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CONTAINING

CASES DETERMINED BY THE HIGH COURT OF NORTHERN RHODESIA

IN THE EXERCISE OF ITS ORIGINAL REVISIONAL AND APPELLATE JURISDICTION

(1949-1954)

EDITED BY

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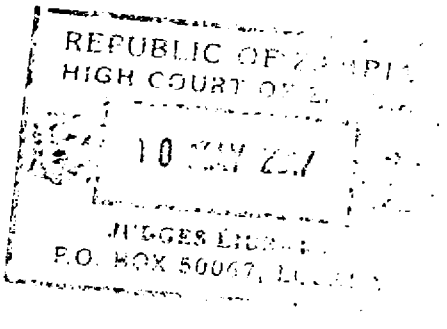

PUBLISHED BY THE AUTHORITY OF THE CHIEF JUSTICE

O. H. SUNDI v. A. N. RAVALIA.

CIVIL CAUSE NO. 49 OF 1948.

[Before the Honourable Mr. Justice WOODMAN at Ndola on the 1st June, 1949.]

Tenancy agreement—effect of non-registration—meaning of "null and void"—entry into possession and payment of rent—tenancy from year to year created by presumption of law.

The facts are set out fully in the judgment below:

Held (1–6–49):

(1) That the meaning of "null and void" in section 6 of the Lands and Deeds Registry Ordinance is "of no effect whatever" (judgment to the contrary in *Ward* v. *Casale and Burney* (1) *infra* not followed).

(2) Accordingly, a tenancy agreement which should have been, but has not been, registered cannot be relied upon as an agreement for a lease and cannot be used to fix the date of the commencement of a tenancy from year to year which has been created by actual entry and payment of rent.

(3) Tenant not estopped from alleging nullity where, although requested to do so, he has failed to register, since such course was open to the landlord or indeed any "interested person". *Quaere* whether this would apply in the event of fraud [*Editor*—and on this point see *Lazarus Estates Ltd.* v. *Beasley* (1956) 1 A.E.R. 341 at p. 345].

(4) The English doctrine of notice of prior registered documents (as set out in *Le Neve* v. *Le Neve* (3) *infra* and similar English cases) is, in the absence of fraud, not applicable to this Territory, being expressly excluded by section 7 of the Ordinance.

The relevant sections of the Lands and Deeds Registry Ordinance are set out in the judgment hereunder.

Cases referred to:

(1) *Ward* v. *Casale and Burney* at page 759 hereof.

(2) *Parker* v. *Taswell* (1858) 27 L.J. (Ch.) 812; 44 E.R. 1106.

(3) *Le Neve* v. *Le Neve* (1748) 3 Atk. 646; Amb. 436; 2 Wh. and Tud. L.C. 175; 26 E.R. 1172.

(4) *Edwards* v. *Edwards* 2 Ch.D. 291.

(5) *Monolithic Building Co.* in *re Tacon* v. *The Company* (1915) 1 Ch. 665.

[*Editor*—For a case where extension of time for registration was allowed see *Patel and another* v. *Ismail* reported at p. 563 hereof.]

Woodman, J.: This is an appeal by O. H. Sundi against a decision of the Subordinate Court (Class I) Fort Jameson giving judgment for the respondent A. N. Ravalia with costs in an action brought by the appellant against the respondent in which the appellant claimed £120 from the respondent as rent due and unpaid for the stand on Plot No. 48.

The action was commenced on the 17th March, 1948, by writ of summons. No statement of claim was filed by the plaintiff apart from the particulars of claim set out in the writ of summons which were as follows: " Rent for stand on Plot No. 48 should be in advance for 1948 and not yet paid ".

No statement of defence was filed by the defendant. As the Subordinate Court did not order the plaintiff to file a written statement of claim nor order the defendant to file a written statement of defence the procedure followed was in accordance with Order XVIII rule 1 of the Subordinate Courts (Civil Jurisdiction) Rules (Cap. 4).

The plaintiff relied on a tenancy agreement dated the 24th January, 1947, according to the terms of which the appellant agreed to let and the respondent agreed to take on rent all that Plot 48 situate in Fort Jameson Township along with the buildings thereon erected for a period of four years commencing from the 1st February, 1947, at the yearly rent of £120 payable yearly in advance.

This tenancy agreement was not registered as required by section 4 (1) of the Lands and Deeds Registry Ordinance (Cap. 84) (hereinafter called " the Ordinance ").

