

Milad R. Hage of the City of Paynesville, Montserrado County, Republic of Liberia
APPELLANT VERSUS **Arthur Sherman** of the City of Monrovia, Liberia
APPELLEE

APPEAL. JUDGMENT REVERSED

HEARD: APRIL 26, 2005 DECIDED: SEPTEMBER 15, 2005

MADAM JUSTICE COLEMAN DELIVERED THE OPINION OF THE
COURT

This matter is before us on appeal growing out of a ruling of the Trial Court granting Petition for the Cancellation of a Lease Agreement, filed by the Petitioner/Appellee Arthur Sherman against Milad Hage for his alleged failure to perform in keeping with the Lease Agreement between the parties.

The records before us show that on the 31st day of January, 2003, Petitioner Arthur Sherman filed a nine (9) Count Petition for the Cancellation of a Lease Agreement before the Sixth Judicial Circuit Court, Montserrado County, praying the Court to cancel a Lease Agreement entered into between the Petitioner Arthur Sherman and the Respondent Milad R. Hage.

In the Petition, it is alleged that Petitioner Arthur Sherman, as Lessor and Milad Hage, the Lessee, entered into a Lease Agreement in 1994 for (1) acre of land with the building thereon situated in Paynesville City for a period of Twenty (20) years certain with an option to renew for an additional period of Ten (10) years.

The Lease Agreement provided for the payment of US\$ 2,000.00 (United States Dollars Two Thousand) per annum in advance, with the further understanding that US\$ 8,000.00 (United States Dollars Eight Thousand) for the first four (4) years of the, Agreement be paid at the signing of the Lease Agreement; that rental for each succeeding five years in the amount of US\$ 10,000.00 (United States Dollars Ten Thousand) be paid in advance.

Petitioner alleged in Counts 2 and 3 of the petition that any violation of the terms: can form the basis for the cancellation of the agreement as provided in Article Eleven of the Lease Agreement attached to the complaint.

Petitioner further complained that to get Respondent to comply with the provision

regarding rental payment for the second five year period, i.e. from 1999 - 2004, Petitioner had to seek remedy in the Debt Court for Montserrado County, resulting in a Judgment from the Debt Court against the Respondent for satisfaction of rental payable under Article Four of the Lease Agreement. Petitioner finally contended that in consequence of the inability of the Lessee to pay the rent stipulated in the agreement, it would be unfair to the Lessor, to be placed in a position to accept or withstand the injustices brewed by the Lessee's inability to pay rent, absent the legal alternative to a petition for the cancellation of the agreement, for failure to perform.

The Petitioner prayed the Court to cancel the Lease Agreement, declare it null and void and to award punitive damage of L\$25,000.00 (Liberian Dollars Twenty-five Thousand) to Petitioner for the failure, inability and non-performance of the Lease Agreement by the Respondent/Appellant. The Respondent/Appellant in response to the Writ of Summons., served on him, filed a Ten (10) Count Returns to the Petition for Cancellation of the Lease Agreement.

The Respondent/Appellant Hage in his Returns, denied the allegations contained in the petition and contended that no provision in the lease agreement gives the Lessor the right to terminate the agreement prior to its expiration in 2024; that Respondents admits default on payment of a portion of the rent, but indicates that said failure to pay a portion of the rent was due to circumstances beyond the Respondent's control; that speculation by the Petitioner that future rent will be delayed is not sufficient ground in law to cancel a valid lease agreement.

The Respondent therefore requested the Court to dismiss the petition, deny the request of the Petitioner to cancel the agreement and award Petitioner punitive damages in the amount of L\$ 25,000.00 (Liberian Dollars Twenty-five Thousand) since no such penalty was provided for under the Lease Agreement.

The Petitioner filed a 8-Count Reply to Respondent's Returns and pleading rested.

Two (2) separate motions were filed by the Petitioner and Respondent to strike the Respondent's Returns and the Petitioner's Reply respectively from the records of the court. Petitioner alleged in his motion to strike Respondent's Returns that even though the matters is venued in a court in Montserrado County, the affidavit showed that the deponent appeared before and signed the affidavit in the presence of a Justice of the Peace for Margibi County. The motion to strike the Petitioner's Reply was filed on ground that the Reply was served late.

