

IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

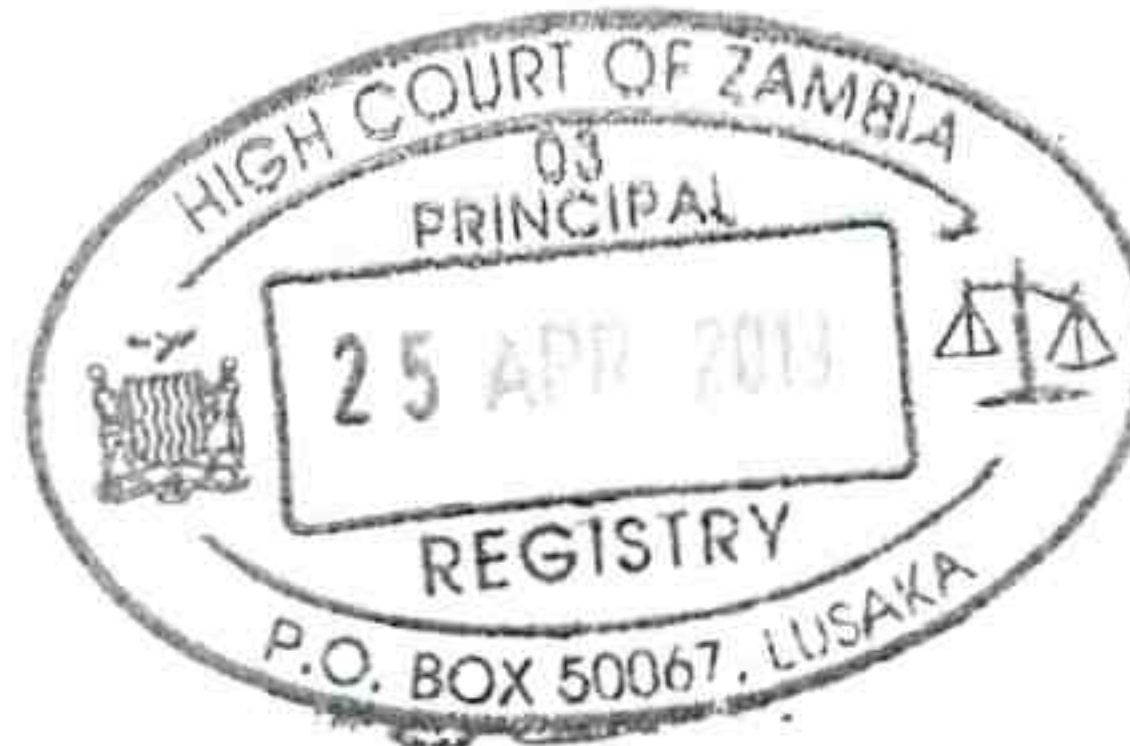
2018/HP/0128

BETWEEN:

MUGAIRANEZZ JEAN PIERRE

AND

BERNADETTE KAYIMBI



PLAINTIFF

DEFENDANT

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 25<sup>th</sup> DAY OF APRIL, 2019

For the Plaintiff : Ms J. Mulenga, Isaac and Partners

For the Defendant : Messrs KBF and Partners

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## J U D G M E N T

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### CASES REFERRED TO:

1. *Knight V Bennet* (1826) 3 Bing 361
2. *Robinson V Harman* 1843-1860 3 ALL ER 353
3. *Sithole V The State Lotteries Board* 1975 ZR 106
4. *Krige and another V Christian Counsel of Zambia* 1975 ZR 152
5. *Mususu Kalenga Building Limited, Winnie Kalenga and Richmans Money Lenders Enterprises* SCZ No 4 of 1999
6. *Sablehand Zambia Limited V Zambia Revenue Authority* 2005 ZR 109
7. *Makanya Tobacco Company Limited V J & B Estates Limited* Appeal No 42/2012 unreported
8. *Emmy Dry Cleaners V National Pension Scheme Authority and Masauso Banda* Appeal No.86/2016

