

JOSEPHAT KUDUMBA
and
LUCKY MUBAIWA

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 3 & 4 March 2022 and 14 June 2022

Civil Trial

Ms *S Mutsau* with Ms *M Moyo*, for the plaintiff
Ms *R C Muchenje*, for the defendant

MHURI J: The Plaintiff issued summons against defendant on 30 January 2019 seeking the following relief:-

- (i) a declaratory order that the plaintiff is a Statutory Tenant at the Sports Bar commonly known as the Beer Engine situated at Uzande Business Centre in Murombedzi
- (ii) that defendant be interdicted from seeking the eviction of plaintiff without due process.
- (iii) the defendant pay the plaintiff's costs of suit on a legal practitioner and client scale.

Plaintiff's claim is premised on his declaration which reads as follows:-

- that on 1 January 2016 he and the defendant entered into a verbal lease agreement in respect of a sports bar owned by the defendant.
- the terms of the lease agreement were *inter alia* that:
 - (i) plaintiff would take occupation of the sports bar on a monthly rental of US\$100-00.
 - (ii) plaintiff would pay his own electricity bills to Zesa
- plaintiff took occupation of the said bar (the Beer Engine) and has been complying with the terms of the agreement.
- on 2 January 2019 he became a statutory tenant of the leased premises.

- on 24 January 2019 defendant visited the plaintiff's sports bar and advised the plaintiff to vacate the premises on 31 January 2019 without just cause.
- plaintiff has not defaulted in making his rental payments and electricity bills as per the agreement.
- plaintiff renewed several contracts with service providers and his employees in respect of his operations at the Sports Bar on the understanding that the lease was still operational.
- plaintiff now risks facing lawsuits from breaking the contracts he had renewed.
- plaintiff has no other remedy available to him other than seeking an order declaring him a statutory tenant and also that defendant be interdicted from evicting him without due process.

In summary, the defendant's plea on the merits was to the effect that:

- he and the plaintiff entered into a lease agreement on 1 January 2016 and the agreement was reduced into writing.
- the terms of the agreement were amended in July 2017 to increase the monthly rental to US\$150-00
- although plaintiff took occupation of the Sports Bar he was not complying with the terms of the lease agreement, in that:
 - a) he has not paid the rentals for the 5 (five) months prior to the expiring of the lease. From July 2017 plaintiff never paid the \$50-00 increase in rent but the initial rent despite consenting to the increment.
 - b) plaintiff did not pay for the renewal of the liquor license for the past 3 (three) years
 - c) the plaintiff did not maintain the premises in good order – he damaged the floors and windows.
- By 2 January 2019 plaintiff's lease had not expired as such he cannot claim to be on statutory tenant by that date

- Plaintiff acted prematurely in renewing contracts with his service providers and his employees without first ensuring that the lease would be renewed upon expiry.
- Plaintiff has no basis to seek the relief he is seeking as he is in clear breach of the lease agreement which entitles the defendant to evict him.

At the pre-trial conference held before a Judge, the issues identified and referred for trial were as captured in the joint pre-trial conference minute dated 21 May 2021. These are

1. whether or not the lease agreement expired on 1 January 2019
2. whether or not the plaintiff can claim statutory tenancy
3. whether or not plaintiff is entitled to the declaratory order sought.

The plaintiff had the *onus* to prove issues 2 and 3 whereas defendant was to prove issue 1.

Plaintiff led evidence from himself and one other witness named Dapfine Muteyiwa and defendant led his own evidence and did not have any witness to call.

Plaintiff's evidence can be summarized as follows; that in December 2015 he and the defendant entered into a verbal lease agreement over the Sports Bar (Beer Engine), the terms being that he as the tenant would pay US\$100-00 as rent as well as licenses and bills to Council and Zesa. This was an open ended lease as long as he paid his rentals. He was to pay US\$ 700-00 cash in advance i.e before 1 January 2016 which he did and in March 2016 he paid US\$ 1 300-00. Because he paid his rentals in advance he never got any demands from defendant, neither did defendant write to him to discuss the issue of rentals. Their relationship was excellent until a time later when defendant asked for some favours when he was sick which he could not help him with, and that since he was not satisfied with the verbal lease agreement, he bought and took to defendant lease agreement forms. He signed them but defendant did not, asking for some time to go through them. Defendant however on second thoughts decided against a written agreement stating they keep the agreement as a verbal one a suggestion he agreed to. To support this submission, plaintiff referred to a letter dated 31 August 2018 written by defendant titled, and reads:-

“RE: NOTICE OF TERMINATION OF VERBAL LEASE

You are hereby informed that your verbal agreement will be expiring on 31 December 2018. So please take note that your tenure is hereby being terminated on the date said (supra) above.