The Judge in his ruling on the motions to strike Respondent's Returns and Petitioner's Reply, granted both motions and ordered that the Returns and Reply be stricken off the Records, and placed the Respondent on bare denial, leaving only the Petition which the judge determined raised no legal issues. He therefore ruled the Petition to trial on its merits, it being the only pleading before the court. Only the Respondent excepted to the striking of his Returns and gave notice to take advantage of the statute.

When the case was assigned for hearing on November 12, 2003, Counsel for Respondent requested for a pre-trial conference since the case related to alleged non-payment of rent, and that the Respondent had arranged for a loan agreement with a local bank to settle his balance arrears, which the Respondent was prepared to settle pending the outcome of the pre-trial conference.

The Petitioner objected to the request for pre-trial conference stating that since the Respondent was ruled to a bare denial, there were no issues to be reviewed. The Court on November 18, 2003, granted the request of Respondent for a pre-trial conference for November 20, 2003 and further stated that if the Respondent failed to make good his offer to settle Petitioner's rent arrears, the Court would proceed with the hearing of the Petition for the Cancellation of the Lease Agreement.

The Petitioner/Appellee excepted to this ruling of the judge, indicating that the proceedings before him was a Cancellation Proceeding and not a Debt Action.

Before the pre-trial conference could be held on the 20th of November, 2003, the Petitioner fled to the Justice in Chambers on a Petition for Certiorari, resulting into the issuance of a stay order to the Lower Court. After the conference, the Justice in Chambers refused to issue the Alternative Writ of Certiorari, lifted the stay order and ordered the judge to resume jurisdiction and proceed with the matter in keeping with law. When the parties met after the lifting of the stay order, the Respondent reminded the Court that a pre-trial conference was pending before the Certiorari Proceeding was filed and requested the court to proceed with the pre-trial conference. The pre-trial conference was held on December 11, 2003. No issue was resolved and the court thereafter ordered the trial to commence.

The Petitioner produced two (2) witnesses in person of Roger Sherman and James Payne, the Deputy Sheriff for Montserrado County.

On the 22nd day of December 2003 when the case was called for continuation of the

trial, Respondent and his Counsel were absent and the Petitioner requested the court to proceed with the trial since the Respondent and his Counsel were absent without an excuse even though a notice of assignment was duly served on the Respondent's Counsel. This request was granted and Petitioner's second witness completed his testimony and was discharged. Subsequently, the Petitioner rested with the production of evidence and offered into evidence the Lease Agreement sought to be cancelled and a Clerk Certificate issued by the Clerk of the Debt Court for Montserrado County stating that an action of debt was instituted in the Debt Court by Mr. Arthur Sherman against Mr. Malid Hage resulting in a judgment in favor of Mr. Sherman, which judgment was not satisfied.

The documents were admitted into evidence and Petitioner's counsel rested with the production of both oral and documentary evidences, cited the court to 1LCLR Civil Procedure Law Sections 25.5 and 25.6 Page 198 and requested the court to make a ruling. The court suspended the matter and reserved ruling pending the issuance of a notice of Assignment. A notice of Assignment was issued on the 29th of December 2003 for Ruling on December 30, 2003.

The Judge in his Final Judgment granted the prayer of the Petitioner and ordered the Lease Agreement entered into between Petitioner Arthur Sherman and Respondent Milad Hage cancelled, declared null and void to all intent and purposes. Excerpts from the Judge's Ruling is quoted as follows: "This Court says that cancellation proceeding can not only be based upon the facts that a Respondent has failed to pay his or her leased rentals; the proper action would be for the Petitioner to pursue a debt action for the payment of such due rentals. In the case at bar, there is a difference; the action filed by the Petitioner, for the cancellation of the lease agreement, is based upon Lessee's inability to perform." The Judge further went to say that "besides the failing to effect payment of the initial lease rental fees by the Respondent and for which a Debt Action in the Debt Court for Montserrado County was instituted, the Respondent has not yet settle the Judgment rendered against him by the Debt Court since 2002"

To this final judgment, the Respondent/Appellant excepted and announced an appeal to this Honourable Court for a review of the errors allegedly committed by the trial court.

