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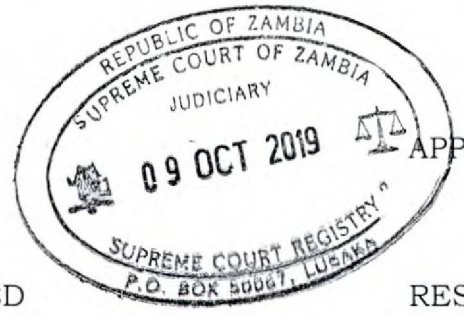
IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 158/2010
SCZ/8/211/2010



BETWEEN:

LINGSON CHIKOTI APPELLANT

AND

ZAMBIA RAILWAYS LIMITED RESPONDENT

Coram: Mambilima, CJ, Kaoma and Mutuna, JJS.
On 1st October, 2019 and 9th October, 2019

For the Appellant: N/A

For the Respondent: Mr. N. Sampa of Norman Sampa Advocates

J U D G M E N T

Kaoma, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Lily Drake v M.B.L. Mahtani and Professional Services Limited (1985) Z.R. 236**
2. **Muliwana Muliwana v Lusaka City Council and Christopher Mulala (2002) Z.R. 1**
3. **Wesley Mulungushi v Catherine Bwale Mizi Choma (2004) Z.R. 96**
4. **Bank of Zambia v Aaron Chungu, Access Leasing Limited and Access Financial Services Limited (2008) 1 Z.R. 159**
5. **Chikuta v Chipata Municipal Council (1974) Z.R. 241**

Legislation referred to:

1. **Rent Act, Cap. 206, sections 2, 4(e), 14 and Rule 3**
2. **High Court Rules, Cap. 27, Order 40 Rule 6**

1.0 Introduction

1.1 This appeal is against a judgment of the High Court presided over by Chisanga, J (as she then was) dismissing the appellant's application under sections 4(e) and 14 of the Rent Act, Cap 206.

2.0 Background facts

2.1 The undisputed facts relevant to this appeal are that on 23rd October, 2009 the appellant was offered to purchase house No. 71, Kariba Road, Kansenshi, Ndola at a consideration of K214,000 (rebased), as substitute for a house earlier offered to him. He accepted the offer the same day and the parties executed a contract of sale. In terms of clause 9 of the special conditions in the contract of sale, the appellant was to take vacant possession upon execution of the assignment. The parties executed the assignment after the appellant paid the purchase price in full.

2.2 On 10th February, 2010, Enias Chulu Legal Practitioners, the respondent's advocates then, wrote to the appellant that he was at liberty to take immediate vacant possession of the property. On 12th February,

2010 Workers Compensation Fund Control Board [the appellant's employer] informed the respondent's advocates that the appellant had failed to take vacant possession of the house because there was a lady occupying it who was also claiming to have paid for the same.

2.3 On 19th March, 2010 the appellant wrote to the respondent's advocates demanding to be given vacant possession by 26th March, 2010 failure to which he would take legal action against them, the respondent and the occupant. He further demanded payment of rentals amounting to K2,800 (rebased) per month with effect from 10th February, 2010 when he should have taken vacant possession, until when vacant possession would be given.

3.0 Pleadings and evidence in the court below

3.1 On 3rd May, 2010 the appellant issued an originating notice of motion under sections 4(2) and 14 of the Rent Act. He sought for an order for possession of the house and leave to levy distress for recovery of rent arrears or mesne profits in the sum of K5,600 (rebased) as at 10th

occupant. A writ of possession and a debit and advice note were annexed, which showed that the writ was executed on 5th and 6th of April, 2009 long before the house was offered to the appellant.

3.4 The respondent denied allowing anyone to move into the house, after recovery of possession by the bailiffs but admitted that the appellant was not given the house keys because the bailiffs forcibly opened the premises and were not given the keys. The respondent refuted any collusion on its part and its advocates to deny the appellant possession of the property.

