

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2010/HP/439

BETWEEN:

HONGLING XING XING BUILDING
PLAINTIFF
COMPANY LIMITED

AND

ZAMCAPITAL ENTERPRISES LIMITED **DEFENDANT**
(FOR NATIONAL ELECTRONICS RETAIL LIMITED)

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 16th day of May, 2011.

For the Plaintiff: None.

For the Accused: Mr. Chizu of Messrs Chanda Chizu and Associates.

R U L I N G

Cases referred to:

1. *Leicester Permanent Building Society v Shearely [1951] Ch 90; [1950] 2 ALL E.R. 738.*
2. *Greater London Council v Jenians [1975] 1 W.L.R. 155.*

Legislation referred to:

1. *Rules of the Supreme Court (White Book) Orders, Order 45; 45/3/4; and rule 3; 45/3/5; 88, and 113.*

Works referred to:

1. *J. R. Lewis, Civil and Criminal Procedure (London, Sweet and Maxwell 1968).*

This matter was commenced on 4th May, 2010, by way of a writ of summons accompanied by a statement of claim. In the writ of summons the plaintiff claims for the following:

- (a) Specific performance of the lease agreement dated 1st September, 2001; and renewed in 2006;
- (b) An injunction to restrain the defendant from committing acts in breach of the plaintiff's quiet enjoyment of the property of subdivision "B" of stand number 5, and any other breach of the subject lease;
- (c) Any other relief the Court may deem fit; and
- (d) Costs.

By an *ex parte* summons, the plaintiff applied for an interim injunction to restrain the defendant from committing acts in breach of the lease agreement dated 1st September, 2001. After hearing both parties, on 9th June, 2010, I held that the lease agreement of 1st September, 2001, and which was renewed sometime in 2006, expired due to effluxion of time. Furthermore, I held that the resulting tenancy at will was duly brought to an end by notice. In view of the foregoing, I refused to confirm the interlocutory injunction which I had earlier on granted on 4th May, 2010, on an *ex parte* basis.

It is against the preceding background that on 29th July, 2010, Mr. Chizu of Messrs Chanda Chizu and Associates applied on behalf of the defendant for leave to issue a writ of possession pursuant to Order 45/3/5 of the Rules of the Supreme Court (White Book).

The *ex parte* summons for leave to issue writ of possession was accompanied by an affidavit in support. The affidavit in support was sworn by Mr. Joseph Banda; the Human Resource Manager of the defendant Company. He deposed as follows: The plaintiff in this matter was a tenant to the defendant until the tenancy agreement expired on 31st March, 2009. When the lease agreement expired, the defendant demanded that the plaintiff vacates the premises, to enable the defendant undertake renovations. However, all efforts to have the plaintiff vacate the premises failed. Instead, the plaintiff decided to initiate legal proceedings against the defendant. In the action commenced by the plaintiff; the plaintiff seeks a remedy for specific performance and initially obtained an injunction on 4th May, 2010, on an *ex parte* basis. However, as earlier on noted, after the *inter partes* hearing, I refused to confirm the injunction. From the time I refused to confirm the injunction, the plaintiff has not taken any further steps in this matter. Thus attempts to have the defendant yield vacant possession have failed to date despite several demands.

On 2nd July, and 21st July 2010, following the ruling where I refused to confirm the injunction, Messrs Chanda Chizu and Associates enquired from the plaintiff when they could collect the keys to the premises and have the property handed over to their client. The defendant has not received any response. It is against this

backdrop, that the defendant is now requesting for leave to issue a writ of possession.

On 20th September, 2010, the defendant filed an affidavit in opposition to the application for leave to issue a writ of possession. The affidavit in opposition is sworn by Mr. Christopher Nebson Mugala. Mr. Mugala is the Business Manager in the plaintiff's company. Mr. Mugala deposed as follows: that the plaintiff has paid into Court the sum of sixty nine million three hundred and twenty thousand kwacha (K 69, 390, 000=00) towards rentals for the premises. The defendant cannot issue a writ of possession when the main matter has not yet been heard by the Court. Furthermore, that the defendant will not suffer any loss because the plaintiff is paying the rentals into Court. In view of the foregoing reasons, I am urged not grant leave to issue the writ of possession.

On 20th September, 2010, the defendant in turn filed an affidavit in reply. The affidavit in reply was again sworn by Mr. Banda. Mr. Banda deposed that: the defendant has continued to suffer monetary losses. And is unable to renovate the premises as planned. Further, that since the plaintiff lost the bid for the injunction, it has not even appealed against the ruling. Consequently, the plaintiff is liable to be evicted at any time. The application for leave to issue a writ of possession, is simply courteous and seeks to comply with procedural rules. Further,

that the present action is frivolous, vexatious, and lacks merits. The action is merely calculated to use the Court process as a means to perpetrate the plaintiff's unjustified occupation of the premises. In the circumstances, leave to issue the writ of possession should be granted.

I am indebted to counsel for their assistance in this matter. The question or issue that falls to be determined in this matter is in my view very narrow. Wit, whether or not I should grant leave to the defendant to issue a writ of possession. It is incontrovertible that on 29th June, 2010, I rendered a ruling in which I stated, in essence, that the lease agreement between the parties to this action had expired. And further that the resulting tenancy at will had been determined by notice. Thus in the absence of a lease agreement, or binding agreement, I did not find any justification for the plaintiff to be granted an interim injunction to enjoy quiet possession of the property.

