

IN THE HIGH COURT FOR ZAMBIA

2016/HP/1953

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



B E T W E E N :

MARGARET CHIMANSE

APPLICANT

AND

NELLY KATEBE

RESPONDENT

Before the Honourable Madam Justice P. K. Yangailo on 12th day of January, 2017

For the Applicant: Ms. Margaret Chimanse (In person)

For the Respondent: Ms. Nelly Katebe (In person)

J U D G M E N T

CASE AUTHORITIES REFERRED TO:

1. *John Paul Mwila Kasengele & Others vs. Zambia National Commercial Bank Limited - SCZ Judgment No. 11 of 2000*
2. *Inter Market Banking Corporation (Zambia) Limited Vs Graincom Investments Limited SCZ Judgment No. 14 of 2014*

By way of Originating Notice of Motion dated 7th October, 2016, the Applicant claims against the Respondent the following reliefs: -

- a) *An Order for Eviction directed at the Respondent from Flat No. 1 Stand No. 576/577 Ndeke Meanwood, Lusaka;*

- b) *Payment of all outstanding rentals standing unpaid from September, 2016 to October, 2016 amounting to the total of ZMK6,000.00;*
- c) *Further and/or alternative, issuance of Warrant of Distress against the Respondent in respect of property and assets of the Respondent at the said premises;*
- d) *Mesne profit;*
- e) *Any other relief the Court may deem fit;*
- f) *Costs of and incidental to these proceedings.*

The Applicant filed herein an Affidavit in Support of the Originating Notice of Motion deposed to by one **Margaret Chimanse**, the Applicant herein. The Applicant deposed that that she was the landlord of the property known as Flat No. 1 Stand No. 576/577 Ndeke, Meanwood in Lusaka ("The Premises"). That on 5th March, 2016, she offered the Respondent a written Lease Agreement for occupation and use of The Premises. The terms of the said Lease Agreement included a provision that the Respondent would make payment of rent, including paying for costs for water and electricity consumed at The Premises. According to the Applicant, the Respondent made irregular payments towards rent and defaulted in payment of rentals for September and October, 2016 resulting in the Respondent accruing rental arrears amounting to ZMK6,000.00. The Lease Agreement entered into by the parties was exhibited as "**MC1**" in the Affidavit in Support of the Originating Notice of Motion. The Applicant further deposed that she approached the

Respondent demanding payment of the rental arrears but the Respondent, who was initially remorseful, started exhibiting unreasonable conduct which the Applicant found intolerable and annoying. That the Applicant finally issued the Respondent with a Notice to Vacate The Premises as it became clear to her that the Respondent no longer had the means to continue meeting her obligations under the tenancy agreement. The said Notice to Vacate was not produced before this Court.

At the scheduled hearing of this matter, on 9th December, 2016, the Applicant relied on the Affidavit in Support of her application and orally submitted that the Respondent had since vacated The Premises during the first week of November, 2016. Further, that the Applicant had used the security deposit in the sum of K3,000.00 to partially repair damages occasioned to The Premises during occupation by the Respondent. Accordingly, the Applicant now sought payment of the accrued rentals for September and October, 2016; refund of funds expended on carrying out repairs of damages occasioned to the premises; mesne profits; other relief that the Court may deem fit and costs.

The Respondent did not file any Affidavit in Opposition against the Applicant's claims herein, but at the scheduled hearing of the matter, she opted to submit *viva voce*. It was her oral submission that she admitted owing the Applicant rental arrears for only the month of October, 2016 in the amount of ZMK3,000.00 and that

she left the premises during the first week of November, 2016 after continuous harassment from the Applicant. The Respondent denied causing damages to the premises as alleged by the Applicant and submitted that the rental arrears for September, 2016 was covered by the security deposit of ZMK3,000.00 that she had paid the Applicant at the commencement of the lease, as there were no damages occasioned to The Premises. On the relief for costs sought by the Applicant, the Respondent submitted that the Applicant was not entitled to full costs as she had already moved out of The Premises when the Applicant served her with Court process in this matter.