3.5 The respondent acknowledged that the purchase of the house was completed and all documents of title handed over to the appellant's financial institution in respect of security for the monies advanced to the appellant for purchase of the house.

3.6 At the hearing of the matter, the appellant repeated what he had averred in his affidavits. In contrast, counsel for the respondent submitted that the application made under the Rent Act was misconceived

because the relationship between the parties was that of vendor and purchaser and not landlord and tenant.

3.7 Counsel cited the case of **Lily Drake v M.B.L. Mahtani and Professional Services Limited**[1], where we said the true purpose of the Rent Act is to protect tenants. He argued that one that seeks to come to court to seek any relief under the Rent Act must first be a tenant or at least hold over from a tenancy.

3.8 Counsel also cited the case of **Muliwana Muliwana v Lusaka City Council and Christopher Mulala**[2], to support his proposition that the relationship between landlord and tenant and that of vendor and purchaser are totally different and governed by different principles of law in the event of breach of any of the terms.

3.9 Counsel contended that based on the above case, when the purchase price is paid, the Rent Act does not apply; it is superceded by the contract and terms of sale. He urged the court to dismiss the matter with costs as it had been argued from the wrong premise.

3.10 In reaction, counsel for the appellant argued that having sold the property to the appellant, the respondent in occupation through its former employee was a tenant who must give vacant possession to the appellant [now landlord] to enjoy the quiet possession expressly stated in the contract of sale. According to counsel, the cited cases were inapplicable and it was a misconception of the law to seek refuge in that manner.

4.0 Consideration of the matter by the High Court and decision

4.1 The court identified two questions for determination, whether the sale of the house had been completed and vacant possession delivered to the appellant; and if vacant possession had not been delivered, whether the appellant was entitled to an order for possession and rent or mesne profits pursuant to sections 4(e) and 14 of the Rent Act.

4.2 On the first issue, the court found on the facts before it that the sale was not completed because the respondent did not deliver to the appellant vacant possession of the property.

4.3 As to the second issue, the court found that the parties were vendor and purchaser, their designation flowing from the contract of sale and assignment and not landlord and tenant as defined by the Rent Act. The court referred to the preamble to the Rent Act, which states in part that the Act is intended to make provision for purposes incidental to and connected with the relationship of landlord and tenant of a dwelling house.

4.4 The court disagreed with the appellant that the respondent, having failed to deliver vacant possession was a tenant as it was in occupation by its former employee. It held that since the parties were vendor and purchaser, the Rent Act did not apply; and that the law that governs failure by a vendor to deliver vacant possession to a purchaser is totally different from that which governs the relationship between a recalcitrant tenant and landlord.

4.5 The court also found that the respondent was in breach of contract by failing to deliver vacant possession, because somebody else occupied the house; and that after 10th February, 2010, the purchaser was entitled to

profits or rent if there was a tenant in the house, or occupation rent if the vendor was in actual possession.

4.6 However, the court opined that the purchaser's entitlements after the date due for completion are available to a purchaser who sues for specific performance by delivery of vacant possession and or damages for breach of contract to deliver possession.

4.7 It concluded that the appellant had applied for possession and mesne profits under a wrong law as the contract of sale did not say the purchaser would become landlord of the vendor upon paying the purchase price in full. Applying **Muliwana Muliwana**[2], the court held that the remedies available to the appellant were not obtainable under the Rent Act but were based on principles of law that govern the relationship between a purchaser and a vendor. Hence, it dismissed the application with costs.

5.0 Grounds of appeal and arguments by the parties

5.1 The appellant has advanced three grounds of appeal as follows:

5.1.1 That the learned Judge in the court below misdirected herself and erred in law and fact when she held that the parties are not landlord and tenant and the provisions of sections 4(e) and 14 of the Rent Act are not available to the appellant.

5.1.2 That the learned Judge in the court below misdirected herself and erred in law and fact when she held that the application made by the appellant was misconceived and argued from the wrong premise.

5.1.3 A further ground is the order on costs against weight of evidence.

5.2 Counsel for the appellant filed heads of argument together with the record of appeal but did not attend the hearing of the appeal, file a notice of non-appearance or excuse his absence. However, we have taken into account the written arguments.

