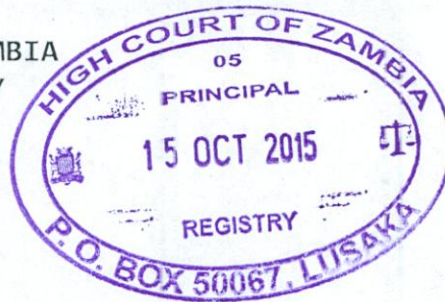


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



2009/HP/169

BETWEEN

M.L MUKANDE AND COMPANY
(Suing as a firm)

APPELLANT

AND

ZAMBIA DEVELOPMENT AGENCY

RESPONDENT

Before Honorable Mr. Justice C.F.R. Mchenga SC

For the Plaintiff: M.L. Mukande SC with M. Mwitumwa, Messrs M.L
Mukande & Co

For the defendant: J.S. Kankondo, Legal Counsel Z.D.A

J U D G M E N T

Cases referred to:

1. Gastove Kapata v The People [1984] Z.R. 47
2. Harry Mwanga Nkumbula and Simon Mwansa Kapwepwe v The Attorney
General [1979] Z.R. 267

Legislation referred to:

1. The High Court Act, Chapter 27 of the Laws of Zambia.
2. The Zambia Development Act, Act No 1 of the 2010

In this appeal, I will refer to the appellant as the plaintiff and the respondent as the defendant, which is what they were before the appeal. The appeal is against the ruling of the learned Deputy Registrar, dismissing the plaintiff's application for an order to fix time within which the defendant should pay interest accrued on the Judgment sum. In her ruling of 28th January 2015, the learned Deputy Registrar observed as follows:

"the application to fix time in which to pay, in my view will be caught up or be subjected to Section 11A of Act No. 1 of 2010. Even if I fixed the time in which to pay, and the Defendant failed to liquidate the same amount within the stated period of time, there would be no execution made. The only option is to engage the institution to commit itself into making sure that it honours its obligation as quickly as possible or making its officer responsible to seeing to it that the institution pays without fail."

One ground of appeal has been advanced and it reads as follows:

"That the Learned Deputy Registrar erred in law and fact when she held that she could not fix time in which interest on the Judgment sum should be paid because Section 11A of the Zambia Development Act No 1 of 2010 gives the respondents immunity from execution of process."

At the hearing of the appeal, counsel relied on the skeleton arguments they had filed in support of their respective client's cases.

On behalf of the plaintiff, Mr. Mukande SC, submitted that the application for an order to fix time in which to pay interest accrued

on the judgment sum was made pursuant to Order XXXVI rule VII of the High Court Rules, of the High Court Act. It provides as follows:

"The Court or a Judge, at the time of making any judgment or order, or at any time afterwards, may direct the time within which the payment or other act is to be made or done, reckoned from the date of the judgment or order, or from some other point of time, as the Court or a Judge thinks fit."

Counsel submitted that the plaintiff is not seeking to execute judgment on the defendant, but to compel the defendant to comply with the law. He submitted that the immunity from execution that the defendant enjoys by virtue of Section 11A of the Zambia Development Act cannot prevent the court from making an order within which the interest on the judgment sum should be paid.

Finally, Mr. Mukande SC submitted that it was within the courts power to order that time be fixed within which the defendant should pay the plaintiff be fixed.

In response, Mr. Karkondo submitted that the learned Deputy Registrar was on firm ground when he dismissed the plaintiff's application. Counsel further submitted that the defendant is a Government funded institution and as such can only liquidate its liabilities as and when funds are available from the Government of the Republic of Zambia.

Mr. Kankondo urged me to take judicial notice of the fact that the defendant is a government funded institution. He referred to the case of *Gastove Kapata v The People (1)* where it was held:

"In so far as the utilisation of personal knowledge is concerned, the general rule is that a court may, in arriving at its decision in a particular case, act on its own personal knowledge of facts of a general nature, that is notorious facts relevant to the case."

He reiterated the defendant's commitment to settling the debt as shown by various steps taken including a request to the Ministry of Finance to release funds to facilitate payment to the Appellant. He also pointed out that the principal sum plus interest amounting to K4,220,282.89 which was paid to the plaintiff was sourced from the Ministry of Finance.

Counsel maintained that the learned Deputy Registrar was on firm ground when she held that the application to fix time in which to pay will be caught up by section 11A of the Zambia Development Agency Act. He referred to the case of *Harry Mwanga Nkumbula and Simon Mwansa Kapwepwe v The Attorney General (2)*, where it was observed as follows:

"The appellants seek declarations to the effect that the amendments to the Constitution were invalid and that consequently the elections of the President and members of the Central Committee were also invalid. The making of such declarations is entirely within the discretion of the court, and as Lord Sterndale, M.R, said in Hansen v Radcliffe U.D.C. (3), generally speaking the

jurisdiction of the court under this rule is in effect only limited by its own judicial discretion. It is a further principle that courts will not make orders which are of no avail. It is trite for instance that a court will not normally make an order relating to the custody of an infant, who is out of the jurisdiction, where such order cannot possibly be enforced."

Counsel implored this court to dismiss the appeal with costs.

I am indebted to counsel for their submissions and I have taken them into account in arriving at my decision.

The learned Deputy Registrar declined to grant the application to fix time within which to pay interest on the ground that **Section 11A of the Zambia Development Agency Act** does not allow execution against the defendant in the event of default. It provides as follows:

"Where any judgment order is obtained against the Agency, no execution, attachment or process of any nature, shall be issued against the Agency or against any property of the Agency, but the Agency shall cause to be paid out of its revenues such amount as may, by the judgment order, be awarded against the Agency to the person entitled to such amount."

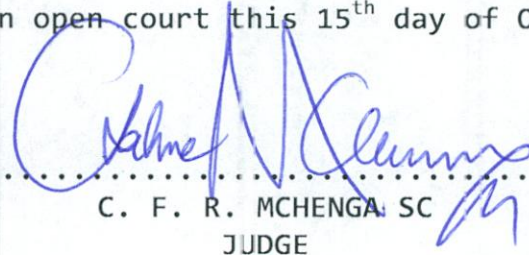
While I agree with the submission on behalf of the defendant that the courts should not make orders that cannot be enforced, it's my view that giving a time limit in which the interest should be paid does not conflict with the **Zambia Development Agency Act**. The grant of such an order does not in itself give the plaintiff power to execute against the defendant in the event of default. The objection raised in this

case is one that should be raised when the plaintiff attempts to execute should it turn out to be the case.

Consequently, I find that there was misdirection when the learned Deputy Registrar declined to fix the time within which to pay on the ground that it would conflict with the provisions of **Section 11A** of the **Zambia Development Agency Act**. The appeal is allowed and I fix 180 days as the time within which the amount should be paid.

Costs to the plaintiff, to be taxed in default of agreement. Leave to appeal is also granted.

Delivered in open court this 15th day of October 2015


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C. F. R. MCHENGA SC
JUDGE