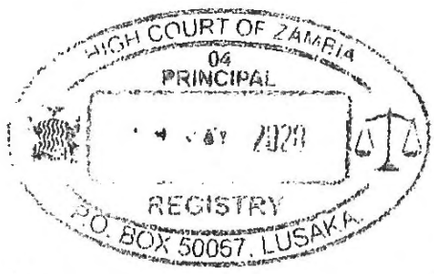
IN THE HIGH COURT FOR ZAMBIA **2019/HP/0454**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)



BETWEEN:

NEIRA INVESTMENTS LIMITED **PLAINTIFF**

AND

NORTHERN PROVINCE CO-OPERATIVE AND MARKETING UNION LIMITED **DEFENDANT**

Before the Hon. Mrs. Justice R. Chibbabbuka on the 29th day of November, 2019

For the Plaintiff: Mrs C. Chibabwe, Messrs Ferd Jere & Company

For the Defendant: Mr W.C Simutenda, Messrs GDC Chambers

JUDGMENT

Cases referred to:

1. *Scholl MFG Co. Ltd vs. Clifton (Slim-line) Ltd CA (1967)*
2. *G.F Construction Limited v Rudnap (Zambia) Limited and Unitechna Limited*
3. *Mhango vs. Ngulube & Others (1983) ZR 61*
4. *Chinyanta and Others vs Building Construction Limited and Another, Appeal No. 158/2015 (2018)*
5. *Phillip Mhango vs Dorothy Ngulube and Others (1983) Z.R 6*

Legislation referred to:

Landlord and Tenant (Business Premises) Act, Chapter 194 of the *Laws of Zambia*

Other works referred to:

Halsbury's Laws of England, Third Edition, Volume 12, paragraph 130 at page 90
Megarry & Wade, The Law of Real Property at page 791 and paragraph 14-072
Black's Law Dictionary, Ninth Edition at page 592

By a writ of summons and statement of claim taken out on the 22nd March, 2019 the Plaintiff sought, the following reliefs;

1. An order for the Defendant to compensate the Plaintiff ZMW120,000.00 for loss of business;
2. A Declaration that the Warrant of Distress is null and void;
3. An Order of damages for trespass;
4. Costs; and
5. Any other relief the Court deems fit.

The Plaintiff's case, according to the statement of claim, was that by way of two tenancy agreements dated 31st August, 2018, the defendant leased two of its properties to the plaintiff known as Plot 154 and Plot 131/132 at a monthly rent of ZMW10,000.00 and ZMW6,000.00 respectively. It was an express term of the tenancy agreements that the effective date was 1st September, 2017 valid for three months subject to renewal by either party. Following the lapse of the tenancy agreements, the parties did not renew their agreements but the plaintiff continued to occupy the aforesaid premises and remitting rentals to the defendant. However, on the 1st December, 2018 the plaintiff gave one month's notice to the defendant due to its restructuring its business model. Pursuant to the notice the plaintiff paid rentals in the total sum of ZMW16,000.00 and vacated the leased premises on 7th January, 2019. On or about the 25th January, 2019, acting on a Warrant of Distress issued by the defendant, the Sheriff of Zambia broke into the plaintiff's premises. The Sheriff of Zambia seized among other things 50 bags of fertilizer purporting that the defendant was owed rent by the plaintiff. That the defendant's action was malicious and resulted in the plaintiff failing to trade for 10 days and led to

loss of ZMW120,000.00 in expected profits. It is for these reasons that the Plaintiff's decided to commence this action.

For its part, the 1st Defendant in its defence averred that contrary to the plaintiffs statement of claim, the tenancy agreements between the plaintiff and the defendant relating to the business properties known as Plot 131/132 and Plot No. 154 situate in Kasama were not for a period of three months only but were for a longer duration. Further that the rentals were payable three months in advance and not 'one month in advance as alleged' by the plaintiff. The defendant avered that the plaintiff continued being in occupation of the defendant's business premises. Consequently the plaintiff was liable to pay the rental due and payable to the defendant in respect of the months of December, 2018 and January and February, 2019. The plaintiff did not give any notice to vacate the defendant's business premises and is liable to pay the sum of ZMW32,000.00 being the balance outstanding as indicated in Invoice Nos. 129 and 130 issued by the defendant to the plaintiff in that respect. Further that the said one months' notice was illegal and *void ab initio* and contrary to the requirements at law in the *Landlord and Tenant (Business Premises) Act, Chapter 194* of the *Laws of Zambia* that requires six months' notice to be given. Further that the plaintiff only paid the sum of ZMW16,000.00 against the outstanding rental arrears in the sum of ZMW48,000.00 thereby leaving an unpaid balance of ZMW32,000.00. The plaintiff did not vacate the defendant's premises on the 7th January, 2019 as alleged but continued being in occupation of the said premises. The plaintiff only handed over the business premises on the 5th March, 2019 by formally handing over the keys to the defendant and signing a handover note. The defendant properly and lawfully issued a Warrant of Distress to recover the outstanding rental arrears in the sum of ZMW32,000.00. The alleged loss of ZMW12,000.00 claimed by the plaintiff is baseless as the plaintiff has failed to plead the alleged loss with sufficient particularity to substantiate the loss.

