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IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT LUSAKA

Appeal No. 119/2019

(Civil Jurisdiction)

B E T W E E N:

BOARDROOM INVESTMENTS LIMITED
(T/A FAIRWAYS CAFE) **APPELLANT**

AND

LUSAKA GOLF CLUB **RESPONDENT**

Mchenga DJP, Majula and Siavwapa, JJA
On 17th June, 2020 and 3rd September, 2020

For the Appellant : *N/A*
For the Respondent : *N/A*

JUDGMENT

Cases referred to:

1. *The Attorney-General vs Marcus Kapumba Achiume (1983) ZR 1.*
2. *DPP vs Bwalya Ng'andu & Others (SCZ Judgment No.50 of 1975).*
3. *Minos Panel Beaters Ltd vs Chapasuka (1986) ZR 1.*
4. *Nida Properties Ltd vs Omnia Fertilizer Ltd (SCZ Appeal No.164 of 2013).*
5. *Kapambwe vs Maimbolwa & The Attorney-General (1981) ZR 127.*
6. *Paperex vs Deluk High School Limited Appeal No. 141 of 1996.*
7. *Crossland Mutinta & Bashir Seedat vs Donovan Chipanda (SCZ Appeal No. 40 of 2016).*
8. *Palsco Stores Ltd vs Ramanbhai Patel (1987) ZR 108.*
10. *Zambia National Holdings Limited & United National Independence Party (UNIP) vs The Attorney-General (SCZ Judgment No.3 of 1994).*

11. *Republic of Botswana, Ministry of Works Transport and Communication, Rinceau Design Consultants (sued as a firm T/A KZ Architects vs Mitre Limited (SCZ) Judgment No.53 of 1995).*
12. *Standard Chartered Bank (Z) Plc vs John M.C. Banda (SCZ Appeal No.94 of 2015).*
13. *Adam Karif (Trading as M.A Brake Construction & Haulage) vs Dora M. Chingo Monga, Appeal No.132 of 2015*
14. *ZIMCO Properties Limited vs Dinalar Randee Enterprises (T/A Empire Cinema) (1988 - 1989) Z.R. 114 (S.C.)*
15. *G.F. Construction (1976) Limited And Rudnap (Zambia) Limited And Unitechna Limited (S.C.Z. Appeal No. 150 Of 1998).*
16. *Mususu Kalenga Building Limited & Winnie Kalenga vs Richmans Money Lenders Enterprises Ltd (S.C.Z. Judgment No. 4 of 1999).*
17. *Appollo Refrigeration Services Co. LTD vs Farmers House LTD (1985) Z.R. 182*
18. *Roadmix Limited, Kearney and Company Limited vs Furncraft Enterprises Limited, Appeal No.122/2010*

Works referred to:

1. Lord Hailsmam, *Halsbury Laws of England* (1915) 4th Edition, volume 10 (Butterworths: London)
2. Riddall, J G, *Introduction to Land Law* (1988) 4th Edition, (Butterworths: London)

Legislation referred to:

1. *The Landlord and Tenant (Business Premises) Act Cap.193 of the Laws of Zambia.*
2. *Rules of the Supreme Court (White Book, 1990 edition)*

1.0 Brief background

1.1 The appellant and the respondent had entered into a Service Level Agreement (SLA) for the period 1st April, 2017 to 31st March, 2018 which was for a tenancy for a term certain. On the 20th February, 2018 the respondent notified the appellant of its intention to terminate the tenancy on 31st March, 2018 when it was due to come to an end by effluxion of time. The notice was issued in accordance with **section 5(4) of the Landlord and Tenant (Business Premises) Act.**

1.2 The appellant reacted by giving notice on 22nd March, 2018 not to give up possession of the leased premises. In addition, the appellant filed an originating notice of motion pursuant to section 26 Rule 4 as read with section 4 and 5 of the **Landlord & Tenant (Business Premises) Act** on 19th April, 2018.

1.3 The High Court (Mwikisa, J) dismissed the appellant's claims for renewal of the lease. It was found that parties did not comply with the provisions of the Act and the appellant could not insist on possession at all costs. In view of the failure by the appellant to comply with statutory requirements as provided for in the Act, she found that it no longer had rights to be protected. The court below proceeded to grant the respondent vacant possession of the leased premises and *mesne profits* being rentals found due, and costs.