5.3 As regards ground 1, counsel for the appellant, identified the question for decision in this appeal as what the status and relationship was that ensued between the parties after the execution of the assignment and payment of full purchase price.

5.4 The gist of his arguments is that although initially the parties were purchaser and vendor when they executed the contract of sale, their relationship changed to that of landlord and tenant when they

executed the assignment, because an assignment signifies change of ownership. Counsel quoted the definition of 'landlord' in section 2 of the Rent Act, as follows:

> **"'landlord" includes, in relation to the premises, any person, other than the tenant in possession, who is or would, but for the provisions of this Act, be entitled to possession of the premises, and any person from time to time deriving title under the original landlord, and any person deemed to be a landlord by virtue of the meaning ascribed in this sub-section to the expression "lease"".**

5.5 He submitted based on this definition, that the status of the appellant was undoubtedly that of landlord and that the matter was properly commenced under the correct provisions of the law.

5.6 In reaction to the questions the court had posed for its determination, counsel submitted that since the sale of the house had been completed, with or without vacant possession, following the assignment, the appellant as landlord was entitled to an order for possession and rent or mesne profits under sections 4(e) and 14 of the Rent Act. Therefore, the court misdirected itself.

5.7 In ground 2, the appellant attacks the court for alluding to the remedy of specific performance on ground that this is a discretionary remedy and nothing stopped the court from exercising its discretion to complete justice by ordering specific performance. He referred to **Wesley Mulungushi v Catherine Bwale Mizi Choma**[3].

5.8 Counsel further submitted that assuming but not conceding that the proceedings were wrongly commenced, we said in **Lily Drake v M.L.B. Mahtani and Professional Services Limited**[1]that:

> **"...Application 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 amendments of the proceedings which have been incorrectly commenced as long as no injustice is done to the parties."**

5.9 Further, he cited Rule 3 of the Rent Act, which provides that:

> **"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".**

5.10 Counsel also cited the case of **Bank of Zambia v Aaron Chungu, and two others**[4] where we held that:

> **"It is not 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 for by statute".**

5.11 In counsel's words, this is what the appellant did as landlord. He made an application under section 4(e) which provides that:

> **"4. The court shall have power to do all things which it is required or empowered to do by or under the provisions of this Act, and in particular shall have power-**
> **(e) subject to the provisions of section thirteen, to make either or both of the following orders, that is to say:**
> **(i) an order for the recovery of possession of premises, whether in the occupation of a tenant or of any other person; and**
> **(ii) an order for the recovery of arrears of standard rent, mesne profits and a charge for services;"**

5.12 Counsel argued that the appellant also sought leave to levy distress of rent under section 14 and that there is no injustice done to the parties since the respondent purports to have given the appellant vacant possession and must be compelled to do so and pay mesne profits until vacant possession is given.

5.13 In ground 3, counsel submitted that the court misdirected itself when it ordered the appellant to bear the costs against the weight of evidence. He argued that

throughout the judgment, the court blamed the respondent, but ordered the appellant to bear costs after arriving at a wrong conclusion. That the judgment shows that the appellant had done no wrong as demonstrated also in this appeal. Counsel urged us to allow the appeal, with costs.

5.14 In response, counsel for the respondent supported the dismissal of the application on ground that it was argued from a wrong premise and submitted that from the affidavits filed by the parties in the court below, the relationship between them was that of a vendor and purchaser and not landlord and tenant.

5.15 Based on the **Muliwana Muliwana**[2] case, counsel contended that the appellant erred when he commenced his action under the provisions of the Rent Act because, as the court rightly observed the remedies available to him were not obtainable under that Act.

6.0 Consideration of the matter by this Court and decision

6.1 We have considered the record of appeal, the judgment appealed against and the arguments by learned

counsel. We shall deal with the grounds of appeal in the order argued by the appellant.

