

STANLEY MOYO
versus
TANAKA HLAHLA
and
PATSON MOYO

HIGH COURT OF ZIMBABWE
WAMAMBO & MUCHAWA JJ
HARARE, 25 October 2022 & 17 January 2023

Civil Appeal

C Chakawa, for the appellant
No appearance for first and second respondents

MUCHAWA J: The first respondent issued summons against the appellant and second respondent, in the court *a quo*. The appellant and second respondent were the defendants whilst first respondent was the plaintiff. The order sought had the following terms:

1. Confirmation of cancellation of the lease agreement between the parties and eviction of the defendants and all those claiming occupation through them from No. 81 Twickenham Drive, Mt Pleasant, Harare.
2. An interdict barring the defendants from removing their assets from the leased premises before payment of arrear rentals and related costs
3. Payment of the sum of US\$ 30 665 being arrear rentals for the period July 2019 to 28 February 2021, at the prevailing interbank market rate on the date of payment and interest thereon
4. Interest at the prescribed rate of interest calculated from the date of service of summons to the date of payment in full.
5. Payment of holding over damages at the rate of US\$ 55 per day payable at the prevailing interbank market rate on the date of payment, reckoned from the 1st March 2021 to the date of giving vacant possession of the property to the plaintiff.
6. Payment of all outstanding council and service charges outstanding as at the date of vacation of the property

7. Collection commission on the total sum due by the defendants to plaintiff in terms of the Law Society By-Laws.
8. Costs of suit on an attorney client scale.

The defendants had entered appearances to defend and the plaintiff applied for summary judgment which was granted. However, the time of the judgment, the defendants had vacated the premises.

The summary judgment was granted with the court noting that there was no need for the eviction order as the defendants had already vacated the premises. The order granted was to the following effect;

1. The lease agreement entered into between the parties in July 2019 in respect of 81 Twickenham Drive, Mount Pleasant, Harare be and is hereby cancelled.
2. The defendants jointly and severally one paying the other to be absolved be and are hereby ordered to pay the sum of US\$ 30 665 payable at the prevailing interbank market rate on the date of payment and interest thereon being arrear rentals for the period July 2019 to 28 February 2021
3. The defendants jointly and severally one paying the other to be absolved be and are hereby ordered to pay interest at the prescribed rate of interest calculated from the date of service of summons to the date of payment in full.
4. The defendants jointly and severally one paying the other to be absolved be and are hereby ordered to pay holding over damages in the sum of US\$ 2 310 payable at the prevailing interbank rate on the date of payment, reckoned from 1 March 2021 to 11 April being the date the defendants gave vacant possession of the property to the plaintiff
5. The defendants jointly and severally one paying the other to be absolved be and are hereby ordered to pay all outstanding council and service charges outstanding as at the date of vacation of the property.
6. The defendants jointly and severally one paying the other to be absolved be and are hereby ordered to pay collection commission on the total sum due by the defendants to plaintiff in terms of the Law Society By-Laws.
7. The defendants jointly and severally one paying the other to be absolved be and are hereby ordered to pay costs of suit on an attorney client scale.

Disgruntled, the appellant has filed this appeal on the following grounds:

- I. The court *a quo* erred and misdirected itself in finding that the appellants had to prove their defence in the case of summary judgment whereas all the appellants are required, by law, to do is only to show that they have a valid defence at law.
- II. The court *a quo* erred and misdirected itself by ignoring the fact that the appellant only signed one acknowledgement of debt for the sum of \$9 600 and thus could not be jointly and severally liable for the judgment debt or any amount outside what is set in the said acknowledgement of debt.
- III. The court *a quo* erred and misdirected itself in dealing with the debt arising from an acknowledgement of debt in which the debt exceeded the monetary jurisdictional limit of the court *a quo* and the parties had not submitted to the said jurisdiction.

