IN THE HIGH COURT FOR ZAMBIA 2017/HK/167

AT THE DISTRICT REGISTRY

HOLDEN AT KITWE

(CIVIL JURISDICTION)

IN THE MATTER OF: PROPERTY KNOWN AS HOUSE NO. 28 (B) ENOS CHOMBA AVENUE PARKLANDS KITWE

AND

IN THE MATTER OF: THE RENT ACT CHAPTER 206 OF THE LAWS OF ZAMBIA

BETWEEN:

FLAVIOUR NGULUBE APPLICANT

AND

JETRO ENGINEERING LIMITED RESPONDENT

Before; Hon. Madam Justice C. B. Maka-Phiri

For the Applicant: Mr. K. Musukwa of Messrs Nyirongo & Co.

For the Respondent: Mr. C. Kalandanya of Messrs G. M. Legal Practitioners

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RULING

Legislation referred to:

1. The Rent Act. Cap 206 of the Laws of Zambia.
2. The Landlord and Tenant (Business Premises) Act Cap. 440 of The Laws of Zambia
3. The Rules of the Supreme Court, 1999 edition.

Cases referred to:

1. Rural Development Corporation Ltd v Bank of Credit and Commerce (Z)

Ltd 1987 Z.R 35

2. **Appollo Refrigeration and Yusuf v Mahtani Group of Companies 2011/HPC/ (unreported)**
3. **Lily Drake v M.B.L Mahtani and Professional Services Ltd 1985 Z.R 236**
4. **Appollo Refrigeration Services Ltd v Farmers House Ltd 1985 Z.R 182**
5. **Chikuta v Chipata Rural Council 1974 Z.R 241**

This is the applicant's notice of intention to raise preliminary issue on a point of law made pursuant to order 14A of the Rules of the Supreme Court, 1999 edition. The following preliminary issues have been raised for the court's determination:

1. **Whether it is legally tenable for the applicant to commence these proceedings under the Rent Act Cap. 206 of the Laws of Zambia when the subject property is a business premises consisting of a workshop and offices.**
2. **Whether it is legally tenable for the applicant to seek reliefs under the Rent Act Cap. 206 aforesaid in relation to a business premises.**

The respondent filed a composite affidavit in opposition of the originating notice of motion and in support of notice of intention to raise preliminary issues on 30th March, 2017. The affidavit was sworn by one Dennis Sichone, the Managing Director in the respondent company. The gist of the affidavit evidence is that the premises at house No. 28 (B) Enos Chomba Avenue, Parklands, Kitwe was a dilapidated residential house when the parties executed a Tenancy Agreement exhibited in the applicant's affidavit in support as "FN2' on 19th September, 2013. That by letter dated 10th

December, 2013, and exhibited in the Respondent's composite affidavit as "DS1", the respondent notified the applicant of its intention to modify and repair the house so that it can meet its business standards. The respondent proceeded to extensively renovate the house and in addition built a workshop, outside toilet and paved the drive ways. It was the respondent's contention that the applicant was fully aware of these renovations and new works as she used to visit the premises to collect rentals and also inspect the several projects. The respondent contended that following the renovations and additional construction works, the premises was converted from residential to business premises and as such the Rent Act does not apply to these proceedings.

The applicant filed an affidavit in opposition to the preliminary issue on 21st April, 2017 as well as skeleton arguments. The applicant's deposition is that she leased a dwelling house to the respondent as evidenced by the Tenancy Agreement. That it is therefore legally tenable to seek reliefs under the Rent Act and that failure to cite the specific order or section is not fatal but curable by way of amendment. Further that both the Rent Act and the Landlord and Tenant (Business Premises) Act provides for the commencement of matters therein by way of originating notice of motion. The applicant urged the court to dismiss the respondent's notice to raise preliminary issues with costs.

At the hearing of the application, Counsel for the respondent, Mr. Kalandanya informed the court that he was relying on the composite affidavit sworn by Dennis Sichone. In addition, counsel submitted that owing to the visible alteration to the structure and the use, the applicant cannot argue that the building is a dwelling house. Counsel further submitted that the applicant was aware of the renovations and raised no objection to the change of use of premises from residential to business.