1.4 It is this decision that has agitated the appellant who has fronted five (5) grounds of appeal.

2.0 **Grounds of Appeal**

1. *The learned trial Judge misapprehended and misdirected herself in law and fact when she dismissed the Appellant's application for a grant of new tenancy on a finding that the tenancy between the appellant and the respondent expired by effluxion of time and that the appellant did not comply with provisions of the* ***Landlord and Tenant (Business' Premises) Act.***
2. *The learned trial Judge erred in law and fact when she glossed over a statutory procedural requirement of the Act and therefore lacked jurisdiction when she heard and determined the appellant's request for a new tenancy in the manner she did, where order for grant of new tenancy was precluded by statute on certain grounds as provided for in section 19(1) read together with Section 19(2) of the* ***Landlord and Tenant (Business Premises) Act.***
3. *The learned trial Judge misdirected herself in law and fact when she dismissed the appellant's application for grant of new tenancy for reasons that it failed to specifically comply with section 26, Rule 5.1 of the* ***Landlord and Tenant (Business Premises) Act.***
4. *The learned trial Judge misapprehended the facts and erred in law when she considered the respondent's submission that the*

appellant persistently defaulted in rental payments contrary to requirements in section 11 and subsection (6) of section six, of the ***Landlord and Tenant (Business Premises) Act.***

5. *The learned trial Judge misdirected herself in law and also lacked jurisdiction when after dismissing the appellant's application for grant of new tenancy in the manner she did, granted the respondent reliefs of vacant possession of the leased premises and also that the respondent recovers from the appellant mesne profits being rentals found to be due by virtue of the appellant's continued occupation of the premises without considering the appellant's subsisting interest in the premises.*

3.0 Appellant's arguments

Ground 1

3.1 The appellant's filed written heads of argument which were also relied on at the hearing of the appeal. In the first ground of appeal, the appellant is attacking the finding that the tenancy between the two parties had expired by effluxion of time and that the appellant did not comply with the provision of the **Landlord and Tenant (Business Premises) Act.**

3.2 The appellant is greatly displeased with this finding and has called in aid the case of ***The Attorney-General vs Marcus Kapumba Achiume***[1] which guides that an appellate court cannot reverse findings of fact unless it is satisfied that the said findings were either perverse or made in the absence of

any relevant evidence or upon a misapprehension of facts in that they were findings which on a proper view of the evidence, *"no trial court acting correctly can reasonably make"*. The case of ***DPP vs Bwalya Ng'andu & Others***[2] which articulates the same principle was also cited.

3.3 The contention by the appellant is that a tenancy for a term certain may expire without giving notice at the end of the period. It was stressed that however, unless a tenancy is terminated in accordance with the **Act**, a tenancy does not terminate by mere effluxion of time. The relevant sections adverted to in the Act are sections 5(2), 5(5) and 5(6). It is on the basis of the foregoing that the appellant is arguing that the holding by the trial Judge that the tenancy had come to an end by effluxion of time and therefore the appellant had no rights to be protected was a misdirection at law.

3.4 It has been submitted that the trial Judge did, as a matter of fact, make a finding that the respondent did not also satisfy the requirements of the Act.

3.5 The appellant further criticized the lower court for finding that the 'notice not to give up possession' of the leased premises from the appellant dated 22nd March, 2018 did not comply with section 6(4) of the Act. In support of this argument the provisions of section 6(4) of the Act have been cited which enact as follows:

"A tenant's request for a new tenancy shall not be made if the Landlord has already given notice under section five to terminate the current tenancy."

3.6 According to the appellant section 6(4) of the Act aforecited does not permit a tenant's application to the Landlord when the latter has already issued a notice to terminate a tenancy. It has been strongly argued that it could not be the contemplation of the Act that the appellant was expected to make an application or request for a new tenancy under section 6(3) to a Landlord who has already made it clear in its notice that they will be terminating the tenancy when the agreement expires. We have been referred to ***Minos Panel Beaters Ltd vs Chapasuka***[3] as authority for this proposition.

3.7 It was further contended that the court below misdirected itself when it held that there were no successful negotiations for renewal of the lease and therefore the appellant could not insist on possession at all costs. The appellant sought to distinguish the case at hand from that of ***Nida Properties Ltd vs Omnia Fertilizer Ltd***[4] which related to a tenant who sought to terminate a tenancy agreement by giving notice to the landlord.