The Subordinate Court found as a fact that the respondent did not enter into possession until the 15th May, 1947. The respondent paid to the appellant £120 by cheque dated the 8th May, 1947. This cheque was given to the appellant on the 8th May, 1947. On the face of the cheque were written the words " House rent for one year ". It was at no time suggested that these words were written after the respondent signed the cheque.

At the trial counsel for the plaintiff contended that although the tenancy agreement was not registered the defendant was to blame for that and was consequently estopped from alleging that the agreement was " null and void " despite the provision of section 6 of the Ordinance which reads " Any document required to be registered as aforesaid and not registered shall be null and void ". He further contended that even if the defendant was not estopped, the effect of section 6 of the Ordinance was that the tenancy agreement, though void in law as a lease, was valid in equity as an agreement for a lease and could be specifically enforced. And further that even if the agreement was void both in law and equity, a tenancy from year to year arose by presumption of law, as the defendant had entered upon the premises and paid an annual rent. He submitted that the entry was made by the tenant under the terms of the agreement and that therefore the defendant became a yearly tenant on the terms of the agreement so far as they applied to a yearly tenancy. In any of these alternatives the second year's rent became due on the 1st February, 1948, and the Subordinate Court should therefore have given judgment for the plaintiff. The contentions of counsel for

requires the original and in certain cases one, and in other cases two, copies to be handed to the Registrar.

As the appellant was only in possession of the counterpart of the lease he contends that he was not in a position to comply with Regulation 6.

It may well be that for this purpose both the lease and counterpart are originals, but even if this is not so, the Registrar under section 4 (2) (*b*) of the Ordinance has power to order the lessee to produce the original lease. A refusal by the lessee to obey such an order could not defeat the landlord's right to have the lease registered. In these circumstances I can see no reason why the respondent should be estopped from setting up the plea that the tenancy agreement was null and void.

It might have been a different matter if the respondent had induced the appellant to refrain from registering by falsely informing the appellant that the document had been registered by the respondent.

The second ground of appeal therefore fails. The questions raised by the other grounds of appeal really amount to this: What on the correct interpretation of the Ordinance were the consequences of non-registration in the circumstances of this case ?

Section 4 (1) of the Ordinance, so far as relevant to this appeal, reads as follows:

> " 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 . . . must be registered within the times hereinafter specified in the Registry or in a District Registry if eligible for registration in such District Registry. Any document required or permitted to be registered affecting land persons property or rights in any district for which a District Registry has been appointed may be registered either in such District Registry or in the Registry."

Section 3 (1) of the Ordinance defines " the Registry " as meaning " the Registry of Deeds in Lusaka ".

The trial Court held that the tenancy agreement had not been registered as required by section 4 of the Ordinance, and this finding of fact has not been attacked by either party to the appeal.

Section 5 specifies the times within which registration must be effected.

Section 6 of the Ordinance is as follows:

> " 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, however, that 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:

Provided also that 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."

Section 7 (1) of the Ordinance reads:

"7. (1) All documents required to be registered as aforesaid shall have priority according to date of registration: notice of a prior unregistered document required to be registered as aforesaid shall be disregarded in the absence of actual fraud."

The agreement dated the 24th January, 1947, on which the appellant relies was produced to the trial Court and marked "O.H.S. No. 2".

From its terms it is clear that it is a lease and not a mere agreement for a lease for a period of four years, and as such it required to be registered under section 4 of the Ordinance. It is to be noted that even if it were a mere agreement for a lease it would still require to be registered under section 4. The lease in question, not having been registered within the time prescribed or indeed at all, is by virtue of section 6 "null and void" whatever that may mean. Apart altogether from authority, I should have thought that the Ordinance means exactly what it says, not "void in law but valid in equity", nor "void as a lease but valid as an agreement for a lease enforceable in equity by way of specific performance", but simply "null and void". And if the lease is null and void then it can have no effect whatever, it cannot pass any interest and it cannot be specifically enforced. Is there any good reason for refusing to adopt this plain and natural interpretation of the Ordinance? ROBINSON, J., in the case of *Ward* v. *Casale and Burney* (1) decided in the High Court of Northern Rhodesia (Civil Case No. 26 of 1941), appears to have held that there was. In his view the expression "null and void" in the Ordinance ought to be interpreted in the same way as the Courts in England have interpreted the expression "void at law" in the Real Property Act of 1845. He says "there is no difference in my opinion between 'null and void' and 'void at law'."