The defendant also went on to make a Counter claim for the following reliefs;

1. An order for payment by the plaintiff to the defendant of the sum of ZMW32,000.00 only in respect of the balance sum of the outstanding rental arrears due and payable by the plaintiff to the defendant.
2. Interest on the said sum of ZMW32,000.00 at current Bank of Zambia lending rate from 28th February, 2019 until full and final payment or settlement by the plaintiff.
3. Costs of the action herein, and
4. Any other relief the Court may deem fit under the circumstances.

At the trial of the action the plaintiff called four witnesses. PW1 was Sydney Mwandila the Regional Manager of the plaintiff company in the Northen and Muchinga provinces of Zambia. PW1's testimony was as follows: Amongst his duties as Regional Manager, he would sign lease agreements on behalf of the plaintiff and he recalled signing a lease agreement between the plaintiff and the defendant on the 1st September, 2017. The duration of the lease agreement was 6 months from the 1st September, 2017 to the 28th February, 2018. After the lease agreement expired the depot manager in Kasama was asked to make a follow up with the landlord in Kasama. In giving feedback to the plaintiff's head office in Lusaka, the depot manager advised that as the plaintiff still had stocks in the warehouse it was agreed that the plaintiff should still continue staying at the defendant's premises and pay rentals up to December, 2018.

At the end of October 2018, the depot manager was informed by the plaintiff's head office to confirm with the defendant that the plaintiff would vacate the defendant's premises at the end of December, 2018 as the plaintiffs' stock were almost finished. The plaintiff did vacate the defendant's premises at the end of December, 2018 and the depot manager was told to go and handover the keys to the landlord the defendant herein. The depot manager informed the plaintiff's head office that the defendant had refused to take over the

warehouse as the plaintiff never gave notice to vacate. PW1 got preoccupied with work in other depots and sometime in January, 2019 he received a call from the Assistant Depot Manager by the name of Ivy Kalunga. The Assistant Depot Manager informed him that they had been visited by some bailiffs who had come to collect 50 bags of Urea to recover the rentals that were pending for the plaintiff's Northern Province branch. The execution took place in January 2019, at a warehouse belonging to the Kasama District Co-operative Union and these premises did not belong to the defendant.

In cross-examination PW1 responded as follows: The plaintiff entered into two lease agreements relating to two different properties known as Plot 131/132 and Plot 154 both in Kasama. The rent at Plot 131/132 was K6,000.00 payable 3 months in advance as per clause 4.1 of the lease agreement. The rent at Plot 154 was K10,000.00 payable 3 months in advance as per clause 4.1 of the lease agreement. Although he had told the Court that both lease agreements were valid for 6 months paragraph 4 in the statement of claim indicated that the lease agreements were valid for 3 months. There was no notice to vacate in the bundle of documents before the Court and neither was there any document to show the handover of the property to the defendant in December, 2018. That although paragraph 7 of the statement of claim states that the plaintiff vacated the defendant's premises on the 7th January, 2019, he was basing his statement to the court, on vacating in December, 2018 on what the depot manager had told him as all their stock was out of the defendant's warehouse by December, 2018. Further, there was no hand over note for the 7th January, 2019. There was also no letter in response to the defendant's letter of demand for overdue rent in the sum of K32,000.00 where the plaintiff was warned that a Warrant of Distress would be issued against it. Additionally, the plaintiff also had not brought any evidence before Court to show that 50 bags of Urea had been seized by the Sheriff of Zambia. Further the plaintiff had not brought any document to show how the sum of K120,000.00 that it had

claimed as having lost was arrived at. Equally, the plaintiff had not brought any document from the Sheriff as proof of execution.

