PALSCO STORES LTD v RAMANBHAI PATEL (1987) Z.R. 108 (S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER AND SAKALA, JJ.S.
11TH MARCH, 1987 AND 14TH SEPTEMBER ,1987
(S.C.Z. JUDGMENT NO. 19 OF 1987)

Flynote

Landlord and Tenant - Application for new tenancy - Irregularity - Objection must be made at the trial.

Headnote

The Landlord argued that the tenant was not entitled to apply for anew tenancy as his application was irregular as to time. At the time of the trial the landlord did not raise such an objection.

Held:

(i) Where there is an objection on a procedure matter, especially as to time, such objection must be raised at the trial; otherwise the parties will be deemed to have waived the irregularity.

Cases cited:

(1) Minos Panel Beaters Ltd v Chapasuka (1986) Z.R. 1
(2) Dodds v Walker [1980] 2 All E.R. 507 p109

Legislation referred to:

Landlord and Tenant (business Premises) Act, Cap. 440, ss.6 (4), 10 (3), 10 (4)

For the appellant: R.R.I. Malik, Messrs Cave Malik & Co.
For the respondent: D.A.Kafunda, Messrs Manek & Co.

Judgment

GARDNER,J.S.: delivered the judgment of the court.

This is an appeal against a judgment of the High Court holding that the appellant was not entitled to apply for a new tenancy' of business premises.

At the original hearing, after hearing the evidence and argument for and against the granting of a new tenancy the learned trial judge held that, as the tenancy was a monthly tenancy, it was not for a term of years certain within the provisions of section **10** 6 (1) of the Landlord and Tenant (Business Premises) Act Cap. 440. He further held that as the application for a new tenancy was made after the giving of the notice to quit, section 6 (4) of the Act prevented the application being heard. The learned trial judge therefore dismissed the application.

At the hearing of this appeal counsel for the respondent conceded that the appeal should be allowed on the authority of a number of cases and in particular on the authority of *Minos Panel Beaters v Chapasuka*, (1) in which this court held that a monthly tenancy comes within the definition of a term of years certain, and that section 8 (4) does not prevent an application to the court for anew tenancy - it prevents a tenant's request to his landlord for a new tenancy after a notice to quit has been served.

We were formed that the matter had resolved itself and there was now no need for new tenancy.

On the question of costs, Mr Kafunda on behalf of the respondent argued that the appellant could in any event, never have succeeded on the original application because his application for a new tenancy was filed less than two months after the delivery of the notice to quit, whereas section 10 (3) of the Act provides that no application for a new tenancy shall be entertained unless it is made not less than two nor more than four months after the giving of the notice to quit. He cited the case of *Dodds v Walker* (2) as an example of the courts' holding that even if an application were only one day out of time, it can be dismissed.

Mr Malik drew the court's attention to section 10 (4) of the Act which provides that a court may permit a tenant to apply to the court for a new tenancy notwithstanding the application is not made within the period specified in subsection (3).

The objection under section 10 (3) was not raised in the court below, and we take the view that, where there is an objection on a procedural matter, especially as to time, such objection must be raised in the court below; otherwise unless there is some statutory authority to the contrary, the parties will be deemed to have waived the irregularity. In this particular case, section 10 (4) specifically allows the court to waive the irregularity and certainly no injustice would be done to the respondent by holding that the irregularity of having made the application nine days earlier than it should have been should be deemed to be waived. We, therefore, hold that the proceedings were not nullified by the irregularity of the premature application.

There is no reason why the successful appellant should be deprived of its costs. The appeal is allowed and the order dismissing the application on the grounds set out in the court below is set aside, with costs of this appeal and in the court below to the appellant.

Appeal allowed