### LEGISLATION REFERRED TO:

1. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*
2. *The Land and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia*



OTHER WORKS REFERRED TO:

1. **McGregor On Damages 18<sup>th</sup> Edition, Harvey McGregor, 2009, Sweet and Maxwell**
2. **Megarry and Wade: The Law of Real Property, Charles Harpum, 6<sup>th</sup> Edition, 2000, Sweet and Maxwell**

The Plaintiff commenced this action on 23<sup>rd</sup> January, 2018 by way of writ of summons claiming;

- i. *A declaration that the eviction effected by the Defendant without giving notice pursuant to the Landlord and Tenant (Business Premises) Act is null and void ab initio;*
- ii. *A declaration that the Defendant is in breach of the covenants and conditions under the lease agreement between the Plaintiff and the Defendant;*
- iii. *A declaration that the Plaintiff herein is the rightful and legally entitled to occupy Shop No 269B Vubu Road, Emmasdale in Lusaka;*
- iv. *An order of specific performance ordering the Defendant to ensure that the lease between the Plaintiff and the Defendant continues to subsist for the duration contained in the lease;*
- v. *An order of injunction restraining the Defendant by herself, servants or her agents from trespassing or ejectment from the premises for the duration of the term given under the lease;*
- vi. *Damages for trespass upon the property by the Defendant;*
- vii. *Damages for unlawful seizure distress by the Defendant;*
- viii. *Damages for loss of use or personal effects, goods and chattels;*
- ix. *Damages for breach of the terms of the lease;*



- x. *Any other order that the court may deem fit and just in the given circumstances;*
- xi. *Costs.*

The statement of claim shows that by a tenancy agreement dated 1<sup>st</sup> August, 2016, the Defendant leased Shop number 269B Vubu Road in Emmasdale to the Plaintiff at a monthly rental of One Thousand Five Hundred Hundred Kwacha (K1, 500.00). It is further stated that it was an express term of the lease agreement that the Plaintiff would renovate the shop and the funds spent would be recovered from future rentals.

The statement of claim further states that the Plaintiff advanced the Defendant the amount of Sixty-Three Thousand Five Hundred and Sixty Five Kwacha Fifty ngwee (K63, 565.50) which was also to be recovered from the monthly rentals of One Thousand Five Hundred Kwacha (K1, 500.00) until the lease expired on 1<sup>st</sup> February, 2020.

However, the Defendant on 29<sup>th</sup> September, 2017 sued the Plaintiff in the Subordinate Court for an order of eviction without notice as provided in Section 5 of the Landlord and Tenant (Business Premises) Act. The Plaintiff challenged that action and before it was concluded, the Defendant commenced another action in the Local Court which the Plaintiff also challenged, and both suits were withdrawn.

To the Plaintiff's surprise, the Defendant levied a warrant of distress for rentals in the sum of K208, 000.00 using registered bailiffs, which amounts were not due and owing. The Plaintiff contends that the Defendant violated the lease agreement and the Landlord and Tenant (Business Premises) Act by forcibly and unlawfully evicting the Plaintiff from the premises on or about Friday 19<sup>th</sup> January, 2018, without giving the requisite notice to quit or terminate the said tenancy or a court order.



The Plaintiff avers that he has been paying the rentals for the property as per the lease agreement in the form of deductions from the monies advanced to the Defendant totaling K63, 565.50. He asserts that the Defendant unlawfully took vacant possession of the property and seized and detained all the goods that were found in the shop without any court order or warrant issued from any court of competent jurisdiction which goods have remained in the Defendant's possession without lawful reason.

It is stated that as a result of the foregoing, the Plaintiff has suffered irreparable loss and damage.

On 2<sup>nd</sup> February, 2018, the Defendant entered appearance and filed a defence and counterclaim which was amended on 3<sup>rd</sup> August, 2018. In that amended defence, the assertion that the parties entered into a lease agreement at a monthly rental of K1, 500.00 is admitted, but the Defendant denies that the said lease agreement was entered into on 1<sup>st</sup> August, 2016, stating that it was on 2<sup>nd</sup> January, 2013.