3.8 The court below has also been faulted for relying on the principles of contract law by citing a passage in **Riddel J**. the author of **Introduction to Land Law, 4th edition, page 225** stating that *"As a contract a lease is subject to the principles of*

contract law." That this is a misapplication of the law and facts as this assertion cannot support the termination of a tenancy outside the provisions of the Act unless the tenancy had a break clause which was not the case in *casu.*

3.9 The appellant is unhappy with the evaluation of the facts by the court below regarding the parties' negotiations of renewal of the lease agreement and is of the view that this was unbalanced as the record shows efforts to renew a tenancy to a non-responsive landlord. That both parties were obliged to commence negotiations for tenancy renewal. It has been submitted that the appellant indicated its unwillingness to yield possession of the leased premises on 22nd March, 2018 before the lease expired by effluxion of time. Therefore the reasons for not concluding the renewal negotiations of the tenancy agreement cannot be faulted on the appellant.

3.10 In furtherance of their grievance section 20 of the Act has been referred to which protects tenants who face tenancy frustrations from landlords. Pertaining to the principle applicable when there has been unbalanced evaluation of evidence entitling the appellate court to interfere, the case of ***Kapambwe vs Maimbolwa & The Attorney-General***[6] has been drawn to our attention.

3.11 The appellant is also grappling with the finding that it did not follow laid down procedures of the Act and argue that section 10(3) of the Act is the correct position. It requires that an

application to court should be submitted not less than two (2) months of the landlord's notice to terminate the tenancy. In light of the cited provision of the Act, it has been contended that the authority of ***Paperex vs Deluk High School Limited***[7] is distinguishable to the one at hand as the tenancy was neither determined nor ceased to be a protected one as the correct notices were issued and procedures followed by the appellant to a non-compliant respondent.

3.12 In concluding arguments in ground 1, it has been stated that the purported termination of the tenancy is ***void ab initio*** for having been done contrary to the provisions of the Act. We have been urged to uphold this ground of appeal.

Ground 2

3.13 This ground in a nutshell relates to the alleged want of jurisdiction by the trial Judge for having glossed over a statutory procedural requirement of the Act. In support of raising a procedural issue at this stage our attention has been drawn to the case of ***Crossland Mutinta & Another vs Donovan Chipanda***[8] which held as follows:

> *"However, although it is a general rule that an issue which has not been raised in the court below cannot be raised on appeal, the question of jurisdiction can be raised on appeal notwithstanding the fact that it was not raised in the court below"*

3.14 ***Palsco Stores Ltd vs Ramanbhai Patel***[9] is another case in point which gives an exception to when procedural matters can be raised in an appellate court. The lack of jurisdiction being alluded to emanates from a lack of authority to proceed to determine an application where the reasons for lack of jurisdiction arises out of a failure on the part of one of the parties to comply with conditions essential for exercise of that jurisdiction.

3.15 It has been contended that the Judge acted outside the statute's jurisdiction by not ensuring that a key procedural matter is satisfied such as on what grounds the respondent would oppose the application to court for a new tenancy before embarking on hearing the application in the manner she did.

3.16 The provisions of the statute being relied upon are section 19(1) and 19(2) of the Act. According to the appellant the court below was obliged by statute to consider compensation for the appellant and not to dismiss the application in its entirety for a subsequent finding of a defect.

3.17 In furtherance of this argument the case of ***Crossland Mutinta and Bashir Seedat vs Donovan Chipanda***[8] has been quoted where it was observed that:

> *"The point should be made that where a statute sets out a condition precedent for a court to acquire jurisdiction (as was the case with section 23 of that case in the*

Subordinate Court Act) (and as is now the case with section 19(1) of this case under the Act), it is incumbent upon the court, even if not moved by the parties, to ensure that the condition precedent is satisfied before embarking on hearing the matter." (emphasis ours)

3.18 It has been contended that the statute provision in section 19(1) being a procedural one could not be waived and the appellant is therefore entitled to raise it on appeal. The grievance expressed is that the trial Judge glossed over her own finding of fact in the judgment that the respondent did not comply with tenancy termination procedures and where no grounds for termination of tenancy were established, she fell into manifest error and consequently lacked jurisdiction by proceeding to find a subsequent curable defect in the appellant's application to court. To buttress this point on the court's exercise of jurisdiction the learned authors of **Halsbury's Laws of England, 4th edition, volume 10 at paragraph 717** have been cited where they state that:

"...where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

3.20 It has been asserted that the High Court has jurisdiction to make appropriate orders when adjudicating disputes, this was not done in this case. To fortify this submission, ***Zambia National Holdings Limited & United National***

Independence Party (UNIP) vs The Attorney-General[10] was relied upon. The Supreme Court had the following to say:

> *"The jurisdiction of the High Court....is unlimited but not limitless since the court must exercise its jurisdiction in accordance with the law...the High Court is not exempted from adjudicating in accordance with the law including complying with procedural requirements as well as substantive limitations."* (emphasis ours).