The Real Property Act of 1845 provided that leases which formerly had to be in writing under the Statute of Frauds now had to be by deed or "shall be void at law". Now the leading case on the interpretation of that provision of the Real Property Act of 1845 is *Parker* v. *Taswell* (2).

In his judgment in that case LORD CHELMSFORD, L.C., said: "The Legislature appears to have been very cautious and guarded in language for it uses the expression 'shall be void at law'—that is as a lease. If the Legislature had intended to deprive such a document of all efficacy, it would have said that the document should be 'void to all intents and purposes'. There are no such words in the Act. I think it would be too strong to say that because it is void at law as a lease, it cannot be used as an agreement enforceable in equity, the intention of the parties having been that there should be a lease, and the aid of equity being only invoked

to carry that intention into effect." So far therefore from the presence of the words " at law " in the expression " void at law " making just no difference at all, their presence was the *ratio decidendi* of LORD CHELMSFORD'S decision.

There is a further difficulty in the way of holding that under the Ordinance exhibit O.H.S. 2 is void as a lease but valid as an agreement for a lease because under section 4 an agreement for a lease for more than one year is just as void for non-registration as a lease is.

I must therefore respectfully disagree with the opinion of ROBINSON, J., that there is no difference between " null and void " and " void at law " and with his opinion that the expression " null and void " in section 6 of the Ordinance should be interpreted in the same way as the English Courts have interpreted the expression " void at law " in the Real Property Act, 1845.

Mr. Conway has relied on the case of *Le Neve* v. *Le Neve* (3), which was a decision under the Middlesex Registry Act, 1708, and other similar cases under other Acts in which it was held that although the Act in terms made certain documents void if they were not registered yet a prior unregistered document would not be void against a person whose document was registered subsequently to the date of the unregistered document, if the person claiming under the subsequent registered document had notice of the prior unregistered document.

Now, apart from the fact that the question of the effect of notice of a prior unregistered document does not arise in this case at all, the case of *Le Neve* v. *Le Neve* and other similar cases can be of no assistance in the interpretation of the Ordinance, even by way of analogy, because the principle applied in those decisions has been expressly excluded by section 7 of the Ordinance, which provides that " notice of a prior unregistered document required to be registered as aforesaid shall be disregarded in the absence of actual fraud ".

That being so it is not necessary to deal with any of those decisions in detail, but I may point out that the reason for the decision in the case of *Le Neve* v. *Le Neve* was that the preamble of the Act stated that whereas indisposed persons had it in their power to commit and frequently did commit frauds *by prior and secret conveyances* and then followed the words of enactment. In view of that preamble the Court held that the intention of the Act was only to protect subsequent purchasers against prior and secret conveyances and not against prior unregistered conveyances of which they had notice.

The Ordinance contains no such preamble.

Moreover, the case of *Le Neve* v. *Le Neve* is 200 years old and in more modern cases it has been held that " it would be dangerous to engraft an equitable exception upon a modern Act " (JAMES, L.J., in *Edwards* v. *Edwards* (4) quoted with approval in *Monolithic Building Co.*, in *re Tacon* v. *The Company* (5)).

Mr. Conway, for the appellant, contended that as the expression used in the Ordinance is " null and void " and not " null and void to all intents and purposes " the language of the Ordinance was not strong enough to exclude what JAMES, L.J., called " equitable exceptions ".

The question as to whether the words " to all intents and purposes " add any strength to the expression " null and void " is one to which the English Courts have not always given the same answer. There is a long line of old cases to the effect that the words " to all intents and purposes " are little more than an expletive (see *Stroud's Judicial Dictionary*, 2nd Edition, pp. 2194–6). But in modern times the courts have been less consistent. (See *Stroud's Judicial Dictionary*, 2nd Edition, p. 2196.)

The position now seems to be that it is a question of ascertaining the intention of the Legislature in the particular enactment under consideration.

Reading sections 4, 6 and 7 of the Ordinance together it seems to me quite clear that the intention of the Legislature was to deprive of all efficacy documents which are required to be registered under the Ordinance and which have not been so registered. The only exception is in the case of fraud.

