IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 171/2019**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ULUBEMBE INVESTMENTS	**1ST APPELLANT**
AMB. F. KAPOKA	**2ND APPELLANT**
NAVNIT PATEL	**3RD APPELLANT**

AND

LETHABO PRIMARY SCHOOL	**RESPONDENT**

CORAM: *CHISANGA, JP, SICHINGA AND NGULUBE, JJA.*

On 22nd September, 2020 and 4th February, 2021.

For the Appellants: *Ms. N. Nambao, and Mr K. Simbao, of Messrs. Mulungushi Chambers.*

For the Respondent: *No appearance.*

J U D G M E N T

NGULUBE, JA, delivered the judgment of the Court

Cases referred to:

1. *New Plast Industries Limited vs The Commissioner of Lands and The Attorney General (2001) Z.R.51.*
2. *Appollo Refrigeration Services Co. Ltd vs Farmers House Ltd (1985) Z.R. 182.*
3. *Roadmix Limited, Kearney and Company Limited vs Furncraft Enterprises Limited, SCZ Judgment No. 41 of 2014.*
4. *Chikuta vs Chipata Rural Council (1974) ZR 241.*

Legislation referred to:

1. *The Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia.*
2. *The High Court Rules, Chapter 27 of the Laws of Zambia.*

Other works referred to:

1. *The Rules of the Supreme Court of England, 1965, (White Book), Volume 1, 1999 Edition.*

INTRODUCTION

1. This appeal is against a Judgment of the High Court delivered on 23rd July, 2019, by Newa, J, in which the court found that the respondent is still a lawful tenant of the third appellant until the tenancy is lawfully terminated. The Court made this declaration after finding that the notice issued by the appellants to terminate the tenancy between the third appellant and the respondent was not valid.

BACKGROUND

2. The respondent is a tenanted primary school at the third appellant's premises situate at Plot Number 848 in Kasama of the Northern Province of the Republic of Zambia, which has been operating for over eighteen years. On 17th of August,

2018, the first and second appellants acting on behalf of the third appellant who was in the United States of America at the time, wrote a letter to the respondent giving it one month's notice to vacate the premises. The respondent was told to vacate on the basis that the third appellant had since leased the premises to the first appellant with effect from 17th September, 2018.

3. The first and second appellants also informed the respondent that an inventory of the buildings and fixtures would be taken and sent to the third appellant. Reacting to the notice, the respondent told the appellants that it would vacate the premises if an inventory of the buildings would be conducted and the respondent is compensated for the improvements it had made to the premises. The respondent also requested for an extension of time within which to vacate and was given up to 30th December, 2018.

4. By a letter dated 27th December, 2018, the respondent declined to vacate the premises contending that it had obtained legal advice to the effect that the first and second appellants needed to produce a power of attorney to show that

they had authority from the third appellant to issue the notice of termination. It was the respondent's position that all its dealings with the first and second appellants were null and void.

5. On 1st February, 2019, the first and second appellants erected a bill board on the premises advertising the presence of the first appellant, who subsequently occupied one of the classrooms. Aggrieved by the actions of the appellants, the respondent filed an originating notice of motion in the High Court on 15th February, 2019, seeking the following reliefs –

i) damages in trespass against the first and second respondents for wrongfully entering the respondent's leased premises and occupying one of its buildings;

ii) an injunction restraining the first and second appellants from interfering with the respondents occupation of its building situation at Plot Number 848, Kasama, Northern Province of Zambia; and

iii) a declaration that the applicant is the lawful tenant of the third appellant until its current lease is lawfully terminated;

iv) costs.

6. In opposing the action, the third appellant confirmed having instructed the second appellant to issue the notice to

terminate the tenancy, arguing that the respondent had been erratic in paying rentals which had accumulated into arrears amounting to K7,359.00, as at 1st February, 2019. The third appellant further alleged that the respondent made improvements to the premises without his consent and did not obtain planning permission from the Council. It was his position that he had no use for the structures and was not averse to them being demolished.

DECISION OF THE HIGH COURT

7. After hearing the parties, the lower Court formed the opinion that the relationship between the respondent and the third appellant was a year-to-year tenancy which was governed by the ***Landlord and Tenant (Business Premises)* Act**[1]. The Court declared the notice to terminate the tenancy invalid, on the basis that it did not comply with ***Section 5 of the Landlord and Tenant (Business Premises)* Act**[1]. This was after finding that for a notice to terminate to be valid under ***Section 5(2) and (5) of the Landlord and Tenant (Business Premises) Act***[1], it has to give notice of not less than six months and not more than twelve months and must require the tenant within two months after

the notice is given, to notify the landlord in writing, whether or not at the date of termination, the tenant will be willing to give up possession of the property comprised in the tenancy. The Court declared the respondent as a lawful tenant until the tenancy is lawfully terminated.

8. The learned trial Judge ordered the first and second respondents to restrain from interfering with the respondent's possession of the premises. She awarded damages to the respondent for trespass to land, after finding that the first appellant illegally occupied one of the classroom buildings. She also awarded costs to the respondent.

THE APPEAL

9. Dissatisfied with the decision of the lower court, the appellants appealed to this Court, advancing the following grounds –

1. The Court below erred in law and fact when it found that the respondent should be given statutory notice to terminate after having found that the respondent was in arrears of rent. Further, that the respondent should be given statutory notice to terminate when there was an affidavit on the record showing that the respondent had consented to giving up the tenancy after the taking of an inventory.