3.21 The thrust of the appellant's argument is that it is entitled to compensation for loss of tenancy at the business premises as stipulated in section 19(1) and 19(2) of the Act. That the breach in compliance was first occasioned by the respondent and therefore it was inequitable to the appellant's subsequent breaches.

3.22 The appellant has gone to town highlighting how significant amounts of money have been invested in the respondent's premises and how some fixtures cannot be transplanted to a new location. That the appellant still has a value interest in the premises and the tenancy, by law, has not determined. Therefore, dismissing the application in its entirety is a misdirection.

3.23 It has been urged upon us to take judicial notice that there is nowhere in the rules of the Act in section 26 that stipulates that the appellant must make an application or directly plead

for compensation to the court but the operation of this provision in section 19(1) and 19(2) of the Act is triggered or determined by the court when it is precluded by certain conditions to grant a new tenancy.

3.24 Having recourse to section 19(1) of the Act, the appellant has abandoned the request for a new tenancy and is seeking compensation as provided in section 19(1) and 19(2) of the Act. We have been beseeched to overturn the decision of the trial court for want of jurisdiction.

Ground 3

3.25 The third ground seeks to impeach the trial Judge's decision dismissing the appellant's application for a grant of new tenancy for reasons that it failed to specifically comply with sections 26, Rule 5.1 of the **Landlord and Tenant (Business Premises) Act.**

3.26 The appellant has drawn our attention to the provisions of the **White Book (1999) edition** specifically order 2 Rule 1 of the Supreme Court Rules which spells out the guidelines on the treatment of defective applications. Reliance has also been placed on the case of ***The Attorney-General vs Achiume.***[1]

3.27 It has been conceded that the original notice of motion did not specifically itemize all the information required in section 26, Rule 5.1 of the Act, it has been submitted that the said irregularity was merely directory and not prejudicial to the

respondent. Refuge has been sought in the case of the ***Republic of Botswana, Ministry of Works Transport and Communication, Rinceau Design Consultants (sued as a firm) T/A KZ Architects vs Mitre Limited***[11] where it was pronounced inter alia that:

> *"The High Court Rules are rules of procedure and are therefore regulatory and any breach should be treated as a mere irregularity which is curable."*

3.28 Another case cited is that of ***Standard Chartered Bank (2) Plc vs John M.C. Banda,***[12] where the Supreme Court held:

> *"In this regard, our approach regarding a party in breach of a rule – which is curable by an order following an appropriate application – is the same as that we have adopted in regard to failure to meet set time lines....We think that rules of court should indeed serve a definitive purpose and we are not to apply them using a rigid approach without regard whatsoever to the consequences of any delayed rectification of their breach. In case of breach of rules that do not result in any real or serious prejudice or negative consequences to any party, the court does surely retain the discretion always as to what order would best meet the justice of the situation." (emphasis ours).*

3.29 The appellant in this ground lamented the cost of significant improvements at the respondent's premises and dismissing the application in its entirety was inequitable. ***Adam Karif (Trading as M.A. Brake Construction & Haulage) vs Dora M. Chingo Monga,***[13] was referenced.

3.30 To cut the long story short, according to the appellant, the alleged irregularity of the application in as far as compliance with section 26. 5.1 of the Rules is concerned was not fatal but merely a curable irregularity that does not bring a tenancy to an end.

Ground 4

3.31 The appellant has expressed frustration with the trial Judge's finding that the appellant persistently defaulted in rental arrears contrary to requirements in sections 6 (6) and 11 of the **Landlord and Tenant (Business Premises) Act**. The appellant has vehemently denied that it is in rental arrears.

3.32 It opposes the reconciliation of accounts that was presented by the respondent on the basis that it was ambushed. Furthermore, the respondent has not come to justice with clean hands as the said accounts show that the respondent was itself guilty of withholding funds belonging to the appellant.

