

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
(CIVIL JURISDICTION)**

2025/HP/0526

BETWEEN:

**VICTOR MBAO
CAROLINE MBAO**



**1ST APPLICANT
2ND APPLICANT**

AND

PESA FINANCE ZAMBIA LIMITED

RESPONDENT

Before the Hon. Mrs. Justice R. Chibbabbuka on the 22nd day of January, 2025.

For the Applicants: In Person

For the Respondent: Ms. B. Simamba, Messrs. Milner and Paul Legal Practitioners

RULING

Cases referred to:

1. *New Plast Industries vs Commissioner of Lands and Attorney General SCZ Judgment No. 8 of 2001*
2. *Apollo Refrigeration Services Co. Ltd vs Farmers House Ltd (1985) Z.R 182*
3. *Roadmix Limited and Another vs Furncraft Enterprises Limited SCZ Judgment No. 41 of 2014*
4. *Ulebembe Investments & Others vs Lethabo Primary School Appeal No. 171/2019*
5. *Chikuta vs Chipata Rural Council (1974) Z.R 241*

Legislation referred to:

The Rules of the Supreme Court of England, 1999 edition

The Landlord and Tenants (Business Premises) Act Chapter 193 of the Laws of Zambia

1.0 Introduction

1.1 The Applicants commenced this action on the 16th April, 2025, seeking, among others, the recovery of the property known as Stand No. LUS/244/100, off Twin Palm Road, Ibex Hill, Lusaka. On 2nd May, 2025, the Respondent filed a notice to raise preliminary issues. This is the ruling on the said notice.

1.2 The Respondent's notice to raise preliminary issues is made pursuant to *Order 14A Rule 1* of the *Rules of the Supreme Court of England, 1999 edition*. The Respondent raises the following questions:

- (i) Whether or not the Applicants have properly commenced these proceedings before this Court; and
- (ii) Whether or not the Applicants have complied with the termination notice in accordance with the *Landlord and Tenant (Business Premises) Act Chapter 193* of the *Laws of Zambia* and the Tenancy Agreement between the parties dated 13th January, 2023.

2.0 The Respondents' Affidavit in Support

2.1 In support of the application, the Respondent's Director, Sililo Mzyece, deposed that on 13th January, 2023, the parties herein entered into a tenancy agreement for a duration of two years. Subject to clause 8.1 of the said agreement, each party was at liberty to terminate the said agreement provided that three (3) calendar months' notice in writing was provided. By email dated 3rd March, 2025, the Applicants herein communicated their disinterest in renewing the tenancy agreement. The Applicants subsequently commenced this action. Subject to clause 12.3 of the tenancy agreement, the Applicants ought to have referred the matter to arbitration in conformity to the said agreement which stipulates that controversy or claim arising out or relating to the agreement, which remains unresolved after negotiation within thirty calendar days will be settled by binding arbitration.

2.2 In the event that the tenancy agreement does not have an arbitration clause, any disputes emanating from the said agreement ought to be commenced by way of an originating notice of motion and an affidavit thereof in accordance with the *Landlord and Tenant (Business Premises) Act* and not commenced by way of originating summons. That the Respondent ought to have been given three (3) calendar months' notice to terminate the tenancy

agreement and as such the Applicants' have not complied with the provisions of the Act. The Applicants' have improperly commenced this action and thus it should be set aside for irregularity.

3.0 The Respondent's Supporting Arguments

3.1 In support of its application, the Respondent filed skeleton arguments wherein counsel referred to *Order 14A* of the *Rules of the Supreme Court of England* as the law that empowers this Court to determine this application. That this application hinges on *Rule 3* of the *Landlord and Tenant (Business Premises) Act* which provides for the commencement of matters emanating from a landlord and business tenancy by stating as follows:

"An application made to the court under the Act shall be commenced by an originating notice of motion. Evidence in support thereof may be on affidavit or, where an affidavit is not required by these Rules, viva voce"

3.2 Counsel referred to the case of **New Plast Industries vs Commissioner of Lands and Attorney General**¹ wherein it was held that where an Act prescribes a mode of commencement, the said mode should be adhered to. That the Applicants wrongly commenced this matter by way of originating summons and affidavit, a clear violation of the *Landlord and Tenant (Business Premises) Act* which requires matters to be commenced by way of originating notice of motion. Counsel argued further that the agreement signed by the parties has a dispute resolution clause which stipulates that disputes arising from the agreement should be referred to arbitration. Counsel referred to clause 12.3 and *Section 6 (1)* of the *Arbitration Act, 2000* in arguing that this court has no jurisdiction to determine this matter.

