

LIAMOND CHOKA v IVOR CHILUFYA.

Supreme Court.

Ngulube, C.J., Sakala, J.S., and Chitengi A.J.S.

6th March, 2002 and 5th June, 2002.

(SCZ Judgment No. of 2002)

Flynote

Civil Procedure – Summary procedure – Order 113 of the Rules of the Supreme Court (White Book) – Whether misconceived and incompetent against a lawful occupant or tenant.

Headnote

The appellant occupied House Number 176 Zebra Street Nkana East, Kitwe as an incidence of employment in a previously wholly owned subsidiary company – Mpelembe Drilling Company – of the Zambia Consolidated Copper Mines Limited (ZCCM). ZCCM embarked upon the sale of its houses to its own direct employees and in many instances which have come before the courts, sold houses to persons who were not sitting tenants, that is the employees in actual occupation. In the case at hand, the respondent bought the house occupied by the appellant and this direct employee sought to oust the indirect employee from the house. He chose to do so by summary procedure provided under Order 113 of the Rules of the Supreme Court (white Book). A major objection taken on behalf of the appellant was that it was incompetent and misconceived to bring order 113 proceedings against persons who were never squatters.

Held:

- (i) It is unthinkable that a person housed as an employee and as an incidence of employment who may have a genuine dispute with the employers and their holding company can suddenly be rendered a squatter and subject to summary eviction by a new comer and without the opportunity of having his own counter claims against the employers and their holding company canvassed and determined.
- (ii) The summary procedure under Order 113 can only be suitable for squatters and others without any genuine claim of right or who have since transformed into squatters.

Cases referred to:

(1) *Zambia Consolidated Copper Mines Limited vs. Kangwa and Others* SCZ Judgment No. 25 of 2002

(2) *Greater London Council v Jenkins* [1995] 1 All E.R. 354

Works referred to:

Supreme Court Rules (White Book) Order 113.

L. Mbaluku (Mrs.) of L.K. Mbaluku and Company for the appellant.

No appearance for the respondent.

Judgment

NGULUBE C.J. delivered the judgment of the Court: On 6th March, 2002, when we heard this appeal, we allowed it and we said we would give our reasons; this we now do. We proceeded with this appeal which had been adjourned several times before when we were satisfied with the assurance of Counsel that notice of hearing had been served on the respondent in person and when Counsel undertook to file an affidavit of service.

In the action, the respondent was plaintiff and the appellant defendant. It was on record that the defendant occupied House No. 176 Zebra Street, Nkana East, Kitwe, as an incidence of employment in a previously wholly owned subsidiary company – Mpelembe Drilling Company of Zambia Consolidated Copper Mines Ltd. (ZCCM). ZCCM embarked upon the sale of its houses to its own direct employees and in many instances which have come before the courts sold houses to persons who were not the sitting tenants, that is, the employees in actual occupation. This court has had occasion to deal with some cases involving the employees of a ZCCM subsidiary Company: see for instance *Zccm v Richard Kangwa and Others* (1) as to the position of the employees of the subsidiary who were the actual sitting tenants when ZCCM attempted to shortchange them by selling to non sitting tenant employees. In the case at hand, the plaintiff bought the house occupied by the defendant and this direct employee sought to oust the indirect employee from the house. He chose to do so by the summary procedure provided under Order 113 of the Rules of the Supreme Court (White Book). A major objection taken up on behalf of the defendant which we considered conclusive of the appeal was that it was incompetent and misconceived to bring Order 113 proceedings against persons who were never squatters. The complaint so raised is unanswerable in the circumstances. For that reason, we will deal with the appeal only on that narrow point. Thus, it will not be necessary to discuss the government directive in these matters; nor the general law when a purchaser buys without vacant possession a house which has encumbrances or which is subject to a previously existing tenancy, licence or other agreement and whether the buyer takes subject to do such encumbrances or not – all of which we would have thought to be fairly elementary.

The point here is that the proceedings under Order 113 were misconceived, incompetent and therefore nullity. The proceedings were wrongly brought against a person exempt by rule 1 from the application of that order and so in the teeth of the Order relied upon. For ease of reference, we quote Order 113 Rule 1 of the White Book (1999) which reads:-

“Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.”

The editorial introduction provided by the learned authors of the White Book is quite illuminating: see 113/0/2 (1999 White Book). Apart from tracing the genesis of the Order, the introduction also contains the following extract:-

“The circumstances in which the procedure can be used are restricted to cases where the land is occupied by persons who have entered into or remain in possession of the land without the licence or consent of the person claiming possession. It does not apply to persons holding

over after the determination of a lease.”

The learned authors also go on to observe that the use of this procedure is to be discouraged where the plaintiff is aware of a real dispute with the occupier defendant. We respectfully concur. It cannot be doubted in this case that there was a real dispute and a possible claim involving the employers and their holding company such that it is not possible to say that at some point in time, at any rate by the launch of the proceedings, the defendant had already become a trespasser or a squatter. It is unthinkable that a person housed as an employee and as an incidence of employment who may have a genuine dispute with the employers and their holding company, can suddenly be lended a squatter and subject to summary eviction by a newcomer and without the opportunity of having his own counter claims against the employers and their holding company canvassed and determined. The plaintiff is such a newcomer in the equation. The summary procedure under Order 113 can only be suitable for squatters and others without any genuine claim of right or who have since transformed into squatters: see *Greater London Council v Jenkins (2)*. It was for the foregoing reasons that we allowed the appeal, with costs, and quashed the summary proceedings and all the attendant orders.

Appeal allowed.