

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA

APPEAL NO. 217/2006
SCZ NO. 8/163/2006

(Civil Jurisdiction)

BETWEEN:

JOHN KABONGO

APPELLANT

AND

ZAMBIA AIRWAYS CORPORATION LIMITED
(In Liquidation)

RESPONDENT

Coram: Chirwa, Chitengi, Silomba JJS

On 20th November, 2008 and 27th October 2009.

For the Appellant: Mr. A. M. Kasonde of Messrs Kasonde and Company.

For the Respondent: Mr. D. Tambulukani of Messrs Sharpe Howard and Mwenye.

J U D G M E N T

Chitengi, JS, delivered the Judgment of the Court.

Cases referred to:

1. *Jack S. Ward and N. B. Allen Vs. Leornard Kasula*, SCZ Judgment No.28 of 1995 (Unreported).
2. *Greater London Council Vs. Jenkins* (1975) ALL ER 345.
3. *Zambia Revenue Authority Vs. Hitech Trading Company Limited*, SCZ Judgment No.13 of 2001 (Unreported).
4. *Jamas Milling Company Limited Vs. Imex International (Pty) Limited* (2002) Z.R. 79.

Statute referred to:

1. *High Court Act Chapter 27 of the Laws of Zambia Order 35, Rules 3 and 5.*

2. Supreme of Zambia Act Chapter 25 of the Laws of Zambia, Section 25.

This is an appeal against the Judgment of the High Court which granted possession of Stand No.329, Bauhinia Avenue, Chelstone, Lusaka to the Respondent and dismissed the Appellant's counter claim for declaration that the termination of his employment with the Respondent was unlawful, damages in respect of gratuity etc, a declaration that he is entitled to purchase the stand number in question and an order of specific performance.

The facts of this case can be briefly stated. The Appellant was employed by the Respondent and allocated the house in dispute to live in as an incident of his employment. On 15th February, 1994 the Appellants employment with the Respondent was terminated and the Appellant was given 21 days grace period from 1st September, 1994 to live in the house. On 16th September, 1994 the Appellant commenced action in the Industrial Relations Court challenging his dismissal and in addition obtained an injunction restraining the Respondent from evicting him from the house in question pending the determination of the action. On 30th January, 1995 the Industrial Relations Court discharged the injunction. On 15th April, 2004 the Industrial Relations Court dismissed the Appellant's action for want of prosecution. From that date the Appellant continued to stay in the Respondents house without paying rent to the Respondent.

On these facts the Respondent brought this action in the High Court claiming possession of the house and the sum of

K61,350,000.00 as rentals for the period 1st January, 1994 to 31st March. 2005.

In this claim the Respondent also averred that the Appellant's continued occupation of the house has prejudiced the Respondent as it is in the process of liquidation and is delaying the process of winding up. Further the Respondent averred that it has been denied the use of the house and it is accordingly entitled to recover the mesne profits of K61,350,000.00.

According to the Appellant since 21st August, 1995, the Respondent has been offering to him the house for sale at K18,000,000.00 as determined by the valuation report; that he accepted the offer of sale. The Appellant then stated that there is an appeal against the decision of the Industrial Relations Court under Appeal No.SCZ/8/102/2004 filed on 30th April, 2004.

He averred that as a sitting tenant he is entitled to be given the right of first refusal to purchase the house and that the proceedings seeking to evict him from the house are surprising, unfounded and completely otiose. The Appellant then said that the delay in completing the sale of the house was due to the proceedings before the Industrial Relations Court and that he is ready and willing to purchase the house even at the price of K60,000,000.00.

The Appellant did not comply with Order for Directions given at the Scheduling Conference despite several adjournment and no witnesses' statements, skeleton arguments and lists of authorities were filed by the Respondent. The learned trial Judge, therefore, relied on the Appellant's Defence and Counter-claim to get the Appellant's side of the story.

On the facts before her the learned trial Judge found that the Respondent proved its case on a balance of probabilities; that the Appellant had no legal right to stay in the house; that the appellant occupied the house as an incident of his employment and that the Appellant's employment was terminated in 1994; that after termination of his employment the Appellant was given 21 days grace period from 1st September, 1994 to stay in the house but the Appellant continued to stay in the house; that the Appellant's continued stay in the house was by virtue of an injunction granted by the Industrial Relations Court and which injunction was discharged on 30th January, 1995.

