HU HE RONG AND CHARITY OF OPARAOCHA

SUPREME COURT
CHIBESAKUNDA, J.S.
8TH AUGUST 2000 AND 14TH DECEMBER 2000
APPEAL NO. 111/2000

Flynote
Civil Law - tenancy agreement - Rent Act - default in payment of rent - declaratory order.

Headnote
The respondent commenced an action in the High Court by Originating Summons. She sought, inter alia, an order to the effect that she was entitled to repossession of the premises from her tenant, the appellant herein. She alleged contractual breach of the lease agreement between herself and the appellant. The learned trial judge, relying on the affidavit evidence ruled in favour of the respondent granting the relief sought in the Originating Summons. On appeal it was argued that the lower court had relied on contradictory affidavit evidence. Thus the court should have proceeded to hear viva voce evidence to determine the truth or otherwise of that assertion.

Held:
The evidence before the lower court was contradictory. Order of the high court quashed. Matter to be heard De Novo.

Appeal allowed.

Authorities referred to:
(1) Air France v Mwase Import and Export Company S.C.Z. Judgment No. 10 of 2000
(2) Dorothy Lungu and Others v Greenwell Siuluta S.C.Z. Appeal No. 14 of 1999
(3) Kenmuir v Hattingh (1974) Z.R. 162.

Legislation referred to:
(1) The Rent Act, Cap. 206

For the Appellant M.V. Kaona, Nakonde Chambers
For the Respondent: L. Mushota. Mushota and Associates

Judgment
CHIBESAKUNDA, J. S. delivered the judgment of the court.
By originating summons, Charity Oparaocha, the respondent before us sought the following reliefs against Hu He Rong now the appellant before the High Court:-

1. A declaratory order that the tenant or lessee who is the Defendant herein has breached Section 13 (i)(b) of the Rent Act and Clause 24 of the Lease dated 17th April, 1997;
2. An order, inter alia, directing the Defendant herein to perform and effect repairs to the interior and external parts, fixtures and fittings of the devised promises;
3. An order to the effect that the Plaintiff herein be entitled to repossession of the demised premises;
4. An order for rent and rent arrears at US $1,200 per month as Lease Agreement has not been terminated by either party;

5. An order for mesne profits at the rate of US $1,200 per month from the date of the summons until the matter is concluded; and
6. An order for costs.

The originating summons was supported by an affidavit. An affidavit in reply was filed by the appellant. In reply to that affidavit the respondent and her daughter filed two affidavits both alleging contractual breach of the lease agreement between the appellant and the respondent. The appellant on the whole had filed one affidavit in opposition to the application under the Rent Act. The learned trial Judge relying on the affidavit evidence ruled in favour of the respondent granting the relief sought in the Originating Summons. The matter then went before the Deputy Registrar for assessment of damages. After assessment of those damages the appeal was filed before the High Court before Imasiku, J., as an appeal against Deputy Registrar's Order. Imasiku, J., declined to make and order as at the time the matter came before him there was another application before Ndhlovu, J., the appellant appeared before Ndhlovu, J., on two occasions for the said action and sought leave to appeal to Supreme Court out of time. The record at this point makes very confusing reading because of the multiplicity of applications before different judicial officers. According to the record, leave was finally granted for the appeal to this court to be filed out of time.

The appellant is challenging the judgment of Ndhlovu, J. It was argued for the appellant that the learned trial Judge fell into gross error both in law and fact by choosing to rely on some aspects of conflicting affidavit evidence. It was pointed out to us that at pages 13 to 14 of the record the respondent's prayer was to terminate tenancy and seek repossession as per Section 13(1)(b) (24) of the Rent Act because according to the respondent in her affidavit the appellant had vacated the premises pursuant to notice to vacate served on them by the respondent. The court chose to rely on the affidavit of the daughter of the respondent Catherine Oparaocha at page 44, where she stated that the appellants were still in occupation at the time she visited subsequently after the date of expiry of the notice to vacate. This was a complete turn around of the facts deposited by the respondent herself. Inspite of this conflict it was argued, the learned trial Judge concluded that there was tenancy post the period in the notice to vacate as asserted by Catherine Oparaocha. The learned counsel pointed out that this was a contradiction and as such the court ought to have proceeded to hear viva voce evidence to determine the truth or otherwise of that assertion. It was also argued that his conclusion by the court was a contradiction also to the fact contended in the affidavit of the respondent in her first affidavit in support of originating summons which was that when she discovered that the appellant had vacated premises, she sent her own security men to guard the premises. She even further asserted in the same affidavit that on two occasions the appellant forced entry to the premises to collect his belongings.

The second argument on behalf of the appellant is that the learned trial Judge misdirected himself by not indicating in his judgment those reasons for arriving at certain conclusion. He cited the cases of *Air France v Mwase Import and Export Company (1), Dorothy Lungu and Others v Greenwell Siuluta (2) and Kenmiur v Hattingh (3)* as authorities. The learned counsel for the respondent arguing in support stated that the learned trial Judge was on firm ground in relying on affidavit evidence before it. She urged us to look at the law of Landlord and Tenant, Hill and Redman 13th Edition Section 4. She argued that the appellants did not traverse any of the allegations and as such that was an admission. She cited Order No. 18/13 of the Supreme Court Practice 1995 (White Book). She further more canvassed the point that as the lease agreement was specific and the breach by the appellant was established in all the letters produced under the High Court rules in which the appellant accepted the liability and to have accepted to carry out the repairs, the learned trial Judge did not have to take other issues, which were irrelevant to the lease into account. She referred to the matter going before the learned Deputy Registrar twice for assessment. The first time the matter was discontinued at the appellant's instance to settle out of court. The second time the appellant offered no

evidence and according to her the appeal to come to the Supreme Court was an afterthought intended to delay or evade justice. She added that on the counterclaim there was no merit.

We have looked at the evidence and arguments before us. It is quite clear to us that the evidence before the learned trial Judge from the respondent herself and her daughter was contradictory and as such the learned trial Judge misdirected himself in relying on such evidence to reach the conclusion, which he did. As we said in the case of *Sam Amos Mumba, Progressive Business Service Limited and Bank of Credit Services and Commerce Zambia Limited, S.C.Z. Appeal No. 88/96:-*

> "It is quite clear from these rules that as a matter of practice an originating summons is heard and disposed of on affidavits in Chambers and that where the issues raised cannot be disposed of on affidavit then the court on it own motion or application by parties or either of them adjourn the matter into open court for summary hearing, which may take the form of cross examination deponents on their affidavits. For this reason we feel that the matter should take its normal course. Moreover from the evidence available on record so far we do not conceive that the defendants indebtedness could be properly ascertained on affidavits alone. We would therefore, order that the matter goes back to High Court to take its normal course."

In this case the proper course for the learned trial Judge to have taken would have been to have the matter adjourned into open court and to proceed to hear the evidence viva voce for him to decide on the veracity or otherwise of the evidence. Failure to do so was a misdirection. We also agree that for any conclusion to be reached the court is duty bound to spell out reasons for reaching those conclusions. The appeal is therefore successful.The order of the High Court is quashed. This matter must go back to the High Court to be heard before another Judge denovo. Costs in the cause.
