

SIFELANI TSIKO
versus
JULY SHAMU

HIGH COURT OF ZIMBABWE
TSANGA & WAMAMBO JJ
HARARE, 3 February & 29 September 2022

Civil Appeal

M Muzaza, for the appellant
S Takaindisa, for the respondent

WAMAMBO J: This is an appeal against the judgment of the Magistrates Court sitting at Harare wherein the Court *a quo* ordered the eviction of appellant and all those claiming occupation through him and costs.

The two grounds of appeal read as follows:-

“(1) The court *a quo* grossly erred and misdirected itself by not dealing with the termination of the rights to the property in determining the issue of *locus standi*.

(2) The Court *a quo* erred and misdirected itself in finding that the issue of compensation for improvements could only be properly raised in a counterclaim and not as defence to a claim for eviction.”

The issues that had been referred for trial as per the joint pre trial conference minute were coined as follows:-

“(1) Whether or not the Plaintiff has the *locus standi* to seek the ejection of the defendant from the property.

(1.2) Whether or not the defendant should be evicted from the property.”

The property at the centre of the dispute is Shop number 7 Old Tafara Shopping Centre. It is owned by City of Harare. Respondent was leasing the said property from the City of Harare and in turn sublet the property to appellant. It is common cause that respondent gave appellant three months' notice to vacate the property.

The appellant submitted that because respondent's lease with City of Harare had expired and flowing there from he could not legally evict appellant.

In a long line of decided cases it has been decided that a lessee can lawfully evict a subtenant. In this case the main lease expired but the City of Harare has not sought the eviction of respondent.

In *Chatprill Enterprises (Pvt) Ltd v Mahere* HH 994/15 CHITAKUNYE J (as he then was) said the following at p 5.

“The ownership or authority to sublet the premises by appellant was not a prerequisite for the validity of the sub lease as long as the sublandlord provided *vacuo* possession and the subtenant paid rentals. In *Robson v Grimm* 1996(2) ZLR 73(s) KORSAN JA quoted with approval the words of SOLOMON J in *Clark v Nourse Mines Ltd* 1910 TS 512 at 520-521 wherein the judge opined that:-

“It seems to me that the rule (that a lessee cannot dispute a lessor's title) may be based on one or other of two very simple grounds. The first is that the lessor having performed his part of the contract and having placed the lessee in undisturbed possession of the property is entitled to claim that the lessee should perform his part of the contract and should pay him rent which he agreed to pay for the use and enjoyment of the premises. The second ground is that the lessee having had the undisturbed enjoyment of the premises under the lease and having had the undisturbed enjoyment of the premises under the lease and having had all for which he contracted it would be against good faith for him to set up the case that the lessor had no right to let him the property.”

It is common cause in this case that appellant has been in occupation of the property since 1 January 2018 and has been paying rent to the respondent.

In *Zuva Petroleum Limited v S Chirenje* HH 166/16

MUNANGATI MANONGWA J opined at pp 6 to 7 as follows:

“The learned magistrate clearly misdirected himself on the law and certainly did not appreciate the import of the case of *Hillock and Another v Hilsage Investments (Pvt) Ltd* 1975(1) SA 568 when he dismissed the appellants' case on the basis that it did not own the premises. The Hillock case to the contrary is authority that a party other than the owner can recover premises from a third party without having to prove ownership. This flows from the legal premise that a lessee is not allowed to challenge the right or title of the lessor. Given that legal position the appellant was within its right as the lessor to evict the respondent and the respondent was estopped from resisting ejection on the basis that the appellant did not have title to the premise. That the property was owned by Zuva Petroleum was neither significant nor important as the appellant was the recognised lessor.”

I find in the circumstances guided by precedent as spelt out above that the first ground of appeal is unmeritorious and is dismissed.

The second ground of appeal also stands to be dismissed for the following reasons:-

The issue of compensation was never part of the issues referred for trial. The trial court however proceeded to consider the issue and found it unmeritorious. See judgment of the Court *a quo* at p 13. The lease agreement between appellant and respondent specifically made provision for compensation. See para 19 at p 133.

The quantum of compensation though specified was not proven. A lessee cannot resist eviction on the ground that he has not been compensated for improvements made. See *Ormashah v Karasa* 1996(1) ZLR 584(H) where GILLESPIE J faced with the same issue determined it thus at p 589A-F:-

“The next defence may be dealt with even more shortly. It is that defendant may persist in occupation of the property in order to enforce a claim for compensation against the landlord. Assuming in the defendant's favour although it is by no means clearly established on the papers, that the defendant effected improvements for which he is entitled to compensation, nevertheless he may not hold over in occupation. On this point of law I can do no better than to refer with respect and to adopt with diffidence, the statement of law expounded by VAN ZYL J in *Syfrets Particulation Bond Managers Ltd v Estate & Co-op Wine Distributors (Pty) Ltd* 1989(1) SA 106 (W).....

The effect of this law is unequivocally that a lessee and consequently the defendant has no right of retention of occupation of leased property after the termination of the lease as a lien against compensation for improvements. The second defence therefore also fails.”

I find in the circumstances that the second ground of appeal should also be dismissed.

As for costs I find no reason to depart from the general principle that they follow the victor.

It is therefore ordered as follows:

The appeal be and is hereby dismissed with costs.

WAMAMBO J:.....

TSANGA J: Agrees

Wintentons, appellant's legal practitioners
Mupanga Bhatasan Attorneys, respondent's legal practitioners