Citing the cases of **Jack S. Ward and N.B. Allen Vs. Leornard Kasula**⁽¹⁾ in which the Supreme Court held that where the Defendant was no longer an employee of the corporation, the Appellant had no legal obligation to provide him accommodation and **Greater London Council Vs. Jenkins**⁽²⁾ where it was held that where a plaintiff in proceedings for possession establishes that the defendant has been let into possession of land belonging to the plaintiff under licence, but has been in occupation after the licence had been terminated, without the plaintiff's consentthe courteven where the defendant has been in occupation under the licence for a substantial period, was bound to grant an order for possession in such circumstances as authority for the basis upon which the owner of the house can get possession, the learned trial Judge reiterated her earlier holding that the Appellant's continued stay in the house had no legal basis. Accordingly, the learned trial Judge granted the Respondent the order of possession which it sought

and ordered the Appellant to vacate the house and pay to the Respondent the mesne profits claimed.

The learned trial Judge dismissed the Appellant's counter-claim holding that issues relating to termination of the Appellant's employment had nothing to do with this action which specifically dealt with possession of property only. And, of course the learned trial Judge having entered judgment in favour of the Respondent the Appellant's counter-claim for a right to purchase the house and for specific performance automatically failed. Dissatisfied with the judgment of the learned trial Judge, the appellant now appeals to this court advancing six grounds of appeal.

The first ground of appeal is that the Appellant's Defence and Counter-claim were never properly dealt in the court below and thereby the question of sitting tenant of the appellant in the house known as 24 Bauhinia Avenue, Chelstone, Lusaka in which the Appellant had lived since his employment with Zambia Airways in 1968 to 1994 and still lives to date was wrongly decided or even never decided at all.

The second ground of appeal is that the Appellants' Defence and Counter-claim were never decided in the court below and the question of terminal benefits to which the Appellant was entitled upon the Appellant's wrongful dismissal by the Respondent was never properly decided.

The third ground of appeal is that the learned trial Judge erred in point of law and in point of fact when she refused or declined to decide Appellants Counter-claim in respect of paragraphs 25 (i) (ii) (iii) (iv) and (v) of the Counter-claim.

The fourth ground of appeal is that the present case was wrongly decided on the basis of cases cited by the Respondent which totally ignored the accrued rights of the first refusal vested in the Appellant as sitting tenant to have the first option of purchasing the house known as 24 Bauhinia Avenue, Chelstone, Lusaka.

The fifth ground of appeal is that the court below was unfair, or did not act judiciously in refusing to grant an adjournment for three days and instead by ordering closure of pleadings against the Appellant while the adjournment was absolutely necessary to enable the Appellant lodge his bundles of documents into court together with the Appellant's Skeleton Heads of Argument and the Appellant's witnesses' Statements and Appellants List of Authorities.

The sixth ground of appeal is that the court below acted unfairly in proceeding to hear Respondent in the absence of the Appellant or his Advocates and thereby the Appellant was totally denied the opportunity to be heard and the provisions of Order 35 Rule 3 of the High Court Rules Cap 27 of the Laws of Zambia were totally ignored.

Both Counsel filed detailed written heads of argument on which they relied and made no oral submissions.

We propose to deal with the sixth ground of appeal first. This ground of appeal deals with the issue that the judgment under appeal was obtained in the absence of the Appellant and that it can be set aside. The relevant High Court Order which deals with judgment obtained in the absence of a party is **Order 35⁽¹⁾**.

The Rules that are relevant to this ground of appeal are (3) and (5).

Order 35 Rule 3 reads:-

“Order 35 (3). If the Plaintiff appears, and the Defendant does not appear or sufficiently excuse his absence, or neglects to answer when dully called, the court may, upon proof of service of notice of trial proceed to hear the cause and give judgment on the evidence adduced by the Plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the Defendant.”

Order 35 Rule 5 reads:-

“Order 35 Rule 5: Any judgment obtained against any party in the absence of such party may, on sufficient cause shown, be set aside by the court, upon such terms as may seem fit.”

As we understand the arguments by Counsel, it is not in controversy that a judgment obtained in the absence of a party can, on sufficient reason being shown, be set aside.

Mr. Kasonde, learned Counsel for the Appellant in his submissions tried to show that there were good reasons that explain the absence of the Appellant and his advocate. On the other hand, Mr. Tambulukani, learned Counsel for the Respondent, argued that there was no excuse for the Appellant or his advocate for failing to attend the hearing. Counsel cited decided cases in support of their arguments. However, in the view we take of this ground of appeal, we do not find it necessary to restate the cases cited. Suffice it to say that we have given the authorities cited our careful consideration. This ground of appeal can be effectively disposed of on **Order 35⁽¹⁾** itself. Rule 5 provides for setting aside of a judgment obtained in the absence of a party. The question arises is who sets aside the judgment.

