

**IN THE HIGH COURT OF ZAMBIA**  
**AT THE PRINCIPAL REGISTRY**  
**HOLDEN AT LUSAKA**

**2006/HP/0719**

*(Civil Jurisdiction)*

BETWEEN:

**ABDUL KADIR ASAFA**



**PLAINTIFF**

**AND**

**GREENWELL SHIMUKONGA** *(being sued as the*  
*Current Chairman General of the Cross Border*  
*Traders Association)*

**DEFENDANT**

*Before the Hon. Mrs. Justice F. M. Chisanga, this .....day of .....2015.*

*For the Plaintiff:*

*For the Defendant:*

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**RULING**

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***Case referred to:***

- 1. Saidi Siwingwa (1979) Z.R. P. 145.**
- 2. Kabwe Transport Ltd vs Press Transport (1975) LTD (1984) Z.R. 43.**
- 3. Manfred Kabanda and Kajeema Construction vs Joseph Kasanga (1992) S.J. 15.**
- 4. Ruth Kumbi vs Robinson Kaleb Zulu (S.C.Z. Judgment No. 19 of 2009.**
- 5. Clement Chuuya & Hilda Chuuya vs JJ Hankwena (SCZ judgment No. 3 of 2002).**
- 6. Kumbi vs Zulu 2009 ZLR 183.**

**7. Livingstone Motor Assemblies Ltd vs Indeco Estates Development Company Ltd and Others SCZ judgment No. 1 of 2013.**

***Others Works referred to:***

**1. Snells Equity Thirty First Edition Thomson Sweet & Maxwell 2005.**

On 14<sup>th</sup> October, 2014, the plaintiff applied ex parte, for a charging order pursuant to order 50 Rule 2 RSC 1999 edition. It was proposed to charge stand No. 9170 situated in the City of Lusaka, with the judgment debt in the sum of K 141, 001.5, together with interest. I signed the said order on 28<sup>th</sup> October, 2014 and appointed the 18<sup>th</sup> November, 2014 for interpartes hearing for the defendant to show cause to the contrary.

On 17<sup>th</sup> November, 2014, learned counsel for the defendant took out a notice to raise preliminary issues in the following terms:

- 1. Whether or not a Charging Order issued pursuant to Order 50 Rule 1 of the Rules of the Supreme Court 1999 Edition with its attendant rights of sale of the property charged via summary procedure, is available as a mode of enforcement of judgments in Zambia given that the entire Order 50 of the RSC is grounded in an English Charging Act of 1979 which Act has not been extended to Zambia by the British acts Extension Act Chapter 10 of the Laws of Zambia.*

2. *Whether or not there is a lacuna in Zambia's Writ of Execution under Order 42 of the High Court Rules Chapter 27 of the Laws of Zambia to warrant resort to the White Book Edition in the fashion proposed by the plaintiff.*
3. *In the event that this Honorable Court holds that the Charging Order is indeed available and was properly issued, whether or not same was properly issued in accordance with Rule 16 of the High Court Rules chapter 27 of the Laws of Zambia and or without first issuing a Writ of Eligit also under Order 42 of the High Court Rules chapter 27 of the Laws of Zambia given that a Charging Order Absolute clothes the Plaintiff with the power of sale of the charged property via summary procedure.*
4. *Further, in the event that this Honorable Court holds that the Charging Order is available in Zambia, whether or not it is competent to apply for a Charging Order after having issued a Writ of Fieri Facias without presenting the Court with the Debit and Advice Note from the Sheriff of Zambia.*

Skeleton arguments have been filed in on behalf of both parties, on which they have placed reliance.

Learned counsel for the defendant contends, in said arguments that the application before the court is totally misconceived at law as order 50 rule 1 of the rules of the Supreme Court is inapplicable in Zambia. That there is no Lacuna on execution of judgments in the laws of Zambia or the rules, to warrant resort to the white book in the manner proposed by the plaintiff.

Learned counsel has alluded to the jurisdiction regarding applicability of English Practice and Procedure in our Courts, by referring to **Saidi Siwingwa (1979) Z.R. P. 145, Kabwe Transport Ltd vs Press Transport (1975) LTD (1984) Z.R. 43, Manfred Kabanda and Kajeema Construction vs Joseph Kasanga (1992) S.J. 15 and Ruth Kumbi vs Robinson Kaleb Zulu (S.C.Z. Judgment No. 19 of 2009).**

Commenting on the **Ruth Kumbi case**, which applied the White Book Wholesale to this jurisdiction. Learned counsel submitted that the said judgment caused confusion, in view of the fact that Zambia has three pieces of legislation that deal with the applicability of English statutes, namely the **British Acts Extension Act CAP 10, English Law (Extent of Application) Act CAP 11** and section 10 of the **High Court Act 27** of the Laws of Zambia. The absurdity created by the **Ruth Kumbi Case**, learned counsel argued, was reversed by amendments to section 10 of the High Court Act, and the English Law (Extent of Application) Act. That the effect of the two amendments was to restore the pre-*Ruth Kumbi* position.