The handover of the keys was done on the 5th March, 2019 by Ivy Kalunga as per the note in the defendants' bundle of documents. The notice to vacate was given verbally by Henry Chipasa the depot manger in Kasama at the time. He never called the landlord over their refusal to get the keys in December, 2018.

PW2 was Issac Ngoma, an Accounts Assistant in the plaintiff company whose testimony was as follows: He was in charge of making payments to the defendant. He used to make the payment of rentals 3 months in advance and the sum would be K48,000.00. The rentals were in relation to the warehouses that are in Kasama. The payments were made by way of a bank deposit the details of which are as per pages 5 to 14 of the plaintiff's bundle of documents as follows:

1st September, 2017 to 1st December, 2017

1st March, 2018 to 1st June, 2018

1st June, 2018 to 1st September, 2018

1st September, 2018 to 1st December, 2018

1st December, 2018 to 1st January, 2019

The last payment made was for one month's rent in the sum of K16,000.00 and this was because the plaintiff had given notice to vacate the defendant's premises. The plaintiff paid all its rentals in full from the time they started renting the defendant's warehouse up to the time the plaintiff gave notice. The plaintiff vacated the defendants' premises in December, 2018 but before the 31st December, 2018.

In cross-examination PW2 responded as follows: The defendant only issued the plaintiff with an invoice for the first three months of the plaintiff's leasing of the defendants' warehouses. During the entire period the defendant never issued any other invoice. There were two invoices issued on the 5th November, 2018 by the defendant as per page 5 of the defendants' bundle of documents. There was no proof of the notice given by the depot manager neither was there any proof of the plaintiff having vacated the defendant's premises in December, 2018. He did receive the letter of demand from the defendant for rental arrears which he did not respond to as at the time he was aware that the plaintiff had vacated the defendants' premises. He only informed the depot manager about the letter of demand but that he did not have proof of the same as it was by way of a verbal communication. He was aware that the lease was in writing and that there is a prescribed format in which Notice must be given.

PW3 was Henry Chikusu a Depot Manager for the plaintiff who testified as follows: His duties include receiving and dispatching fertilizer to the district on behalf of the plaintiff. He was aware of the lease agreement entered into between the plaintiff and the defendant. Both lease agreements were from the 1st September, 2017 to the 28th February, 2018. After the 28th February, 2018 the plaintiff informed the defendant that they still had some stock in the warehouses and that the plaintiff would want to continue renting the defendant's premises until the stock was cleared. The defendant agreed to this proposal and the said agreement between the parties was oral. The oral agreement took effect from the 1st March, 2018 and the end of the same was not specified as it was dependent on when the plaintiff would be ready to move out of the defendant's premises.

On the 27th October, 2018 he was informed by the plaintiff that he was supposed to clear the warehouse by the 31st December, 2018 and that he should inform the defendant. When he went to the defendant's offices he did

not find the Finance Manager but found the Accountant instead who informed him that he could only speak to the General Manager about the plaintiff's Notice to vacate who equally was not in the office. The Accountant advised him to return after a week as the General Manager would be back in the office then. After a week he returned and as the General Manager was not yet back he called him. The General Manager advised him that the handover could not be done in November as according to the lease agreement the plaintiff was supposed to give 3 months' notice and at that time in December, the 3 months' notice could not take effect. The General Manager was referring to the lease agreement that was for the period 1st September, 2017 to 28th February, 2018. The General Manager had brought some invoices to the plaintiff demanding 3 months payment and that is when he, PW3 informed the plaintiff about the matter.

They vacated the defendants' premises on the 31st December, 2018 as per instructions received from the plaintiff's head office. They also took the keys to the defendant on the 31st December, 2018 but the defendant informed him that they could not handover as the defendant had only received part payment. He held onto the keys and on the 5th or 6th of January, 2019 he left the keys with a colleague as he had to travel to Mpika. At the time he left the plaintiff was no longer occupying the defendants' premises.

In cross-examination PW3 responded as follows: He had no proof of the telephone conversation where he informed the defendant of the plaintiff's intention to vacate the defendant's premises. When he was told that he could not handover properly due to lack of notice to the defendant, he informed the management of the plaintiff company. Upon passing on this information he was not sure whether the plaintiff did anything about it.

He was the one who attempted to hand over the keys to the landlord which keys the landlord refused to get. He did not know whether the defendant had since been paid by the plaintiff. When he went to Mpika he left the keys

with Ivy Kalunga and she signed the handover note on the 5th March, 2019. He was not sure why the keys were only handed over on that date. When he left Kasama in January, 2019 his colleague Ivy Kalunga took over from him as the warehouse manager.