The Defendant states that the Plaintiff requested to renovate the shop by linking two shops into one and as a result, the rentals were increased to K4, 000.00 per month. The Defendant denies ever having received any monies from the Plaintiff which were to be recovered from the rentals, and she also denies having evicted the Plaintiff from the premises illegally, her defence being that the Plaintiff was evicted as he breached the terms of the lease agreement, and he was given notice to vacate, but he did not acknowledge receipt.

The Defendant also states that the suits that she instituted in the Local Court and the Subordinate Court were not heard on their merits. She also denies having levied a warrant of distress for rentals in the amount



of K208, 000.00 which was not due, and that she did so in violation of the lease agreement and the Landlord and Tenant (Business Premises) Act. The allegation that the Defendant forcibly evicted the Plaintiff from the premises without giving advance notice to quit and terminated the said tenancy agreement and did so without a court order is also denied.

The Defendant further denies that the Plaintiff duly paid the rentals from deductions of monies advanced to her in the amount of K63, 565.50 or that she unlawfully took possession of the premises, and detained all the goods in the shop without a court order or warrant issued from any court of competent jurisdiction, and has remained in the custody of the goods to date. The Defendant denies that the Plaintiff has suffered any irreparable loss and damage as a result of her actions.

It is the Defendant's defence that when she realized that the Plaintiff was in continuous breach of the lease, she asked him to make good the agreement in the lease, and he had responded that he had documentation to show that he had been paying the rentals. The Defendant discovered that the documentation that the Plaintiff was relying upon had her forged signatures. On 9<sup>th</sup> October, 2018, she reported the matter to Matero Police and the 11 disputed signatures were submitted to the Police Forensic Science Department for analysis by a handwriting expert.

The particulars of the fraud are stated as;

- i. *The tenancy agreement forms relating to property number 299B Emmasdale, Lusaka.*
- ii. *Lease agreement in the amount of K5, 000.00.*



- iii. *Tenancy agreement form dated 3<sup>rd</sup> April, 2015 in the amount of K15, 000.00.*
- iv. *Credit contract dated 4<sup>th</sup> April, 2016 in the amounts of K23, 000.00, K7, 000.00, K14, 000.00 and K2, 400.00.*
- v. *Credit Contract dated 12<sup>th</sup> March, 2015 in the amount of K7, 000.00*
- vi. *Agreement in the sum of K63, 000.00 and*
- vii. *Provision for additional advances.*

It is the Defendant's defence that the forensic report pertaining to the above documents shows that the Plaintiff forged the documents with the Defendant's signature purporting to show that she acknowledged receipt of the monies when in fact not.

The Defendant states that she has suffered damages and loss of income due the Plaintiff's conduct and she counterclaims the following;

- i. *a declaration that the eviction of the Plaintiff from the shop was lawful and done in good faith;*
- ii. *a declaration that the levying of the warrant of distress was lawful;*
- iii. *immediate payment of the amount of K208, 000.00 being the amount due as accrued rentals;*
- iv. *interest*
- v. *any other relief the court may deem fit;*
- vi. *costs.*

The Plaintiff filed a defence to the amended counterclaim on 10<sup>th</sup> October, 2018 in which he denies that the Defendant approached him with a view to make good what was agreed upon in the lease. He further



denies having forged the documents as alleged by the Defendant, stating that the Defendant signed the said documents and he denies that the Defendant has suffered loss of income and damages. The Plaintiff also denies that the Defendant is entitled to the claims as set out in the counterclaim.

At the trial only the Plaintiff was before court. He testified and called no witnesses. It was his evidence that on 13<sup>th</sup> October, 2014, he entered into an agreement with the Defendant which went up to 1<sup>st</sup> January, 2016. He stated that the agreement was the document at page 2 of the Plaintiff's bundle of documents which provided that the rentals were K1, 500.00 a month for two years. The Plaintiff further testified that he paid cash and in the form of building materials to renovate the house which was not in a good state into a shop.