Five issues were raised by the Appellant in its brief and one issue was raised by the Appellee in its brief.

We find the decisive issue to determine this matter to be: Whether or not a Petition for Cancellation of a Lease Agreement will lie for failure to pay rent, in the absence of such provision in the Lease Agreement?

The records reveal that the parties entered a lease agreement on the 20th day of May 1994 to take effect on the 1st day of September 1994 for a parcel of land containing four (4) lots with buildings thereon, situated in the city of Paynesville for a period of twenty years certain; paying before US\$ 2,000.00 (United States Dollars Two Thousand) per annual in advance, and that, the rent for the first four years, that is, US\$ 8,000.00 (United States Dollars Eight Thousand) would be paid at the signing of the agreement. The agreement also provided that subsequent rent would be paid every five (5) years in advance that is US\$10,000.00 (United States Dollars Ten Thousand) every five (5) years for the rest of the period certain.

Clause Five (5) of the Lease Agreement provides the Lessee an option to renew for an additional period often (10) years after the expiration of the certain period of twenty (20) years which will expire in 2014. The rental for the optional period is US\$ 20,000.00 (United States Dollars Twenty Thousand) to be paid in advance every five (5) years.

The Petitioner/Appellee alleged that the Respondent/Appellant violated provision of the Lease Agreement for the payment of the second five (5) years period of the rent; that as a result of the Respondent/Appellant's failure to pay the rent for the second five (5) years period, an Action of Debt was instituted in the Debt Court for Montserrado County that resulted in a judgment from the Debt Court, in favor of the Petitioners, which Judgment the Respondent had not satisfied.

While the judgment from the Debt Court in an Action of Debt for failure of the Respondent/Appellant to pay rent is still not satisfied and an appeal from said judgment is still pending before this Court, the Petitioner/Appellee filed a Petition for the Cancellation of the Lease Agreement praying the Court to cancel the agreement for the inability of the Lessee/Appellant to perform, that is, to pay rent as stipulated in Clause Four (4) of the Lease Agreement. It is clear from the facts stated above, the reason for the Petition to cancel the

Lease Agreement is the failure of the Respondent to pay rent as stipulated in the Agreement. This failure, Petitioner has termed "inability to perform"

The Respondent in his brief and argument before this court contended that the judge

erred when he cancelled the lease agreement in the absence of fraud or a provision stated therein that said agreement can be cancelled for failure to pay rent, that the remedy available to the Petitioner was an action of debt, or breach of contract.

Even though the trial judge in his ruling admitted that the remedy to the Petitioner was an action of debt, yet the judge concluded that this case at bar is different because the Petition for the Cancellation of the Agreement is based upon Lessee 's inability to perform. He denotes the non-performance to mean the failure to effect payment of the initial lease rental for which a debt action was filed in the Debt Court which judgment the Respondent was unable to satisfy. Both witnesses of the Petitioner testified to the failure of the Respondent to pay rent, which clearly indicates that an action of Debt will lie under our law.

Our laws are clear to the extent that a Lease Agreement may not be cancelled where there is no allegation of fraud in obtaining the Agreement or where there is no specific provision in the Lease Agreement that provides that the Agreement may be cancelled if the Lessee fails to pay rent. A thorough review of the Lease Agreement between the parties does not show any provision therein giving to Lessor the right of the Lessor to cancel the Agreement in the event of the non-payment of rent. We therefore hold that the remedy available to the Petitioners was an Action of Debt, which was first instituted, and a judgment rendered in favor of the Petitioner.