PW4 was Ivy Kalunga who testified as follows: She is an Assistant Depot Manager in the plaintiff company and some of her duties included dispatching fertilizer on behalf of the plaintiff. In Kasama the plaintiff had about four sheds and they closed about three. Two of the sheds that closed belonged to the defendant which they closed on the 31st December, 2018. The reason for closure was that the stock had finished and the little that was there was moved to the Kasama District Co-operative Union Shed. On the 5th March, 2019 she handed over the keys to a Mr. Munthali of the defendant company.

Whilst she was at the Kasama District Co-operative Union the bailiffs came with a Warrant of Distress issued by the defendant to collect bags of Urea for non-payment of rentals. She then called the management of the plaintiff and also informed the Regional Supervisor, Sydney Mwandila, who advised her to wait as they were still communicating with the head office. She tried to stop the bailiffs from collecting the bags of Urea who in turn informed her that if the plaintiff did not have the money to pay the defendant, they had to collect the 50 bags of fertilizer which they did. The bailiffs refused to leave any document with PW4 on the basis that it was not her document and she did not sign any document as proof of the collection of the 50 bags which she had counted.

In cross-examination PW4 responded as follows: She did not have any proof to confirm the number of bags that were seized by the bailiffs. She was not aware of the plaintiff's claim of K120,000.00 as loss suffered and that she did not give this figure to the plaintiff. However, she knew that this figure was arrived at as a result of the bags of Urea that were collected by the bailiffs and that their warehouse was closed for almost a month. The bags were returned on the 1st February, 2019 and as per the statement of claim the bags were

collected by the defendant on the 25th January, 2019. The period between the collection and return was not one month but that even after the collection of the 50 bags they had to keep the shed closed as the bailiffs were supposed to collect a total of 100 bags.

At the time of execution, she had 1,770 bags in the shed and the bailiffs were only able to collect 50 bags as their vehicle was too small to carry 100 bags. She did not hand over the keys for the warehouse to the bailiffs and the keys remained in her custody. The bailiffs left her with a document for the 100 bags that they were to collect and she could not recall what the document was called and neither had she produced the said document before court. The said 50 bags of Urea were not sold by the bailiffs.

They moved out of the defendants' warehouse on the 31st December, 2018 to the Kasama District Co-operative Union shed with the stock that was damaged as the stock that was alright was finished. She only handed over the keys to the defendant's warehouse on the 5th March, 2019. Without the said keys the landlord could not have access to their warehouse and the defendant could not show prospective tenants the same. She handed over the keys to Mr Munthali and she signed a note over the same. She did not receive any money for the sale of fertilizer as monies were deposited directly with the bank. She did know the number of bags that were sold daily although she did not bring any proof of this before the Court.

That was the case for the plaintiff.

The defendant called one witness, Kingsley Munthali, DW1, who is the Acting General Manager of the defendant company. DW1's evidence was as follows:

The defendant signed two lease agreements with the plaintiff on the 31st October, 2017 for two plots being Stand No 154 and 131/132 respectively. The two leases were signed by Emmanuel Kapambwe and Samson Kaonga. The

lease agreement in relation to Stand No 154 was for K6,000.00 per month while the lease agreement in relation to Stand No 131/132 was for K10,000.00 per month. The duration for both leases was for 6 months from the 1st September, 2017 to the 28th February, 2018. Both leases had an option to renew.

After signing the two leases the plaintiff and the defendant did business amicably until November, 2018 when the defendant wrote two invoices dated 5th November, 2018 numbered 129 and 130. Invoice number 129 was for K18,000.00 covering the period December 2018 to February, 2019 a period of 3 months. Both invoices were produced before court and the total amount on the said invoices was K48,000.00. The plaintiff made a partial payment on the 30th November, 2018 in the sum of K16,000.00 which left a balance of K32,000.00. After the payment of K16,000.00 the plaintiff continued occupying the defendants sheds and the defendant through their Kasama office and Lusaka office started pursuing payment of the outstanding balance from the plaintiff.

In Kasama they would usually go to the plaintiff's office to pursue the payment whereas in Lusaka they would call the plaintiff's head office. The defendant tried by all means to collect the balance but as no payment was forthcoming they engaged their lawyers, GDC Chambers, to pursue the payment of the balance on their behalf. GDC Chambers, wrote to the plaintiff on the 10th January, 2019 demanding payment of the sum of K32,000.00. As no payment was received, a warrant of distress was issued on the 16th January, 2019 which was executed on the 17th January, 2019.