Still in his testimony, the Plaintiff told the court that the Defendant borrowed money from him on 3<sup>rd</sup> March, 2015 in the amount of K7, 000.00 which she was supposed to pay back on 31<sup>st</sup> March, 2015. She however did not pay back the money as agreed, and they signed a credit contract to that effect, which was at page 5 of the Plaintiff's bundle of documents. The Plaintiff stated that when the Defendant did not pay, his witness followed her up, but she indicated that she did not have the money. He testified that the Defendant stated that as the Plaintiff was in occupation of the shop, there was no problem, as the money could be deferred to the next contract.

He continued testifying, stating that on 24<sup>th</sup> December, 2015 the Defendant wrote him an eviction notice on the ground that they were not getting along as he was not helping her with money or whatever she wanted and she wanted to put someone else in the shop. His evidence



was that the notice to vacate which was at page 6 of the Plaintiff's bundle of documents dated 14<sup>th</sup> December, 2015 was written as he did not give her money when she asked for some more. He explained that the said notice did not give him the option of renewing the tenancy agreement.

However, on 4<sup>th</sup> April, 2016, the Plaintiff and Defendant entered into another agreement as the Defendant wanted some more money in the amount of K14, 000.00 which amount would be set off from the rentals in the new contract. The Plaintiff also paid for separation of the metre in the shop from the one in the house, having given the Defendant money twice previously for the same.

The Plaintiff explained that the contract at page 4 of the Plaintiff's bundle of documents provided that the amount of K23, 400.00 would be recovered in the next contract and that the Defendant and her witness signed that document as did the Plaintiff and his witness. He added that the contract would take effect on 1<sup>st</sup> August, 2016 and it was signed on 11<sup>th</sup> May, 2016. On what the K23, 400.00 encompassed in the contract comprised, the Plaintiff testified that it was K7, 000.00, K14, 000 and K2, 400.00 which he paid for electricity as seen at page 7 of the Plaintiff's bundle of documents. The Plaintiff also testified that apart from the K23, 400.00 there were groceries of K8, 822.50, building materials of K19, 194.00, extras of K7, 149.00, cash advance of K5, 000.00 on 5<sup>th</sup> November, 2016 which totalled K63, 565.50.

It was the Plaintiff's evidence that the money was paid under the lease agreement dated 1<sup>st</sup> August, 2016 to 1<sup>st</sup> February, 2020 as seen at page 7 of the Plaintiff's bundle of documents, and that both the Plaintiff and the Defendant signed the agreement and so did their witnesses. Still in evidence, the Plaintiff testified that thereafter on 14<sup>th</sup> November, 2016,



the Defendant borrowed more money as seen at page 8 of the Plaintiff's bundle of documents in the amount of K8, 500.00 for business as well as the other money indicated thereon.

He further testified that before 19<sup>th</sup> January, 2018, the Defendant took him to court so that he could vacate the shop and that private bailiffs levied a warrant of distress for the amount of K208, 000.00 as rentals for five years, and they seized his goods. He retrieved the goods from the bailiffs but was chased from the shop and he kept them in his house as a new tenant, being an Indian national was put in the shop.

The Plaintiff prayed that the court declares that his eviction from the shop was illegal and that he be paid damages for loss of business from the date of eviction being 19<sup>th</sup> January, 2018. He also prayed that he be paid damages for trespass and unlawful distress, and that it be directed that he remains in the shop until when the tenancy was supposed to come to an end in 2020. He also prayed for a declaration that the Defendant breached the terms and conditions of the tenancy agreement, damages for licences from the Council and costs.

I have considered the evidence. It is common cause that the Plaintiff and the Defendant entered into agreements for the Plaintiff to rent a shop known as Plot No 299B Emmasdale in Lusaka. The question is whether the Plaintiff is entitled to the reliefs sought. It will be noted that while the Plaintiff by his pleadings states that the tenancy agreement was entered into on 1<sup>st</sup> August, 2016, the Defendant in her amended defence and counterclaim states that she first entered into a tenancy agreement with the Plaintiff on 2<sup>nd</sup> January, 2013.