Counsel argued that the preliminary issue touches on the jurisdiction of this court and that the Rent Act and the Landlord and Tenant (Business Premises) Act are not interchangeable. That it is therefore not legally tenable to bring an action under the Rent Act for business premises. Counsel argued that the irregularity is incurable and subsequently the action must be dismissed.

In opposing the notice to raise preliminary issues, Mr. Musukwa relied on the affidavit in opposition and the skeleton arguments both filed into court. In addition, counsel submitted that it is evident from the tenancy agreement exhibited by the applicant that any modifications and repairs to the house were to be made known to the Landlord. That in this case, no documents have been shown before court as proof that the applicant consented to the said modifications or the changes of use of premises. That consequently, the applicant's argument is that the premises is a dwelling house and should be subjected to the Rent Act and that if the respondent

opted to use the premises for otherwise than a dwelling house, then the same was not consented to by the applicant..

Counsel further submitted that should the court be of the view that the action should have commenced under another statute, the court should allow for amendment instead of dismissing the action. Counsel relied on Order 2/1/3 of the Rules of the Supreme Court and the cases of **Rural Development Corporation Ltd v Bank of Credit and Commence Ltd,**[1] **Appollo Refrigeration and Yusuf v Mahtani Group of Companies**[2], to augment his submission.

Counsel further relied on Order 2 Rule 2 of the Rules of the Supreme Court and argued that the respondent waived its right to challenge the irregularity the moment it filed an affidavit in opposition to the originating notice of motion. Counsel urged the court to dismiss the notice to raise preliminary issue.

In reply Mr. Kalandanya submitted that the applicant has not denied the fact that the premises is a business premises and should that be the finding of the court, then the court will have no jurisdiction to hear this matter on ground that it has been moved wrongly. Counsel further submitted that it is trite law that the mode of commencement of the matter is determined not by reliefs sought but by the statute applicable. That therefore, it is not possible for this court to order an amendment of source of authority because it lacks jurisdiction to do so. Counsel submitted that the respondent's

contention in any case is on the applicable Act and not the mode of commencement of action. Counsel refuted assertion by the applicant that the respondent waived its right to challenge the irregularity when it filed the composite affidavit on grounds that the first step that the respondent took in this matter was to file the notice to raise preliminary issue which was done within a reasonable time. Counsel reiterated his prayer that the preliminary issue should be upheld with costs.

I have considered the notice to raise preliminary issue on point of law and the affidavit evidence in support and opposition thereof. I have also considered the applicant's skeleton arguments and the oral submissions by both parties advanced at the hearing of the matter. The starting point is note that this preliminary issue was raised pursuant to order 14A of the Rules of the Supreme Court which in part provides that:

"(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceeding where it appears to the Court that-...."

The applicant's argument therefore as it relates to order 2 rule 2 of the Rules of the Supreme Court on application to set aside for irregularity is misplaced on account that a preliminary issue under order 14A can be raised at any stage of the proceedings.

From the evidence, it is not in dispute that the parties in this matter are Landlord and Tenant respectively. The Tenancy Agreement signed between the parties is exhibited as "FN2" in the applicant's affidavit in support of originating notice of motion. According to the said Tenancy Agreement, the applicant as landlord "agreed to lease his/her house to the respondent." I have looked at the said Tenancy Agreement. Firstly, I note that the house that was to be leased or rented out is not described. Secondly, the purpose or use for which the house was being leased or rented out was equally not stated. The applicant's argument that she leased a dwelling house cannot be sustained as the same is not stated on the Tenancy Agreement. Suffice to note that it is not in dispute that the house in issue is House No. 28B, Enos Chomba Avenue, Parklands, Kitwe.