Also take note that due to change of administration no renewal will be accepted hence you are being asked to vacate by the said date without fail”.

Plaintiff also referred to another letter dated 17 May 2016 written by *Kwenda & Chagwiza* Attorneys at Law, defendant’s erstwhile legal practitioners to Messrs *Mutumbwa, Mugabe & Partners*, plaintiff’s legal practitioners in which paragraph 2 reads:

“.....Basically our client denies yours’ allegation that parties have a (three) 3 year tenure lease agreement.
The lease was open ended.”

The letter further reads as follows;

“our client acknowledges that yours paid \$700-00 rent in advance as well as that Zesa is deducting some amount each time yours buys an electricity voucher.....
We have now been instructed to give your client, as we hereby do, three calendar months’ notice to vacate the leased property.
Our client intends to renovate it and thereafter use the premises personally.”

Plaintiff also submitted that there was no other discussion held amending the verbal lease agreement and since he took occupation of the Beer Engine he had been paying his rentals without any problems. There was however a time when defendant closed the shop and he incurred losses as a result.

He is claiming statutory tenancy because since December 2015 he has been paying his rentals without any problems.

Under cross-examination applicant confirmed his name was Josphat and not Joseph. On why he was claiming statutory tenancy, he maintained his position that he has been paying his rentals in advance and is not in arrears. On the absence of proof of payment applicant responded that due to the trust he had, he did not ask for any receipts. On the issue that he cannot be granted the relief he is seeking because the property now has new owners, Mubaiwa Family Trust, Applicant’s response was that he was not shown the communal land’s lease and that it was just a circus by defendant trying to avoid the long arm of the law.

The next witness to give evidence on behalf of plaintiff was Daphine. She was plaintiff’s employee as a cashier for 6 years from the year 2016 to 2021. From 2016 to 2018 she would give defendant rent on the instructions by plaintiff. She would pay either in cash or eco-cash. Defendant never issued her with any receipt. Defendant never approached her asking for rentals which were due and she had no knowledge of any rental arrears. She was aware of the deteriorating

relationship between plaintiff and defendant and that in February 2020 defendant locked up the premises only to be opened later in the year.

Under cross-examination she stated the rent per month was US\$100-00 which she paid in cash after having been given by plaintiff. She did not have any evidence of handing the money over to defendant. She insisted she handed over the money otherwise defendant would have approached plaintiff over the rentals. She was not aware of other issues between plaintiff and defendant, but insisted that between 2016 and 2018 she was paying rent but as from 2019 it was plaintiff who was paying. She would record in a book that she had given defendant rent but he would never give any receipts.

With the evidence of Daphine, plaintiff closed his case.

Defendant gave evidence very similar to that given by plaintiff in as far as the tenant/landlord relationship began. They only differed on whether the tenancy was open-ended or it was a 3 year tenancy ending on 1 January 2019 and that it was a written lease agreement.

Defendant's further evidence was that he wrote the letter dated 11 April 2016 after observing some damages to the property and he tried to call plaintiff to no avail. He changed lawyers after he realised his lawyers had told an untruth in a letter dated 17 May 2016 that the lease was open ended. He is the one who wrote the letter dated 31 August 2018 the notice of termination of verbal lease. He wrote it because there were no rentals being paid and also that the administration of the property had changed, it being managed by his son. He totally disagreed that plaintiff was up to date with his rentals and if he had, he would have appended his signature. It was his evidence further that he only issued one receipt, that is for the US\$ 700.00 he received on 6 January 2016 for rent up to July 2016. The outstanding rentals for February 2017 to January 2022 is US \$ 6400.00. In 2021 he had a round table conference with his current Legal Practitioners where they discussed the issue of rentals and was prepared to forego the issue of rentals as long as plaintiff vacated his premises. In response to a question by his Legal Practitioners as to why he does not want plaintiff declared a statutory tenant, he stated it was because at this point plaintiff is no longer his tenant but that of the G Mubaiwa Family Trust, the property having been donated in 2016 and that his lease expired in January 2019. He insisted he no longer wants to see plaintiff at his premises as he has caused him a lot of trauma. .

With his evidence, defendant closed his case.

