informing the public that the building they were occupying was being taken over and sold by a Mortgagee in Possession.

Therefore Counsel argued that no reasonable businessman would wait to be kicked out by the Bank as the prudent thing to do would be to move out of the disputed property in order to protect his reputation and rather than have his things thrown out by a Bank. Further the fact that Barclays only took possession of the premises much later did not change the fact that the advert to sell the property was first published to the public in September, 2012 which forced the Defendant to take the action as a terminating act of the Contract to Grant a lease as at October, 2012. Further that this advert was pointing to the Defendant in the minds of right thinking members of the public as having financial challenges which affected their reputation and business.

Counsel went on to rely on the case of **ZIMCO PROPERTIES LTD V HICKEY STUDIOS LTD & MARRYAT & SCOTT ZAMBIA LTD (5)** where it was held that:

***“This covenant for quiet enjoyment extends, I think, so as to protect the tenant in his possession and enjoyment of the demised properties from any invasion”.***

Counsel then argued that there can never be quiet enjoyment of the demised property when a Mortgagee in Possession begins to enforce their rights. Any reasonable person put in a similar position would have prepared and eventually vacated the demised premises as the Defendants did.

Moreover that although PW1 classified the counterclaim of the Defendant as an afterthought, this was not true as the letter dated 15<sup>th</sup> November, 2012 contained claims that formed the backbone of the counterclaim. Thus it was well grounded and not an afterthought.

In summary the Defendant’s Counsel argued that the case of the Defendant was clearer and more credible and that the Defendant admitted owing the Plaintiff a rental bill of K211,000.00 and declined to settle it until its counterclaim was settled by this Court because the K211,000.00 may actually be swallowed up by an appropriate award of damages in favour of the Defendant for breach of contract to grant a lease, damages for inconvenience, damages for loss of business and six months rental in lieu of notice.



That this claim for six months rental in lieu of notice was grounded in the fact that the Plaintiff failed to comply with the common law requirement for provision of notice before termination of a lease for business premises. That the Plaintiff's failed to inform the Defendant that its creditors would be taking over the premises after it failed to service the loans with them thereby effectively terminating the lease without notice. Moreover that a claim for six months rentals in lieu of notice was reasonable notice for a 5 year contract to grant a lease.

I am grateful to both Counsel for their written submissions which I have seriously considered together with the evidence on record.

It is not in dispute that the parties herein entered into a Contract to Grant a Lease for a term of 5 years from 1<sup>st</sup> June, 2012 and that the rentals were structured to be K60,715.00 from June to December, 2012, K95,000.00 from January, to December, 2013 and K95,000.00 from January to December, 2014. Thereafter the rentals were to be reviewed and agreed by the parties.

The Plaintiff is claiming the immediate payment of K440,000.00 as the amount owing in rentals by the Defendant as well as Damages for breach of the Contract to Grant a Lease. It was also stated that the Defendant only paid a sum of K30,000.00 towards the rentals and that it vacated the premises despite having signed a 5 year Contract to Grant a Lease.

Whilst the Defendant has argued that the Plaintiff made various breaches to the Contract to Grant a Lease and that the rentals payable were varied to K30,000.00 from 1<sup>st</sup> August, 2012 to account for these breaches. Moreover that it only refused to settle the rentals due because of the breaches which included the leasing and hiring out of part of the demised premises to church and other organisations, collecting rentals and cash meant for the Defendant, continued use of offices after leasing them out to the Defendant and failure to remove the Plaintiff's furniture from the demised premises. Further that according to its calculations, the Defendant only owed the Plaintiff a sum of K211,000.00.

The Defendant also counterclaimed and stated that the Plaintiff had breached the Contract to Grant a Lease because they did not give the Defendant any notice before terminating the agreement barely 5 months into the Contract to Grant a Lease. According to them their agreement was terminated when Barclays Bank advertised as having taken over the property as Mortgagee in Possession. Thus the Defendant was suing the Plaintiff for inter alia six months rentals in lieu of notice.

The Plaintiff in response stated that the rentals were not reduced at any point for the period June to December, 2012 and that it did not terminate the contract with the Defendant as Barclays did not at the material time take over the premises as Mortgagee in Possession and the Defendant left the premises on their own volition. Further that Barclays only took over the premises two years after the Defendant vacated it.