3.3 In addition to the above, counsel argued that the *Landlord and Tenant (Business Premises) Act* provides that a tenancy agreement shall not cease unless terminated in accordance with the provisions of the said Act. That the tenancy agreement executed by the parties provides under clause 8.1 that the

tenancy agreement may be terminated by either party giving the other three calendar months' notice. That the Applicants herein gave the Respondent notice on 3rd March, 2025. That the Applicants ought to have given the Respondent three months' notice in accordance with the agreement. That this matter is irregularly before this court and should be dismissed with costs.

4.0 The Hearing

4.1 There was no appearance by the Applicants in spite of being served as was evidenced by the affidavit of service filed into court on the 21st July, 2025. This Court allowed counsel for the Respondent to proceed.

4.2 Counsel for the Respondent relied on the documents filed in support of this application.

5.0 The Decision of the Court

5.1 I am indebted to counsel for the arguments which I have taken into consideration. The first issue raised by the Respondent questions the originating process employed by the Applicants herein in bringing this action. The Respondent argues that this matter should have been commenced by originating notice of motion and not by way of originating summons. In our jurisdiction, the law is well established when it comes to commencement of matter in the High Court as per *Order 6 of the High Court (Amendment) Rules, 2020* provides that:

"1. (1) Except as otherwise provided by any written law or these Rules, an action in the High Court shall be commenced, in writing or electronically by writ of summons endorsed and accompanied by

- (a) a statement of claim;*
- (b)*
- (c)*
- (d)*

5.2 The above provision clearly provides that the general commencement procedure in the High Court of Zambia is by way of writ of summons and

statement of claim, unless a rule of court or a statute provides otherwise. The Respondent herein argues that the statute that governs the parties' relationship, being the *Landlord and Tenants (Business Premises) Act* provides under *Rules 3*, which I have reproduced earlier in this ruling, that the mode of commencement of matters emanating from a landlord and business tenancy is an originating notice of motion.

5.3 I have carefully reviewed the said *rule* which provides that applications made to the court under the *Act* shall be commenced by an originating notice of motion and supported by an affidavit. The correct reading and interpretation of *Rule 3* clearly shows that it is not all disputes arising from a landlord and tenant relationship under the *Act* that the said *Rule* applies to, meaning it is not all disputes that must be commenced by way of an originating notice of motion. It is only the applications specifically referred to in the *Act*, such as applications for new tenancy, that must be commenced by way of originating notice of motion. For applications and causes not specifically stated under the said *Act*, the mode of commencement is by writ of summons and statement of claim, the general mode of commencement.

5.4 In the case of **Apollo Refrigeration Services Co. Ltd vs Farmers House Ltd**², the landlord tried to recover possession of business premises using an originating notice of motion. The Supreme Court held that a claim for possession was not one of the statutory applications under the *Act*. In the case of **Roadmix Limited and Another vs Furncraft Enterprises Limited**³, the Supreme Court held that claims for declarations and damages cannot be brought by way of originating notice of motion even in a landlord and tenant context. In a more recent case of **Ulebembe Investments & Others vs Lethabo Primary School**⁴ the Court of Appeal adopted the holding of the Supreme Court in the **Apollo** and **Roadmix** cases, that it is not every landlord and tenant dispute that must commence by originating notice of motion. The

court went on to find that the matter having not been properly commenced, the High Court had no jurisdiction to hear and determine it.

5.5 Based on the above, the Respondent's argument that this matter ought to have been commenced by originating notice of motion is misconceived. However, in spite of the foregoing, this action should not have been commenced by originating summons either. As per the Applicants' claims, they are seeking recovery of their property known as Stand No. LUS/244/100, off Twin Palm Road, Ibex Hill which is currently occupied by the Respondent. The Applicants are also seeking damages. Based on the Applicants' claims, this matter clearly should have been commenced by writ of summons and statement of claim. This action having been wrongly commenced, this court lacks the jurisdiction to hear and determine it as mode of commencement goes to jurisdiction as per the case of **Chikuta vs Chipata Rural Council**⁵ Premised on the foregoing, there is no need to belabor on the other preliminary issues raised. This matter is dismissed in its entirety with costs awarded to the Defendant to be taxed in default of agreement.

Leave to appeal is hereby granted.

Dated at Lusaka this.....^{22nd} day of.....^{January}.....2026



HIGH COURT JUDGE