From the testimony given by the Plaintiff, it can be seen that he alleges that he entered into various tenancy agreements with the Defendant and



made reference to page 2 of the Plaintiff's bundle of documents as being the first lease agreement that was signed by the parties. This document is dated 13<sup>th</sup> October, 2014, and was to run up to 1<sup>st</sup> January, 2016.

At page 1 of the Plaintiff's bundle of documents is a letter authored by the Defendant to the Plaintiff dated 2<sup>nd</sup> January, 2013 which states that since the Defendant occupied the shops on 2<sup>nd</sup> January, 2013, the rentals had been adjusted from K1, 500.00 to K4, 000.00. Further, that from the K18, 000.00 owed, K5, 000.00 had been paid leaving a balance of K13, 000.00. The Plaintiff did not rebut the defence raised by the Defendant that he occupied the shop in 2013. There is however no document in the form of a lease agreement that shows that the parties signed lease agreements when the Plaintiff entered the shop in 2013.

In the case of ***Emmy Dry Cleaners V National Pension Scheme Authority and Masauso Banda*** <sup>(8)</sup>, the Supreme Court on appeal stated that the question that the court below had to grapple with was what sort of tenancy existed between the parties, after the court found that the proposed agreement for the lease was null and void for want of registration in terms of section 6 of the Lands and Deeds Registry Act. It found that the court below came to the conclusion, and rightly so, in their view, that there was a tenancy at will created by the possession of the premises, and that when the applicant paid rent and the rent was accepted by the 1<sup>st</sup> respondent, a periodic tenancy from year to year was created, which was determinable by 6 months' notice.

This it was stated was the principle espoused by ***Megarry's Manual of the Law of Real Property***, and by that Court in the case of ***Krige and another V Christian Counsel of Zambia*** <sup>(4)</sup> which the learned Judge applied. The Supreme Court further stated that the same principle was



reiterated in the case of *Makanya Tobacco Company Limited V J&B Estates Limited* <sup>(7)</sup>.

The Supreme Court went on to hold that the law is also settled, that where there has been an agreement for a lease, and an occupation without payment of rent, the occupier is a mere tenant at will, but if he subsequently pays rent under that agreement, he thereby becomes a tenant from year to year. The case of *Knight V Bennet* <sup>(1)</sup> was cited where the plaintiff took possession of the premises under an agreement for a lease to be granted to him for a term of ten years, at a yearly rent, payable half-yearly.

No lease was executed, nor was the quantum of rent to be paid ascertained, but the plaintiff occupied the premises under the agreement for three years, paying rent for two. It was held that this created a tenancy from year to year, and entitled the landlord to distrain for the rent due, at the rate previously paid.

Therefore, in this matter, the fact that the parties herein did not execute a lease agreement when the Plaintiff occupied the shop in 2013 did not mean that there was no tenancy agreement. Rather, a periodical tenancy was created from year to year which was determinable on notice of six months being given. The same goes with regard to the tenancy agreement at page 2 of the Plaintiff's bundle of documents which ran from 13<sup>th</sup> October, 2014 to 1<sup>st</sup> January, 2016, as it was a lease for over one year and it was not registered in line with Section 4 (1) of the Lands and Deeds Registry Act which provides that;



*"4. (1) Every document purporting to grant, convey or transfer land or any interest in land, or to be a lease or agreement for lease or permit of occupation of land for a longer term than one year, or to create any charge upon land, whether by way of mortgage or otherwise, or which evidences the satisfaction of any mortgage or charge, and all bills of sale of personal property whereof the grantor remains in apparent possession, unless already registered pursuant to the provisions of "The North-Eastern Rhodesia Lands and Deeds Registration Regulations, 1905" or "The North-Western Rhodesia Lands and Deeds Registry Proclamation, 1910", must be registered within the times hereinafter specified in the Registry or in a District Registry if eligible for registration in such District Registry:*