The evidence brought before Court by both the Plaintiff and the Defendant has shown that indeed the parties had signed a Contract to Grant a Lease that was for 5 years and was to commence on 1<sup>st</sup> June 2012.

What is in dispute however is how much the Defendant owes the Plaintiff in form of rentals and which of the two parties was in breach of the Contract to Grant a Lease.

The parties agreed that the rent for the period June to December 2012 was going to be K60,715.00 as set out in the Lease Agreement (that is Contract to Grant a Lease). The Defendant contended that this amount was reduced to K30,000.00 from 1<sup>st</sup> August, 2012 due to the breaches of the Contract to Grant a Lease on the part of the Plaintiff.

In my view the amount of rent payable in any Lease Agreement or a Contract to Grant a Lease is a fundamental term and ought to have been written down if indeed it had been varied. Since there is no concrete evidence to show that it was reduced I find it as a fact that the rent was not varied.

It is trite law that a lease will be valid if two requirements have been satisfied. The essential qualities of a lease are that it gives a person the right of exclusive possession of property for a defined or certain duration. The right to exclusive possession is the right to exclude all others from the premises including the landlord.



Mr. Fredrick S. Mudenda in his book Land Law in Zambia – Cases and Materials at page 92 states that:

***“As a basic proposition, a lease will exist when the occupier of land has been granted exclusive possession of the premises. If such a right is not conferred upon the grantee then it is likely that he holds merely a licence, which is a personal revocable interest. If the grantor remains in control of the demised premises, a licence is likely to be inferred”.***

The requirement that a tenant must have exclusive possession of the property also applies to a Contract to Grant a Lease.

I have established from the evidence adducted by both Plaintiff's and Defendant's witnesses as well as the Bundles of Documents that:

- (a) Prior to the execution of the Contract to Grant a Lease, the Plaintiff leased part of the demised premises to 2 churches who used same on Sundays and who paid rent up to December, 2012. The Plaintiff admitted getting rent from the 2 churches in April, 2012 and not crediting rent for the period 1<sup>st</sup> June, to 31 December, 2012 to the Defendant.*
- (b) After the Contract to Grant a Lease was executed the Plaintiff-*
  - (i) Continued to collect rent from the use of the Restaurant or Cafeteria.*

- (ii) *Continued to use the Managers office and the Internet Café which were part of the demised premises without paying any rent to the Defendant.*
- (iii) *Failed to give the Defendant vacant possession of 2 offices which it used as storage for its office furniture.*
- (iv) *Locked the demised premises between 27<sup>th</sup> September and 10<sup>th</sup> October, 2012.*

Having established the foregoing facts, I am of the considered view that the Defendant did not have exclusive possession of the demised premises. The Defendant did not have the right to exclude all others from the premises including the Plaintiff who was the landlord. If the Defendant had exclusive possession of the demised premises the Plaintiff would not have reserved to itself the right to (i) keep rentals paid by the 2 churches covering the period 1<sup>st</sup> June, to 31<sup>st</sup> December, 2012;

- (ii) *collect rent for use of the Restaurant after 1<sup>st</sup> June, 2012;*
- (iii) *continue to use the Managers office, the Internet Café and 2 offices used as storage without paying rent to the Defendant;*  
*and*
- (v) *lock up the premises between 27<sup>th</sup> September and 10<sup>th</sup> October, 2012.*

The Plaintiff told this Court that the Lease Agreement was based on the remaining offices except for the Cafeteria, the Internet café and the Manager's office and that there was an email to this effect that had been sent to one of the Defendant's directors. This

email was not exhibited before court. I find that this should also have been included as a term in the Lease Agreement.

As there was no such term excluding any part of the property on Stand No. 10876 Downtown Lusaka, I find that no part of the said property was excluded from being the demised premises.

It is trite that a tenant has a right to be put into possession at the commencement of the term and is entitled to damages if his enjoyment is substantially interfered with by the acts of the landlord. The covenant for quiet enjoyment gives the tenant the right to be put into possession of the whole of the premises demised, and to recover damages from the landlord if the landlord, or any other person to whom the covenant extends, physically interferes with the tenants enjoyment of the land. This was the holding in **OWEN V GOULD (6)** and **HUDSON V CRIPPS (7)**

I am of the considered view that the Plaintiff herein was in breach of the covenant for quiet enjoyment when it failed to give vacant possession of the whole demised premises and continued to use the Restaurant, Internet Café and Managers Office. The Plaintiff further breached the covenant for quiet enjoyment when it locked up the premises between 27<sup>th</sup> September and 10<sup>th</sup> October, 2012.