However, the question that falls to be resolved now is whether or not the defendant is entitled to leave to issue a writ of possession. The application for leave to issue a writ of possession has been made pursuant to Order 45 of the Rules of the Supreme Court (White Book). According to the editorial introduction of Order 45 the series of Orders comprising Orders 45 to 52 inclusive, under the rubric "*Enforcement of Judgment and Orders,*" groups together the methods for the enforcement of the judgments and

Orders of the Court. Together they constitute a code of procedure on the subject of what was called "Execution" in the former rules. They should therefore be read together as they deal with the various ways in which a successful party can employ the machinery of the Court towards satisfaction of his judgment.

More specifically, Order 45, rule 3, which the defendant has relied on, relates to enforcement of judgment for possession of land. And the Order is expressed in the following terms:

"3__ (1) Subject to the provisions of these Orders for the giving of possession of land may be enforced by one or more of the following means, that is to say__

- (a) Writ of possession;*
- (b) In a case in which rule 5 applies, an Order of committal;*
- (c) In such a case, writ of sequestration.*

(2) A writ of possession to enforce a judgment or Order for the giving of possession of any land shall not be issued without the leave of the Court where the judgment or Order was given or made in a mortgage action to which Order 88 applies.

(3) Such leave shall not be granted unless it is shown__

- (a) That every person in actual possession of the whole or any part of the land has received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled; and*
- (b) If the operation of the judgment or Order is suspended by subsection (2) of section 16 of the Landlord and Tenant Act, 1954, that the applicant has not received notice in writing from the tenant that he desires that the provisions of paragraphs (a) and (b) of that subsection shall have effect.*

(4) A writ of possession may include provision for enforcing the payment of any money adjudged to be paid by the judgment, or Order which is to be enforced by the writ."

The fundamental requirement about the preceding rule is that leave is necessary in all cases to enforce a judgment or Order for the giving of possession of land, except in a mortgage action to which Order 88 applies or an Order for possession made under Order 113.

By the way, Order 113 relates to summary proceedings for possession of land. Typically, Order 113 is resorted to in circumstances where land is occupied by persons who have entered into or remained in possession of the land without the licence or consent of the person claiming possession. This summary procedure is however discouraged where the plaintiff is aware of a real dispute with the occupier. (see *Greater London Council v Jenkins* [1975] 1 W.L.R. 155).

To continue with the narration, the practice stated in Order 45/3/5, relied on by the defendant in the instant case, underscores the point made earlier on that leave to issue a writ of possession is necessary except in mortgage action. The practice stated in Order 45/3/5 is elucidated by J. R. Lewis in his book entitled, Civil and Criminal Procedure, (London Sweet, and Maxwell 1968) in the following terms at page 98:

“Where the plaintiff obtains a judgment for the recovery of land he may apply to Court for leave to issue a writ of possession. He must give notice to every person in actual possession of the whole or part of the land and may then make an application for leave to issue the writ. The writ directs the sheriff to enter upon the land and give possession to the plaintiff. By order 45, rule 3 (4), the writ may include provision for the enforcing of any payment of money adjudged or ordered to be paid by the judgment or Order which is being enforced by the writ of possession.”

The question or issue that falls to be determined in this application is simply this: whether or not I should grant leave to the defendant to issue a writ of possession. I must state at once that in my opinion the grant of leave to issue a writ of possession presupposes in the first place the existence of a judgment or Order for the giving of possession of land. Thus the enforcement of a judgment or order to grant possession of land through a writ of possession, must be preceded and complimented by leave of the Court to issue the writ of possession. A question that therefore arises on the facts of this case is whether or not the defendant has in this action obtained a judgment or Order that it should be granted possession of the property in issue.

It is instructive to note that the cause of action in this matter instituted by the plaintiff is for a specific agreement dated 1st September, 2011. And allegedly renewed sometime in 2006. This cause of action was complimented by an application for interlocutory injunction to restrain the defendant from disturbing the plaintiff's quite enjoyment of the property.

As earlier on noted, I refused to confirm the interim injunction granted on 4th May, 2010, on *ex parte* basis. The grounds for refusing to confirm the injunction were that the lease agreement had expired. And the resulting tenancy at will had been determined by notice. It is on the basis of the preceding order however that the defendant has now launched this application for leave to issue a writ of possession. The plaintiff objects to the grant of the leave mainly on the ground that the main action has not been heard and determined.

I have carefully considered this matter. It is trite law that the grant of leave to issue a writ of possession as means of recovering possession of the premises, presupposes that either a final judgment ordering the giving of possession of land has been rendered, or alternatively, an order has been issued directing that possession of land should be given. In this case, the cause of action has not been determined on its merits. And consequently, a final judgment has not been rendered. Further, the Order relied on by the defendant did not in any event in terms direct that the defendant should be given possession of the premises in issue. Rather by that order I refused to grant an interlocutory injunction to the plaintiff to restrain, the defendant from interfering the plaintiff with the quiet enjoyment of the property. In the course of my ruling dated 29th June, 2010, I observed that the main question that falls to determined in the main action is whether or

not the plaintiff is entitled to the remedy of specific performance. The remedy for specific performance, I went on, presupposes the existence of an agreement. Thus, in the absence of agreement, the remedy of specific of performance could not be availed to the plaintiff. Ultimately, I considered that there was no serious question to be tried on the facts of this case. And since there was no serious question to be tried, I refused to confirm the interlocutory injunction granted on 4th May, 2010.

By my refusal to grant to confirm the interlocutory injunction, I did not however order that the defendant should be granted possession of the property in dispute. The net result of this application is therefore that it is incompetent for a party to apply for leave to issue a writ of possession, in the absence of a judgment or Order for the giving of such possession. I accordingly dismiss the application for leave to issue a writ of possession.

Costs to follow the event.

Leave to appeal is granted.

Dr. P. Matibini, SC

HIGH COURT JUDGE