The legislator has met the case of hardship arising from non-registration by providing in section 4 a procedure whereby the Court may authorise registration out of time in a proper case. It seems to me to be as plain as a pikestaff that the legislator intended to provide his own equities and did not intend that any others should be read into the Ordinance.

There was no fraud in this case. Failure by the respondent to register was not fraud. The appellant knew or must be taken to have known the law as well as the respondent. As I have pointed out there was nothing to prevent the appellant obtaining registration himself and he could even if necessary have applied to the Court for permission to register out of time. It is not fraud for a man to insist upon his legal rights.

Another argument of Mr. Conway was that the Ordinance only makes the document void and it does not say that the transaction is void. The transaction therefore is valid and can be enforced.

Such an interpretation appears to me to be excluded by section 7 of the Ordinance. To say that one document should or should not have priority over another would be meaningless unless that priority was intended to affect the rights of the parties to the documents. Mr. Conway's final argument on the construction of the Ordinance is that to hold that the transaction is void would lead to absurd results. He puts the following hypothetical case. " Supposing I agreed with Mr. Smith in writing that I will sell him a large quantity of machinery at the price of £10,000 and I would allow him to store this in a small corner of a yard which belonged to me on terms which amounted to a demise for two years at a rental of, say, £5 per annum. Mr. Smith very kindly pays me the whole of the purchase money, but when he asks for delivery of the machinery some four months later I say, ' Oh, no. The agreement between us is null and void because the document containing the agreement has created an interest in land and is null and void for want of registration—you can neither have your machinery nor the land.' " And then Mr. Conway goes on to suggest that Mr. Smith would be unable to recover his £10,000 if even one bolt had been delivered to Mr. Smith by Mr. Conway, because there had not been a total failure of consideration.

If this were the result of holding that the transaction was null and void that result would be absurd. But fortunately for Mr. Smith no such result would follow. Either the agreement is separable or it is not. If it is separable no difficulty arises. If it is not separable then the transaction being null and void no property passed and the £10,000 still belongs to Mr. Smith and the bolt to Mr. Conway. Mr. Smith is entitled to the return of his £10,000 and Mr. Conway to the return of his bolt or its value. I therefore hold that by virtue of sections 4 and 6 of the Ordinance the lease dated the 24th January, 1947, is null and void for want of registration and that that lease can have no effect whatever, it can pass no title or interest either in law or equity and that the transaction evidenced by the document of the 24th January, 1947, is equally null and void and cannot be enforced nor have any effect.

That being so, what is the position ?

The trial Court found as a fact that the respondent did not enter into possession until the 15th May, 1947. There was evidence upon which the trial Court could so find and I see no reason to disturb that finding of fact. The respondent also paid to the appellant £120 as one year's rent in advance on the 8th May, 1947. By presumption of law a tenancy from year to year was created as from the 15th May, 1947, by the respondent's entry into possession and payment of an annual rent. As the sum of £120 was paid as one year's rent in advance, the respondent must be taken to have agreed that the rent was to be £120 per annum and was to be paid yearly in advance.

Mr. Conway contends that that payment of £120 must be taken to have been paid as rent for the period from the 1st February, 1947, to the 31st January, 1948, and that all the terms of the lease of the 24th January, 1947, must be imported into the tenancy agreement implied by law, so far as those terms are consistent with a tenancy from year to year. The tenancy must therefore be taken to have commenced on the 1st February, 1947, and in consequence the second year's rent was due on the 1st February, 1948. I am unable to agree with those contentions. The lease having been deprived by the Legislature of all efficacy cannot be called in aid to show that the tenancy commenced on the 1st February, 1947, nor for the purpose of importing any other of its terms into the tenancy implied by law. The presumption is that the tenancy commenced on the date of entry into possession, and that presumption can only be rebutted by proof that there was a fresh agreement between the parties that the lease should commence at some other date. What evidence is there of such fresh agreement ? I can find none. That the respondent on 8th May, 1948, gave appellant a cheque on the face of which was written " House rent for one year " is not enough. Mr. Conway contends that you must link that up with the lease of the 24th January, 1947. That cannot be done because the lease has no more effect than as if it had never been entered into. The burden of proof of such a fresh agreement lies on the appellant and he had failed to discharge it.

Although I cannot agree with all the reasoning of the learned Magistrate who tried the case, he arrived in the end at the right conclusion and properly gave judgment for the respondent with costs.

For the reasons I have stated this appeal is dismissed with costs against the appellant both in this Court and in the Court below.