In the prayer sought the appellant prays that the appeal succeeds with costs and the judgment of the court *a quo* be set aside and substituted with an order that the application for summary judgment be dismissed, the respondents be allowed to file their plea to the summons within 10 working days of the judgment and the applicant to pay costs of suit on an attorney client scale.

The respondents elected not to appear for the hearing of the appeal despite proper service and we asked the appellant to motivate for the granting of the appeal. Mr *Chakawa* submitted, in support of ground 1 of appeal, that all they had to show was that they had a valid defence at law. He argued that they indeed had a valid defence at law as the claim was for eviction and not arising from an acknowledgment of debt. It was further submitted that the appellant was never part of the lease agreement and such defence was raised on page 71 of the record and should have been ventilated at the trial. Furthermore, Mr *Chakawa* averred that the first respondent had changed the cause of action in the application for summary judgment from one for eviction to that of the acknowledgements of debt. An attempt was made to say that the appellant had not raised the defence of duress but it was pointed out by the court that such defence was in fact raised in para 5 at p 71.

It appears that the crux of the appellant's matter is that the summary judgment was based on an acknowledgement of debt to the tune of US\$ 33 000 yet he was not a co-signatory to that as he had only signed for the US\$9 600 as appears on p 76 for the period 11 July 2019 to 19 December 2019 as arrear rentals. It was argued that the acknowledgement of debt did not substitute the lease

agreement which was between the first and second respondents only. It was contended that the appellant could not therefore be found to be properly jointly and severally liable.

As the appellant was not part of the acknowledgement of debt on p 49 of record in which the parties consented to the jurisdiction of the magistrates' court and he insists on the jurisdiction of the High Court.

In the end, Mr *Chakawa* clarified that all the appellant wants is to be removed from the order granted by the court *a quo*. In our opinion, the court *a quo* was correct in observing that the appellant had acknowledged indebtedness to the amount of US\$ 9 600. The acknowledgement of debt on p 26 is clear. He was also not a party to the lease agreement which was between the first and second respondents. In the circumstances his indebtedness would only correctly accrue to this amount of US\$ 9 600.

Accordingly we make the following order:

1. This appeal partly succeeds.
2. The order of the court *a quo* is upheld as summary judgment is entered, albeit on the following amended terms, in part;
 - a) The lease agreement entered into between **applicant and first respondent** in July 2019 in respect of 81 Twickenham Drive, Mount Pleasant, Harare be and is hereby cancelled.
 - b) **The defendants jointly and severally one paying the other to be absolved be and are hereby ordered to pay the sum of US\$ 9 600 payable at the prevailing interbank market rate on the date of payment and interest thereon being arrear rentals for the period July 2019 to 19 December 2019.**
 - c) **The first defendant is hereby ordered to pay the amount of US\$ 21 065 payable at the prevailing interbank market rate on the date of payment and interest thereon being arrear rentals for the period December 2019 to 28 February 2021.**
 - d) The defendants jointly and severally **at a pro rata rate of liability set out above** one paying the other to be absolved be and are hereby ordered to pay interest at the prescribed rate of interest calculated from the date of service of summons to the date of payment in full.

- e) The **first defendant be and is** hereby ordered to pay holding over damages in the sum of US\$ 2 310 payable at the prevailing interbank rate on the date of payment, reckoned from 1 March 2021 to 11 April being the date the defendants gave vacant possession of the property to the plaintiff
- f) The defendants jointly and severally one paying the other to be absolved be and are hereby ordered to pay all outstanding council and service charges outstanding as at the date of vacation of the property.
- g) The defendants jointly and severally one paying the other to be absolved be and are hereby ordered to pay collection commission on the total sum due by the defendants to plaintiff in terms of the Law Society By-Laws.
- h) The defendants jointly and severally one paying the other to be absolved be and are hereby ordered to pay costs of suit on an attorney client scale.

MUCHAWA J:.....

WAMAMBO J: Agrees.....

Tamuka Moyo Attorneys, appellant's legal practitioners