Civ. App. 6/2002

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

PASCAL ARINZE - APPELLANT

AND

ABDUL FODAY FOFANAH - RESPONDENT

CORAM:

HON MR JUSTICE A.N.B. STRONGE J.A.
HON MR JUSTICE G. GELAGA KING J.A.
HON MRS JUSTICE P. E. MACAULAY J.A.

S.M. Touray, Esq., for the appellant
J.G. Thompson, Esq., for the respondent

JUDGEMENT DELIVERED ON THE 14TH DAY OF MAY, 2003

HON MR JUSTICE G. GELAGA KING, J.A.: This is an appeal from the judgement of P.O.Hamilton, J., sitting in the High Court, granting possession of premises situate at 89 Circular Road, Freetown, to the respondent, who was the plaintiff in that court. The plaintiff had claimed possession of the said premises, mesne profits from May 1999, alleging that he had terminated the defendant's tenancy by giving him six months notice to quit. The defendant, the appellant herein, did not quit. He delivered and filed a defence and counterclaim averring that the notice was invalid and ineffective. He counterclaimed the sum of Le9,970,000, with interest, which he alleged he spent, at the request of the plaintiff, on structural improvements, alterations and repairs to the premises. The learned judge dismissed both the claim for mesne profits and the counterclaim. He ordered that each party should bear his own costs.

In a hard fought application for a stay of execution by the defendant, the learned judge granted a stay pending the hearing and determination of the appeal herein. He then purported to further order a speedy hearing of the appeal, a matter in which, with respect, he has no jurisdiction and, therefore, is not competent to so order, this court having an exclusive jurisdiction *vis a vis* the High Court in that regard.

The appellant has appealed to this Court on five grounds, dealing mainly with the notice to quit, complaining that it was insufficient in law and that there was a waiver of it when the respondent accepted rent after the notice. Furthermore, that the learned judge erred in law in dismissing the counterclaim when no

defence to it had been delivered and filed. Counsel for the respondent, during his reply to appellant's arguments, by a novel procedure which we will not tolerate in future, sought and obtained leave, at that late stage, to give notice that the decision of the court below be varied. However, after three attempts, he failed to comply with the relevant rule 18 (2) of this Court's rules and had to abandon the adventure.

Let me say from the outset that this case reveals a concatenation of irregularities throughout its peregrination in the High Court. Incredibly, no steps were taken by any of the parties, either to have the proceedings set aside wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the High Court should think fit, as provided for in order 50 rule 1 of the High Court Rules.

I shall now proceed to specify some of the more glaring irregularities, seriatim. The plaintiff commenced action in the High Court by issuing a specially indorsed writ herein on the 6th day of July 1999. The defendant entered a conditional appearance on the 19th day of July 1999. Thereafter, the parties went into a deep slumber and remained in the resulting state of hibernation until the 22nd day of January 2001, a period of over one year and six months before the plaintiff roused himself and entered the action for trial. Even the legendary Rip van Winkle could not have afforded to wax into such utter somnolence.

Order 64 rule 3 of the English rules of the High Court, which applies, obviously deprecates such lethargy and slothfulness. It stipulates that "in any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give one month's notice to the other party of his intention to proceed." The plaintiff was obliged to give the notice, if only to rouse the defendant from his slumber; he did not. The defendant, on the other hand, was at liberty to take steps to set aside the proceedings for irregularity; he did not.

The High Court Registry must have been anaesthetized by this soporific atmosphere, for it totally ignored the proviso in O.52 r.2 of the High Court Rules that "when no step is taken in any action over a period of twelve months, the master shall bring such action to the notice of a judge who may in his discretion call on the parties to show cause why the action should not be dismissed for want of prosecution." The Master did not notify a judge and the Registry continued its slumber unperturbed. The litigants, unhappily, were left to cringe in the experience of 'justice delayed is justice denied.'