The defendant did not recover the balance from the execution. After the execution Ms. Ivy Kalunga from the plaintiff company came to the defendant company and handed over the keys to their shed on the 5th March, 2019. DW1 made her sign a handover note which he signed too. The plaintiff did not issue a notice to terminate the lease agreements either orally or in writing. The

plaintiff has not settled the outstanding balance to date and as such the defendant prays that the Court grants the defendant its counter claim.

As at November, 2018 the plaintiff was still in occupation of the defendants' properties. There was a clause in each lease agreement for renewal of the lease by way of mutual agreement. Since the defendant and the plaintiff were still doing business together the plaintiff continued occupying their shed and was compliant in paying the rentals. Invoice No 129 was from December, 2018 to February 2019 and was for the sum of K18,000.00 while Invoice No. 130 also from December, 2018 to February, 2019 was for the sum of K30,000.00. The two invoices were for the total sum of K48,000.00. The plaintiff never complained about or challenged these invoices. The plaintiff has not shown any proof of the alleged loss of K120,000.00 and that the fertilizer that was collected by the bailiffs was returned to the plaintiff.

In cross-examination DW1 responded as follows: The lease agreements were in writing and were from 1st September, 2017 to 28th February, 2018. From the 1st March, 2018 the plaintiff continued to occupy the defendants' premises and pay rent for the same. Proof of the mutual agreement of the renewal of the leases was the handover of the keys note. For the period 1st March, 2018 to 1st June, 2018 the plaintiff paid K48,000.00 and for the period 1st June, 2018 to 1st September, 2018 the plaintiff paid another K48,000.00.

In relation to the month of December, 2018 the plaintiff paid the sum of K16,000.00 in the month of November, 2018. The letter of demand included the month of December, 2018 as there was only a partial payment in December, 2018 of K16,000.00. The period was from December, 2018 to February, 2018 and thereby a balance of K32,000.00 was outstanding. The reference to the continued occupation being by way of mutual agreement was as a result of the continued stay of the plaintiff in the defendant's shed which was shown by the handover of the keys on the 5th March, 2019. This handover note signified that there was a silent agreement as the plaintiff never disputed

the period that they stayed in the defendant's sheds. Silence means consent and if the plaintiffs had disputed this agreement they would not have continued staying in the defendant's sheds. The plaintiff could not silently leave the defendants premises as they still had possession of the defendants' keys for the two sheds. The plaintiffs' could not leave the defendants' premises without handing over the keys to the sheds as the defendant did not have access to the sheds.

He did not have any proof that he was calling the plaintiff over the balance that was outstanding. He did visit the premises before the Warrant of Distress was issued and the plaintiff was still in possession of the keys. Proof of the plaintiff still being in occupation of the defendant's premises at the time of issuance of the Warrant of Distress is the handover note. He did not have proof to show that he visited the premises before the Warrant of Distress was issued. The Warrant of Distress was proof that the bailiffs collected whatever goods they found at the plaintiffs' place. He did not have any proof to show that the goods collected by the bailiffs were returned to the plaintiff.

He did visit the plaintiff at their premises in Kasama to follow up on rentals for the period December, 2018 to February, 2019 and the plaintiff referred him to their Lusaka office for payments. He did proceed to follow up with the plaintiffs' Lusaka office several times and he was advised that they would return his calls. To date however there has been no response to these follow- ups. The proof of Notice of vacating the premises was the one month payment of rent by way of cash deposit with Cavmont Bank by the plaintiff on the 30th November, 2018 in the sum of K16,000.00.

That was the case for the defendant.

Both parties filed into Court written submissions. The gist of the plaintiffs' submissions filed on the 16th October, 2019 is as follows: In the first limb learned counsel for the plaintiff submitted that this Court has discretion

to declare the one months' notice to vacate given by the plaintiff to the defendant as sufficient and further that the two lease agreements came to an end by effluxion of time. For this argument the Court was referred to *Section 8* of the *Landlord and Tenant (Business Premises) Act, Chapter 193* of the *Laws of Zambia*. It was counsel's considered view that though this *section* makes it mandatory for a tenant to give three months' notice, the same was not applicable to the oral agreement which was subsequently entered into by the parties in the case in *casu* as the lease agreements had come to an end by effluxion of time. To buttress this argument, the Court was referred to the case of **Scholl MFG Co. Ltd vs. Clifton (Slim-line) Ltd**[1].