*Provided that if a document creating a floating charge upon land has been registered under the provisions of section ninety-nine of the Companies Act or section thirty-two of the Co-operative Societies Act, it need not be registered under the provisions of this Part unless and until such charge has crystallised or become fixed".*

Section 6 of the said Act provides for the effect of want of registration of documents required to be registered under the Act. It states that;

*"6. Any document required to be registered as aforesaid and not registered within the time specified in the last preceding section shall be null and void:*

*Provided that-*

- (i) the Court may extend the time within which such document must be registered, or authorise its*



*registration after the expiration of such period on such terms as to costs and otherwise as it shall think fit, if satisfied that the failure to register was unavoidable, or that there are any special circumstances which afford ground for giving relief from the results of such failure, and that no injustice will be caused by allowing registration;*

- (ii) *the probate of a will required to be registered as aforesaid, and not registered within the time specified in the last preceding section, shall be null and void so far only as such will affects land or any interest in land”.*

The first relief claimed by the Plaintiff is for a declaration that the eviction effected by the Defendant without notice pursuant to the Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia was null and void ab initio. In seeking this claim, the Plaintiff testified referring to page 2 of the Plaintiff's bundle of documents as the lease agreement which the parties signed as well as the one at page 5 and 7 of the same bundle of documents. The document at page 2 of the Plaintiff's bundle of documents is the last document executed by the parties in relation to the lease.

Clause 3 B at page 2 of the Plaintiff's bundle of documents states that any party that wished to terminate the lease had to do so by giving thirty (30) days' notice in writing. The Defendant challenged this document as well as the ones at pages 3, 5 and 7 of the Plaintiff's bundle of documents which she produced in her bundle of documents at pages 11-17 and included other documents as having been forged.



In the case of ***Sablehand Zambia Limited V Zambia Revenue Authority*** <sup>(6)</sup> it was held that;

*“1. Where fraud is an issue in the proceedings, then a party or wishing to rely on it must ensure that it is clearly and distinctly alleged. Further, at the trial of the cause, the party alleging fraud must equally lead evidence, so that the alleging fraud must equally lead evidence, so that the allegations is clearly and distinctly proved.*

*2. Allegations of fraud must, once pleaded, be proved on a higher standard of proof, than on a mere balance of probabilities, because they are criminal in nature”.*

Going by the above decision, the Defendant bears the burden of proving the fraud, by firstly pleading clearly the allegations of fraud, and secondly by proving the same on a higher standard than a balance of probabilities that indeed her signature on those documents was forged. The pleadings clearly show that the Defendant has set out the particulars of the fraud in her defence and counterclaim. In terms of proving the fraud, she did not testify before this court.

However, at page 11 of her bundle of documents is a letter authored by S.M Choompo the Deputy Principal Criminal Investigations Officer on 19<sup>th</sup> January, 2018, stating that all the disputed documents recovered from the now Plaintiff and submitted to the Police Forensic Science Department Handwritings Experts for analysis confirmed that the signatures for the Plaintiff were genuine on those documents, while those for the Defendant were forged. The actual report by the forensic expert was not produced in the bundle of documents.



The case of *Sithole V The State Lotteries Board* <sup>(3)</sup> held that;

*“(iv) The function of a handwriting expert is to point out similarities or differences in two or more specimens of handwriting and the court is not entitled to accept his opinion that these similarities or differences exist but once it has seen for itself the factors to which the expert draws attention, it may accept his opinion in regard to the significance of these factors.*

*(v) Where there is in fact documentary or pictorial evidence which forms the basis of the expert's opinion it is necessary for these documents to be properly proved and for the court to see for itself the various points on which the expert bases his conclusions”.*

There is no such evidence as stated above before this court, and I have no basis upon which to conclude that the documents at pages 11-17 of the Defendant's bundle of documents are forgeries and thereby establishing the fraud. The defence on the ground of fraud will fail, as it has not been proved on a higher standard than a balance of probabilities.