3.33 In addition, on the authority of ***ZIMCO Properties Limited and Dinalar Randee Enterprises (T/A) Empire Cinema)***[14] ,

a landlord is restricted from opposing the grant of a new tenancy on any ground other than that set out in the notice. It has been argued that we ought to uphold this ground of appeal as the finding was not supported by the facts and the law.

Ground 5

3.34 The appellant has a bone to chew with the trial Judge on her refusal to grant a new tenancy and other reliefs availed to the respondent which were vacant possession of the leased premises and recovery of *mesne profits* to be due by virtue of the appellant's continued occupation of the premises.

3.35 On the issue as to whether or not the court below had jurisdiction, the case of ***Crossland Mutinta and Bashir Seedat vs Donovan Chipande***[8] was called in aid which held that:

> *"....although it is a general rule that an issue that has not been raised in the court below cannot be raised on appeal, the question of jurisdiction can be raised on appeal notwithstanding the fact that it was not raised in the court below."*

3.36 The argument advanced is that the proceedings leading to the reliefs granted to the respondent were commenced by Originating Notice of Motion for grant of new tenancy pursuant to sections 26(4) as read together with sections 4,5

and 6 of the **Landlord and (Business Premises) Act.** It was therefore contended that it was a misconception by the respondent to pray for such reliefs and a misdirection at law for the trial Judge to grant such reliefs. That in accordance with section 26, Rule 3 read together with Rule 4 of the Act, the reliefs that can be sought under the Act by application to the court are those specified in the Act.

3.37 Turning to the order for vacant possession, a strong objection has been raised on the basis that there is no provision in the Act that provides for the same. The appellant has also protested the order for recovery of *mesne profits* on the basis that it is not supported by any provision in the Act and is not suitable to be claimed in a matter commenced by an originating notice of motion. They have gone on to argue that the trial court never made a finding that any rentals were purportedly due and how much.

3.38 Lengthy submissions have been advanced to support the argument that the proceedings in the trial court for recovery of *mesne profits* were improperly before the court and a chain of authorities has been cited namely:

- ***G.F. Construction Ltd vs Rudnap Zambia Ltd & Unitechna Ltd.***[15]
- ***Mususu Kalenga Building Limited & Winnie Kalenga vs Richmans Money Lenders Enterprises Ltd***[16]***.***

3.39 The appellant has placed great store in the case of ***Crossland Mutinta & Bashire Seedat vs Donovan Chipanda***[8] to nullify the reliefs granted of recovery of *mesne profits* and vacant possession, that these were not properly before court on the basis of want of jurisdiction by the trial court.

3.40 It has also been argued that the respondent opened itself up to liability by evicting the appellant immediately the application was disposed of contrary to the provisions of section 23 (1) of the Act. That the appellant is entitled to compensation for this wrongful eviction and we have been implored to uphold this ground of appeal.

4.0 Respondent's Arguments

4.1 No heads of argument were filed on behalf of the respondent and they were also not in attendance at the hearing of the appeal.

5.0 Our decision

5.1 We have scrutinized the evidence on record, the judgment of the court below and the grounds of appeal before us together with all the arguments. We are mindful that the appellant has advanced five grounds of appeal, however we shall deal with them globally as they are intertwined and for reasons that will become clear in the end.

Lack of compliance with statutory requirements

5.2 We have apprehended the central issue for determination to revolve around the breach by the respondent when terminating the lease whether this entitles the appellant to compensation.

5.3 It is clear from the evidence adduced that the appellant entered into a tenancy agreement with the respondent in respect of business premises. This was in line with the **Landlord and Tenant (Business Premises) Act.** The tenancy agreement was for a term certain and was due to terminate on 31st March, 2018. Before the expiry date, the respondent gave notice to the appellant of their intention not to renew the tenancy.

5.4 The issue that greatly displeased the appellant, as we understand it, is that the respondent did not comply with the provisions of the **Landlord and Tenant (Business Premises) Act.** The learned trial Judge did make a finding of fact that both parties i.e. the appellant as well and the respondent had breached the provisions of the Act.

5.5 On the one hand, the appellant was required to comply with the statutory requirements, which are found in sections 4 and 5 of the Act. The tenant ought to have requested for a new tenancy in accordance with section 6 but did not do so. The respondent on the other hand should have given notice under section 5 to terminate the tenancy.

