

IN THE HIGH COURT FOR ZAMBIA

2018/HP/1103

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



**IN THE MATTER OF: SECTION 4 (E) (I) AND (II) OF THE
RENT ACT, CHAPTER 206 OF THE
LAWS OF ZAMBIA**

**IN THE MATTER OF: SECTION 14 OF THE RENT ACT,
CHAPTER 206 OF THE LAWS OF
ZAMBIA**

**IN THE MATTER OF: THE PREMISES KNOWN AS STAND NO.
19/BLOCK 75, CHAWAMA, LUSAKA**

BETWEEN:

JUDGE PRISCA MATIMBA NYAMBE S.C.
(RTD)

APPLICANT

AND

CEPHAS SALIMBUCHI

RESPONDENT

**BEFORE THE HONOURABLE MADAM JUSTICE P. K. YANGAILO
IN CHAMBERS ON 31ST DAY OF JULY, 2018**

For the Applicant: Mr. M. Mwitumba - Messrs. ML Mukande & Company

For the Respondent: N/A

JUDGMENT

LEGISLATION REFERRED TO:

1. *The Rent Act, Chapter 206 of the Laws of Zambia;*

2. *The High Court Act, Chapter 27 of the Laws of Zambia; and*
3. *Halsbury's Laws of England, Fourth Edition, Volume 13, Butterworths, London.*

By way of Originating Notice of Motion dated 21st June 2018, brought pursuant to **Section 4 (E) (I)** and **(II)** and **Section 14** of **The Rent Act**¹, the Applicant claims against the Respondent the following reliefs: -

- a) *For an Order for leave to issue warrant of Distress to recover the sum of ZMW18,000.00 rent arrears for three (3) years and to take vacant possession; and*
- b) *Costs of the proceedings.*

The Applicant filed herein an Affidavit in Support of the Originating Notice of Motion deposed to by one **Prisca Matimba Nyambe**, who is the Applicant. It was deposed, *inter alia*, as follows: -

1. *That the Applicant is the registered owner of Stand No. 19/Block 75 Chawama and the Respondent is her tenant in the said house, having been in occupation for a period exceeding three (3) years;*
2. *That the Respondent has refused to pay rent from the time he took possession of the property and instead he sublet the premises without her permission; and*
3. *That the lease was on verbal terms as it was intended that the Respondent would only stay in the property for a period not exceeding three (3) months at a monthly rent of ZMW500.00 and he has now fallen in arrears amounting to ZMW18,000.00, being outstanding rentals for 3 years.*

An attempt was made to effect service of the originating process on the Respondent, but his wife who was found at the premises and

left with the originating process refused to sign the acknowledgement of service form. The Respondent did not file herein any Affidavit in Opposition nor make an appearance at the hearing that I scheduled for 31st July, 2018. There is an Affidavit of Service on record. I proceeded to hear this matter on the basis of **Order XXXV Rule 3** of **The High Court Act**², which provides as follows: -

"If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly 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."

At the hearing of this matter, Learned Counsel for the Applicant Mr. Mwitumwa, relied on the Applicant's Affidavit in Support and in his *viva voce* submissions, he reiterated the contents of the said Affidavit. He prayed that the reliefs being sought be granted.

I have considered the claims by the Applicant in the Originating Notice of Motion and the averments deposed to in the Affidavit in Support filed herein. I have further considered the Respondent's oral submissions.

This application has been brought pursuant to **Section 4 (e) (I)** and **(II)** of **The Rent Act**¹, which provides as follows: -

"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 any other person; and*
 - (ii) an order for the recovery of arrears of standard rent, mesne profits and a charge for services."*

The Court's attention was also drawn to **Section 14** of **The Rent Act**¹, which provides as follows: -

"No distress for the recovery of rent in respect of any premises shall be levied except with the leave of the court."

As I stated earlier, the Respondent herein has not opposed the application by the Applicant. I refer to **Halsbury's Laws of England**³, where the learned author has the following to say regarding the remedy of distress at paragraph 202: -

"The right of the landlord to distrain for arrears of rent arises at common law and need not be expressly reserved. It enables the landlord to secure payment of rent by seizing goods and chattels found upon the premises in respect of which the rent or obligations are due..."

Further, at paragraph 207, the learned author states: -

"In order that the right to distrain for rent upon a demise may arise the relation of landlord and tenant must exist, both when the

rent becomes due and when the distress is levied, and the rent must be in arrear..."

And lastly, a paragraph 208, the learned author states: -

"An actual existing demise is necessary; the common law right to distrain for rent does not arise before the relationship of landlord and tenant is complete or continue after it has determined. A formal instrument of tenancy is not necessary; possession taken by the tenant under an agreement for a tenancy which can be specifically enforced gives the landlord the right to distrain. Further, provided there is a demise, the nature or duration of the tenancy is immaterial, it may be a tenancy at will or a weekly tenancy. The right of distress also exists where, after the expiration of a previous tenancy, a tenant by the consent of both parties continues in possession under such circumstances as to warrant the inference that there is a tacit renewal of the contract of tenancy, but there must be facts to warrant the inference of a renewal of the tenancy..."

As can be seen from the above, the law is very clear that where a relation of landlord tenant exists, when rent becomes due and in arrears, the landlord may apply for leave to issue Warrant of Distress.

Having carefully considered the Affidavit evidence adduced by the Applicant, I am satisfied that rent amounting to ZMW18,000.00 is due and in arrears, from the Respondent who has not opposed the application. I accordingly, grant the Applicant leave to issue Warrant of Distress for the amount of ZMW18,000.00.

With regard to the Applicant's claim for an Order for the recovery of possession of the premises, again there is no opposition from the Respondent. **Section 13 (1) (a)** of **The Rent Act**¹ provides for circumstances upon which possession may be granted. It provides as follows: -

"No order for the recovery of possession of any premises or for the ejectment of a tenant therefrom shall be made unless-

(a) some rent lawfully due from the tenant has not been paid, or some other obligation of the tenancy (whether under a contract of tenancy or under this Act) so far as the same is consistent with the provisions of this Act, has been broken or not performed;..."

Further, **Section 13 (2)** of **The Rent Act**¹ provides that the Court will only order recovery of possession if it considers the same reasonable, in the circumstances of the case. It is couched in the following manner: -

"... no order for recovery of possession of premises shall be made unless the court considers it reasonable to make such order."

I have considered the particular facts of this case, that the Respondent is owing rentals amounting to ZMW18,000.00, which is lawfully due from him to the Applicant. The Applicant has thus satisfied the requirements of **The Rent Act**¹ and is entitled to the orders specified in **The Rent Act**¹.

Accordingly, I hereby grant the Applicant the orders as follows: -

1. An order of eviction and recovery of possession of Stand No. 19/Block 75, Chawama, from the Respondent;

2. An order for recovery of the rental arrears of ZMW18,000.00 and leave for the Applicant to levy distress for the same pursuant to **Section 14** of **The Rent Act**¹; and
3. The rental arrears will carry interest at the average short term bank deposit rate from the date of the originating process to the date of this Judgment and thereafter, interest will accrue at current Bank of Zambia lending rate up to the date of payment.

Costs are awarded to the Applicant to be taxed in default of agreement.

Delivered at Lusaka on the 31st day of July, 2018.



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P. K. YANGAILO
HIGH COURT JUDGE