In reply, the Applicant submitted that the Respondent vacated the premises without notifying her and left the keys to The Premises with a neighbour. That the Respondent sent her husband to hand over the premises to the Applicant and having inspected the premises with the Respondent's husband, they agreed that there was need for a fresh coat of paint to the premises and repairs of damages occasioned to The Premises, which damages included broken tiles, a broken and blemished shelf to a walk-in wardrobe. According to the Applicant, the total cost for the damages, including labour amounted to ZMK4,700.00. Therefore the Applicant reiterated her prayer that she was entitled to the reliefs that she sought from this Court.

I have considered the claims by the Applicant in the Originating Notice of Motion and the averments deposed to in the Affidavit in Support filed herein. I have further considered the submissions on record, orally advanced by both parties herein.

The Applicant initially claimed vacant possession of The Premises; Further and/or alternative, issuance of Warrant of Distress against the Respondent in respect of property and assets of the Respondent at the said premises, but these particular claims were abandoned. At the time of hearing this matter, the Respondent had vacated The Premises. The Applicant proceeded with the rest of the claims namely: Payment of all outstanding rentals standing unpaid from September, 2016 to October, 2016 amounting to the total of ZMK6,000.00; refund of extra funds, over and above the security deposit, expended on carrying out repairs of damages occasioned to The Premises; mesne profits; any other relief the Court may deem fit; Costs of and incidental to these proceedings.

There are four issues that need to be determined and these are: -

1. Whether or not there are outstanding rentals due to the Applicant as claimed;
2. Whether or not there were damages that were occasioned by the Respondent to The Premises, during the tenancy period;
3. Whether or not the Applicant was entitled to apply the security deposit paid by the Applicant towards the repairs of The Premises; and

4. Whether or not the Applicant is entitled to mesne profits for damages arising out of the fact that the Respondent allegedly breached the Lease Agreement by failing to pay the rentals.

I will deal with the issues in the manner that I have listed them above.

The first issue for determination is whether there is due and outstanding rentals to the Applicant in the sum of ZMK6000.00 in respect of The Premises for the months of September and October, 2016. The Respondent admits owing only ZMK3,000.00 in respect of rent for October, 2016, but denies owing the sum of ZMK3,000.00 in respect of September, 2016, contending that the Applicant recovered that from the security deposit amounting to ZMK3,000.00 that she had paid to the Applicant at the commencement of the tenancy in accordance with the conditions of the Lease Agreement. The Applicant, on her part, contends that the security deposit was applied towards repairs of the damages occasioned to The Premises by the Respondent and therefore the Applicant is obligated to pay rentals for the months of September and October, 2016.

I have perused the documentary evidence exhibited in the Applicant's Affidavit in Support dated 7th October, 2016. By Lease Agreement dated 5th March, 2016, entered into by the Applicant and Respondent, the Respondent agreed that she had satisfied herself with the condition of the house and shall be responsible for

the general maintenance and care of The Premises including keeping the interior of the demised premises drains, sanitary water, electrical apparatus, all fixtures and additions thereto including the structure roof, main walls, timbers and exterior of the house. The Respondent also agreed to pay an initial payment of four (4) months rentals, which included security deposit equivalent to one (1) month's rental of ZMK3,000.00. I refer to the Exhibit marked "**MC1**" attached to the Affidavit in Support of Originating Notice of Motion. It is not in issue that the Respondent paid security deposit in the sum of ZMK3,000.00 at the commencement of the Lease Agreement. What is in dispute is whether this security deposit should be applied to off-set the rental arrears for September, 2016 or against the repairs of damages allegedly occasioned to The Premises by the Respondent.

