ZAMBIA NATIONAL PROVIDENT FUND BOARD v CHIKAKO FORD KAMALONDO (1986) Z.R. 55 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., CHOMBA AND GARDNER, JJ.S.
19TH JUNE, 1986
(S.C.Z. JUDGMENT NO. 14 OF 1986)

Flynote
Land lord and Tenant - Quiet enjoyment - Breach caused by another tenant - Effect of.

Headnote
The appellant was the Landlord of the respondent. The respondent sued the appellant for breach of his right to quiet enjoyment of the promises in that on three occasions the premises were flooded causing damage to the respondent's property. The lower court found that the Landlord could not be exonerated from the flooding which was caused by a structure put up by another tenant without authority.

Held:
Where another tenant of the same landlord causes a nuisance which interferes with a tenant's quiet enjoyment, the landlord is not liable unless he actually participated in the nuisance.

Case cited:
Malzy v Eichholz [1916] 2 K.B. 308

For the appellant: M. Matakala, Z.N.P.F. Legal Counsel
For the respondent: R. M. A. Chongwe, Chongwe and Co.

Judgment

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

In this judgment we will refer to the appellant as the defendant and the respondent as the plaintiff respectively.

This is an appeal against a judgment of the High Court awarding damages to the plaintiff arising out of the flooding of the premises leased by the defendant to the plaintiff. The facts of the case are that the defendant leased the premises in a block of offices to the plaintiff and after some years without any cause or complaint there were four instances of flooding during the rainy seasons as a result of which the plaintiff alleged that he had suffered damage to his property kept in the premises. The plaintiff complained about the damage and was informed by the defendant that the damage had been caused by structural work done by other tenants of the defendant in next door premises, which had interfered with the drainage of rain water, resulting in the seepage of the rain water into

the plaintiffs premises. They gave the name of the next door tenant allegedly responsible as Shaw's Auto Electrical. The plaintiff, therefore wrote to Shaw's Auto Electrical claiming that they were responsible for the damage and that the company replied to the effect that they had constructed a structure next door to the plaintiffs premises but such construction had been carried out by a firm called Intersum Development Limited and they were confident that any damage

caused to the plaintiffs premises by flooding could not have been as a result of the erection of this structure. This denial was drawn to the attention of the defendant and as a result they called for a report from their architects, a firm known as Architrave Limited. This report was written on the 11th February, 1981 and indicated that the damage resulted from the construction of a temporary structure next door to the premises as a result of which the rain water was not properly drained away and at the same time the report indicated that the roof of the premises was leaking and needed attention. There is no evidence from the plaintiff that he ever saw this report and he subsequently issued a writ claiming damages for a breach of covenant for quiet enjoyment by the negligence of the defendant in carrying out repairs to the roof of the premises.The defence put in by the defendant was a simple denial of the whole of the statement of claim and a denial that the plaintiff had suffered any loss and damages at all. There was also a counter-claim for rent which has not been dealt with in the appeal.

At the trial the plaintiff gave evidence that the premises were flooded and he said this was due to work done by the defendant's workmen whom he recognised as being employed by the defendant. The defence called a number of witnesses all of whom gave evidence that the flooding to the premises was caused by the construction of the structure next door, and, in particular, the architects called by the defence said that the leakage to the roof of the premises referred to in the architect's report was not the cause of the problem of the flooding. In his judgment the learned trial judge criticised the pleadings in the case and we agree that the pleadings did not give effect to the purpose of pleadings, namely to set out the disputed matters between the parties. The learned trial judge went on to say that he had ascertained the facts from the correspondence and, inter alia, said that he found a number of relevant facts were not in dispute. These facts included "the causes of the flood as ascertained by the defendant's architects were a temporary structure constructed by the defendant's other tenant and a leakage in the roof of the plaintiffs offices." He went on to say that he found the previous facts which were not in dispute as being proved. Finally as regards liability the learned judge said this in his judgment: "In my view the defendant had a duty to ensure that the roof over the premises leased to the plaintiff was well maintained and that the plaintiff would be guaranteed a quiet anal peaceful enjoyment of the premises. This they did not do. They were therefore in breach of their duty and therefore I find them to have been negligent. The defendant cannot he exonerated on the ground or allegations that the flood was caused by the structure put up by one of their tenants without authority." Mr Matakala on behalf of the defendant had argued in this appeal that the learned judge misdirected himself when he said that it was not in dispute that one of the causes of the the flooding was a leakage in

the roof of the plaintiff's offices. He said the defendant had maintained through out that the leakage in the roof, if there was one, had not contributed to any flooding whatsoever and that the whole of the damage was caused by the construction of the structure by the defendant's tenant of the premises next door, which structure was unauthorised by the defendant. He pointed out that there

was ample evidence of the lack of authority for that structure. Mr Chongwe on behalf of the respondent maintained that it was correct that there were two causes for the flooding in the premises but he agreed that the proportion which each cause bore to the damages suffered had not been estimated or found by the learned trial judge. We agree with Mr Matakala that it was not common cause between the parties that either of them admitted that the damages were due to the reasons set out by the learned trial judge and in this respect the learned trial judge misdirected himself as to fact. Furthermore, although Mr Chongwe has very persuasively argued to the contrary, we construe the learned judge's conclusion to the effect that he found it was the legal duty of the plaintiff to prevent the flooding of the premises and it was no defence for the defendant to argue that the flooding had been caused by a tenant of the defendant.

In the case of Malzy v Eichholz (1) it was held by the Court of Appeal that:

"A lessor is not liable in damages to his lessee under a covenant for quiet enjoyment for a nuisance caused by another of his lessees because he knows that the latter is causing the nuisance and does not himself take any steps to prevent what is being done. There must be active participation on his part to make him responsible for the nuisance. A common lessor cannot be called upon by one of his tenants to use for the benefit of that tenant all the powers he may have under agreements with other persons."

We respectfully agree that this is a proper statement of the law. In this case the flooding of the plaintiffs premises was a nuisance, and consequently, if it was caused by another tenant of the defendant without consent express or implied, the defendant would not be liable for breach of the covenant for quiet enjoyment. It follows, therefore, that the learned trial judge misdirected himself as to the law when he found that the defendant could not be exonerated by the fact that the flooding was caused by the structure put up by another tenant without authority. The result of the learned trial judge's misdirection to this effect was that he did not resolve the issue between the parties as to whether the damage suffered by the plaintiff was caused by the defendant, the other tenant or both. It is impossible for this court to resolve that the issue of fact and both Mr Matakala and Mr Chongwe have very properly indicated that in view of our finding as to the law it is proper that this case be sent back for retrial.

The appeal is allowed. The judgment of the court below is set aside and the case is sent back for retrial by another judge of the High Court. Costs will be in the cause.

Appeal allowed.