After analysing the witnesses evidence, I find that plaintiff's evidence was more credible than that of the defendant. He maintained his position that the lease agreement was a verbal one and open ended. He maintained that he was paying his rentals and was not in arrears. Letters written by defendant and his erstwhile while Legal Practitioners dated 11 April 2016, 17 May 2016 and 31 August 2018 the contents of which are quite telling which however he tried to explain supports plaintiff's position. The letter dated 17 May 2016 reads in part,

“..... Basically our client denies yours' allegation that parties have a three (3) year tenure lease agreement. The Lease was open ended.” (Underlying for emphasis)

The letter by defendant dated 11 April 2016 reads in part,

“We write to advice (sic) you that since we have been trading on a verbal agreement and have since failed to agree on terms and conditions.....”

The letter dated 31 August 2018 authored by defendant himself, reads

“You are hereby informed that your verbal agreement will be expiring on 31 December 2018 so please take note that your tenure is hereby being terminated, on the date said (supra) above.

Also take not (sic) that due to change of administration no renewal will be accepted hence you are being asked to vacate by the said date without fail.”

Plaintiff's evidence was also corroborated by Daphine who maintained that between 2016 -2018 she was paying rent on plaintiff's instructions. I found her to be a credible witness. She did not exaggerate her evidence to support plaintiff, her previous employer. She did not include the period she was no longer the one paying rent, where she was not aware of any issues, she said so.

I found the defendant to be an unreliable witness. If the lease agreement was a written one, he would not have in his letters referred to verbal agreements. If plaintiff was in rental arrears he would have stated so in his letters in which he was telling plaintiff to vacate the premises. These letters gave different reasons, for wanting plaintiff to vacate the premises. Further in their round table conference, defendant would not have opted that plaintiff vacates his property instead of pursuing with his claim for US\$ 6400-00 arrears. His evidence is full of contradictions, at one point he stated plaintiff never paid anything after July 2016 and later he said, plaintiff owed 5 months arrears before expiry of the lease. In his plea he says from the time the agreement was verbally amended to increase the rentals by \$50-00 in July 2017 the plaintiff did not pay the but continued

to pay the amount stipulated in the original lease agreement. At one point he said the lease expired on 1 January 2019 on another he said it expired on 31 January 2019. At one point again he said, the property was under new management in 2018 as per his letter of 31 August 2018 on another he said it is in January 2022.

From the totality of the evidence placed before me, it is clear that defendant for reasons best known to him which certainly are not breaches of the lease agreement, was as early as May 2016, hell bent on evicting plaintiff from the property. May 2016 was a period covered by the US \$ 700.00 advance payment. This means the issue of rental arrears had not risen.

Having considered all the evidence placed before me, it is my finding that plaintiff has proved his case. He complied with the terms of the agreement and is therefore entitled to the declaratur he is seeking.

By definition, a statutory tenant is a person who continues occupation of the landlord's premises after the expiry of the lease agreement, either by effluxion of time or in consequence of notice of termination duly given by the lessor and the lessee however continues to pay the rent due within days of due date and perform other conditions.

See: *Zuva petroleum limited v S Chirenje HH 166/16*

Section 22 (2) of the Commercial Premises (Rent) Regulations 1983 provides:

“No order for the recovery of possession of commercial premises or for the ejection of a lessee therefrom which is based on the fact of the lease having expired either by effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee;-

(a) continues to pay the rent due, within seven days of due date;

and

(b) performs the other conditions of the lease.....”

As alluded to, by 11 April 2016 and 17 May 2016 when letters were written advising plaintiff to vacate within 3 months plaintiff had paid 7 months' rent advance up to July. In the letter of the 31 August 2018 no mention was made of rental arrears. After all these notices to vacate, plaintiff remained in occupation, defendant did not seek a Court order for his eviction, it was plaintiff who then instituted these proceedings seeking to protect himself from eviction without due process. I am persuaded by plaintiff's submission that defendant sought cession of

the property from his name to the Family Trust to frustrate plaintiff in his application to be declared a statutory tenant. The cession was done well after plaintiff had already instituted these proceedings.

Consequently, in view of all the above, it is declared that:

1. Plaintiff is a statutory tenant at the Sport Bar (THE BEER ENGINE) situated at Uzande Business Centre Murombedzi.
2. Defendant is interdicted from seeking eviction of the plaintiff without due process.
3. Defendant pays plaintiff's costs of suit on a legal practitioner and client scale.

Mutumbwa, Mugabe & Partners, plaintiff's legal practitioners,
Mbizo Muchadehama & Makoni, defendant's legal practitioners