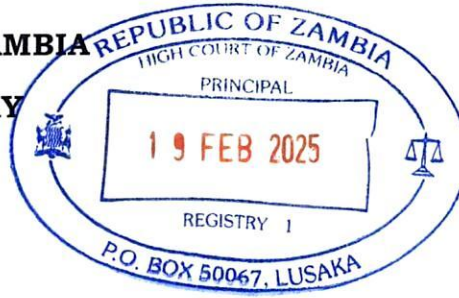


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**



2023/HP/0227

BETWEEN:

OWEN KAMWI

APPLICANT

AND

FIRST NATIONAL BANK

RESPONDENT

BEFORE HON. JUSTICE E. P. MWIKISA

FOR THE PLAINTIFF: IN PERSON

FOR THE DEFENDANT: MRS. KALUBA MWANSA OF AMW AND CO. LEGAL PRACTITIONERS

RULING

CASES REFERRED TO:

- 1) *Savenda Management Services Limited vs. Stanbic Bank Zambia Limited (selected judgment No. 47 of 2018)*
- 2) *Mpongwe Farms Limited vs. Dar Farms and Transport Appeal 208 of 2015*
- 3) *Motor Vassel Lilians S vs. Catex Oil (Kenya) Limited Appeal 50 of 1998*
- 4) *Nchimunya vs. Michelo SCZ judgment 12 of 1997*
- 5) *Ntombie Zimbwele Siwale v. Registrar of Lands and Deeds and Ors (Appeal 133 of 2012)*
- 6) *Jayesh Shah v. Mwenda Mwimanemwa Nyambe and Amos (SCZ/8/05/2023)*
- 7) *Chishala Karabasis Nivel and Another v. Laston Mwale, case, SCZ Appeal No. 161 of 2015*

1. Introduction

- 1.1 On 2nd June 2023, Defendant filed a notice of motion to raise preliminary issues on point of law pursuant to **Order 14A Rules 1 & 2 and Order 33 Rule 3** of the Rules of the Supreme Court of England, 1999 edition.
- 1.2 The preliminary issues raised for determination are the following;
- a) Whether or not this action is properly before Court when the demised premises are business premises.
 - b) Whether or not this action should be dismissed for want of jurisdiction having been commenced pursuant to a wrong Act.
 - c) Whether or not the Applicant's Originating Notice of Motion and affidavit in support of Originating Notice of Motion discloses a cause of action against the Respondent.
- 1.3 The notice of motion to raise preliminary issues was accompanied by an affidavit in support and skeleton arguments.

1.4 The Plaintiff contested the application and filed an affidavit in opposition and heads of arguments on 27th August 2024

2. Affidavit evidence in support of the application.

2.1 The affidavit in support was dated 2nd June 2023, and deposed to by one Peter Thole, the procurement manager of the Respondent.

2.2 He deposed that on 30th August 2016, the Respondent entered into a lease agreement with the Landlord, Mr. Mckilrain Mwansa for Stand No. 12/70 of 4586 Chilenje South Kasama Road, Lusaka. A copy of the lease agreement was exhibited and marked "PT1"

2.3 That by email dated 6th April 2022, the landlord indicated that he was selling the demised premises to the Applicant and further instructed the Respondent to pay rentals for the next ensuing quarter to the Applicant. A copy of the email was exhibited and marked "PT2".

2.4 He stated that by email dated 8th April 2022, the Respondent replied to the Landlord and requested to be availed a deed of cession, contract of sale, and all necessary documentation

relating to the sale and transfer of the demised property. A copy of the email was exhibited and marked "PT3".

2.5 It was further deposed that by email dated 10th May 2022, the Respondent requested the Landlord and the Applicant for a letter of intent to be executed among the parties for presentation to the Respondent's risk committee for approval. A copy of the email was exhibited and marked "PT4".

2.6 That on 5th July 2022, before furnishing the Respondent with the documents it had requested, the Landlord rescinded his earlier instruction and informed the Respondent that the rentals were to be paid to him instead and not the Applicant. A copy of the letter was exhibited and marked "PT5".