Counsel submitted further that a tenant is not precluded from giving notice to a landlord, any time prior to the scheduled termination of a tenancy by effluxion of time. It was counsel's considered view that the silent lease agreement in issue did not contain a provision for termination by notice but notwithstanding, the notice to quit was an implied term of the lease agreement. Counsel contended that the plaintiff could not read terms into a lease agreement that did not exist between the plaintiff and the defendant and as such the plaintiff was at liberty to give oral notice to the defendant at any time that they wished to vacate the premises. That by the plaintiff paying one months' rent in November, 2018 to the defendant it was evident that the plaintiff did not intend to continue or remain in the premises beyond December, 2018.

In the second limb, counsel argued that the Warrant of Distress issued by the defendant was wrongly executed and tantamount to a malicious act. To buttress this argument, the court was referred to the case of **G.F Construction Limited v Rudnap (Zambia) Limited and Unitechna Limited**[2]. Counsel concluded their submissions by urging this Court to grant the plaintiff the reliefs sought.

Those were the submissions for the plaintiff.

The gist of the defendants submissions were as follows: Learned counsel submitted firstly, that, the plaintiff did not give statutory notice in the prescribed form as required under *Section 8* of the *Landlord and Tenant (Business Premises) Act, Chapter 193* of the *Laws of Zambia.* Counsel contended that by this *section* the plaintiff was required to give notice in writing and that the failure to do so is manifestly fatal and renders the alleged oral notice completely ineffective and of no legal effect or consequence.

Secondly,. counsel went on.to submit that the plaintiff was a tenant at sufferance and in so doing referred the Court to the learned author **F. Mudenda's Land Law in Zambia: Cases and Materials at page 65** which states:

> *"A tenant at sufferance arises where a tenant holds over after his lease has expired and remains in possession without the Landlord's assent or dissent (Remon v City of London Real Property Co. Limited [1921] KB at page 49). The tenant is liable to pay compensation for occupying and using the land (Leigh Dickson [1984] 15 QB 60). A tenant at sufferance differs from a trespasser in that his original entry was lawful and from a tenant at will in that his tenancy exists without the landlord's assent."*

Counsel contended that the alleged expiration of the lease agreements despite continued occupation of the defendant's business premises does not exonerate the plaintiff from paying the rental arrears.

Thirdly, counsel submitted that the plaintiff had miserably failed to prove the alleged claim for loss of business in the sum of K120,000.00 as no evidence was adduced to support this claim. Further that the plaintiff had not adduced any evidence to show that the alleged fertilizer was actually seized by the bailiffs under the warrant of distress issued by the defendant and how this led to the alleged loss of business for 10 days. To buttress this argument, the Court was

referred to the case of **Mhango vs. Ngulube & Others**[3] where the Supreme Court stated:

> *"Any party claiming a special loss must prove that loss and do so with evidence which makes it possible for the Court to determine the value of that loss with fair amount of certainty."*

In summing up their submissions the defendant's counsel argued that the defendant had proved its counterclaim against the plaintiff on a balance of probabilities. It was counsel's considered view that the defendant's evidence was credible and not discredited as the defendant had shown that the plaintiff was in occupation of the defendants' premises under lease agreement until the 5th March, 2019 when handover of the key was done. That the defendant duly invoiced the plaintiff for rent of the two business premises in the sum of K48,000.00 but that the plaintiff only paid the sum of K16,000.00 thereby leaving a balance of K32,000.00. Lastly that despite follow ups and the issuance of a Warrant of Distress the plaintiff failed and neglected to attend to settlement of the sum of K32,000.00 which sum is still due and payable to date. Counsel urged this Court to enter judgment in favour of the defendant with costs.

Those were the submissions for the defendant.

I am indebted to both parties for their submissions and have taken the same into consideration.

The undisputed facts are that:

1. The plaintiff and the defendant entered into two written lease agreements in respect of Plot No. 131/132 Kasama and Plot No. 154 Kasama for a period of 6 months commencing on the 1st September, 2017 and ending on the 28th February, 2018.

2. Rent for Plot No. 131/132 Kasama was K6,000.00 and rent for Plot No. 154 was K10,000.00. The rent for both properties was payable three months in advance.
3. The leases were subject to renewal at the expiration of the 6 month period by mutual agreement of the parties.
4. At the expiration of the leases in February, 2018 the plaintiff and the defendant continued in their relationship without any written leases.
5. The defendant issued a Warrant of Distress in January, 2019.

