

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**

CAZ/08/300/2020

(Civil Jurisdiction)

B E T W E E N:

MWEENE PHIGEN

AND

MWENYI MUNGANDI

CHINGOLA MUNICIPAL COUNCIL

THE ATTORNEY-GENERAL



APPLICANT

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

Before Honourable Judge B.M. Majula this 8th day of December, 2020

For the Applicant : Mr. M. Mweene of GM Legal Practitioners

For the 1st Respondent : No appearance

RULING

Cases referred to:

1. *African Banking Corporation vs Mubende Country Lodge SCZ Appeal No.116/2016*
2. *NFC Africa Mining PLC vs Techpro (Z) Ltd (2009) ZR 236*
3. *Twampane Mining vs E & M Storti Mining (2011) ZR 67*
4. *Kashikoto Conservancy Limited vs Darrel Alexander Watt Appeal 146/2019*

Other authorities referred to

1. *Court of Appeal Rules SI 65 of 2016*
2. *The Supreme Court Practice (White Book) 1999 edition*

This matter came to me as a renewed application by the applicant, Mr. Mweene Phigen Mwiinga, seeking for an order of injunction against the respondents.

Before the injunction application could be heard, the advocates for the 1st respondent raised a preliminary issue on the ground that the appeal is incompetently before me and should therefore be declared null and void.

According to the notice of the preliminary issue which was made pursuant to Order VII Rule 1 and 2 of the Court of Appeal as read with Order 33 Rule 3 of the Rules of the Supreme Court 1999 edition.

It was also supported by affidavit sworn by Mwenyi Mungandi wherein he deposed that the affidavit in support of the *ex-parte* summons for an order of injunction filed by the applicant does not depict the application that was before the High Court. It was stated that it has in fact introduced new aspects particularly in clauses 17, 20 and 27. It was contended that this offends the Rules of the Court and that it is an attempt to introduce new evidence and to re-litigate the matter that was determined by the Court below.

The applicant opposed the application. In an affidavit sworn in opposition the applicant averred that the Notice to raise preliminary issues filed by the 1st respondent is irregular and defective. He deposed that the introduction of new aspects in clauses 17, 20 and 27 do not offend the rules of this court as it is a renewal application and not an appeal. It was contended that the 1st respondent is therefore at liberty to oppose the contents of the new aspects. He concluded by stating that the preliminary issues raised are misconceived and are merely intended to delay the hearing of the injunction application.

The matter came up for hearing on 1st December, 2020 but there was no appearance on behalf of the 1st respondent. Mr. Mweene who appeared for the applicant intimated that he would be relying on the affidavit in opposition and also make oral submissions. He submitted that the application by the 1st respondent is improperly before court as it was made pursuant to Order 7 rule 1 and 2 of the Court of Appeal Rules as read with Order 33 rule 3 of the White Book. He pointed out that the 1st respondent did not cite Order 14A of the White Book, making the whole application irregular as it is trite law that Order 33 rule 3 cannot be cited in isolation. As authority for his proposition counsel referred the court to the case of ***African Banking Corporation vs Mubende Country Lodge¹***.

He went on to argue that the 1st respondent's application before court should not be entertained as it was alien and as such

should be set aside for irregularity. He drew the court's attention to the case of ***NFC Africa Mining PLC vs Techpro (Z) Ltd***² which articulates the principle that rules of court are intended to assist in the proper and orderly administration of justice and as such they must be strictly followed.

The case of ***Twampane Mining vs E & M Storti Mining***³ was also relied upon which states that to choose to ignore the rules of Court is to do so at one's own peril.

Mr. Mweene further took issue with the fact that the Notice for the preliminary issue referred to an appeal as opposed to a renewal.

In the alternative, Mr. Mweene argued that there is a difference between an appeal and a renewal as defined in the Black's Law Dictionary. He observed that an appeal entails looking at faults of the decision of the lower court while a renewal involves a fresh application that is to be considered on its merits without regard to the previous decision. It was Mr. Mweene's further submission that the rules relating to introducing new aspects in an appeal do not apply to a renewed application.

