

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

**2011/HP/1315**

**BETWEEN:**

**ROBERT MBONANI SIMEZA**

Plaintiff

and

**ELLIS & COMPANY**  
(Sued as a Firm)



1st Defendant

**ELIZABETH MZYECHÉ**

2nd Defendant

**Coram:** Honourable Lady Justice F. M. Lengalenga in chambers at Lusaka.

**For the plaintiff:**

Mr. K. Chenda – Messrs Simeza Sangwa & Associates.

**For the defendants:**

Miss M. Mukuka – Messrs Ellis & Company.

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**J U D G M E N T**

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**Cases cited:**

1. GLEESON v J. WIPPELL & CO (1977) 3 ALL E R 54 at page 62
2. SALIJAH BTE AB LATEF v MOHD IRWAN BIN ABDULLAH TEO (1997) 1 LRC 280 at page 281



This is the plaintiff's appeal against the Deputy Registrar's ruling of 5<sup>th</sup> April, 2012 dismissing this action with costs. This appeal, therefore, arises from the learned Deputy Registrar's decision to dismiss the action *in limine*. The plaintiff filed two grounds of appeal and heads of argument in support of the appeal on 2nd October, 2012.

Ground one is set out as follows:

**"That the learned Deputy Registrar erred in law and in fact when he refused to address the arguments advanced by the parties on the application to dismiss this action for alleged abuse of court process."**

The argument advanced in respect of ground one is that the learned Deputy Registrar ignored arguments advanced by both parties before delivering the ruling appealed against as indicated in the following excerpt of the said ruling where it was stated:

**"A number of arguments were advanced by both parties on the application before Court. I do not wish to delve into the same as the issue to be decided is elementary. It is not proper for the plaintiff to commence a fresh action to declare a process issued by another court to be wrongful. There is no way that this Court can entertain a litigation whose overall effect may be to impugn process by the Supreme Court whether the process is issued directly or indirectly."**



It is the plaintiff's contention that the learned Deputy Registrar misdirected himself when he totally ignored the issues canvassed by both parties when the said arguments addressed specific issues that were the subject of the application before him. It was submitted that by so doing the plaintiff was denied an opportunity to respond to issues that formed the basis of the court's ruling.

It was submitted further that the defendant's preliminary objection to strike out the Writ of Summons and Statement of Claim was premised on grounds that the action was frivolous and vexatious and an abuse of court process as the plaintiff had purportedly raised similar issues in cause number 2003/HP/91 and not because this action would impugn process issued by the Supreme Court.

It was further submitted on behalf of the plaintiff that the issues to be decided in this case relate to post execution events and do not require the court to consider whether or not a writ of *fifa* should have issued following the Supreme Court judgment. It was submitted further that the Supreme Court judgment did not order execution of the writ of *fifa* against the plaintiff to warrant a decision that it was not proper for the plaintiff to commence a fresh action to declare a process issued by another court wrongful. The plaintiff submitted that, therefore, the learned Deputy Registrar's ruling is unsupported by the Supreme Court judgment.



Counsel for the plaintiff asked this court to consider the court's guidance in the case of **GLEESON v J. WIPPELL & CO**<sup>1</sup> wherein it was stated *inter alia*:

**".....that the jurisdiction to strike out an endorsement or pleading, whether under the rules or under the inherent jurisdiction, should be exercised with great caution, and only in plain and obvious cases that are clear beyond doubt."**

Counsel for the plaintiff submitted that in the premises, the ruling appealed against ought to be set aside on the basis of the miscarriage of justice occasioned thereby.

The plaintiff's ground two is stated as follows:

**"That the learned Deputy Registrar erred in fact and in law by concluding that the overall effect of this action may be to impugn the process issued by the Supreme Court and that there was a possibility of conflicting decisions that could cause embarrassment to the Court."**

In arguing this ground of appeal, Counsel for the plaintiff invited the court to consider the decision by the Court of Appeal of Singapore in the case of **SALIJAH BTE AB LATEF v MOHD IRWAN BIN ABDULLAH TEO**<sup>2</sup> wherein it was held at page 281:



**“(1) When considering whether there was any conflict of jurisdiction between different tribunals it was important not to confuse jurisdiction with power. The jurisdiction of a court was its authority to hear and determine a dispute that was brought before it, whereas the power of a court constituted its capacity to give effect to its determination by making or granting the orders or relief sought by the successful party to the dispute. Jurisdiction was therefore a precondition to the lawful exercise of a particular power. The ability of a court to enforce an order could not be described as an incident of jurisdiction, but was instead a form of power.”**

In the case before me, Counsel for the plaintiff submitted that the learned Deputy Registrar ought to have taken time to consider the subject matter of this action in order to determine which court between the High Court and Supreme Court has jurisdiction to hear and determine the matter. He submitted further that section 7 of the Supreme Court Act, Cap. 25 of the Laws of Zambia confers the Supreme Court with jurisdiction to hear and determine appeals in civil and criminal matters and such other appellant or original jurisdiction as may be conferred upon it by or under the Constitution or any other law.