Regarding termination of the Contract to Grant a Lease, the Plaintiff has argued that the Defendant left the premises of their



own accord and that Barclays Bank did not take over the property until two years later in about September, 2014.

DW1 in cross examination stated in response that they left the property sometime between November and December, 2012. He also stated in examination in chief that Barclays Bank Zambia Plc took over the property as Mortgagee in Possession and issued notices in the newspaper and this prompted them to leave the premises.

I find that any reasonable tenant would become apprehensive in such circumstances and immediately resort to find alternative business premises. Even PW1 in Cross - examination acknowledged that if he was running the University and a bank advertised taking over the premises, he would be apprehensive as prospective students would stay away.

On this basis I find that the Plaintiff breached the Contract to Grant a Lease when the demised property was advertised in the newspaper without notice to the Defendant, as well as when they continued to use the cafeteria, internet cafe, managers office and receiving rentals from the churches without a clause expressly allowing them to do so in the Contract to Grant a Lease.

Going by the evidence on record, I am satisfied that the Defendant vacated the Demised Premises sometime in December, 2012. Whilst the Defendant was entitled to vacate the premises

and find alternative office accommodation from 22<sup>nd</sup> October, 2012 when the Demised Premises were advertised as being repossessed and up for sale, DW1 in Cross – examination testified that the Defendant vacated the Demised Premises between November and December, 2012. I therefore find that the Defendant vacated the Demised Premises on 15<sup>th</sup> December, 2012.

The Plaintiff's Counsel submitted that the Defendant induced Barclays Bank Zambia Plc into advertising the property as 'repossessed on sale'. This because of its failure to pay rent which was required to service the Plaintiff's loan with the Bank. I am of the considered view that this submission is not sustainable because the Defendant was not a party to the loan between Barclays Bank Zambia Plc and the Plaintiff and the subsequent Consent I have already made a finding that the amount of rent payable was not varied from K60,715.00 per month to K30,000.00 per month. This means that the rent due from the Defendant to the Plaintiff is the sum of K364,290.00 being six months rent from June to December, 2012. However, this amount should be reduced by K30,000.00 the amount paid by the Defendant to the Plaintiff as well as K40,000.00 that the 2 churches paid to the Plaintiff for use of part of the Demised Premises for six months.

I therefore find that the Defendant owes the Plaintiff the sum of K294,290.00 rent outstanding.

In respect of the Plaintiff claim for damages for breach of contract to grant a lease, damages for loss of rental income and damages for loss of business, I find as a fact that there was no breach of contract to grant a lease by the Defendant.

In the circumstances, I find that the Plaintiff has partially proved its case only to the extent that the Defendant owes it K294,290.00 rent outstanding.

As regards the Defendants Counter - Claim for damages for breach of the common law contract to grant a lease, I have already found as a fact that there was breach of contract to grant a lease by the Plaintiff.

I therefore find that the Defendant has proved its Counter - Claim on a balance of probabilities and I award it six months rentals in lieu of notice. Six months rentals is a total of K364,290.00.

The Defendant has apart from showing that the Plaintiff breached the contract to grant a lease, not shown what damages it has suffered as a result of the Plaintiff breach. No evidence was led to prove the damage allegedly suffered. The claims relating to damages cannot therefore succeed.

For the foregoing reasons, I hereby enter Judgment in favour of the Defendant for the payment of the sum of K70,000.00 together with interest in accordance with Order 36 Rule 8 of the High



Court Rules Chapter 27 of the Laws of Zambia from 11<sup>th</sup> February, 2015 to date of Judgment and thereafter in accordance with the Judgments Act, Chapter 81 of the Laws of Zambia. The parties shall bear their respective costs.

Leave to appeal is granted.

Delivered at Lusaka that 30<sup>th</sup> day of June, 2016.

A handwritten signature in black ink, consisting of several slanted, parallel strokes followed by a circular flourish at the end.

.....  
**WILLIAM S. MWEEMBA**  
**HIGH COURT JUDGE**