

IN THE HIGH COURT FOR ZAMBIA

2009/HK/308

AT THE DISTRICT REGISTRY

HOLDEN AT KITWE

(Civil Jurisdiction)

BETWEEN:

SYDNEY SICHIKOLO

PLAINTIFF

AND

JAMES KINGROSE MUTALE

1ST DEFENDANT

KINGFRED MUTALE

2ND DEFENDANT

Before Honourable Madam Justice C. K. Makungu

For the Plaintiff: Mr. D. Mazumba of Messrs Douglas & Partners

For the Defendant: Mr. C. Chitala of Messrs Nkana Chambers

RULING

Cases referred to:

1. *Barclays Bank (Z) Ltd vs Walisco and Company and Another (1980) ZR 7*
2. *Chikuta vs Chipata Rural Council (1974) ZR 241*
3. *Supa Bakery Company vs Philimon J Pendwe SCZ No. 31 of 2004.*

Legislature referred to:

1. *Order 30 Rule 14 of the High court Rules Cap 27 of the Laws of Zambia*
2. *Order 2 Rule 2 of the White Book*

This matter came up for trial on 30th May, 2011 when Learned Counsel for the defendant raised a preliminary issue whether or not the commencement of these proceedings relating to an equitable mortgage by originating notice of motion was correct. He pointed out that according to Order 30 Rule 14 of the High Court rules Chapter 27 of the Laws of Zambia such an action must be commenced by Originating Summons. Mr. Chitala referred to the case of **Barclays Bank (Z) Ltd vs Walisco and Company and Another** ⁽¹⁾ where it was held in accordance with **Chikuta vs Chipata Rural Council**⁽²⁾ that:

“Where an Act of Parliament has specifically laid down the method by which proceedings must begin, there is no option as to which procedure to adopt. The plaintiff is bound to commence his action by the procedure laid down by the Act.”

Mr. Chitala therefore submitted that the plaintiff in the present case had no option but to commence the action using Originating Summons. He therefore prayed that the case be dismissed.

In response Mr. Mazumba said the preliminary application to dismiss action for irregularity was raised late in the proceedings. He said according to Order 2 rule 2 of the White Book procedural irregularities do not nullify the proceedings and an application to set aside any proceedings or steps taken in the proceedings should be made promptly. And if the person wishing to make

such an application takes further steps in the proceedings after becoming aware of the irregularity, he waives his right to apply.

In the present case, the defendant has waived his right to make such an application because he has taken many steps in the proceedings up to trial stage.

Mr. Mazumba further submitted that the defendant will not be prejudiced if the matter is tried because he will have a chance to be heard.

In reply Mr. Chitala said that it is trite that a preliminary issue may be raised at any stage of the proceedings. He said in the case of **Supa Bakery Company vs Philimon J Pendwe**⁽³⁾ the Supreme Court nullified proceedings that were started using the wrong procedure and ordered the plaintiff to go back to the High Court and commence the action using the correct procedure. Therefore the issue of prejudice should not arise.

I am of the view that it is trite law that a point of law may be raised at any stage of the proceedings. Therefore the argument that the defendant has waived his right to apply to set aside the proceedings by taking many steps in the proceedings does not hold water. I agree entirely with Mr. Chitala's submissions. I therefore find and hold that the plaintiff's action is misconceived as it was commenced by Originating Notice of Motion instead of

Originating summons in breach of Order 30 Rule 14 of the High Court rules.

Following the case of **Barclays Bank (Z) Ltd vs Walisco & Company and Another**⁽²⁾ I find and hold that the plaintiff had no option but to adopt the procedure laid down in Order 30 Rule 14.

In line with the **Supa Bakery Company case**⁽³⁾ I dismiss the action for it is wrongly before me. I order that the plaintiff may commence a fresh action using the correct procedure after settling the costs of this action. Such costs should be agreed upon or taxed in default of agreement.

Delivered this day of 2011.

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C. K. MAKUNGU
JUDGE