

BRENDA CAROL LEEPER N.O
and
JOHN JONES
versus
RAYMOND NYAMBIYA
and
PETRONILA RUFARO NYAMBIYA

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 21 March 2017 & 21 June 2017

Opposed Matter

Advocate Ochieng, for the applicants
2nd respondent in person

MATANDA-MOYO J: This is an application for cancellation of a lease agreement entered into between applicant and respondents, in respect of stand 279 Woodlands, Uplands, Waterfalls, Harare. Applicants also sought the eviction of the respondents from the above property. Applicants claimed for arrear rentals in the sum of \$28 700.00 and holding over damages in the sum of \$700 per month from the date of summons to the date of eviction. Applicants alleged nonpayment of rentals as the basis for cancellation. The respondents opposed the relief sought on the basis that the cancellation of the lease agreement was unlawful. They denied owing any rentals. Whilst accepting not paying rentals for the period in question, respondents averred that this was as a result of a novated agreement. After discovering human remains in the form of ashes in the main bedroom, the respondents averred that an agreement was reached between the parties whereby applicants agreed to pay respondents \$1 500.00 per month for safe keeping of the ashes. Effectively this meant that, the applicants after subtracting rentals were to pay to the respondents the sum of \$800.00 per month. The respondents submitted therefore that they did not breach the terms of the lease agreement by not paying rentals and the applicants are therefore not entitled to the relief sought. The respondents prayed for the dismissal of applicant's claim with costs on a higher scale.

The brief facts of the matter are that the second applicant and respondents entered into a lease agreement whereby respondents agreed to lease the above property for rentals of \$500.00 per month. The lease commenced on 1 July 2010 but was signed in September 2010. The lease was renewed in 2012 with respondents paying \$700.00 per month. Rentals were paid monthly in advance.

Upon realising the respondents were not paying rentals from January 2013 the applicants demanded payment. On 23 April 2013 respondents' lawyers wrote to the applicants that there were holding rentals for the property and that such rentals would be released upon satisfactory proof of entitlement. The respondents' lawyers later denied holding rentals for the property resulting in this application.

From the facts before me it is clear that the respondents have not been paying rentals since January 2013. In terms of the law the applicants are entitled to cancel the lease agreement and claim for eviction of the respondents from the property.

The respondents alleged a novation of the agreement. No proof of the terms of the new contract was placed before the court. Van Der Merwe, Van Huyssteen Reineke and Lutte in their book *Contract: General Principles* at p 456 describe novation as follows:

“Novation is an agreement whereby one obligation or more is extinguished and replaced by a new obligation relationship (see *Jaubert Contract* 296; *Erasmus v Du Toit* 1907 TS 891 --- *Total South Africa (Pty) Ltd v Bekker* 1992 (1) SA 617 A and *Barclays Bank of Zimbabwe Ltd v Binga Products (Pvt) Ltd* 1985 (3) SA 1041 (ZS)--”

A novation agreement must comply with all requirements imposed by the law in order for it to have the force of law. An intention to replace the previous agreement with the current one must be proved. See *Boots Co (Pvt) Ltd v Somerset West Municipality* 1990 (3) SA 216 (C).

The onus to prove the existence of such novated agreement rest with the respondent. I am of the view that the respondents failed dismally to so prove. The respondents should have stuck to that story if it were true. But firstly through their lawyers they had indicated they were paying rentals, only to change later on. The defence of novation is therefore not available to the respondent. I am of the view that this was an afterthought by the respondents considering an undertaking by their lawyers to payout rentals upon proof of entitlement by the applicants. It turned out that the respondents' lawyers had lied that they were holding rentals in their trust account. The respondents then raised the issue of the cremated ashes as the reason for not paying rentals.

Respondents alleged that such ashes were causing them extreme psychological trauma. Again I am unable to believe the respondents. If that was correct surely the respondents would have left the premises long back. The respondents are simply trying to avoid paying rentals to the applicants.

In terms of clause 20 of the lease agreement entered into between the parties nonpayment of rentals constituted a breach of the lease agreement entitling the landlord to cancel the lease. The respondents herein accepted they had not been paying rentals. The respondents have no legal defence to the breach. See *Parkside Holdings (Pvt) Ltd v Londoner Sports Bar* 2005 (2) ZLR 68 (H) where it was held that a landlord has a right to evict a tenant who failed to pay rentals. Once there is breach of payment of rentals no notice is required before seeking such eviction.

I do not intend to deal with other issue raised as I am of the view that they were simply raised to delay the inevitable.

In the result I order as follows;

1. The respondents and all those claiming occupation through them are hereby ordered to vacate number 279 Woodlands Road, Uplands, Waterfalls, Harare within 7 days of service of this order.
2. The respondents shall pay the first applicant arrear rentals in the sum of \$28 700.00
3. The respondents shall pay to first applicant holding over damages in the sum of \$700.00 per month from 1 June 2016 to date of vacation.
4. The respondents shall pay all arrears outstanding in respect of water, electricity, telephone rates, municipal taxes, refuse charges and any other services whatsoever at the premises.
5. Should the respondents fail to vacate in accordance with paragraph 2 above, the Deputy Sheriff shall eject the respondents and all persons claiming occupation through them.
6. The respondents shall pay costs of suit.

Kevin J Arnott, applicant's legal practitioners