

BARCLAYS BANK (ZAMBIA) LTD v WALISKO AND COMPANY AND MOHAMED
ASHROF MANSOOR (1980) Z.R. 7 (H.C.)

HIGH
SAKALA,
6TH
1979/HP/101

FEBRUARY,

COURT
J.
1980

Flynote

Civil Procedure - Proceedings - Procedure specifically set out by Act of Parliament - Whether departure from acceptable.

Headnote

The Deputy Registrar dismissed the application made by the plaintiff on the grounds that he had no jurisdiction to entertain a matter for which the rent claimed was lower than K3,600 as stipulated by the Rent Act and also that the application had been wrongly commenced.

Held:

- (i) Where an Act of Parliament has specifically laid down the method by which proceedings must be begun, there is no option as to which procedure to adopt. The plaintiff is bound to commence his action by the procedure laid down by the Act.

Case cited:

(1) Chikuta v Chipata Rural Council (1974) Z.R. 241.

1980 ZR p8
SAKALA,

J.

For the plaintiff: D. W. Fluck Esq, Ellis and Company.
For the defendant: N. Kawanambulu, Esq, Shamwana and Company.

Judgment

SAKALA, J.: By a specially endorsed writ the plaintiff claims:

(a) As against the first defendant for-

- (i) Possession of a flat in premises on Plot 916 Livingstone occupied by the first defendant as tenant of the plaintiff under a verbal tenancy agreement at the rent of K150.00 per month which agreement was terminated by notice in writing dated the 30th day of June, 1978.
- (ii) K1,500.00 being arrears of rent to 31st August, 1978.
- (iii) Mesne profits at and after the rate of K150.00 per month from 1st September, 1978 to 31st December, 1978 inclusive.

(b) As against the second defendant for -

- (i) Possession of a flat in premises on Plot 916 Livingstone occupied by the second defendant as a trespasser in or about the 1st day of January, 1979 and still so occupied.
- (ii) Damages for such illegal occupation.

The plaintiff applied for summary judgment under Order XIII of the High Court Rules. On the 15th November, 1979, the learned Deputy Registrar dismissed the application with costs on the ground that he had no jurisdiction to entertain a matter for which the rent claimed was lower than K3,600 as per s. 2 of the Rent Act. He also declined to entertain the application on the ground that it had been wrongly commenced. The plaintiff has now appealed to this court against the order of the learned Deputy Registrar.

Before this court both counsel are agreed that under the provisions of the Rent Act, actions in relation to premises for which the rent demanded exceeds K3,600 per annum should be before the High Court and should be commenced by an originating notice of motion as per the Rent Rules of 1973. Counsel for the plaintiff has informed the court that in so far as the claim relates to possession of the premises the issue is now academic the plaintiff having obtained the possession of the premises since the ruling of the learned Deputy Registrar. The plaintiff's claim at this point in time is for arrears of rent and mesne profits as against the first defendant and damages for illegal occupation as against the second defendant. On behalf of the plaintiff Mr Fluck argued that since the claim includes a claim for damages for illegal occupation by a trespasser it does not come within the ambit of the provisions of the Rent Act and the Rent Rules. On behalf of the defendants Mr Kawanambulu argued that the amount of rent at K150 is less than K3,600 per annum. Hence this court has no jurisdiction to entertain a claim of that nature. Counsel further argued that under the Rent Rules an application for rent must be by way of originating notice of motion and not by a specially endorsed writ. Mr Kawanambulu also pointed out that under s. 4 (e)

1980 ZR p9
SAKALA,

J.

of the Rent Act, a court has power to order recovery of possession of premises whether in the occupation of a tenant or of any other person and it can also order recovery of arrears of standard rent, mesne profits and a charge of services.

I have very carefully considered the submissions by both learned counsel and I have equally considered the relevant applicable provisions of the Act. Since possession has already been obtained I do not propose to make any ruling on the matter. Basically the claim in this action is for arrears of rent and mesne profits as against the first defendant and damages as against the second defendant. As already observed there is no dispute as to the procedure governing matters of this nature. The application must be commenced by an originating notice of motion (r. 3, Rent Rules 1973). Where rent exceeds K3,600 per annum the court is the High Court (s. 2 (1) (a) Cap. 438). What then is the consequence of any departure from this procedure specifically set out by an Act of Parliament? In the case of *Chikuta v Chipata Rural Council* (1) the plaintiff applied to the High Court for a declaration by means of an originating summons. The High Court refused to make the declaration sought. The plaintiff appealed to the Supreme Court. At p. 243, Doyle, C.J., had this to say:

"The matter was brought before the court by means of an originating summons. The practice and procedure in the High Court is laid down in the High Court Rules, and where they are silent or not fully comprehensive, by the English White Book. Under Order 5, of the English Rules of the Supreme Court, Rule 2 lays down what proceedings must be begun by writ; rule 3, the proceedings which must be begun by originating summons; rule 4, the proceedings which may be begun either by writ or originating summons; and rule 5 proceedings that may be begun by motion or petition. The Zambian Rules are much more rigid. Under Order 6, rule 1 every action in the court must be commenced by writ, except as otherwise provided by any written law or the High Court Rules. Order 6, rule 2, states that any matter which under any written law or the rules may be disposed of in Chambers shall be commenced by an originating summons. Rule 3 provides for matters which may be commenced by an originating notice of motion. It is clear, therefore, that there is no case where there is a choice between commencing an action by a writ of summons or by an originating summons."

And at p. 244 he had also this to say:

"As the matter was not properly before him the judge had no jurisdiction to make the declarations requested even if he had been so disposed."

The court dismissed the appeal on procedural reasons having pointed out that the proceedings were misconceived. It is therefore quite clear from that decision that where an Act of Parliament has specifically laid down the method by which proceedings must be begun whether by a writ, an

1980 ZR p10
SAKALA,

J.

originating summons or an originating notice of motion there is no choice of which procedure to adopt. I am bound by the decision of the Supreme Court. The plaintiff in the instant action had no choice but to commence his action by an originating notice of motion as laid down by the rules. Whether the claim included a claim for damages for illegal occupation by a trespasser is in my opinion not material. The plaintiff is bound to commence his action by a procedure laid down by the Act. In this case I do not see any difficulties if the plaintiff commenced his action by an originating notice of motion to include also a claim of damages for illegal occupation.

For procedural reasons therefore this appeal must in fact fail. Accordingly, I uphold the order of the learned Deputy Registrar and dismiss the appeal with costs.

Appeal dismissed

1980 ZR p10