The crux of this matter lies with the nature of the tenancies that existed between the plaintiff and the defendant in respect of the properties that were leased out to the plaintiff. It is not in dispute that the plaintiff and the defendant entered into two lease agreements in respect of Plot No. 131/132 and Plot No. 154 both of Kasama from the 1st September, 2017 to the 28th February, 2018. The type of tenancy that existed in this period was a lease for a fixed period. Once these leases came to an end by way of effluxion of time the nature of the tenancies changed between the plaintiff and the defendant to that of a tenancy at will and then into that of a periodic tenancy. **Hasbury's Laws of England, Third Edition, Volume 23 paragraph 1153** explains that:

> *"A tenant, who with the consent of the landlord, remains in possession after his lease has expired, is a tenant at will until some other interest is created; until for instance the tenancy is turned into a yearly tenancy by payment of rent."*

As such, although the initial leases expired there was a holding out of the leases past the expiration date which *prima facie* created a tenancy at will and the same transitioned into a periodic tenancy as the plaintiff continued to pay the defendant rent.

Halsbury's Laws of England, Volume 27, Fourth Edition, paragraph 202 at page 154 states:

> *"A holding over with the landlord's consent, which prima facie gives rise to a tenancy at will, may be converted by the parties by their acts or by agreement into a weekly or other periodic tenancy."*

According to **Megarry & Wade, The Law of Real Property at page 791 and paragraph 14-072,** a periodic tenancy can be created in the following ways, namely –

> *"(i) by express agreement;*
>
> *(ii) by inference, such as that arising from the payment and acceptance of rent measured by reference to a week, month, quarter or other period, in circumstances where the parties intended there to be a periodic tenancy and not a mere tenancy at will or a licence; or*
>
> *(iii) by an express provision that the tenancy is to be determinable by some specific period of notice, e.g a quarter's notice"*
>
> ***(Underlining mine for emphasis)***

It is not in dispute that the leases expired on the 28th February, 2018 and the plaintiff remained in possession of the defendants' properties beyond that date. Neither is it in dispute that the defendant continued to receive the rent due and paid by the plaintiff beyond that date. Evidently therefore the nature of the tenancy that existed between the parties was a periodic tenancy.

Counsel for the defendant has argued that the defendant did not assent to the plaintiff holding over of the tenancy agreements after they expired on the 28th February, 2018. I do not accept this argument as the defendants' own witness, DW1, stated the following in his evidence in chief:

"After signing the two leases the plaintiff and the defendant did business amicably until November, 2018 when the defendant wrote two invoices dated 5th November, 2018 numbered 129 and 130. Invoice number 129 was for K18,000.00 covering the period December 2018 to February, 2019 a period of 3 months.....

.....As at November, 2018 the plaintiff was still in occupation of the defendants' properties. There was a clause in each lease agreement for renewal of the lease by way of mutual agreement. Since the defendant and the plaintiff were still doing business together the plaintiff continued occupying their shed and was compliant in paying the rentals."

From the evidence of DW1 it can be inferred that there was consent or assent from the defendant as landlord, for the plaintiff to continue being in occupation of its properties after the expiration of the written leases on the 28th February, 2018. It can be inferred further that, the plaintiff in return continued to pay rent at the agreed interval of every three months in advance. Consequently the defendants' argument that the tenancy that existed between the plaintiff and the defendant was a tenancy at sufferance cannot stand. A tenancy at sufferance is defined by **Megarry & Wades' The Law of Real Property at pages 794 to 795 under paragraph 14-970** as arising where:

"...a tenant, having entered under a valid tenancy, holds over without the landlord's assent or dissent...A tenancy at sufferance can arise only by operation of law, and not by express grant, for it assumes an absence of agreement between the landlord and tenant. Indeed, it is strictly incorrect to call it a "tenancy" at all, for there is no "privity", i.e. tenure, between the parties. But since it normally arises between parties who have been landlord and tenant it has acquired the title of tenancy; and the tenant is liable to a claim for "use and occupation", which properly lies against a tenant, rather

than to an action for damages for trespass or for mesne profits. There of course be no claim for rent as such, for rent is a service which depends upon a proper tenure by consent."

It must be noted that for the defendant's counsel to place reliance on this line of argument, would in essence defeat the defendant's counterclaim as it is clear that a 'tenant at sufferance' cannot make a claim for rent but rather for 'use and occupation.'