2. ***The Court below erred in fact and law when it found for the respondent in trespass when there was evidence that in fact the respondent had vacated the premises on their own; that the first appellant had wanted to move in with permission from the owner; and halted their move being made aware of the dispute.***
3. ***The Court below erred in fact and in law for awarding costs to the Applicant when in fact it had found for the appellants.***

10. Learned Counsel for the appellants filed heads of argument on 20th September, 2019, while the respondent did not file any heads of argument. On account of the view we take of this appeal, it is rather unnecessary for us to discuss the grounds of appeal and the heads of argument.

DECISION OF THIS COURT

11. We have considered the evidence on record, the heads of arguments, the submissions of Counsel and the authorities cited. In our view, this appeal turns on whether or not the respondent employed the correct mode of commencement when it commenced this matter in the High Court, even though the parties and the Court below did not address the issue. The respondent in this matter employed an originating notice of motion to commence the action.

12. The starting point, as far as the commencement of proceedings in the High Court is concerned, is ***Order 6 Rule 1 of the High Court Rules***[2], which provides that:

> ***"(1) Except as otherwise provided by any written law or these Rules, every action in the High Court shall be commenced by writ of summons endorsed and accompanied by a full statement of claim."***

It is a general rule of procedure that every action in the High Court should be commenced by writ of summons. Other modes of commencement such as the originating notice of motion which was used by the respondent in this matter, should only be used if such procedure is required or permitted under the court rules or a statute. In the case of ***New Plast Industries Limited vs The Commissioner of Lands and The Attorney General***[1], the Supreme Court guided that the mode of commencement of an action is generally provided by the relevant statute and not the relief sought. When it comes to the commencement of an action by an originating notice of motion, ***Order 8/1-5/2 Rules of the Supreme Court***[1], provides the following guidance:

> ***"Proceedings by originating motion are, in the main, applications and appeals to the High Court under various statutes. Where, in a statute, provision is made for such an application either specifically prescribing the use of an originating motion or without specifying procedure, an originating motion is the appropriate means of approaching the court."***

13. The respondent in its originating notice of motion is claiming damages for trespass to land, an injunction to restrain the defendants from interfering with its occupation of the rented premises, as well as a declaration that the respondent is the lawful tenant of the premises in dispute. There is nevertheless no provision in the ***Landlord and Tenant (Business Premises) Act***[1] requiring that an originating notice of motion should be used to commence an action for these claims.

14. It is therefore not clear from where we stand, what informed the respondent's decision to commence this action by originating notice of motion. We appreciate that the ***Landlord and Tenant (Business Premises) Act***[1] specifies the applications or actions which should be commenced by an originating notice of motion, but it is also a settled principle of law that it is not every action between a landlord and tenant of business

premises which must be commenced in that mode. In the case of ***Appollo Refrigeration Services Co. Ltd vs Farmers House Ltd***[2], a landlord of business premises commenced an action to recover possession by originating notice of motion thinking that every action between a landlord and tenant of business premises had to be commenced in that way by virtue of the ***Landlord and Tenant (Business Premises) Act***[1] and the Rules thereunder. The Court held that-

> ***"...an Originating notice of motion was not the proper process for a landlord claim for possession since all the applications which can be made under the Act are in fact specified in the various sections. A landlord's action for possession is not so specified and the action should, therefore, have been commenced as provided for by Order 6 of the High Court Rules."***

15. The respondent's claim for an injunction to restrain the defendants from interfering with its occupation of the premises can be made by originating notice of motion in appropriate cases, but the other claims for a declaration and damages can only be made by writ of summons as they depend on pleadings and *viva voce* evidence to be called on both sides. The principle that declarations and damages should be made by

writ of summons was enunciated by the Supreme Court in the case of ***Roadmix Limited, Kearney and Company Limited vs Furncraft Enterprises Limited***[3], which held that -

> ***"The request for a new tenancy is specifically provided for under Sections 4 and 6 of the Landlord and Tenant (Business Premises) Act as well as under Rule 5 of the Landlord and Tenant (Business Premises) Rules. The claim for a new tenancy cannot, therefore, be combined with claims for declarations and damages which are distinct and require to be brought by Writ of Summons and depend on pleadings and viva voce evidence being called on both sides... With the exception of the claim for a new tenancy, this matter was not properly before court and the learned trial Judge had no jurisdiction to determine the matter on its merit."***

16. We have no doubt in our minds that it was procedurally improper for the respondent to commence an action of this nature by originating notice of motion. Because this matter was not properly before the High Court, that Court had no jurisdiction to hear and determine the matter. In the case of ***Chikuta vs Chipata Rural Council***[4], it was held that where a matter is commenced using a wrong mode of commencement, the Court has no jurisdiction. The net result is that the proceedings and the judgment of the High Court in this matter

are null and void. We accordingly set aside both the proceedings and the judgment of the Court below for being a nullity and void ab initio.

17. We hereby dismiss this appeal and award costs to the appellants, to be taxed in default of agreement.

F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

D.L.Y. SICHINGA
COURT OF APPEAL JUDGE

P.C.M. NGULUBE
COURT OF APPEAL JUDGE