APPOLLO REFRIGERATION SERVICES CO. LTD v FARMERS HOUSE LTD
(1985) Z.R. 182 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., GARDNER AND MOWO, JJ.S.
5TH JULY,1985
(S.C.Z. JUDGMENT NO.19 OF 1985)

Flynote
Landlord and Tenant - Action - Commencement of Landlord's action for possession - Business premises - Originating notice of motion inappropriate.
Landlord and Tenant - Notice to quit - Business premises - Landlord relying on notice to quit served by previous landlord.

Headnote
A landlord of business premises commenced an action to recover possession by originating notice of motion thinking that every action between a landlord and tenant of business premises had to be commenced in that fashion by virtue of the Landlord and Tenant (Business Premises) Act and the Rules thereunder. The landlord also relied on a notice to quit served by the previous landlord.

Held:
(i) An originating notice of motion was not the proper process for a landlord's claim for possession of business premises since all the applications which can be made by an originating notice of motion under the Landlord and Tenant (Business Premises) Act are specified in the 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;
(ii) Notice to quit given by a previous landlord was available to a new landlord who had similar intentionof redeveloping the property and such new landlord could resist a request for a new tenancy on the same ground as the previous landlord.

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Case cited:
(1) A.D.Wimbush and Son Ltd. v Ranmills Properties Ltd. and Others [1961] 2 All E.R.197.

Legislation referred to:
High Court Rules, Cap. 50, 0.6.

For the appellant: A.M. Musanya, of Zambezi Chambers.
For the respondent: M.Lwatula, of Ellis and Company.

Judgment

NGULUBE, D.C.J.: delivered the judgment of the court.

This is an appeal by a tenant against a judgment of the High Court which allowed the respondent's claim, as Landlord, for possession of certain business premises occupied by the appellant.

The action in the High Court was commenced by an originating notice of motion and the first point which Mr Musanya has taken up is that such a procedure was wrong and the action was, therefore, not properly before the High Court. He relies on Order 6 of the High Court Rules and submits that the action commenced by the respondent was not such application as is referred to in the Landlord and Tenant (Business Premises) Act, Cap.440 and the rules made thereunder. Mr Lwatula, for the landlord, concedes this argument and has indicated that he was under the impression that every action between a landlord and a tenant of business premises had to be commenced in that fashion. He has applied to this court to grant the necessary amendments to rectify the proceedings, pointing out that no prejudice can result to the appellant since both parties had every opportunity to be heard on the merits. We agree with the submission by Mr Musanya that an originating notice of motion was not the proper process for a landlord claim for possession since all the applications which can be made under the Act are infact specified in the various sections. A landlord's action for possession is not so specified and the action should, therefore, have been commenced as provided for by Order 6 of the High Court Rules. With regard to the application for the necessary amendments to be made, we agree that, for the reasons given by Mr Lwatula, this is a proper case in which to order that the amendments be effected, as prayed, and it is hereby so ordered.

Mr Musanya in his second ground of appeal argued that the learned trial commissioner erred in holding that the respondent could rely on notice to quit which the previous landlord had served on the appellant. He is not able to cite any authority but nevertheless contends that the respondent should not have relied on a notice served by the previous owners of the property. In fairness, we should record that Mr Musanya eventually accepted that, since the new landlord took the property subject to the tenancies, he also took all the advantages including any notices already given by the previous landlord. In any case, there is authority in support of the proposition to which we have made reference,

namely, that notice to quit given by a previous landlord is available to a new landlord who has similar intentions of redeveloping the property - which was the ground upon which the notice was given in this case and such new landlord can resist a request for new tenancy on the same ground as the previous landlord. We refer to *A.D. Wimbush and Son Limited v Franmills Properties Limited and Others* (1).

The third ground of appeal alleged that the learned trial commissioner had misdirected himself by his failure to hear viva voce evidence in this case, which failure resulted in prejudice to the appellant. The alleged proposed evidence consisted of facts stated by counsel for the respondent in his submissions, and which amounted to evidence, to which objection was successfully taken by counsel for the appellant. It is quite clear that there was no such evidence relevant to the issues before the court. Again in fairness to Mr Musanya, we should record that he has in any case abandoned this argument. There was a further point which Mr Musanya raised in his submissions

concerning the alleged lack of proof of the fact that the landlord did require the premises for the purpose of redevelopment. Once again this ground was not proceeded with and Mr Musanya quite properly conceded that there was no dispute in this regard. Indeed the landlord's basic claim in the action was never at any stage challenged by the appellant.

For the reasons which we have given it is quite clear that there are no grounds upon which we can possibly interfere with the decision of the learned trail commissioner. The appeal is accordingly dismissed.

Mr Musanya submitted that, in the event of this court finding against him, the appellant should be given sufficient time to find alternative accommodation. Mr Lwatula has quite fairly indicated that this would be a proper course for us to take. We observe that the appellant has had, since these and other previous proceedings, over three years in which to make alternative arrangement. However, in all the circumstances and having regard to the matters which were submitted to us, we feel that the respondent should not be able to obtain possession for a further period of three months from today's date. We accordingly order a stay of execution of the respondent's judgment for possession of the said property for three months.

With regard to the question of costs, it is to be observed that we have had to grant an application by the respondent to amend the proceedings. The alternative order, had we not taken that course, would have been to require the respondent to commence the action all over again. For this reason, and in fairness to both parties, we feel that there should be no order as to costs. In other words each party will bear its own costs of this appeal.

Appeal allowed in part