2.7 He deposed that on 16th August 2022, by way of email and without having entered into any lease agreement with the Respondent, the Applicant informed the Respondent of his intention to adjust the monthly rental from USD 633.33 to ZMW14,500.00. A copy of the mail was exhibited and marked "PT6".

- 2.8 It was deposed that by email dated 17th August 2022, the Respondent informed the Applicant that it would continue remitting the rentals under the lease agreement to the Landlord until the contract relating to the sale of the demised premises was availed to the Respondent and the transaction finalized between them. A copy of the said email was exhibited and marked "PT7".
- 2.9 He deposed that the Respondent continued to remit the rentals to the Landlord as per clause 5 of the lease agreement. A copy of the remittance advice notes for the period 1st February 2022, to 31st October 2022, was exhibited and marked "PT8".
- 2.10 That there was no point before, during or after the alleged transaction between the Landlord and the Respondent did the Respondent terminate the lease agreement and enter into a fresh one with the Applicant. That it's for that reason, the Respondent has never been the Applicant's tenant.
- 2.11 That the conclusion of the transaction between the Landlord and the Applicant was not brought to the Respondent's attention and thus the Respondent continued to remit

rentals to the Landlord until October 2022, when the Respondent vacated the demised premises.

2.12 That on 14th October 2022, the Applicant served the Respondent a demand letter, for the sum of ZMW116,000.00, being the alleged outstanding rentals. Furthermore, that on 17th October, 2022, the Respondent responded to the demand stating that it was unable to comply with the Applicant's demands as there has never been a lease agreement between the Applicant and the Respondent.

2.13 It was deposed further that by a letter dated 9th November 2022, the Applicant terminated the lease agreement and requested for vacant possession of the premises demised within 7 days as well as the payment of the revised rentals for the month of April. A copy of the letter was exhibited and marked as "PT11".

2.14 Furthermore, it was deposed that due to the manner in which the Respondent conducted himself and to avoid any further confusion, the Respondent obliged and vacated the demised premises.

3. Skeleton Arguments in support of the application.

- 3.1 The application was made pursuant to Order 14 A Rules 1 and 2 and Order 33 Rule 3 of the Rules of the Supreme Court of (RSC) England, 1999 edition. The case of **Savenda Management Services Limited vs. Stanbic Bank Zambia Limited**¹ and **Mpongwe Farms Limited vs. Dar Farms and Transport**² were cited to reinforce the position that the Court has the inherent jurisdiction to hear any matter before it unless a statute or rule limits that authority. It was submitted that the application herein is competently before Court.
- 3.2 The Respondent asserted that as per clause 8 of the lease agreement exhibited in its affidavit in support herein, it was agreed that the Respondent would lease the demised premises for the purposes of operating its Automated Teller Machine (ATM) for commercial purposes. Section 2 of the Rent Act was quoted in defining what a dwelling house is and it was their submission that the demised premises was never used as a dwelling house within the meaning of the Rent Act.

Thus, the Respondent contended that the provisions of the Rent Act do not apply to the lease agreement. Thus, the Applicant's attempt to seek reliefs under the Rent Act is unattainable at law.

3.3 The Respondent submitted that since the action had been commenced under the wrong Act, the action herein should be dismissed for want of jurisdiction. Several cases were cited among others was **Motor Vassel Lilians S vs. Catex Oil (Kenya) Limited**³ to reinforce the position that jurisdiction is important. Without jurisdiction, the Court has no power to make one more step. On that basis, it was the Respondent's submission that this application be granted.

3.4 It was submitted that the Applicant's action does not disclose any cause of action. Firstly, that there was no Landlord and tenant relationship that ever existed between the Respondent and Applicant. Secondly, that the Applicant has never furnished any proof of ownership of the demised premises and thirdly, that the Respondent has adduced evidence that

shows that it did not breach the Lease agreement as it continued with its remittance of the rentals.

- 3.5 The case of **Nchimunya vs. Michelo**⁴ was cited to fortify the position that if there is no disclosure of a cause of action, then there is nothing to prove and as such the action should be dismissed for abuse of Court process.