Is it the trial court or the appellate court. In this case Mr. Kasonde has not shown to us and the record of appeal is silent on the point that the Appellant applied to have the judgment set aside and the learned trial Judge refused to set aside the judgment. All the Appellant has done is to appeal without showing us that the learned trial Judge refused to set aside the judgment. In fact, this ground of appeal is an invitation to us to stand in the shoes of the learned trial Judge to decide at first instance whether there were sufficient reasons to set aside the judgment or not. We regret but we must decline the invitation. This ground of appeal is misconceived and we dismiss it.

We now deal with ground one.

Mr. Kasonde, learned Counsel for the Appellant, filed fifteen closely typed pages of written heads of argument on ground one. In these written heads of argument Mr. Kasonde complains that the learned trial Judge did not consider the Appellant's defence. Mr. Kasonde also went into detailed history of the Appellant's service with the Respondent. Mr. Kasonde then referred to the fact that the Appellant brought an action against the Respondents in the Industrial Relations Court for wrongful dismissal and that the Appellant was granted an injunction by the Industrial Relations Court which was later discharged in accordance with the authorities. Mr. Kasonde said all the documents which relate to the Respondent offering the house for sale to the Appellant were excluded although they were mentioned in the Defence and Counter-claim. Mr. Kasonde said the documents excluded are so vital that they can now be produced with leave of the court. In the alternative Mr. Kasonde

argued that we can order a retrial before another High Court Judge.

Mr. Kasonde then referred to the Government policy to enable Zambians to purchase houses in which they lived as employees etc. Of course this is a sweeping statement because no such policy has ever existed. As Mr. Kasonde later corrected himself Government policy on sale of houses to sitting tenants applied only to government and parastatal employees buying Government and parastatal house in which they lived as sitting tenants.

Mr. Kasonde cited eight decided cases to support his submissions. Unfortunately none of these cases is favourable to the Appellant.

In his submissions Mr. Tambulukani, learned Counsel for the Respondent, pointed out that when the Appellant's services were terminated he was given 21 days to stay in the house but later obtained an injunction to stay in the house but the injunction was later discharged. On considering the Appellant Defence, Mr. Tambulukani submitted that the learned trial Judge considered the Appellant's Defence and quoted excerpts from the learned trial Judge's judgment to that effect. On the claim for wrongful dismissal, Mr. Tambulukani submitted that the learned trial Judge cannot be faulted for not having considered the claim for wrongful dismissal because that matter is on appeal to the Supreme Court.

We have considered the submissions of Counsel on this ground of appeal. We are bound to say that we do not know what else the learned trial Judge should have done for her to be

said to have considered the Defence and Counter-claim. The learned trial Judge applied her mind to the Defence and Counter-claim. In her summary of the facts of the case the learned trial Judge referred to the Defence and Counter-claim and ruled that the Appellant had no legal right to continue to stay in the house. The learned trial Judge went on to say that the Appellant occupied the house by virtue of his employment which was terminated in 1994. On our part we say that it is a notorious fact that in 1994 there was no Government policy to sale Government and parastatal houses to the sitting tenant employees. The policy to sell Government and parastatal houses was introduced in 1996.

In her Judgment the learned trial Judge said ***"In arriving at the above finding (referring to granting possession of the house to the Respondent), I did take into account the Defence by the Respondent which I find wholly untenable."*** What other evidence is needed to show that the learned trial Judge considered the Appellant's Defence and the Appellant's status in the house. Similarly the learned trial Judge considered the Appellant's Counter-claim and dismissed it, and rightly so. The counter-claim referred to the Appellants dismissal. The Appellant brought an action against the Respondent for wrongful dismissal in the Industrial Relations Court and the matter was dismissed. The Appellant himself said that case is on appeal to the Supreme Court and gave the appeal number. We are not here concerned with the reasons for dismissal of the Appellant's claim by the Industrial Relations Court. For the Appellant to litigate the dismissed matter in the High Court is an abuse of court process.

In the circumstances we do not accept Mr. Kasonde's submissions that the learned trial Judge did not properly consider the Appellant's Defence and Counter-claim. We accept Mr. Tambulukani's submissions that the learned trial Judge properly considered the Appellant's Defence and Counter-claim.