It is submitted that there is no Lacuna in our laws, to warrant resort to the Charging Orders Act, by invoking provisions that rely on an Act of parliament whose application has not been extended to Zambia. That there is an express provision on execution of money judgments, in Order 30 rule 14 of the High Court Rules and Order 42 of the High Court Rules. It is submitted that under our law, a secured creditor has recourse to mortgage actions pursuant to Order

30 rule 4 HCR and if unsecured, a plaintiff can rely on Order 42 HCR to enforce a judgment.

It is submitted that there is no mention of a charging order in order 42, and deliberately so. That order 50 RSC transforms an unsecured creditor into a secured creditor; a situation not contemplated in this jurisdiction.

It is argued that as order 50 RSC is entirely grounded on the 1979 Charging Orders Act, an English Act not extended to Zambia, the reasoning of the Supreme Court in the *Kabwe Transport* and *Manfred Kabanda* cases apply. It is contended that there is no lacuna on enforcement or execution of money judgments in Zambia, orders 30 rule 14 and 42 having sufficiently provided for the same. I am urged to hold that order 50 rule 1 RSC 1999 Edition does not apply to Zambia.

The defendant opposes the preliminary issues raised. Skeleton arguments have equally been filed herein. It is first argued that the Notice to Raise Preliminary Issues has been brought under the wrong provision of the law, and must be dismissed forthwith. That under Order 33 and 3 RSC, it is for the court to order questions of fact or law to be tried before the main trial. That the present matter is beyond trial and at execution stage. That the defendant has filed the Notice and gone ahead to argue the preliminary issues. That the issues raised ought to be dismissed with costs.

Learned counsel for the plaintiff has quoted **Halsburys Laws of England 4<sup>th</sup> Edn. Vol. 37**, the first paragraph wherein the purpose of civil procedure law is discussed. He then contends that there is a clear distinction between procedural and substantive law. According to learned counsel, in terms of section 10 of the High Court Act as amended by Act No. 7 of 2011, all procedural law contained in the White Book, and law and practice applicable in England up to 31<sup>st</sup> December, 1999 is applicable in Zambia, including the Charging Orders Act of 1979. That although an action cannot be commenced to assert a right under the Charging Orders Act 1979, the Act is available for procedural purposes through the White Book.

Learned counsel argues that the White Book is mostly based on the Supreme Court Act, 1981, an English Act. That Order 33 lists several sources, none of which are applicable to Zambia. That the 1999 White Book and the law and practice applicable in England in the High Court of Justice up to 31<sup>st</sup> December, 1999 is applicable, for purposes of practice and procedure.

It is submitted that Order 50 RSC only complements the Charging Orders Act.

Regarding the second preliminary issue, it is argued that the authorities cited are based on repealed law, the old section 10 of the High Court Act, before it was repealed by Act No. 7 of 2011. Referring to the **Kabwe Transport** case, it is submitted that that case is distinguishable from the present one on the grounds that the **Kabwe Transport case** discussed actual legislation and not procedural rules of court. Further, that there is actual legislation that deals

with evidence in Zambia, but no Charging Orders Act in Zambia. The application for a Charging Order is made pursuant to a rule in the White Book, and not a particular section of Legislation. That reference to the Charging Orders Act 1979 is a creation of the defendant and not the plaintiff. Further, it is argued, the question in the *Kabwe Transport* case was whether a piece of evidence was admissible and not how it was to be admitted.

It is contended that a Writ of Elegit and Charging Order are completely different, and it cannot be said there is an equivalent procedure in our local rules. A judgment creditor therefore has a choice, as per the words of Justice Ngulube in **Clement Chuuya & Hilda Chuuya vs JJ Hankwena (SCZ judgment No. 3 of 2002)** where Chief Justice Ngulube, as he then was said

*“There are many ways of enforcing a money judgment and if a judgment creditor chooses to proceed by way of elegit this must be done properly. Similarly, if charging orders are preferred, the correct procedure and practice must be adopted.”*

It is submitted, premised on the said statement, that a judgment creditor has a choice between the two methods of enforcement.