In conclusion, it was submitted that the learned Deputy Registrar thus fell in error when he concluded that the overall effect of this action was to



impugn the process issued by the Supreme Court and that there was a possibility of conflicting decisions that could cause embarrassment to the court. Counsel for the plaintiff submitted further that because of the learned Deputy Registrar's ruling, his client has been left without remedy for the malicious tortuous acts inflicted on him by the defendants. They, accordingly prayed that the said ruling be set aside.

I have carefully considered the plaintiff's grounds of appeal against the learned Deputy Registrar's ruling of 5<sup>th</sup> April, 2012 and the heads of argument in support thereof. The gist of the plaintiff's argument in ground one is that the learned Deputy Registrar disregarded the arguments advanced by both parties when determining the application that was before him and, therefore, fell into error when he dismissed this action with costs. According to counsel for the plaintiff's argument, the arguments as presented to the learned Deputy Registrar addressed specific issues that were the subject of the application before him but he did not consider them. A typical example of what is alleged is that the defendant's preliminary objection to strike out the Writ of Summons and Statement of Claim was premised on grounds that the action was frivolous, vexatious and an abuse of court process but the learned Deputy Registrar proceeded to address other issues that this action may have the overall effect of impugning process by the Supreme Court.

I accept Counsel for the plaintiff's submission that the issues to be decided in this case relate to post execution events after the Supreme Court



judgment. Further that by not addressing the real issues raised by the parties, the plaintiff was prejudiced as he was denied an opportunity to respond to the fresh issue that formed the basis of the learned Deputy Registrar's ruling.

Therefore, on the basis of the plaintiff's arguments in support of ground one and for the reasons I have stated, I, find as a fact, that the learned Deputy Registrar erred in law and in fact when he failed or neglected to address the arguments advanced by the parties on the application to dismiss action for abuse of court process. I, accordingly, allow the plaintiff's ground one and he succeeds.

I turn to the plaintiff's ground two that the learned Deputy Registrar erred in fact and in law by concluding that the overall effect of this action may be to impugn the process issued by the Supreme Court and may result in the possibility of conflicting decisions. As earlier stated by Counsel for the plaintiff the issues to be decided in this case relate to post execution events and, therefore, the issue or danger of this action impugning the process issued by the Supreme Court does not arise. Further, that being the position, there can be no possibility of conflicting decisions that could cause embarrassment to the Court as alluded to by the learned Deputy Registrar.

For the aforesated reasons I find that the learned Deputy Registrar erred in law and in fact by concluding as he did. I, therefore, allow the plaintiff's ground two of the appeal. The plaintiff, accordingly, succeeds on

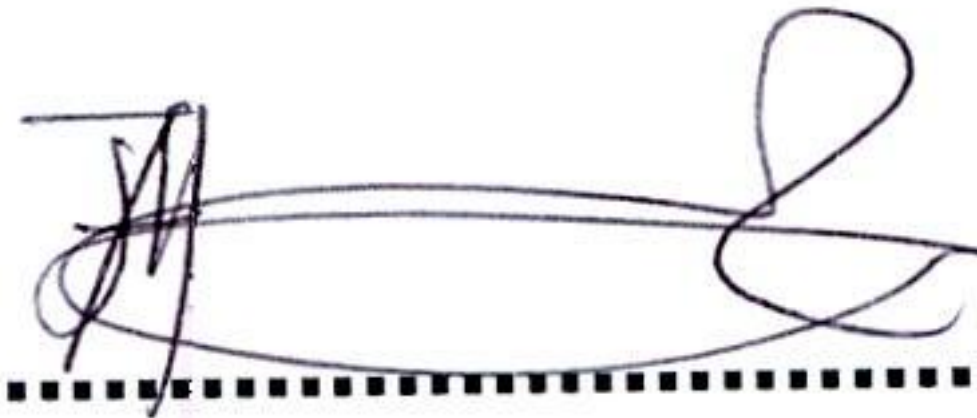


both grounds of appeal. The net effect is that the plaintiff succeeds in his appeal with costs.

I must, however, mention that the defendants did not contest this appeal as no heads of argument were filed into court.

Leave to appeal to the Supreme Court is granted.

DATED this .....<sup>14<sup>th</sup></sup> day of October, 2014 at Lusaka.



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**F. M. Lengalenga**  
**JUDGE**