From the evidence adduced on record, I find that there was a valid Lease Agreement entered into between the Applicant and Respondent in respect of The Premises effective 5th March, 2016, with rentals payable three (3) months in advance, with an initial payment of four (4) months' rentals, which included security deposit equivalent to one (1) month's rental. The monthly rent agreed by the parties was K3,000.00. The existence of the lease agreement can be deduced from the exhibited Lease Agreement, as well as the conduct of the parties. The Respondent in her oral submissions stated that she did not have any source of income as she was a student, hence the delay in making rental payments.

The argument by the Respondent that the rentals were in arrears on account of her not having any source of income as a student is untenable. The terms of the Lease Agreement were clear, effective 5th March, 2016. The Respondent cannot be heard to argue financial constraint or difficulties as the basis for non payment of rentals. It is my view that inability to pay a debt is no defence at all. I refer to the case of ***John Paul Mwila Kasengele & Others vs. Zambia National Commercial Bank Limited***⁽¹⁾ where the Supreme Court entered Judgment and stated that inability to pay has never been and is not a defence to a claim. I therefore find that the sum of ZMK6,000 is due and outstanding in respect of rentals for September and October, 2016.

The second issue for determination is whether or not there were damages that were occasioned to The Premises by the Respondent, during the tenancy period. The Applicant had applied for a refund of the costs of repairs of the damages occasioned to The Premises during occupation by the Respondent. The Respondent disputes that there were any such damages at the time she vacated The Premises. The issue is whether the Applicant has adduced cogent evidence before this Court to establish that any damages were occasioned to The Premises whilst the Respondent was in occupation thereof and whether its repair costs are due and owing.

The Lease Agreement exhibited as "**MC1**" and entered into between the Applicant and Respondent was a poorly drafted basic

agreement, which regrettably did not have the usual unambiguous standard terms required and expected in a lease agreement of this nature. For example paragraph 5 of the said agreement merely provided as follows: -

5. The Tenant of the premises hereby covenants with the Landlord as follows: -

- (i) That the Tenant of the premises has satisfied himself/herself with the condition of the house and shall be responsible for the general maintenance and care of the premises.**
- (ii) To keep the interior of the demised premises drains, sanitary water and electrical apparatus and all fixtures and additions thereto including the structure roof, main walls, timbers and exterior of the house.**
- (iii) Not to make any alterations or additions to the demised premises or erect any new buildings thereon without the consent of the Landlord.**
- (iv) To keep all roofs and gutters of the buildings on the demised premises free from leaves and dirt and to keep all the drains sinks and sewers thereon in good order and condition.**

It is not in dispute that the parties encountered problems during the tenancy period, which emanated from the fact that the Respondent failed to pay rentals as agreed in the Lease Agreement, resulting in the Applicant blocking the Respondent from accessing The Premises by inserting a key blocker in the key hole of the door to the main entrance to the house. This led to the Respondent reporting the matter to the Police and eventually vacating the

premises without giving Notice, as required in the Lease Agreement. There was no proper handover of The Premises and according to the Applicant, The Premises were later inspected in the presence of the Respondent's husband. It was the Applicant's oral evidence that she did not know that the Respondent had vacated The Premises and that inspection of The Premises was later carried out in the presence of the Respondent's husband, where the Applicant verbally indicated to the Respondent's husband that there would be need to apply one coat of painting to The Premises and fix the broken tiles and blemished wardrobe. There was no acknowledgement in writing of these alleged damages to The Premises. Indeed the Respondent, on her part, disputed having caused any damages to The Premises during her occupation and orally submitted that since there were no damages to The Premises, the security deposit that she paid will offset the rental arrears for the month of September 2016. The Respondent submitted that she vacated the premises in the first week of November, 2016 and that her vacating the premises without giving notice was as a result of constant harassment from the Applicant, which included the Applicant blocking her access to The Premises, thus leaving her with no choice but to vacate the premises.

