

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(Civil Jurisdiction)**

2013/HP/1526



BETWEEN:

**TOBACCO BOARD OF ZAMBIA
AND
MUSONDA SAMPA LISHOMWA**

PLAINTIFF

DEFENDANT

BEFORE HON. MRS. JUSTICE M.S. MULENGA THIS 18TH DAY OF SEPTEMBER 2014

For the Plaintiff : Ms O. Zyambo of Messrs Ranchod Chungu Advocates
For the Defendant: Ms M.T. Sitali of Messrs Barnaby and Chitundu Advocates

R U L I N G

Cases cited:

1. **Development Bank of Zambia and KPMG Peat Marwick v Sunvest Pharmaceuticals and Sun Pharmaceuticals Limited SCZ no. 10 of 1997**
2. **Mukumbuta Mukumbuta Kweleleka Mubita and Others v Nkwilimba Choobana and Others SCZ no. 8 of 2003**
3. **Tobacco Board of Zambia v Chishimba Konde 2013/HP/1527 (unreported)**
4. **Riches v DPP [1973] 2 All ER 935**
5. **Yat Tung Investments Company Limited v Dao Heng Bank Limited [1975] AC 581**
6. **Beatrice Muimui v Sylvia Chunda SCZ Appeal No. 50 of 2000 (unreported)**

This is the Defendant's application for an order to dismiss action for abuse of court process pursuant to Order 18 Rule 19(1) of the Rules of the Supreme Court 1999 Edition.

The application is supported by an affidavit sworn by counsel for the Defendant who deposes that prior to the institution of these proceedings by the Plaintiff, the Defendant with four (4) others who are all tenants of

the Plaintiff's flats which are a subject of these proceedings took out an earlier action under Cause No. 2011/HP/728.

That in the earlier cause, the Plaintiffs are seeking for a declaration that they are entitled to be sold the Defendant's flats they are occupying by virtue of being sitting tenants and they have also sought for an order of interim injunction to restrain the Plaintiff from evicting them from the flats in issue. The said cause is pending before Justice G. Chawatama and the Plaintiff is fully aware of this as confirmed by its advocates and per exhibit marked "MC1".

That while the earlier matter is still subsisting, the Plaintiff has brought this action and four (4) others against the same parties and same properties as in the earlier cause claiming for, among other reliefs, an order to be granted vacant possession of the flats in issue. Counsel further deposes that the institution of the current matter while the earlier one is pending determination may result in the Courts arriving at two conflicting decisions which may bring embarrassment to the courts of law. That the Plaintiff had and still has the opportunity to bring the new cause under the earlier action which has not yet been set for trial.

The Plaintiff through its advocates opted to file written skeleton arguments, dated 11th July 2014 on the application.

At the hearing of the matter on 14th July 2014 counsel for the Defendant relied on the affidavit in support and submitted that the Order 18 rule 1 pursuant to which the application is made permits the

court at any stage of the proceedings to order to be struck out any proceedings or endorsement on ground that it is an abuse of court process.

She further argued that the process of the court ought to be used bonafide and properly and not to be abused. Paragraph 18/19/18 White Book outlines the categories of conduct and states that the same are not closed but depend on all the relevant circumstances. That this court and the Supreme Court has frowned upon the court being abused by multiplicity of actions.

In the case of **DBZ and KPMG and others (1997) ZR 187** the Supreme Court stated that "**we also disapprove of parties commencing multiplicity of procedures and proceedings over the same subject matter.**" In **Mukumbuta Mubita and Others v Mpilimba Chobana and Others SCZ Judgment No. 8 of 2003** which case dealt with consolidation, the Supreme Court noted that it also touched on multiplicity. Counsel then went on to surmise that a look at this action and the earlier action will show that it refers to the same subject matter. On this basis she submitted that it is an abuse of court process. That the Plaintiff had and still has an opportunity to bring all issues against the Defendants in the earlier action without resorting to multiplicity of actions as stated in the DBZ case. That this was followed in a similar case of **Tobacco Board of Zambia v Chishimba Konde 2013/HP/1527 (unreported)** in which Judge Sitali found that there was abuse of court process.

Further counsel submitted that Order 18 of the High Court Rules buttresses the argument which give courts the discretion to order amendment and Order 20 rule 5 of the White Book which also deals on amendment.

Lastly counsel wondered how the Plaintiff in this matter will enforce the Judgment when an injunction is still in force under the earlier cause. She prayed that this Court orders that this action be dismissed.

In response, counsel for the Plaintiff submitted by repeating the contents of the skeleton arguments dated 11th July 2014. It is submitted that the application is premised on the provisions of Order 18, rule 19(1) of the Supreme Court Rules 1999 Edition(White Book). The provision permits for the Court to strike out or amend any pleading or proceedings on the grounds, inter alia, that the pleading or proceedings are an abuse of Court process. Counsel argues that the test is therefore that the proceedings which a party seeks to have dismissed must be an abuse of the process of the Court.