I was accordingly urged to dismiss the preliminary issues with costs.

I have carefully considered the application before me, the arguments advanced as well as the authorities cited. The preliminary issues have been raised pursuant to the provisions of Order VII Rule 1 and 2 of the Court of Appeal Rules as read

together with the provision of Order 33/3 of the Rules of the Supreme Court 1965 White Book 1999 edition (RSC). The appellant has taken issue with the provision that has been used and has contended that the provision is not a stand alone provision and ought to have been made with Order 14A **RSC**.

Order 33 Rule 3 of the RSC states as follow:

“The court may order any question or issue arising in any cause or matter whether of fact or law or partly of fact or partly of law, and whether raised by the pleadings or otherwise to be tried before, at or after the trial of the cause or matter, and may give direction as to the manner in which the question or issue is to be tried”.

Order 14A, deals with determination of question of law or construction. It provides as follows:

“(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.”

There are certain requirements that need to be met before one can use the provision under Order 14A. These have been clearly stipulated in Order 14A/2/3 which provides as follows:

“The requirements for employing the procedure under this Order are the following:

- (a) the defendant must have given notice of intention to defend;*
- (b) the question of law or construction is suitable for determination without a full trial of the action (para. 1 (i)(a));*
- (c) such determination will be final as to the entire cause or matter or any claim or issue therein (para. 1 (i)(h)); and*
- (d) the parties had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination (para. 1 (3)).”*

In the case of ***African Banking Corporation vs Mubende Country Lodge***¹ it was held that:

“The import of Order 33 rule 3 of the White Book is that a preliminary point of law can be raised at any time including before trial. Parties need not wait for setting down for trial before an application to determine a preliminary point of law can be raised. Order 33 rule 3 however cannot be invoked independently to the exclusion of Order 14A of the White Book.

In the case of ***Kashikoto Conservancy Limited vs Darrel Alexander Watt***⁴ Chashi JA, in delivering judgment on behalf of this Court stated that:

“Order 33/3 should be read together with Order 14A and Order 18/11 RSC. Under this rule, the court has power to try a preliminary question of law at the outset. Order 33/3, therefore, envisages a trial or inquiry into the issue so as to establish it as a matter of fact in the determination of the whole cause or matter.”

Having looked at the provision that has been cited by the 1st respondent which is Order 33/3, I totally agree with counsel for the appellant that this provision does not come to the aid of the 1st respondent in raising the preliminary issue. The appropriate provision should have been under Order 14A RSC.

But that notwithstanding I will exercise my discretion and proceed as if they raised it properly under Order 14A of RSC.

The second bone of contention that has been raised by the appellant is that the issue before court is a renewal as opposed to an appeal. I could not agree more with this position. There is a distinction to be made between a renewal and an appeal. In a renewal, the matter is being heard afresh. We are not concerned with what transpired in the court below. In the same view, the parties cannot refer to what was, or transpired in the court below.

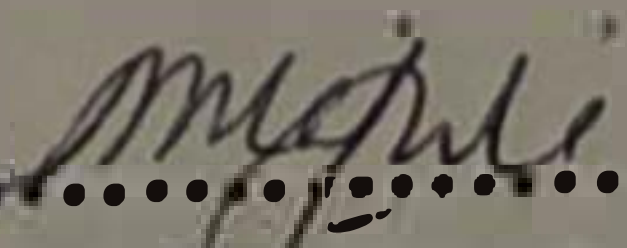
Therefore, it behooves me to state that whatever new aspects the 1st respondent has a grievance with in the matter before this Court, they cannot at this stage be dismissed. This is so because the application is a renewed one and therefore any new material does not offend the Rules of Court.

If it were an appeal on the other hand, the applicable rules would apply. In an appeal no new aspects can be introduced.

In light of the foregoing, I find the preliminary issue raised to be devoid of merit and dismiss it. I will accordingly proceed to hear the application for an injunction

Costs in the cause.

Dated at Lusaka this 8th day of December, 2020

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B.M. Majula
Court of Appeal Judge