The document at page 6 of the Plaintiff's bundle of documents and page 1 of the Defendant's bundle of documents being the notice to vacate written to the Plaintiff by the Defendant is dated 14<sup>th</sup> December, 2015 before the lease agreement at pages 7-8 of the Plaintiff's bundle of documents was executed. I can only presume that this notice was waived as the parties subsequently entered into another lease agreement.



The said notice to vacate cannot qualify as valid notice having been given to the Plaintiff in light of the fact that a lease agreement was executed after that notice was given.

Section 5 of the Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia provides that;

***“5. (1) The landlord may terminate a tenancy to which this Act applies by a notice given to the tenant in the prescribed form specifying the date on which the tenancy is to come to an end (hereinafter referred to as “the date of termination”):***

***Provided that this subsection shall have effect subject to the provisions of section twenty-three as to the interim continuation of tenancies pending the disposal of applications to the court.***

***(2) Subject to the provisions of subsection (3), a notice under subsection (1) shall not have effect unless it is given not less than six months and not more than twelve months before the date of termination specified therein”***

The law as seen above provides for the giving of six months’ notice to terminate a lease under the Landlord and Tenant (Business Premises) Act. However, the parties in this matter agreed to shorten that period to one month’s notice as this is what is contained in the lease agreement at page 2 of the Plaintiff’s bundle of documents, and this is what bound them. Therefore, the Defendant by not giving the one month’s notice to vacate as required by the lease and evicting the Plaintiff did so contrary to the agreement.



I accordingly declare that the eviction effected by the Defendant was null and void and the Defendant breached the terms and conditions of the lease agreement. The counterclaim that the said eviction was lawful and done in good faith consequently fails.

The Plaintiff also claims that he is rightfully and legally entitled to occupy the premises he was evicted from. He further claims an order of specific performance of the lease. The case of **Robinson V Harman** <sup>(2)</sup> held that specific performance will not be decreed where common law remedies such as damages are available and would put the Plaintiff in the position he would have been, but for the breach.

Specific performance is a discretionary remedy, and in light of the Plaintiff's evidence that the Defendant put another tenant in the shop weighs against the remedy of specific performance being granted, despite the Plaintiff having proved that his eviction from the shop was unlawful.

The Plaintiff further claims damages for trespass as well as for unlawful distress and loss of use of personal effects goods and chattels.

The document at page 2 of the Plaintiff's bundle of documents shows that the Plaintiff would from 13<sup>th</sup> October, 2014 to 1<sup>st</sup> January, 2016 pay K5, 000.00 in advance for future rentals so that he could complete the construction works. The document at page 5 of the Plaintiff's bundle of documents shows that the parties executed a credit document on 12<sup>th</sup> March, 2015 under which the Defendant acknowledged having received the amount of K7, 000.00 to be paid back before 31<sup>st</sup> March, 2015.

At page 4 of the said Plaintiff's bundle of documents is another credit document dated 4<sup>th</sup> April, 2016 which states that the Defendant collected K7, 000.00, K14, 000.00 and K2, 400.00 for the electricity quotation



totaling K23, 400.00 which would be recovered from the contract commencing 1<sup>st</sup> August, 2016. Page 7 of the said bundle of documents is the agreement for rent of the property at K1, 500.00 effective 1<sup>st</sup> August, 2016. Further, that the Defendant owed K63, 565.50 to the Plaintiff which would be recovered from the monthly rentals.

I also note that the document at page 1 of the Plaintiff's bundle of documents shows that the Defendant owed K13, 000.000 after the rentals were increased to K4, 000.00 after he occupied the two shops. The Defendant did not adduce any evidence to show that there was agreement on this rental increment and that if agreed, the K13, 000.00 indicated on the document was actually paid, and therefore did not form part of the K208, 000.00 that she counterclaims. Her defence to the lease agreements exhibited at pages 2, 4, 5 and 7 of the Plaintiff's bundle of documents is that they were forged and yet there no evidence was led to prove the said forgery, and I have said that the said defence cannot stand.