Having established that the nature of the tenancy arrangement between the plaintiff and the defendant was a periodic tenancy, it will now be apt to outline how such a tenancy can be determined. **Halsbury's Laws of England, Volume 27, Fourth Edition, paragraph 203 at page 155** states:

"A weekly or other periodic tenancy is determinable by notice to quit, which, in the absence of special stipulations, should be given so as to expire at the end of any complete period of the tenancy, and should, subject to the statutory minimum in the case of dwellings, be equal to the length of period, that is, in a weekly tenancy a week's notice, in a monthly tenancy a month's notice, and in a quarterly tenancy a quarter's notice."

Both the plaintiff and the defendant agreed that after the expiration of the leases on the 28th February, 2018 the plaintiff continued to pay rent to the defendant three months in advance. It can be inferred therefore that the term of the periodic tenancy was a quarterly one. Indeed, PW2 took time to show the court the payment of rentals that were made 3 months in advance from the 1st March 2018 to the 1st December, 2018. It follows therefore that the plaintiff was required to give a quarter's notice which translates to three months' notice as every quarter in a year has a period of three months. The argument advanced by counsel for the plaintiff that there was no obligation for the plaintiff as a tenant to give notice to terminate due to the lease agreements

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to give not less than three months' notice and not more than six months' notice to a landlord to terminate a lease or tenancy agreement. It has already been established that as the tenancy in question was periodic one and a quarterly one at that, then the requisite notice period was three months. Accordingly the plaintiff was required to give three months notice to quit.

Turning now to the issuance of the Warrant in Distress by the defendant, which in turn led to the plaintiff's main claim of K120,000.00 for loss suffered as a result of the seizure of 50 bags of Urea under this Warrant of Distress, the main questions to be asked are:

1. Was the issuance of a Warrant of Distress by the defendant illegal?
2. Did the plaintiff prove its claim of the loss of K120,000.00 following the seizure of 50 bags of Urea?

According to **Halsbury's Laws of England, Third Edition, Volume 12, paragraph 130 at page 90** the right to distrain for rent arises when:

a) The relation of landlord and tenant exists;
b) When the rent becomes due and the distress is levied; and
c) The rent is in arrears.

In response to the first question, it is apparent from the guidelines in Halsbury's above that the defendant was well within its rights to distrain for rent and there was nothing illegal in the course of action that it took. Consequently the reference by counsel for the plaintiff to the case of **G.F Construction (1976) Limited vs Rudnap (Zambia) Limited and Unitechna Limited SCZ Judgment No. 18 of 1999** is erroneous and misplaced as the Supreme Court held in that case that there was no relationship of Landlord and Tenant between the parties in question and nor was there any agreement that before completion of the sale of the property the appellant would pay rent to the 1st appellant.

In answering the second question, the evidence before this Court reveals that the bags that were seized by the bailiffs were returned to the plaintiff without the plaintiff making good on the rent arrears that were outstanding. Further, the evidence shows that the bags were seized on the 17th January, 2019 and returned to the plaintiff on the 1st February, 2019. The period for which the plaintiff was deprived of its goods was 16 days. Be that as it may however, the plaintiff has not produced any evidence before this Court by way of records pertaining to daily sales, numbers in terms of stock and what projected income was to be realized in that 16 day period to substantiate the loss that it now claims before this Court.

As such I agree with counsel for the defendant's reference to the case of **Phillip Mhango vs Dorothy Ngulube and Others**[5] where the Supreme Court held:

> *"Any party claiming a special loss must prove that loss and do so with evidence which makes it possible for the court to determine the value of that loss with fair amount of certainty."*

The plaintiff has not provided any evidence to prove the loss that it has alleged to have suffered and has thereby disabled this Court to determine with a fair amount of certainty the loss it has suffered. The plaintiff therefore on a balance of probabilities has failed to establish its claim that as a result of the defendants' distrain for rent it incurred a loss in the sum of K120,000.00.

The upshot of the matter is that the plaintiffs claim fails in totality and is dismissed forthwith.

In relation to the counterclaim however, the defendants claim succeeds and the defendant is entitled to the following reliefs:

1. An order for payment by the plaintiff to the defendant for the sum of K32,000.00 being the outstanding rental arrears for the months of January and February, 2019.
2. Interest on the said sum of K32,000.00 at the Bank of Zambia average short term deposit rate from the date of the Writ of Summons until the date of this Judgment and thereafter at current bank lending rate until date of payment.
3. Costs to be taxed in default of agreement.

Dated the 19th day of May 2020

Ruth Chibbabbuka

JUDGE