Although the Applicant orally submitted that she expended funds amounting to ZMK4,700.00 on the costs of repairs for the alleged damages to The Premises, she has not adduced, before this Court, any evidence to prove that she had expended the said amount, as

alleged. It is my considered view that, the parties should have inspected The Premises together at the time of hand over and placed on record, in writing, an acknowledgement of any damages that were found to have been occasioned to The Premises during occupation by the Respondent. This evidence could then have been placed before the Court. Further, there was no evidence adduced before the Court to prove that the Respondent or her husband acknowledged the existence of damages to The Premises apart from the Applicant's word. It is therefore my view that the Applicant has failed to prove to the Court on this particular issue that there were damages occasioned to the premises by the Respondent and that she expended funds on repairing such damages. Therefore, I find that the Respondent cannot be held liable for unproven damages and costs of repairing such damages.

Further, the Lease Agreement did not provide for the Respondent to apply one coat of paint to The Premises upon termination of the lease. As I stated earlier on, the Lease Agreement herein was poorly drafted . Accordingly, in the absence of such express provision in the lease, the Applicant's claim that the Respondent refunds her for the expenses incurred in applying a fresh coat of paint to the premises fails.

The third issue for determination is whether or not the Applicant should apply the security deposit paid by the Applicant towards the repairs of the property. Having found that the Applicant's claim for

refund of costs allegedly incurred in repairing damages to The Premises fails, the Applicant cannot therefore apply the security deposit towards the unproven damages allegedly caused to The Premises. It is my view, that the Applicant is only entitled to rental arrears and as such the security deposit paid by the Respondent will be applied towards the rental arrears for the month September, 2016. I order that the Respondent must pay the Applicant the rental for the month of October 2016, only, in the sum of K3,000.00.

The fourth issue for determination is whether or not the Applicant is entitled to mesne profits for damages arising out of the fact that the Respondent breached the Lease Agreement by failing to pay the rentals claimed by the Applicant. In my view, an Order for payment of interest on the amounts due and owing will suffice. Otherwise the Applicant may be unjustly enriched. The Supreme Court in the case of *Inter Market Banking Corporation (Zambia) Limited Vs Graincom Investments Limited* ⁽²⁾ noted that: -

“...it is pertinent to observe that ‘redress’ must follow both the evidence and the rules; and should, in itself, not lead to unjust enrichment.”

In any event, it was an express condition of the Lease Agreement that the Respondent paying the rent and observing the covenants on her part would peacefully hold and enjoy The Premises without any interruption by the Applicant. The Respondent having defaulted with payment of rentals, the Applicant should have then

interrupted the Respondent's hold of The Premises by invoking the Notice Clause. Both parties were under an obligation under the Lease Agreement to give notice to quit, which provision was never invoked by the parties. It is my considered view that the correct approach should have been for either party to give notice to vacate in writing, which notice should have been brought before this Court. There was no notice given by either party and no evidence was adduced before this Court to prove that either party had given notice to vacate to the other as per the lease agreement. The Lease Agreement provided that: -

Either party shall give One (1) month notice of intention to terminate the lease agreement provided that such notice be served in writing to the Landlord or Tenant personally (as the case may be) and signed for.

I therefore find that the Applicant's claim on this issue has no merit and fails.

Accordingly, I hereby enter Judgment in favour of the Applicant against the Respondent for the payment of the sum of ZMK3,000.00 being outstanding rentals for October, 2016 in respect of Flat No. 1 Stand No. 576/577 Ndeke Meanwood, Lusaka. It is further adjudged that the sum of ZMK3,000.00 be paid with interest from the date of Originating Notice of Motion to date of hereof at the short term Bank of Zambia deposit rate. Thereafter at the current Commercial Banks lending rates.

Costs are awarded to the Applicant to be taxed in default of agreement. Leave to appeal is granted.

Dated the 12th Day of January, 2017

A handwritten signature in black ink, appearing to read 'P. K. Yangailo', written in a cursive style. The signature is positioned above a horizontal dotted line.

**P. K. YANGAILO
HIGH COURT JUDGE**