Counsel then relies on the case of **Riches v DPP [1973] 2 All ER 935** wherein it was decided that in order to be struck out, the litigation must be frivolous, vexatious and hopeless. That paragraph 18/19/16 of the White Book, in addressing the question of "frivolous, vexatious and hopeless" states that these are cases that are so obviously unsustainable. In exercising this discretion the court must be convinced that it is plainly desirable and only in obvious cases.

That in the present case, the cause is brought for the recovery of rental arrears and for a declaration that the Defendant has breached the Lease Agreement with the Plaintiff and that as such it should be terminated and the Plaintiff be given vacant possession of the leased premises. The action under cause 2011/HP/728 was commenced at the instance of the Defendant and four others on 29th July 2011 for a declaration that the Plaintiffs are entitled to be offered the houses that they occupy as sitting tenants for purchase. That while both causes of action touch on the rented premises, the substance of the claims are materially different and cannot be said to have been claims that could have been resolved in the same action.

Counsel further cites the case of **Yat Tung Investments Company Limited v Dao Heng Bank Limited [1975] AC 581** wherein it was affirmed that "..... **it is an abuse of the process to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings.**" Counsel surmises that this is not the case in the present instance. The accrued arrears in rent are for the period up to 31st August 2013. That it is not possible that these accruals could have been included in a suit that was instituted in July 2011. The substance of the dispute in this action mainly arose way after the earlier proceedings had commenced and it cannot now be said that these were matters that could or would have been litigated at that earlier date. That the claim is a legitimate right of the Plaintiff, it is not spurious nor is it vexatious or frivolous or hopeless.

That therefore dismissing the action at this summary stage would deprive the Plaintiff the opportunity and right of recovery of the claimed arrears in rent while permitting the Defendant to evade his responsibility for the payment of rent. That under paragraph 18/19/1 of the White Book it is clearly stated that an applicant under this rule must show that he is in some way prejudiced by the content of the proceedings. The Defendant will not be prejudiced as alleged but her application is in fact the prejudicial act whose ends will prejudice the Plaintiff's legitimate right.

Counsel for the Plaintiff further argues that the authorities of **Development Bank of Zambia and KPMG Peat Marwick v Sunvest Pharmaceuticals and Sun Pharmaceuticals Limited SCZ no. 10 of 1997** and **Mukumbuta Mukumbuta Kweleleka Mubita and Others v Nkwilimba Choobana and Others SCZ no. 8 of 2003** are both distinguishable from this case to the duplication of actions which is not the issue in the instant case. The only relationship that this matter and the one commenced under cause 2011/HP/728 bear with one another is that the demised premises are the same. The facts are not related and the claims and reliefs sought are completely different and cannot be rolled up in one action and should be resolved separately. That in the **DBZ case** the Court frowned upon the dual action as a multiplicity of actions on the same subject matter that would result in the contradictory decisions being given by the same court. The present case is by no means comparable. The action here is the only step that this Plaintiff

has taken to assert its rights. The Plaintiff therefore submits that the application by the Defendant must fail because it lacks merit. That to dismiss this action would prejudice the Plaintiff. That alternatively, if the court should hold the view that this claim and the reliefs sought under cause 2011/HP/728 are capable of being resolved together, the Court must order the consolidation of these matters and not completely dismissing the Plaintiff's claims.

In reply counsel for the Defendant basically repeated her earlier submissions and went on to state that the Plaintiff has conceded that the subject matter in the two actions is the same and it is on that premise that it is an abuse of court process.

I have considered the respective submissions by the parties.

This application to dismiss action for abuse of court process is brought pursuant to Order 18 rule 19(1). The said order is couched in the following terms:

"The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that—
(a) it discloses no reasonable cause of action or defence, as the case may be; or
(b) it is scandalous, frivolous or vexatious; or
(c) it may prejudice, embarrass or delay the fair trial of the action; or
(d) it is otherwise an abuse of the process of the Court;
and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

This provision gives the court discretion to inter alia, stay or dismiss an action for being an abuse of court process based on the particular circumstances.

The Defendant herein has applied to dismiss the action under paragraph (d) that is, that it is an abuse of court process. Paragraph 18/19/15 White Book explains abuse of the process of the Court as follows:

"Para. (1)(d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court." This term connotes that the process of the Court must be used bona fide and properly and must not be abused .The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see *Castro v. Murray* (1875) 10 Ex. 213; *Dawkins v. Prince Edward of Saxe Weimar*; *Willis v. Earl Beauchamp* (1886) 11 P. 59, per Bowen L.J. p.63). See also "Inherent jurisdiction," para. 18/19/18."(emphasis mine)

The Order goes on to state that:

"the categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances and for this purpose considerations of public policy and the interests of justice may be very material.It is an abuse of the process of the Court to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings (*Yat Tung Investment Co. Ltd v. Dao Heng Bank Ltd* [1975] A.C. 581)"

The question that remains to be answered therefore is whether the Plaintiff by bringing its action when there is another one pending before another High Court Judge constitutes an abuse of court process.

