

F.S. BHATTI

1st Appellant

G.M. BHATTI

2nd Appellant

ETHEL JOHANN RAHMAN

Third Party

and

F.J.N. DOPOCO

Respondent

CORAM' Silungwe, C.J., Gardner, Ag.D.C.J., and Chaila, Ag.J.S.,

17th December, 1987.

G. Chilupe, Chilupe and Co., for the appellant

O Dzekedzeke, Messrs D.H. Kemp and Co., for the respondent

J U D G M E N T

Gardner, Ag.D.C.J., delivered the judgment of the court.

This is an appeal against a judgment of a High Court judge dismissing an appeal from an order by the deputy registrar giving summary judgment under Order 13. In this judgment we will refer to the first and second appellants as the defendants, to the third appellant as the third party and to the respondent as the plaintiff.

The history of this case is that the plaintiff entered into an agreement in writing with the first and second defendants for the sale of certain machinery in premises then occupied by the plaintiff. In the same agreement the parties contracted that they would enter into a lease of the premises and accordingly the defendants moved into the premises. The plaintiff alleged that the defendants failed to pay rent for the premises and accordingly a writ was issued claiming possession and arrears of rent. The defendant made application to the court to strike out the writ for an injunction to restrain the plaintiff from interfering with the defendants' quiet enjoyment of the property. on the ground that the plaintiff was not the owner of the property. Application was made for summary judgment under Order 13 and such judgment was granted on the ground that the defendants were estopped from denying the plaintiff's title. On appeal to the

High Court.....

High Court. the learned appellate judge came to the same conclusion and dismissed the appeal.

The defendants entered an appeal to this court against the findings of the deputy registrar and the learned appellate judge, and, prior to the hearing of this appeal, an application was made by the third party to join in the appeal on the ground that she was the real owner of the property and that the plaintiff was not entitled to possession.

During the course of this appeal, we pointed out to Mr. Chilupe the law relating to the denial by a tenant of a landlord's title and our view that such law estopped the defendant from putting forward a denial of title in this case.

Mr. Chilupe has conceded that the judgment in relation to the money due to the plaintiff cannot be upset in view of our finding as to the law in respect of estoppel. He has, however, drawn our attention to the rights of the third party and maintains that whatever order is made now, the rights of the third party must be taken into account.

Mr. Dzekedzeke, on behalf of the plaintiff, has confirmed the argument concerning estoppel and has said, furthermore, that at this late stage the remedy for the third party is to issue a fresh writ against the plaintiff claiming possession of the property.

We have considered the argument put before us and are satisfied, as we have said, that the defendants cannot challenge the title of the plaintiff and accordingly the judgment in respect of the outstanding rent and mesne profits must stand. The defendants' appeal in respect of these issues, therefore, fails.

So far as the claim by the third party is concerned, we are satisfied that, as this has been drawn to our attention, we cannot ignore the position of the third party. Having regard to the facts filed on behalf of the third party, it is clear to us that there is a triable issue between the third party and the plaintiff. We therefore allow the appeal by the third party and order that the proceedings be remitted to the deputy registrar for an order for directions to be made as to the continued conduct of the case in the High Court.

The defendants will pay the plaintiff's costs of this appeal.
Costs as between the third party and the plaintiff will be in the
cause.

.....
A.M. Silungwe
CHIEF JUSTICE

.....
B.T. Gardner
ACTING DEPUTY CHIEF JUSTICE

.....
M.S. Chaila
ACTING SUPREME COURT JUDGE