Therefore, the evidence as it is shows that the Defendant owed the Plaintiff money.

A perusal of the record shows that the Defendant levied a warrant of distress on 19<sup>th</sup> January, 2018, as seen at pages 16 -17 of the Plaintiff's bundle of documents. This was done without a court order.

In the case of **Mususu Kalenga Building Limited, Winnie Kalenga and Richmans Money Lenders Enterprises** <sup>(5)</sup> it was held that;

***"The respondent was in occupation for more or close to 7 months before the office was locked. It was therefore incumbent upon the appellants to comply with the provisions of the Act by giving the respondent a proper notice***



*terminating the lease and if the notice was not complied with to commence proceedings for possession of the office and recovery of mesne profits”.*

In this case, the Defendant levied execution when no money was due under the lease as she is the person that owed the Plaintiff money. **McGregor On Damages 18<sup>th</sup> Edition, Harvey McGregor, 2009, Sweet and Maxwell** at paragraph 33-091 at page 1247 states that illegal distress is one which is wrongful from the very start either because no right to distrain existed or because a wrongful act was committed at the commencement of the levy which invalidated all subsequent proceedings.

It is further stated in that paragraph that since in the case of an illegal distress, the defendant will have committed a trespass, an action for illegal distress is just an action for trespass based upon a distress. Therefore, in this matter the distress levied by the Defendant was illegal, as there was no rent due upon which the distress was levied, the Defendant is liable to pay damages for the distress which was trespass.

I accordingly so declare. The Defendant's counterclaim that the distress levied was lawful and that the Plaintiff owed her K208, 000.00 shall fail.

Paragraph 33-092 of **McGregor on Damages** cited above states that the normal measure of damages for illegal distress is the value of the goods illegally distrained. The Plaintiff testified that he recovered the goods illegally distrained by the private bailiffs, and he has therefore been recompensed in that regard. I am alive to the fact that he incurred costs in recovering the distrained goods and these can be recovered under the umbrella of costs. The claim for loss of use of personal effects, goods and chattels was not substantiated by any evidence and it accordingly fails.



The Plaintiff also claimed damages for breach of the lease agreement. The breach in this case was the eviction of the Plaintiff without notice, and the question that arises is what damages are due to the Plaintiff as a result of that breach of the lease agreement?

The lease agreement at page 2 of the Plaintiff's bundle of documents provided that either party to the lease agreement had to give one month's notice to terminate the lease. The Plaintiff was evicted from the premises. The document at page 6 of the Plaintiff's bundle of documents and page 1 of the Defendant's bundle of documents being the notice to vacate written to the Plaintiff by the Defendant is dated 14<sup>th</sup> December, 2015 before the lease agreement at pages 7-8 of the Plaintiff's bundle of documents was executed. I can only presume that this notice was waived as the parties subsequently entered into another lease agreement. The said notice to vacate cannot qualify as valid notice having been given to the Plaintiff in light of the lease agreement that was executed after that notice was given.

Therefore, there is no evidence on record to show that the Plaintiff was given notice to vacate, and the Defendant by not giving the one month's notice to vacate as required by the lease was in breach of the lease agreement. It is trite that the normal measure of damages for breach of contract are those that put the person in the position that they would have been in had the contract not breached. In this case, the Plaintiff would have earned profit from the shop had the one month's notice been given.

I accordingly order that the Defendant shall pay the Plaintiff the profits that he would have earned in the one month had the requisite notice to vacate been given. There is no evidence before court to show the said



earnings. The said damages for breach of contract shall be assessed by the Registrar.

The amounts found due shall carry interest at the average short-term deposit rate from the date of issue of the writ until judgment and thereafter at the Bank of Zambia lending rate until payment. The Plaintiff is also awarded costs of the action to be taxed in default of agreement. Leave to appeal is granted.

**DATED THE 25<sup>th</sup> DAY OF APRIL, 2019**

*Kaunda*  
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**