4. The affidavit in opposition

- 4.1 It was dated 27th August 2024, and deposed to by one Mr. Owen Kamwi the Respondent, herein.
- 4.2 He deposed that the Respondent was notified through a formal letter of change of Landlordship. A copy of the letter dated 20th June 2022 was exhibited and marked "OK1"
- 4.3 That the Respondent as tenant is not privy to the contract of sale and therefore it was irregular for the Respondent to demand the documents for change of ownership.
- 4.4 He deposed that a letter of intent was not necessary as this was not a new tenancy to warrant any approval as what was changing was the landlord under the same terms.

- 4.5 Furthermore, he deposed that the Respondent was duty bound to notify the Applicant of the turn of events in a similar way at change of Landlord as all three parties were involved.
- 4.6 He stated that there was no reason for the Respondent to continue remitting the rentals to the former Landlord as the Applicant had notified it of the change of Landlord.
- 4.7 It was stated that the action is properly before the Court in that the Rent Act is a general law applicable to rent matters be it business premises or residential.

5. Hearing.

- 5.1 The matter came up on 29th August 2024, both parties were present and there was no objection for the Court to render a ruling based on the affidavit evidence and skeleton arguments filed herein.

6. Consideration and determination

- 6.1 I have considered all the evidence and the submissions by both parties. I have also noted the skeleton arguments from both sides.

6.2 This Court is moved pursuant to **Order 14A Rule 1 & 2** and **Order 33 Rule 3** of the Rules of the Supreme Court of England, 1999 edition which provides as follows;

Order 33 Rule 3 of RSC

“The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.”

Order 14 Rule 1 and 2

“(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just”

6.3 Only matters commenced by way of writ require the entering of appearance and defence by the defendant, but the matter in casu was commenced by way of originating notice of motion and I am of the considered view that there are

contentious issues herein which require a full trial hence the matter should be deemed to have been commenced by way of writ pursuant to order 28 rule 8 of the Rules of the Supreme Court of England (RSC) 1999 edition which states that:

“Where, in the case of a cause or matter begun by originating summons, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.”

6.4 The order 28 (8) gives the court power to deem proceedings commenced by originating summons as though they had begun by writ. (See the case of **Ntombie Zimbwele Siwale v. Registrar of Lands and Deeds and Ors (Appeal 133 of 2012)**⁵, also **Jayesh Shah v. Mwenda Mwimanemwa Nyambe and Amos (SCZ/8/05/2023)**⁶.

6.5 Further in the **Chishala Karabasis Nivel and Another v. Laston Mwale, case, SCZ Appeal No. 161 of 2015**⁷. The Supreme Court stated that:

“Notwithstanding commencement of an action through a wrong mode, order 28 rule 8 of the Rules of the Supreme Court (White book 1999 edition) allows a judge to deem a matter that has been commenced by originating summons as having been commenced by writ of summons”.

6.6 Further, in **African Banking Corporation (Z) Limited (T/A Banc ABC) v. Phiri Technical Works Limited⁸**. The

Supreme Court stated that:

“Where, in a matter begun by originating summons it appears to the court that the matter should have commenced by writ of summons, the court has power under order 28 rule 8 RSC at any stage of the proceedings to order that the proceedings should continue as if the matter had so begun and may, in particular, order that any affidavits shall stand as pleadings and give further directions on the conduct of the matter”

I accordingly invoke the provisions of order 28 (8) of RSC of England, 1999, edition, as guided by the Supreme Court in a plethora of authorities.

6.7 As I have stated above, there are clearly contentious issues in the case in casu which can only be resolved at the full trial of the matter. In view of that, I order that the matter proceeds in accordance with order 28 rule 8. I shall issue orders for directions to the parties in due course.

6.8 The application to raise a preliminary issue on point of law is accordingly dismissed.

6.9 I award no costs.

Leave to appeal is granted.

Dated at Lusaka this.....19th.....day of.....February....., 2025

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**ELITA PHIRI MWIKISA
HIGH COURT JUDGE**