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**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(Civil jurisdiction)**

2015/HP/0085



**IN THE MATTER OF : THE LAW OF DISTRESS AMENDMENT ACT
1888 AND SECTION 14 OF THE RENT ACT
CHAPTER 206 OF THE LAWS OF ZAMBIA.**

**IN THE MATTER OF : THE LEASEHOLD PROPERTY KNOWN AS
HOUSE NUMBER 37 MILIMA ROAD
WOODLANDS, LUSAKA**

BETWEEN:

KATEBA MAPOMA

APPLICANT

AND

HARRY SHIOMPA

RESPONDENT

BEFORE HONOURABLE MRS. JUSTICE P.C.M. NGULUBE IN CHAMBERS

FOR THE APPLICANT : MR P.G. KATUPISHA

MESSRS MILNER KATOLO & ASSOCIATES

FOR THE RESPONDENT : MR. P. SONGOLO

MESSRS PHILSONG LEGAL PRACTITIONERS

R U L I N G

Cases referred to:

1. New Plast Industries vs The Attorney General (2001) ZLR p.51
2. Chikuta vs Chipata Rural Council (1974) ZR 241

Legislation referred to:

1. The High Court Act, Chapter 27 of the Laws of Zambia
2. The Rules of the Supreme Court of England, (1999 Edition)

This is a Ruling on the Applicant's application for an Order to deem the proceedings as having begun by way of Writ of Summons. The Applicant made the application pursuant to Order 30 rule 8 of the High Court Rules as read with Order 28, rule 8 of the rules of the Supreme Court of England.

In the Affidavit in Support of the application sworn by the Applicant, it was stated that the facts in the matter raised serious and extremely contentious issues which required to be tested through Cross Examination at trial. The allegations of illegality made it imperative for the Court to satisfy itself that the evidence led will be valid through Cross Examination, more so that the claim involved huge sums of money in excess of ZMW1, 000, 000.00.

Further that the facts of the case may require the Court to grant declaratory reliefs which Affidavit evidence cannot adequately support. He thus sought an Order to proceed with the matter as though it had been commenced by way of Writ of Summons supported by Statement of Claim as opposed to the Originating Notice of Motion supported by Affidavit.

Learned Counsel for the Applicant, Mr Songolo made oral submissions in support of the application. He stated that the Applicant sought to have rule 3 of the Rent Act interpreted in the light of the application made and that the question was whether the Court had jurisdiction to deem itself out of the provisions of Rule 3 of the Rent Act.

Counsel stated that if the Court cannot so deem itself, the Applicant would withdraw the subject application.

Mr Katupisha, Learned Counsel for the Respondent filed written submissions in which he opposed the application by submitting that the application by the Applicant was improperly before the Court as Rule 3 of the Rent Act was couched in mandatory terms. Relying on **New Plast Industries vs The Attorney General (2001) ZLR p.51** and **Chikuta vs Chipata Rural Council (1974) ZR 241**, it was submitted that in the High Court there was no choice between commencing an action by Writ of Summons or Originating Notice of Motion where a Statute had clearly provided for a procedure.

It was thus prayed that the application be dismissed with costs.

I have carefully considered the submissions by both Counsel for the Applicant and the Respondent. Commencement procedure in all Rent Act based actions is clearly stipulated in Rule 3 of the Rent Rules which provides as follows-

"A complaint or application to the court under the Act shall be commenced by an originating notice of motion. Evidence in support thereof may be on affidavit or viva voce."

The Applicant is inviting this Court to consider whether, it can opt out of the said stipulation which is couched in mandatory terms.

Section 10 of the High Court Act as amended by the High Court Amendment Act, number 7 of 2011 states as follows;

"The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act, the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or any other written law, or by such rules, orders directions of the Court as may be made under this Act, the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or such written law, and in default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book) of England and subject to subsection (2), the law and

practice applicable in England in the High Court of Justice up to 31st December, 1999."(own emphasis)

The Rent Act has stipulated that all proceedings are to be by way of Originating Notice of Motion and that is the procedure which this Court is mandated to follow in the exercise of its jurisdiction.

I note that the Applicant bases his application on the fact that there are certain contentious issues that have arisen and may need to be addressed by way of Cross Examination as well as the fact that among the reliefs sought, there is a claim for a declaration. However, I am unable to appreciate the substance of the application as nothing stops either party from filing further Affidavits to address all issues at play. As a matter of fact, rule 3 of the Rent Rules gives leeway to a party to tender viva voce evidence.

The element of the relief sought holds no merit either, as the Supreme Court held in **New Plast Industries v The Commissioner of Lands Another** (cited supra) that-

"in our view, it is not entirely correct that the mode of commencement of any action largely depends on the relief sought. The correct position is that the mode of commencement of any action is generally provided by the relevant statute. Thus, where the statute provides for procedure of commencing an action, a party has no option but to abide by that procedure..."

Order 28, rule 8 of the Rules of the Supreme Court of England upon which the Applicant based this application, provides as follows-


Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it

may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

I am of the considered view that this provision is restricted to matters began by Originating Summons as opposed to Originating Notice of Motion and it further leaves it to the Court's discretion to so decide. As I have stated above, I see no cause as to why this matter should not continue in the manner it was commenced.

Based on the foregoing, the Applicant's application is dismissed for lack of merit and Costs to the Respondent.

Dated this 8th April, 2016


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P. C. M. NGULUBE
HIGH COURT JUDGE