Mr. Kasonde complained of some documents vital to the Appellant's case not having been admitted during the trial because of the failure by the Appellant to file bundles of documents for the reasons he has given in his submissions. Mr. Kasonde then asked us to use our discretion to admit the documents. We are startled by this request by Mr. Kasonde. We cannot on our own motion order the production of documents the existence and contents of we are not aware of. Counsel should have made application to adduce fresh evidence in terms of Section 25 of the **Supreme of Zambia Act**⁽²⁾. Even the cases Mr. Kasonde relied upon say that an application should be made to lead fresh evidence on appeal. See for example **Zambia Revenue Authority Vs. Hitech Trading Company Limited**⁽³⁾.

In the event we find no merit in this ground of appeal and we dismiss it.

We now deal with ground two. In view of what we have said in ground one, it is not necessary for us to restate Counsel's submissions on this ground of appeal. What we have said in the first ground of appeal effectively disposes of this ground of appeal and we accordingly dismiss it. The issue of wrongful dismissal had gone to the Industrial Relations Court and is on appeal to the Supreme Court and the appellant cannot relitigate it in the fashion we want to.

On ground three, Mr. Kasonde and Mr. Tambulukani made detailed submissions and cited various authorities to support their submissions. However, it is again not necessary to restate these submissions because what we have said in ground one and two disposes of this ground of appeal. As the learned trial Judge said in her judgment and Mr Tambulukani in his submissions, the issue of wrongful dismissal and terminal benefits was litigated by the Appellant in the Industrial Relations Court.

On ground four Mr. Kasonde argued issues of accrued right which he said the learned trial Judge ignored. It was Mr. Kasonde's submission that the Appellant having been a sitting tenant he had the accrued right to purchase the house. In reply Mr. Tambulukani submitted that the Appellant had no accrued right of first refusal as a sitting tenant to have the first option to purchase the house in question. Mr. Tambulukani submitted that the learned trial Judge was on firm ground when she dismissed the Appellant's claim on the ground that the Appellant after dismissal had no legal right to continue staying in the house which was allocated to him as an incidence of employment. Mr. Tambulukani pointed out that the Appellant was dismissed from the Respondent's employment in February, 1994. Further Mr. Tambulukani pointed out that the Appellant cannot claim rights that accrued to former Zambia Airways employees who lost their employment by virtue of liquidation in December, 1994 when the Appellant was dismissed in February, 1994.

We have considered the submissions by Counsel on this ground. Mr. Kasonde has dwelt on the issue of accrued rights. But as Mr. Tambulukani has rightly pointed out the issue of

accrued rights does not arise and we do not need to cite authorities to arrive at this conclusion. The clear undisputed evidence is that the Appellant was dismissed from employment in February, 1994 and given 21 days to stay in the house. The 21 days expired and he obtained an injunction from the Industrial Relations Court to stay in the house. The injunction was later discharged. It is, therefore, not correct to say, as Mr. Kasonde argued, that the Appellant was a sitting tenant in the house. At best the Appellant was a licensee and at worst the Appellant was a trespasser. Of course the Appellant first got into the house lawfully but after his legal stay in the house had expired he occupied the house as a trespasser subject to eviction.

There is no merit in this ground of appeal and we dismiss it.

The complaint in ground five is the alleged learned trial Judge's refusal to grant three days adjournment to enable the Appellant file bundle of documents.

Mr. Kasonde argued this ground of appeal without bearing in mind that the matter was in the Commercial List. As we said in **Jamas Milling Company Limited Vs. Imex International (Pty) Limited**⁽⁴⁾ the Commercial List was introduced as a fast track to quickly dispose of commercial cases. In this case, as Mr. Tambulukani rightly pointed out, the Appellant was given more than enough time to comply with the Order for Directions but for reasons best known to the Appellant and his advocate he failed to do so. The complaint that the learned trial Judge did not act fairly and judiciously in refusing to grant the Appellant an adjournment for three days and instead ordered closure of the pleadings is totally unjustified. The learned trial Judge could not

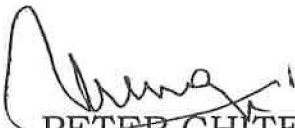
go on adjourning the matter in order to accommodate the Appellant's lapses. We find no merit in this ground of appeal and we dismiss it.

All in all, we are satisfied that the learned trial Judge was on firm ground when she found that the appellant had no legal basis to continue to stay in the house. The Appellant was not a sitting tenant with an accrued right to purchase the house but as we have said at best a licensee and at worst a trespasser in both cases with no right to purchase the house.

We find no merit in this appeal and we dismiss it with costs to the Respondent to be agreed upon and in default to be taxed.



D. K. CHIRWA
SUPREME COURT JUDGE



PETER CHITENGI
SUPREME COURT JUDGE



S. S. SILOMBA
SUPREME COURT JUDGE