In Count 5 of the petition, it is alleged that Article Twelve of the agreement provides that -if the Lessee faithfully performs his side of the terms and conditions in the agreement, shall peaceably have, hold and enjoy the quiet use and occupancy of the premises, while Lessor shall warrant and defend said premises" Petitioner argues that this provision of the agreement places obligations and rights on the Respondent and where violated, operates under the sooner Termination Clause found in Article Eleven of the Agreement. Petitioner further argue that if the Lessee is not faithfully performing, he cannot enjoy the provision of the Lease Agreement and this gives Lessor the right to cancel the Agreement

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A review of Article Eleven of the Lease Agreement states that it is further agreed and understood by and between the parties hereto that at the expiration or sooner termination hereof, the Lessee shall in a peaceable manner surrender unto the Lessor said demised premises in as good and habitable a condition as when utilized by Lessee himself, or sub-leased, reasonable wear and tear, and damages due to natural causes, the elements or Acts of God, excepted"

Petitioner contends that these words "sooner termination" gives him the right to terminate the agreement if the Lessee does not faithfully perform his side of the Agreement. The court disagrees with the argument of the Petitioner that the words sooner termination as stated in Article Eleven gives him the right to cancel in case the lessee does not pay the rent. The phrase "at the expiration or sooner termination" does not say how, when or upon which conditions the "sooner termination" may occur. This phrase does not clearly state that the "sooner termination" gives right to the Lessor to cancel the Lease Agreement for failure to pay rent when due.

In answering the question whether the non-payment of rent is a valid ground for the cancellation of a lease agreement absent a provision in the said agreement? The Supreme Court of Liberia opined in the case Doe Versus Mitchell 35 LLR (1988) text at page 651 to 652 that where the agreement did not specifically contain a provision for cancellation of the agreement for [non] payment of rent on a lease agreement, nonpayment of rent is no ground for ejectment or cancellation of the lease agreement except where the Lease agreement has specifically provided for cancellation in case of nonpayment of rent." The Court speaking through Mr. Justice Gbalazeh said "Cancellation of the lease agreement can only be obtained where the lease has been obtained by fraud, misrepresentation or misinformation. Where a Lessee fails in the payment 'of rent, the proper cause open to the Lessor is an action of debt or an action of damages for breach of contract in order to Obtain his outstanding rent. He can not proceed on an action of ejectment or for Cancellation of the lease agreement simply for non-payment of rent unless the Agreement had particularly made that provision" See also Jantzen versus Coleman, 2 LLR 208 (1915) Nassa and Salaby versus Elias Brothers, 5 LLR 108 (1936) LBDI versus Joseph Isaac Anthony 37 LLR 471 (1994).

We hold therefore that the judge properly ruled that the remedy for non-payment of rent is an action of debt, but erred at the same time when he ruled that the Agreement be cancelled for inability of Lessee to perform, which inability to perform the Judge stated arose from the non-payment of rent by the Lessee. We are convinced that the Appellee was aware that the proper action to be brought in this case was an action of debt, and that is why he first instituted an Action of Debt in the Debt Court against Appellant, for failure to pay rent in the first place.

In the absence of any allegation of fraud in obtaining the Lease Agreement and there being no provision in the lease agreement specifically providing for cancellation of said agreement for non-payment of rent, coupled with the trial court's own acknowledgment that the "inability to perform" was failure to pay rent and that the

remedy would have been an action of Debt, the trial judge had no ground to order the Cancellation of the Lease. We therefore hold that the trial judge erred when he ordered the Lease Agreement cancelled,;

Wherefore and in view of the above, we hold that the Judgment of the Court below canceling the Lease Agreement not being in consonant with the laws in our jurisdiction -same is hereby reversed. The Clerk of this Court is hereby ordered to send a mandate to the court below ordering the Judge presiding therein to resume jurisdiction over this case and give effect to this Opinion. Costs are ruled against the Appellee. AND IT IS HEREBY SO ORDERED.

COUNSELLORS EMMANUEL R. BERRY, ROLAND F. DAHN AND JOSEPH H. CONSTANCE APPEARED FOR THE APPELLANT.

COUNSELLOR RICHARD MACFARLAND APPEARED FOR THE APPELLEE.