

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

**APPEAL 031/2017
CAZ/08/028/2017**

BETWEEN:

EDWARD KAHARE

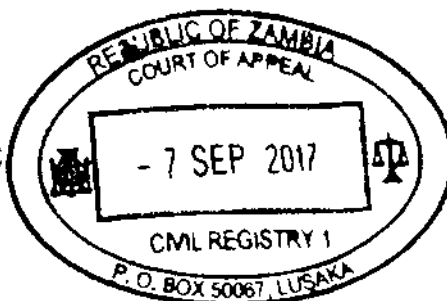
APPELLANT

AND

DOMINIC TIMUNA KAHARE

VINCENT KAMWAYA

HENRY POLI KAHARE



1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

CORAM: Chisanga JP, Chishimba and Sichinga, JJA

On 6th June 2017 and 7th September 2017

For the Appellant:

Mr. W. Muhanga of A.K.M. Legal Practitioners

For the 1st Respondent:

N/A

For the 2nd Respondent:

Mr. S. S. Zulu, SC of Zulu and Company

For the 3rd Respondent:

Mr. S. S. Zulu, SC of Zulu and Company

J U D G M E N T

CHISANGA, JP delivered the Judgment of the Court

Cases cited:

1. *Denver Logistics vs Swift Cargo Services Limited* 2015/HPC/0360
2. *The Republic vs Mberenga*
3. *Sakala & Another vs Fert Seed and Grain Ptv Limited & Another*
Appeal No 85 of 2015
4. *Nyambe vs Barclays Bank Zambia PLC* (2008) ZR 195
5. *Kavindele and Another vs Bologna Properties Ltd and Another*
(2013) HP/0196
6. *Conybeare vs Lewis* (1879-80) 13 Ch. D

This appeal is against a ruling rendered by the learned judge on preliminary issues raised by the appellant in the court below. Although a number of issues were raised, the appeal is only against the ruling on two of those issues. The grounds, which we must remark are improperly stated as questions are as follows, verbatim:

- i. Whether the holding of the judge below that an omission of the date of commissioning of an affidavit is curable and to set the law straight regarding the omission of a date (place) of commissioning an affidavit whether it is fatal or not, and whether the judge below was correct to have held that the omission of the date on the affidavit was not fatal.
- ii. To set the law straight on whether an order whose penal notice is endorsed and not displayed on the first page is not fatal and whether it is only fatal on committal proceedings as was held by the court below, when she held that the endorsing of the penal notice on the 2nd page of the order of injunction was not fatal.

On the first ground, it is contended that the learned judge erred in law. This view is premised on section 6 of the Commissioner for Oaths Act CAP 33 of the Laws of Zambia, which provides:

"6. Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made."

Learned counsel also draws this court's attention to Order V rule 20(g) of the High Court Rules CAP 27 of the Laws of Zambia, which states:

"(g). The jurat shall be written, without interlineation, alteration or erasure (unless the same be initialed by the Commissioner), immediately at the foot of the affidavit, and towards the left side of the paper, and shall be signed by the commissioner.

It shall state the date of the swearing and the place where it is sworn.

It shall state that the affidavit was sworn before the commissioner or other officer taking the same."

It is contended that both pieces of legislation impose a mandatory duty on every commissioner for oaths before whom an affidavit is taken to state the place at, and date on which the affidavit was sworn. To buttress the argument, reference is made to ***Denver Logistics vs Swift Cargo Services Limited***¹ where Chashi J, as he then was, held that failure to state the date and place where the affidavit was sworn was fatal as it offended the mandatory provisions of both the Commissioner for Oaths Act, as well as Order 5/20/3 of the High Court Rules.

Chashi J was persuaded by a decision of the Court of Appeal of Tanzania in the ***Republic vs Mberenga***², where that court interpreted a provision of the Commissioner for Oaths Act of that jurisdiction, which is similar to Section 6 of the Commissioner of Oaths Act of Zambia, and held that an affidavit that did

not show the date or place where it was affirmed was incurably defective, as it offended the mandatory provisions of that Act.

It is argued that the learned judge erred in holding that although the word 'shall' in Order V Rule 20 (g) of the High Court Rules was used, the rule was merely regulatory or directory. This argument is predicated on **Sakala & Another vs Fert Seed and Grain Ptv Limited & Another**³ where the Supreme Court reportedly held that as Rule 54 of the Supreme Court Rules used the word 'shall', it was couched in mandatory terms and failure to comply with it rendered the appellant's appeal incompetent.

Regarding the second ground, it is argued that Order 45 Rule 7(7) of the Rules of Supreme Court (1999) prescribes that a penal notice should be endorsed and displayed on the front page of the Order. It is pointed out that the said rule clarifies the fetter placed on the court's discretion when it comes to enforcing an order which has not complied with the requirement that the penal notice be placed in the prescribed place. **Nyambe vs Barclays Bank Zambia PLC**⁴ and **Kavindele and Another vs Bologna Properties Ltd and Another**⁵ are referred to in that connection. It is then argued that the penal notice, which is required for purposes of committal if the injunction is disobeyed, must be endorsed on the order of injunction, in order to make the penal notice effective, and for any order to be of value. This is imperative, as the court has no discretion to do away with the requirement to endorse the penal notice on the first page.

According to learned counsel, the penal notice starts serving its purpose even before committal, in that it proclaims the eventual punishment in the event of disobedience. It must therefore be endorsed on the front page of the order for injunction.

The 2nd and 3rd respondents filed terse heads of arguments on 31st May 2017. They state therein that the plaintiff in the court below, now 1st respondent to this appeal, discontinued the action in cause number 2016/HP/1777. The *ex parte* order of injunction he had earlier obtained automatically lapsed. Therefore, this appeal is an exercise in futility as it has been overtaken by events, and the 2nd and 3rd respondent's will not engage in an academic exercise.

We have taken judicial notice of the contents of the record in cause number 2016/HP/1777. Indeed, there is on a record a notice of discontinuance under the hand of Messrs H. M. Munsanje and Company, lodged on the 4th May 2017. By that notice, the plaintiff, Dominic Timuna Kahare, 1st respondent to this appeal, wholly discontinued the action against the defendants to that action. By the time the appeal was being argued, the action in the court below was no more. *Conybeare vs Lewis*⁶ is an old case in which the effect of discontinuance of an action on a pending appeal was restated.

In that case, the plaintiff gave notice of appeal from the refusal of an injunction. Shortly afterwards, the plaintiffs solicitors wrote to the defendant's solicitors to withdraw the notice of appeal. Two days after this the plaintiff's

solicitors gave the defendant's solicitors notice of discontinuance of the action. The defendant's solicitors declined to consent to the withdrawal of the appeal except on terms to which the plaintiff's solicitors did not agree, and the appeal came on in its terms.

It was held, by the Court of Appeal, that the discontinuance of the action put an end to the appeal, and that no order could be made except to strike it out of the paper.

Likewise in the present case. The moment the notice of discontinuance was filed, the appeal in the action became *ipso facto* vacated. It is thus incompetent for this court to make any orders on the questions raised. The questions raised by the appeal, though interesting, cannot be interrogated in this appeal as a result. The appeal is accordingly struck out.

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F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

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F. M. CHISHIMBA
COURT OF APPEAL JUDGE

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D. L. Y. SICHINGA
COURT OF APPEAL JUDGE