Ironically, in the teeth of such indolence and slovenliness, the plaintiff, by notice of motion dated 5th February 2001, applied for and obtained on 13.2.2001 an order for speedy trial! After the entry for trial and a day before the order for a speedy trial, the defendant on the 12th of February 2001, filed and delivered a

defence and counterclaim, that is to say, one year and seven months after the issuing of the specially indorsed writ. The time set in the rules for delivery of a defence is "within ten days from the time limited for appearance". (See O.18 r.6 of our rules). This pleading was not dated, contrary to O.19 r.11 of the applicable English Rules, that "every pleading shall be delivered between the parties and shall be marked on the face with the date on which it is delivered." My emphasis

The plaintiff did not take any step to set aside the defence and counterclaim for irregularity, nor amazingly, did he seek to obtain judgement in default of defence during the nineteen months that no defence was delivered. Even more incredibly, the plaintiff did not deliver and file a Reply and Defence to the Counterclaim. O.16 r. 3 of High Court rules makes it mandatory on the plaintiff to deliver and file a reply, if any, to the counterclaim within ten days of the delivery to him of the counterclaim. I must emphasize that a defence delivered after the proper time cannot be disregarded. Where a defence is delivered out of time the court will have regard to its contents and deal with the case in such a manner that justice can be done: Gibins v. Strong, 26 Ch. D. 66, C.A.

Furthermore, unless plaintiff delivers a reply, i.e. a defence to a counterclaim, statements of fact at the expiration of ten days or such time as may be allowed for reply are deemed to be admitted. Vide notes to O. 23 r. 1, 2 & 3 of the English Rules, 1957 Annual Practice, at page 415, under the rubric, "Defence to Counterclaim". Obviously this order is vital in relation to the ground of appeal dealing with the dismissal of the defendant's counterclaim.

Now that I have dealt with some of the more substantial irregularities, I shall now devote my attention to the grounds of appeal and the submissions made for and against those grounds. The first question arising is what type of tenancy exists between the parties? The evidence in the court below shows clearly that it was a yearly tenancy and there has been no dispute about that. The appellant testified that the tenancy commenced in April 1994 and the precise date of commencement, from exhibit "C", was from the 29th April of each year to the 28th April of the following year. At the request of the respondent, at the start of the tenancy rent was paid for two years in advance up to 1998 at Le1.2 million per year. In 1999 the respondent increased the rent to Le2 million per annum.

The next question I have to adjudicate upon is the determination of a yearly tenancy. How is a tenancy from year to year determinable? What length of notice is the landlord obliged to give to his tenant for the notice to be valid and effective in law? It has been well established for over five hundred years, going back to the eighteenth century, that at common law where a yearly tenancy is created by express agreement, as in this case, half a year's notice to quit must be given. The notice, to be valid, must expire and terminate the tenancy at the anniversary date of its commencement or on the preceding day. Vide the cases of Parker d. Walker

Constable (1709) 3 Wils. 25 and Right d. Flower v. Darby (1786) 1 T.R. 159. In the instant case, for the notice to quit to be valid, the six months must expire on the 28th or 29th April of the anniversary year.

Ex. "C", the notice to quit from the respondent's solicitor to the appellant dated 31st December 1998 states: "This notice takes effect from the 1st day of January 1999 therefore you must hand over vacant possession of the said premises on or before the 30th day of June 1999." It follows from the authorities to which I have referred that the notice is patently invalid, ineffective and bad in law, and I so hold.

The learned judge fell far short of his duty to make a straightforward and unequivocal pronouncement on the validity or otherwise of the notice to quit. This is what he said at p. 93 of the record: "The notice given by the defendant is a six month's notice to be determined on or before 30th June 1999 and the evidence of P.W.1 as to the tenancy is from April to April. This notice therefore has some problems in it as to its validity in the determination of this yearly tenancy." What a strange and equivocal finding! The simple truth and fact is that, problems or no problems, the notice was bad in law. The judge, with respect, should have had the courage to say so and not quibble, or dilly dally, or prevaricate over it. Quite clearly, in not pronouncing that the notice fell far short of what the law requires, the learned judge erred in law. The ground of appeal on this point must, therefore, succeed and I so hold.

It follows that since the notice was invalid, as I have found, the learned judge was wrong in law to grant possession of 89 Circular Road, Freetown, to the respondent particularly when he himself said that the notice "has some problems." It must be borne in mind always that the onus is on the landlord to plead and lead evidence of the date on which the tenancy began. *A fortiori,* the onus is also on the landlord, the respondent herein, to establish that the notice to quit was a valid notice.