Section 5 of the Act provides as follows:

> *"5. (1) The landlord may terminate a tenancy to which this Act applies by a notice given to the tenant in the prescribed form specifying the date on which the tenancy is to come to an end (hereinafter referred to as "the date of termination"):*
>
> *Provided that this subsection shall have effect subject to the provisions of section twenty-three as to the interim continuation of tenancies pending the disposal of applications to the court.*
>
> *(2) Subject to the provisions of subsection (3), a notice under subsection (1) shall not have effect unless it is given not less than six months and not more than twelve months before the date of termination specified therein."*

5.6 Having failed to comply with the provisions of the Act, the trial Judge cannot be faulted for having found that both parties were at fault. The question that agitates our minds is whether having so found she would determine that the tenancy had come to an end by effluxion of time.

5.7 We are very much alive to the guidance given by the erstwhile Ngulube CJ in the case of ***Paperex vs Deluk High School Limited,***[7] when he expressed himself as follows:

"A notice to quit was served on the respondent who failed to apply for a new tenancy. Finally, the appellant issued a writ to recover possession and it was in that action where the respondent counterclaimed for the grant of a new tenancy. Of course, this is not the procedure tenants served with notice to quit should emulate under the Act; it is up to the tenant to apply to court for a new tenancy within the period laid down otherwise the tenancy determines and ceases to be a protected one..."

5.8 Failure by the tenant to apply for a new tenancy in conformity with the Act results in the tenancy ceasing to be a protected one. The landlord is required to give not less than six months' notice before the date of termination. What are the consequences of the landlord's failure to give the requisite notice or non-compliance with section 5 of the Act?

5.9 The appellant has strongly argued that they ought to be compensated. Before we address the question, it is important at the outset to mention that a lease agreement for business premises is to all intents and purposes a 'contract' which is governed by the ordinary rules of contract law. This proposition finds support from the position taken by the learned authors of **J.D Riddall** in a book entitled ***Introduction to Land Law***, 4th edition at page 225 where the learned author states that:

"As a contract, a lease is subject to the principles of contract law."

The peculiar nature of a lease agreement relating to business premises is that it is composed of express terms that are to be found in the actual lease agreement, as well as express terms imposed by statute law that are found in the Landlord and Tenant (Business Premises) Act.

5.10 Reverting to the issue for our determination, we have combed through the provisions of the **Landlord and Tenant (Business Premises) Act**, and what we discern is that there are specific circumstances set out in the Act under which a court can order that a tenant be compensated. These are set out in sections 19 and 22 of the Act. Section 19 provides as follows:

19. (1) Where, on the making of an application under section four, the court is precluded (whether by subsection (1) or (2) of section twelve) from making an order for the grant of a new tenancy by reason of any of the grounds specified in paragraphs (e), (f) and (g) of subsection (1) of section eleven and not of any grounds specified in any other paragraph of that subsection (or where no other ground is specified in the landlord's notice under section five or, as the case may be, under subsection (6) of section six, than those specified in the said paragraphs (e), (f) and (g), and either no application under the said section four is made or such an application is withdrawn), then, subject

to the provisions of this Act, the tenant shall be entitled on quitting the holding to recover from his landlord by way of compensation such amount as may be determined by the court."

Our interpretation of section 19(1) of the Act is that a tenant's right to compensation only arises where the court is precluded from making an order for the grant of a new tenancy on ground specified in paragraphs (e), (f) or (g) of section 11(1). In other words section 19(1) will apply where:

1. The tenant has applied for a new tenancy and the landlord has successfully opposed the application under grounds (e), (f) or (g) of section 11(1) of the Act;
2. The landlord has specified grounds (e), (f) or (g) of section 11(1) in his or her notice and the tenant has applied for a new tenancy but has subsequently withdrawn the application; or
3. The landlord has specified grounds (e), (f) or (g) of section 11(1) in his or her notice and the tenant has not applied for a new tenancy.

For ease of reference section 11(1)(e),(f) and (g) provides as follows:

"11. (1) The grounds on which a landlord may oppose an application under subsection (1) of section four are such of the following grounds as may be stated in the landlord's

notice under section five or, as the case may be, under subsection (6) of section six, that is to say:

(e) where the current tenancy was created by the subletting of part only of the property comprised in a superior tenancy and the landlord is the owner on the termination of the superior tenancy, that the aggregate of the rents reasonably obtainable on separate lettings of the holding and the remainder of that property would be substantially less than the rent reasonably obtainable on a letting of that property as a whole, that on the termination of the current tenancy the landlord requires possession of the holding for the purpose of letting or otherwise disposing of the said property as a whole, and that in view thereof the tenant ought not to be granted a new tenancy;

(f) that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding;

(g) save as otherwise provided in subsection (2), that on termination of the current tenancy the landlord intends to occupy the holding for the purposes, or partly for the purposes, of a business carried on by him therein, or as his residence."

