

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

2016/HPC/0395

BETWEEN:

CELL SITE COMMUNICATIONS LIMITED
AND

PLAINTIFF

NATIONAL PENSION SCHEME AUTHORITY
MASAUSO BANDA

1ST DEFENDANT
2ND DEFENDANT

Before Lady Justice B.G. Shonga this 18th day of March, 2021

For the 1st Defendant, Mr. N. Sameta, Messrs. Mambwe, Siwila & Lisimba Advocates.

JUDGEMENT

Cases Referred to:

1. *Kankomba and Others v Chilanga Cement Plc (2002) Z.R. 129.*
2. *M.J.A Limited and 15 Others v NAPSA, 2013/HPC/0560 (H.C.)*
3. *Krige and Another v Christian Council of Zambia (1975) Z.R. 152 (S.C.)*

Legislation and Other Material Referred To:

1. *Section 4 (e) (ii) of the Rent Act*

No page numbers.

1.0 THE CLAIM

This Judgment speaks to a counterclaim by the 1st defendant for the sum of K552, 259.19 in respect of monies allegedly due from the plaintiff for rental arrears for occupation of the 1st defendant's premises from 24th November, 2011 to 31st August 2014; alternatively, damages for loss of use of the 1st defendant's premises, plus interest.

The agreed facts are that on or about 20th September, 2011, the 1st defendant agreed to let the plaintiff Shop No. F.17 at the 1st defendant's Levy Business Mall, Lusaka (the "premises"). The plaintiff subsequently took possession.

On 24th September, 2013, the 1st defendant issued and served a notice to terminate the tenancy on the plaintiff. Approximately one year later, on 18th September, 2014, the 1st defendant issued (of) a warrant of distress for a sum of K534,594.90, being rental arrears for the period 24th November, 2011 to 31st August, 2014 inclusive of expenses of distress.

The parties join issue as to when the plaintiff took possession. According to the 1st defendant, the plaintiff took possession of the premises in September, 2011. The defendant on the other hand, averred that it took possession in September, 2012 after works on the premises were completed.

2.0 DEFENCE TO COUNTER CLAIM

In response to the counterclaim, the plaintiff averred that after it took possession, it paid rentals for two months until a dispute arose between the tenants of Levy Business Park mall and the 1st defendant. The plaintiff accepted that it subsequently did not pay rentals. However, the plaintiff denies liability on the premise that the 1st defendant is not entitled to any reliefs sought in the counterclaim because the lease agreement upon which the relationship between the parties was founded was *void ab initio* for want of registration. Reference was made to a judgement dated 25th August, 2014 under cause 2013/HPC/0560.

3.0 THE EVIDENCE

When the matter came up for hearing, the plaintiff was not in attendance. Given the affidavit of service on the record, I was satisfied that the plaintiff was aware of the hearing date. There being no reason advanced for the non-attendance, I proceeded to hear the matter.

The 1st defendant called one witness, DW1, Mr. Nkatya Glenam Kasumpa, the Property Manager for Levy Business Mall. Mr. Kasumpa presented his evidence in chief through his witness statement of 22nd March, 2016.

According to DW1, the 1st defendant availed the plaintiff a proposed lease agreement in April, 2011. The lease was availed through Liberty Properties, a property management company that represented the 1st defendant. The plaintiff signed the proposed agreement on 12th April, 2011. I was referred to pages 1-7 of the 1st defendant's bundle of documents.

DW1 testified that the plaintiff did not pay rentals from its initial occupation in 2011. DW1 recounted that the 1st defendant served a notice to terminate the lease agreement on the plaintiff on 24th September, 2013. According to PW1, the effective date of termination was stated to be 25th March, 2014. Reference was made to the notice appearing on page 16 of the 1st defendant's bundle of documents.

It was DW1's testimony that as of 30th September, 2013, the balance outstanding stood at K 336,909.66. Reference was made to the letter dated 21st October, 2013 appearing at page 17 of the 1st defendant bundle of documents. The letter is addressed to the plaintiff. In it, the plaintiff was requested to confirm the reflected balance of K 336,909.66. Follow up letters were sent to the plaintiff on 26th November, 2013 and 9th December, 2013. This is demonstrated by the letters exhibited on pages 18 and 19 of the 1st defendant's bundle of documents.

According to DW1, the plaintiff did not vacate the premises on 25th March, 2014 in accordance with the notice to terminate. This provoked the 1st defendant to issue a warrant

of distress for the sum of K 534,594.04 on the 18th of September, 2014. Reference was made the warrant of distress exhibited on page 20 of the 1st defendant bundle of documents. Subsequently, on 22nd September, 2014 the 2nd defendant proceeded to distrain and impound the goods of the plaintiff as demonstrated by the inventory exhibited on pages 24 to 27 of the 1st defendants' bundle of document.

4.0 LEGAL ARGUMENTS

The gist of the submissions tendered on behalf of the 1st defendant is that there is no evidence before this court to counter the evidence that the plaintiff is indebted to the 1st defendant in the sum of K552, 259.19 in respect of rental arrears. Essentially, the 1st defendant argues that the plaintiff has no defence.