This onus and duty is highlighted by Morton, L.J., in Lemon v. Lardeur [1946] 2 All E.R. 329 a case of a periodic four-weekly tenancy but, where the principle of law I have enunciated is the same. He said:

> "It was suggested in argument that it was for the defendant to establish that the notice did not expire at the proper date, but I do not agree with that suggestion. The plaintiff has pleaded that the defendant was her tenant; she has pleaded the tenancy was determined by a notice and it is for her to establish that the notice was a valid notice."

I wholeheartedly endorse the legal principles enunciated in that dictum.

In his statement of claim, the plaintiff herein failed to state the date the tenancy commenced, nor did he state when the notice was served, nor did he lead evidence to prove the validity of the notice, as he was obliged to do. It was the

appellant, gratuitously, it must be said, probably, *ex abundanti cautela*, who led evidence to establish that the notice was bad in law and for his pains all the judge said was that the notice had some problems in it. Since I have held that the notice was invalid and ineffective in law, it is unnecessary for me to consider the question of waiver of the notice to quit. The issue of mesne profits also does not now arise since the notice was bad. A tenant, in this instance, only becomes liable for the payment of mesne profits if he holds over his tenancy after the expiration of a valid notice to quit.

Let me turn briefly now to the appellant's counterclaim. The respondent failed to deliver and file a reply and defence to the counterclaim and as I said, *in limine*, the statements of fact contained therein must be deemed to be admitted. The appellant, therefore, need not have led evidence to prove those statements of fact in court. However, he did lead substantial evidence in the lower court to prove his counterclaim. He led credible evidence that at the request of the appellant he spent various sums of money connecting water supply, fixing steel doors, iron window protectors, floor tiles, building a kitchen, walling the warehouse and even re-plumbing the premises.

The judge, although he was bound in law, for the reasons I have given, to give judgement for the appellant on his counterclaim, he instead made the following rather ambivalent finding. At p. 95 of the record he says:
"I have considered the defendant's counterclaim and I am satisfied that the evidence led although of some importance does not fully support the claim since the defendant failed to lead oral evidence in the absence of his documents such as masons, (stet) welders or labourers who did the work to support the averment contained in paragraph 10 of the counterclaim. The defendant's counterclaim fails and is therefore dismissed."
Clearly, the judge not only woefully misdirected himself as to the facts, but he also erred in law. Even if the onus was on the appellant to prove his counterclaim, which it was not, he was to do so only on the balance of probabilities. This ground of appeal succeeds and with it, the counterclaim.

Finally, it only remains for me to calculate the amount due on the counterclaim. In the particulars of the statement of claim the appellant claims the sum of Le9,970,000 as money spent on improving the premises at the request of the respondent. The evidence reveals that the appellant is owing the respondent a balance of Le664,000 rent for April 2000 to April 2001. Add to that amount the sum of Le6 million being rent for three years from April 2001 to April 2004 and you get a total of six million six hundred and sixty-four thousand leones (Le6,664,000). Subtract that total from the Le9,970,000 and we are left with a net balance of three million three hundred and six thousand leones (Le3,306,000). The appellant is claiming interest at 32%, but I refuse to award this for the simple reason that the arrangement and agreement between the appellant and

116

respondent was that the refund was to be made by the respondent either in dollars, or the appellant was to deduct it from the rent.

As regards costs, because of the appellant's laches in delivering and filing his defence and counterclaim in the High Court, I award him no costs in that court. The appellant will have the costs in this Court.

In conclusion, for all the reasons I have given, the appeal succeeds and I make the following orders:-

1. The judgement of the court below is reversed and judgement entered for the appellant who is lawfully in possession of premises situate at 89, Circular Road, Freetown.
2. The counterclaim succeeds. The respondent to pay to the appellant the net balance of Three Million Three Hundred and Six Thousand Leones (Le3,306,000)
3. The respondent to pay to the appellant interest on the Le3,306,000 from the 14th day of May 2003 at the rate of 5% per annum until payment.
4. Costs in this Court only to the appellant assessed at One Million Leones (Le1,000,000)

Hon Mr Justice G. Gelaga King

I agree

Hon Mr Justice A.N.B. Stronge

I agree

Hon Mrs Justice P.E. Macaulay