Turning to the third preliminary issue, it is submitted that Order 42 and 30 HCR clearly indicate that there is no chronological order of methods of execution to be employed once the judgment creditor has failed to recover from personal property.

On the fourth issue, it is submitted that the duty to file a return after execution lies with the Sherriff and not the plaintiff. I am, on the whole, urged to dismiss the preliminary issues with costs.

I have considered the spirited submissions made by both learned counsel. The Notice of Intention to raise Preliminary Issues is issued pursuant to Order 33 rule 3 RSC 1999.

I agree that the said Order deals with trials. The questions or issues that may be raised are those that may be tried before the trial of the cause or matter. The fact that the parties are required to obtain an order of the court suggests that an application must be made to the court for an order that the preliminary issues or questions be tried before the main matter. In a proper case, I agree that failure to obtain an order to try the preliminary issue would be fatal. On the view I have taken of this matter however, I will proceed to determine the preliminary issue, by my inherent powers.

Learned counsel for the defendant laments the decision handed down by the Supreme Court in **Kumbi vs Zulu 2009 ZLR 183**, saying the said judgment caused confusion in light of the three pieces of legislation obtaining at the time. He says that the absurdity of the Ruth Kumbi decision made the Ministry of Justice to propose amendment of relevant legislation to correct the situation. I think it is imperative to outline the provisions of the law at the time the Kumbi decision was made:



The English Law (Extent of Application) Act CAP 11 of the Laws of Zambia declares the extent to which the Laws of England apply in the Republic.

By Act No. 14 of 2002 that Act was amended by inclusion of 2 (e). It now provided:

*2 Subject to the provisions of the Constitution and to any other written law\_\_*

- a) The common law; and*
- b) The doctrines of equity;*
- c) The statutes which were in force in England on the 17<sup>th</sup> August, 1911 being the commencement of the Northern Rhodesia Order in Council, 1911; and*
- d) Any statutes of later date than that mentioned in paragraph (c) in force of England, now applied to the Republic, or which shall apply to the Republic by an Act of Parliament, or otherwise;*
- e) The Supreme Court Practice Rules of England in force until 1999: shall be in force in the Republic*

*Provided that the Civil Court Practice 1999 (The Green Book) of England or any other civil court practice rules issued after 1999 in England shall not apply to Zambia except in matrimonial causes.*

In 2011, by Act number 6 of that year, the said Act was amended to read as follows:

- 2. Subject to the provisions of the Constitution of Zambia and to any other written law\_\_*
- a) The common law; and*
- b) The doctrines of equity; and*

- c) *The statutes which were in force in England on the 17<sup>th</sup> August, 1911 (being the commencement of the Northern Rhodesia Order in Council, 1911); and*
- d) *Any statutes of later date than that mentioned in paragraph (c) in force in England, now applied to the Republic, or which hereafter shall be applied thereto by any Act or otherwise; shall be in force in the Republic. (As amended by Acts No. 24 of 1973 and 1 of 1991)*

It will be observed that section (e), which had earlier been introduced by Act No. 14 of 2002 was now repealed. Section 2 (e) of Act No. 14 of 2002 had made the Supreme Court Practice Rules of England in force until 1999 applicable to Zambia. The provision was in conflict with section 10 of the High Court Act CAP 27 of the Laws of Zambia by which the Rules of the Supreme Court of England were applicable only where there was default in practice and procedure in our rules. Section 2 (e) of Act number 14 of 2002 The English Law (Extent of Application) Act applied the entire Supreme Court Rules to this jurisdiction. That is why the Supreme Court of Zambia held as it did, in the *Kumbi* case, because by statute, the entire White Book had been made applicable in our courts. The courts could not ignore section 2(e) of Act number 14 of 2002.

I do not see how that decision can be characterized as absurd, when all the Supreme Court did was to apply the law as it then stood. If that piece of legislation was absurd, the absurdity cannot be blamed on the Supreme Court, which merely interpreted the law, as per its function.

I must admit that I felt the Supreme Court was unjustly condemned for the *Kumbi* decision and could not resist the urge to set the record straight, in all fairness.

I now turn to consider the issues raised. Resort to the 1999 RSC is provided for by section 10 of the High Court Act CAP 27 of the Laws of Zambia.