To recapitulate, section 11(1) paragraphs (e) to (g) can be broken down as follows:

- Paragraph (e) involves a situation where the landlord wants possession of the demised premises for purposes of disposing of it.
- Paragraph (f) is where the landlord wants to demolish or reconstruct the premises; and
- Paragraph (g) is where the landlord intends to occupy the premises either for business or residential purposes.

5.11 It can thus be concluded that the reason the tenant may have to be compensated under the stated grounds is that the tenant is giving up the tenancy through no fault of his or her own.

5.12 Finally the court may order that the tenant be compensated under section 22 of the Act after it discovers that it was induced to make an order for possession by means of misrepresentation or concealment of material facts. Section 22 enacts as follows:

> *"22. (1) Where, under this Act, an order is made for possession of the property comprised in a tenancy, or an order is refused for the grant of a new tenancy, and it is subsequently made to appear to the court that the order was obtained, or the court was induced to refuse the grant, by misrepresentation or concealment of material facts, the court may order the landlord to pay to the tenant such sum as appears sufficient as compensation for damage or loss sustained by the tenant as the result of the order or refusal."*

5.13 Arising from the foregoing, where the landlord breaches a lease agreement or provision of the Act such as giving a one month notice to quit instead of 6 months, the tenant may be awarded damages for breach of contract and not compensation. Compensation under the Act is only awarded under specific circumstances which have not been demonstrated by the appellant in the circumstances of the present case. The claim for compensation therefore fails. It would thus be an exercise in futility to proceed on each and every ground advanced as ground 2 determines the whole appeal.

5.14 In light of the foregoing we find the appeal has no merit to the extent that the appellant is not entitled to compensation. Grounds 1, 3 and 4 fall away.

Vacant possession and Mesne profits

5.15 Regarding ground five where the unhappiness stems from the Judge having ordered the appellant to yield vacant possession and to pay *mense profits* to the respondent for holding over the demised premises after the termination of the service level agreement by effluxion of time. The gist of the appellant's argument is that the trial Judge lacked jurisdiction to order vacant possession and *mesne profits* in a matter commenced by originating notice of motion.

5.16 We have considered the arguments in relation to the judgment appealed against. In determining whether or not the trial

court had jurisdiction to grant the respondent the two reliefs highlighted we have looked at the position of the law as stated by the Supreme court in the case of ***Appollo Refrigeration Services Co. LTD vs Farmers House LTD[17].*** The brief facts were that a landlord of business premises commenced an action to recover possession by originating notice of motion thinking that every action between a landlord and tenant of business premises had to be commenced in that fashion by virtue of the Landlord and Tenant (Business Premises) Act and the Rules thereunder. The landlord also relied on a 'notice to quit' served by the previous landlord.

5.17 In relation to the case that is before us, it was held as follows: *"An originating notice of motion was not the proper process for a landlord's claim for possession of business premises since all the applications which can be made by an originating notice of motion under the Landlord and Tenant (Business Premises) Act are specified in the various sections. A Landlord's action for possession was not so specified and should therefore be commenced by writ in accordance with Order 6 of the High Court Rules".*

5.18 The position of the apex court on the issue was recently reaffirmed in the case of ***Roadmix Limited, Kearney and Company Limited vs Furncraft Enterprises Limited[18]*** where it was held that, *"With the exception of the claim for a new tenancy, this matter was not properly before court and the*

learned trial Judge had no jurisdiction to determine the matter on its merit." (underlining for emphasis)

5.19 Given the position of the law, we are of the view that indeed the learned trial Judge had no jurisdiction to award *mesne profits* and award vacant possession in a matter that was commenced by originating notice of motion. We accordingly find merit in ground five and set aside the order for vacant possession and recovery of *mesne profits*.

5.20 Considering the fact that appellant has abandoned the claim for an order for a grant of a new tenancy, we award damages for wrongful eviction which was by way of an irregular notice to quit. The said damages are to be assessed by the Deputy Registrar.

5.21 The appeal having partially succeeded, we award costs to the appellant.

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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT

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B. M. Majula
COURT OF APPEAL JUDGE

.....
M. J. Siavwapa
COURT OF APPEAL JUDGE