My attention was drawn to **Section 4 (e) (ii) of the Rent Act** which gives the Court authority to make an order for the recovery of arrears of standard rent, mesne profits, and a charge for services. Consequently, I was invited to order the

plaintiff to pay the claimed arrears. Alternatively, I was implored to award damages in favour of the 1st defendant for the loss of use of its premises from 24th November, 2011 to September, 2014.

5.0 DETERMINATION

Before delving into my determination, I must express regret for the delay in rendering this Judgment. It was occasioned by an unusual lapse in record management that was beyond my control.

I now turn to the merits. I have considered the evidence before Court and the submissions presented. In my view, this case turns on determining whether the 1st defendant is entitled to the rental arrears worth K552, 259.19 from 24th November, 2011 to 22nd September, 2014.

Firstly, I accept and find that the plaintiff and defendant entered a lease agreement which was signed by the parties on 12th April, 2011. According to clause 5 of the lease agreement, the commencement date was 20th September,

2011. By clause 6, the rent obligation date was 20th October, 2011 or such other date as may be determined in accordance with the said agreement. In addition, according to clause 8, the term of the lease was expressed as follows:

"The lease shall enure for a period of 5 years after the rent obligation date, so as to achieve an expiry date of 20 October, 2016."

There was no evidence led to demonstrate that the parties agreed a rent obligation other than 20th October, 2011. Thus, I am satisfied that the plaintiff took possession of the premises on 20th September, 2011, in accordance with the lease and that it was obligated to pay rent from 20th October, 2011. In addition, I accept that the plaintiff occupied the premises from September, 2011 to September, 2014 without paying rentals.

My findings are rooted in the uncontroverted evidence of DW1 and documentary evidence before me. Based on the undisputed testimony of DW1, I find that as of September, 2014 the plaintiff was indebted to the plaintiff in the sum of K 534,594.04

I take pause to remind myself of the established legal principle that *"he who alleges must prove,"* which was affirmed by the Supreme Court in the case of ***Kankomba and Others v Chilanga Cement Plc (2002) Z.R. 129¹***. I will apply this principle as I make my determination.

Turning back to the case before me, I have not lost sight of the plaintiff's pleadings wherein it was contended that the lease was not registered and therefore *void ab initio*. My attention was drawn to the Judgment in the case of ***M.J.A Limited and 15 Others v NAPSA, 2013/HPC/0560 (H.C.)²***. In that case, her ladyship, Judge Nyambe (as she then was), held as follows:

"no terms of a lease agreement can be effective, nor can a party therefore claim under an unregistered lease agreement."

Her Ladyship relied on the case of ***Krige and Another v Christian Council of Zambia (1975) Z.R. 152 (S.C.)³***, where it was held as follows:

"none of the express covenants in the agreement for a lease nor the purported date of termination was effective because of the lack of registration."

There, the Supreme Court pronounced that the effect of non-registration is that the lease is void for all purposes whatsoever. *In casu*, no evidence was led to demonstrate that the lease was not registered. I apply the principle that was affirmed in the **Kankomba** case and opine that the plaintiff was required to prove the allegation that the lease was not registered. Absent such proof, I decline to make a finding that the lease in this case was void ab initio.

Since evidence was led to demonstrate that the 1st defendant issued a warrant of distress pursuant to the Law of Distress Amendment Act, 1888, I am provoked to consider the import of distraint. The evidence before me reveals that ~~that~~ the 1st defendant issued a warrant of distress on 18th September, 2014. In addition, a notice of distress was issued on the same date. The notice reads, in part, as follows:

"Take notice that by virtue of the authority given to me by the Landlord, I have this 22nd day of September, 2014 seized distrained for the sum of KZMK534, 594.00 being rental arrears owing for the period 24th November, 2011 to 31 August, 2014..."

Take Notice that unless the said rent be together with the expenses of distress or the goods be reprieved within five (5) days from the date hereof they will be sold."

Further, the evidence tendered by the 1st defendant has demonstrated that the goods listed in the inventory on pages 25-26 were seized pursuant to the warrant of distress from the premises to satisfy the rental arrears of K534, 594.00 owed by the plaintiff to the 1st defendant.

I have combed through the evidence before Court in search of evidence that demonstrates that the process of distress was not completed or that it was concluded but the amount of money received from the distress sale was deficient. My search yielded no results. In the absence of any evidence to the contrary, I am left to conclude that the 1st defendant successfully distrained for its rental arrears. Again, applying the principle that he who alleges must prove, I find that the 1st defendant ought to have demonstrated that there are monies outstanding in respect of rental arrears after the process of distress.

Considering the 1st defendant's failure to establish the existence of outstanding rental arrears following distraint, I opine that entitlement to the rental arrears claimed has not been demonstrated. Consequently, the 1st defendant's claim is unsuccessful, and is dismissed. Each party shall bear its own costs.

Dated this 18th day of March, 2021



B. G SHONGA
HIGH COURT JUDGE