6.2 The question raised by ground1is whether the court below erred when it held that it could not grant the remedies under sections 4(e) and 14 of the Rent Act because the parties were not in a landlord and tenant relationship but of a vendor and purchaser.

6.3 The appellant contends that he became landlord of the respondent as defined in the Rent Act upon execution of the assignment. We do not agree. The court below was right that execution of the assignment did not turn the relationship of vendor and purchaser that existed between the parties to that of landlord and tenant as envisaged under the Rent Act.

6.4 A 'tenant' under the Rent Act, in relation to the premises, means the person entitled, whether exclusively or in common with others, to possession. The respondent, as vendor does or did not fall under this definition and there was no lease between the parties.

6.5 In **Muliwana Muliwana**[2], which the court below applied when dismissing the application, the parties were initially landlord and tenant before the appellant was offered the house to purchase. We put the matter as follows at pages 4 to 5:

> **"We are satisfied that after the offer was made, the terms and conditions applicable were those in the offer which did not prohibit subletting. The house in our view was no longer governed by council's tenancy conditions and the Rent Act, after the offer was made and accepted by payment of the 10 percent deposit.**
>
> **Above all, when an offer to purchase the house was made, the relationship between the Council and the appellant was no longer that of landlord and tenant, but vendor and purchaser. The two relationships are totally different and governed by different principles of law in the event of any breach of the terms. In our view, the respondent's case in the court below was argued from a wrong premise."**

6.6 Clearly, the relationship that existed between the parties from the time the appellant accepted the offer and executed the contract of sale was that of vendor and purchaser, and it remained so, even after execution of the assignment.

6.7 As we said in **Muliwana Muliwana**[2], the court below was right that the remedies available to the appellant were not attainable under the Rent Act but were based on principles of law that govern the relationship between a

purchaser and vendor. Accordingly, we find no merit in ground 1.

6.8 In ground 2, the appellant attacks the court below for holding that he wrongly commenced the action under sections 4(e) and 14 of the Rent Act.

6.9 As correctly stated by the court below, the Rent Act is intended to protect tenants of dwelling houses. It makes provision for restricting the increase of rents, determining the standard rents, prohibiting the payment of premiums and restricting the right to possession of dwelling houses and for other purposes incidental to and connected with the relationship of landlord and tenant of a dwelling house[preamble].

6.10 Since the relationship of landlord and tenant in the context of the Rent Act did not exist between the parties, we find no basis for disturbing the court's finding that the application for possession and rent or mesne profits was made under the wrong law.

6.11 The appellant also argued that nothing stopped the court from exercising its discretion in doing justice by

ordering specific performance. Again, we do not agree. Truly, in **Bank of Zambia v Aaron Chungu and two others**[4] [and other cases on the point], we have held that the mode of commencement of any action does not depend on the relief sought but is generally provided for by statute.

6.12 However, in **Chikuta v Chipata Municipal Council**[5], and a plethora of other cases we have said the court has no jurisdiction to grant any relief in an irregularly instituted action. The court had no jurisdiction to grant the reliefs the appellant was seeking under the Rent Act, because the Act did not apply to the relationship between the parties.

6.13 In our view, nothing stopped the appellant from recommencing the action by writ or otherwise, to recover vacant possession of the house, instead of appealing to this Court in a matter that is devoid of merit. Ground 2 must equally fail.

6.14 Ground3 attacks the award of costs. We have said in various cases that in terms of Order 40(6) of the High Court Rules, Cap 27 the award of costs is in the

discretion of the court and will generally flow with the result of litigation; the successful party being entitled to an order for costs against the unsuccessful party. In this case, the appellant was unsuccessful. Therefore, there is no basis to fault the court's exercise of its discretion to award costs to the respondent. This ground too must fail.

7.0 CONCLUSION

7.1 In all, we do not find any merit in this appeal and we dismiss it with costs.

I.C. MAMBILIMA
CHIEF JUSTICE

R.M.C. KAOMA
SUPREME COURT JUDGE

N.K. MUTUNA
SUPREME COURT JUDGE