The Plaintiffs' claim under cause number 2011/HP/728 is for the following reliefs:

- i. A declaration that by virtue of them being sitting tenants in the Defendant's houses they are entitled to be offered the same.*
- ii. An Order that the Defendant forthwith offers the Plaintiff the houses they are occupying.*

- iii. *An Order of injunction restraining the Defendant from evicting or harassing the Plaintiffs while in occupation of the said houses or selling them to other persons until the matter is fully determined.*
- iv. *Any other relief the Court deems fit under the given circumstances.*
- v. *Costs of and incidental to this action.*

On the other hand, the Plaintiff's claim under this cause is for the following reliefs:

- i. *The sum of K12,372.00 being arrears in rent as at 31st August 2013 being in respect of the Defendants occupation of Flat No. 5.*
- ii. *An Order that the Defendant has breached the terms and conditions of his tenancy contained in the Lease dated 1st January 2011 by his failure to pay monthly rentals as agreed AND that thereby abrogated the agreement to lease.*
- iii. *Possession of Flat No. 5, Kaleya Flats Roma, Lusaka.*
- iv. *Mesne Profits at the rate of K1,980.00 per month from the date of issue of the Writ hereof until possession is delivered to the Plaintiff.*
- v. *Interest for such period and such rates as the Court may order.*
- vi. *Costs.*

The reliefs which are similar are the ones under paragraph (iii) in both causes. Further, Flat no. 5 Kaleya Flats Roma, Lusaka is a common denominator as both actions are arising out of a landlord and tenant relationship between the parties. The earlier cause is for the Defendant and others as tenants to be availed the right to purchase as sitting tenants and this action is on rental arrears for the same property that have since fallen due.

Counsel for the Plaintiff in the present cause submitted that the claim for rental arrears arose way after the first cause and that it was not possible to have brought the proceedings under that cause. Even

though this is the case, it does not necessarily warrant the commencement of a fresh action if it is possible to still raise it under the earlier cause. The Defendant's position is that this could and can still be done under the earlier cause. Counsel for the Defendant also argued that the Judge handling cause No. 2011/HP/728 and this Court can give conflicting Judgments which may cause embarrassment. I indeed note that the reliefs which are commonly sought under paragraphs (iii) of both suits can lead the two Courts to issue conflicting Judgments. For instance if I am to order that possession be granted to the Plaintiff while in the interim the other Court in the earlier cause has granted an injunction against the Defendant restraining it from evicting the Plaintiffs, the two Judgments or orders can cause embarrassment as the parties may find themselves in a dilemma when enforcing them.

This is in essence what the rule on multiplicity of actions seeks to avoid. In **Beatrice Muimui v Sylvia Chunda SCZ Appeal No. 50 of 2000 (unreported)** the Supreme Court reiterated its disapproval of the abuse of Court process and forum shopping and stated that once a matter is before a Court in whatever place, if that process is properly before it, that Court should be the sole Court to adjudicate all issues involved. The parties then have the obligation to bring all issues in that matter and not resort to forum shopping. The Supreme Court further held that to do so is an abuse of process.

In this instant case, the Plaintiff was fully aware of the earlier cause having the same parties and same subject matter arising out of the

landlord and tenant relationship and should have brought the issues or claims raised in this action under the earlier cause no. 2011/HP/728. The position as stated by both parties is that the earlier cause has not yet been determined or listed for trial. This shows that the Plaintiff could have reasonably raised the issue regarding rental arrears and abrogation of the tenancy agreement in the same action as opposed to commencing this fresh action.

I thus find that the action of the Plaintiff in commencing this current action relating to the same property and party in cause no. 2011/HP/723 is an abuse of Court process as it results in multiplicity of actions over the same subject matter and property.

Having noted the that the issues raised herein can be property adjudicated in the earlier cause, I am satisfied that instead of staying or dismissing these proceedings, it would be more equitable to consolidate the two causes for all the issues raised in this action to be conclusively adjudicated upon.

Order 4 rule 9(1) of the Rules of the Supreme Court (1999 edition) provides as follows:

"Where two or more causes or matters are pending in the same Division and it appears to the Court—

- (a) that some common question of law or fact arises in both or all of them, or**
- (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or**
- (c) that for some other reason it is desirable to make an order under this paragraph the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after**

another or may order any of them to be stayed until after the determination of any other of them."

It is clear that the reliefs sought by both parties arise by virtue of the Plaintiff being Landlord and the Defendant tenant and thus this is a common question of fact which has led to the causes herein.

It is in the interest of justice to order that this cause be consolidated with the earlier cause number 2011/HP/728 and I so order.

Ordinarily, costs follow the event but in this case, I have considered the issues raised and the conduct of both the Defendant and the Plaintiff and I thus order that the costs for this application will remain in cause.

Leave to appeal is granted.

Dated this 18th day of September 2014.



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M.S. MULENGA
HIGH COURT JUDGE