The respondent has clearly established that the house in issue was renovated and improved upon for purposes of business. The respondent subsequently used the premises for business and that is the position to date. Was the applicant not aware of the change of use of the premises? My answer is no. The renovations and works done to the house as well as the premises are very visible and if the applicant had any objection she should have stopped the works immediately in 2013. This was however not done and as such the applicant cannot now claim that she never gave consent to the renovations as well as to change of use of the rented premises. That notwithstanding, it is indisputable that the premises have

been used for business all this while. The Rent Act is therefore not applicable to the applicant's cause as its application is restricted to regulating the relationship of Landlord and Tenant of a dwelling house, being any building or house used as a place of residence. I agree with the Respondent that it was erroneous for the applicant to have commenced these proceedings under the Rent Act and seek reliefs thereunder. I therefore find that the preliminary issue raised has merit and it is hereby upheld.

The question however, is whether I should dismiss this action on account that these proceedings have been commenced under the wrong Act or I should allow for an amendment. The respondent's argument is that this court has no jurisdiction to order an amendment because it has no jurisdiction in the first place to deal with this case. In the case of **Lily Drake v M.B.L Mahtani and Professional Services Ltd**[3], the application to the High Court for possession of premises which were subject of the Rent Act, were commenced by writ of summons instead of originating notice of motion. The appellant in that case raised a preliminary objection as to the form of commencement of proceedings. The Supreme Court held that:

" Applications to the court for possession of premises which were subject of the Rent Act must be by originating summons but it has always been the practice of the courts to allow amendment of proceedings which have been incorrectly commenced so long as no injustice is done to the parties".

Further in the case of **Appollo Refrigeration Services Ltd v Farmers House Ltd,**[4] the Landlord of a business premises commenced an action in the High Court to recover possession by originating notice of motion. On appeal, the appellant challenged the mode of commencement of action. The Supreme Court agreed with the appellant and held that;

"An originating notice of motion was not the proper process for Landlord's claim for possession of business premises since all applications which can be made by originating notice of motion under the Landlord and Tenant (Business Premises) Act are specified in 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".

Consequently, the Supreme Court ordered amendments to be effected.

Further in the case of **Rural Development Corporation Ltd v Bank of Credit and Commerce (Z) Ltd**[1], the Supreme Court stated that:

"Even if counsel for the defendant had succeeded on his preliminary point that the action was wrongly before court because it was commenced by way of originating summons instead of writ, the court on the authority of Appollo Refrigeration Services Company Limited v Farmers house should only have effected the necessary amendment and not dismissed the action".

The Supreme Court discussed the **Chikuta v Chipata Rural Council**[5] case in the **Rural Development Corporation**[1] case. The holding in the Chikuta case was that:

"Where any matter is brought to the High Court by means of an originating summons when it should have commenced by writ, the court has no jurisdiction to make any declarations".

The Supreme Court was of the view that the **Chikuta case**[5] had no relevance to the facts of the **Rural Development Corporation Ltd**[1] case and reaffirmed its decision in the **Appollo Refrigeration Services Ltd**[4] case.

The cases cited above clearly guide the court on what should be done were an action is wrongly commenced. According to the **Chikuta case**[5], the Court has no jurisdiction to grant remedies in an action wrongly commenced and as such it would be a futile exercise for the court to proceed to hear a matter wrongly commenced. The court is however in my considered view not precluded from ordering an amendment so as to bring the action in sync. The practice of the court as emphasized by the Supreme Court is in fact to allow an amendment if it will not cause injustice to the parties instead of dismissing the action. The respondent's argument therefore that this court has no jurisdiction to order an amendment flies in the face of the Supreme Court decisions cited herein.

I have not found any injustice that the parties will suffer if an amendment is allowed in this matter. I am therefore of the considered view that this is a proper case in which I should allow amendment of originating process. I thus order that the applicant should amend originating process within 14 days from date of this ruling failing which this action will stand dismissed for being misconceived. I have awarded costs to the respondent to be taxed in default of agreement.

Leave to appeal is hereby granted.

Delivered in chambers at Kitwe; this 26th day of July, 2017.

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C. B MAKA-PHIRI (MRS.)
HIGH COURT JUDGE