The Rules of the Supreme Court are to be resorted to when there is default in our Rules regarding Practice and procedure. The jurisdiction conferred on the High Court is to be exercised in accordance with the Rules of Court made under the High Court Act. Where there is default, we are to look to the Rules of the Supreme Court and apply the practice and procedure obtaining in England, in exercising the jurisdiction conferred on the High Court by the law. The extent to which substantive laws of England may be resorted to is prescribed by The English Law (Extent of Application) Act CAP 11 of the Laws of Zambia.

In my considered view, the default envisaged is that occurring when the rules make no provision for the procedure and practice to be employed when a particular relief is craved by a litigant in the High Court. And the relief a litigant claims must be that obtainable under the laws the High Court is by Law mandated to apply in determining questions and issues that are raised before it. English Substantive law has been resorted to in this jurisdiction where there has been default in our own substantive law. In **Livingstone Motor Assemblies Ltd vs Indeco Estates Development Company Ltd and**

**Others SCZ judgment No. 1 of 2013**, the Supreme Court resorted to English Law in determining a dispute under the Companies Act. They said,

*“There is no provision in this division dealing with the status of a receiver manager in a case where there is a liquidator overseeing the winding up of a company. It is our considered view therefore, that in this respect, a lacuna does exist and there is therefore, a need to draw a parallel between the Laws of England and those of Zambia”.*

It appears therefore that where there is in force in Zambia a piece of legislation similar to that obtaining in England, and our legislation does not provide for a situation which English law provides for, and a question arises for determination of an issue on the point on which our law is silent, recourse can be had to English Law.

The question to be asked is, is it competent for the plaintiff to obtain a charging order pursuant to Order 50 RSC?

Order 50 RSC forms part of the Rules of the Supreme Court made for the purpose of regulating and prescribing the practice and procedure to be followed in the Supreme Court of England. I agree that Order 50 RSC is not part of the Charging Orders Act. It merely outlines the procedure to be followed in applying for a charging order. A scrutiny of the history of charging orders, obtainable in England reveals that prior to the Charging Orders Act of 1979, a judgment creditor could obtain a charging order over a judgment debtor's

shares, stocks, funds and annuities pursuant to the **Judgments Act of 1938 (1&2 Vict. C. 110) S. 14** and the Judgment **Act 1840 (3 & 4 vict. 82) S.1**. A charging order over land was unobtainable. As at 1911, there was no provision that entitled a judgment creditor to obtain a charging order over land. **Snells Equity Thirty First Edition Thomson Sweet & Maxwell 2005 by John Mcghee QC** states, at paragraph 17-26 page 438 that, *The Writ of elegit was abolished in 1956 (by the Administration of Justice Act 1956, S. 34(1)) and replaced by a system of charging orders.*

It is clear that the charging of land by way of enforcement of a judgment was introduced as late as 1956, and that mode of enforcement of a judgment was not available to a judgment creditor prior to that. Therefore, it is not a mode of enforcement that was available in Zambia by virtue of the statutes extended to this jurisdiction, nor by the common law, or equity.

The law that is applicable to this jurisdiction is prescribed by statute. The English statutes that were in force as at August 1911, in England are applicable to Zambia. After that year, only those that have been expressly extended to Zambia are applicable. The Charging Orders Act 1979 of England, is not one of those Acts extended to Zambia.

A charging order is intended to secure payment of money due to a judgment creditor. It is an indirect method of enforcement of a judgment. The learned authors of **Halsbury's Laws of England 4<sup>th</sup> Edition Vol. 17** state, in paragraph 523, that as the writs of execution, that is, writs of fieri facias,

possession, delivery, sequestration e.t.c. do not reach many kinds of property which a debtor may own, various types of proceedings have been authorized by statute or rules of Court or, to a limited extent, under the inherent powers of the court, whereby a judgment creditor can obtain satisfaction of his debt out of the property of the debtor which otherwise he could not reach.

Charging Orders are one such mode of enforcement.

The learned authors of **Halsbury's Laws of England** opcit state, at page 343 that the Administration Act 1956, S. 35(1) County Courts Act 1959, S. 204, Sch 3, RSC Order 50 rule 1 (1), replaced the procedure by Writ of Elegit which previously had been the usual method of execution against the land of a judgment debtor.

I gather therefore that enforcement of a judgment by Writ of Elegit is no longer available in England. It has been replaced by charging orders. That is not the position in Zambia, as enforcement by Writ of Elegit is still applicable by virtue of the High Court Act, CAP 27 of the Laws of Zambia. The question that arises is whether there is legislative default in enforcing execution against land owned by a judgment creditor. I think the inevitable answer to that question is negative, as adequate provision to recourse a judgment debtor's land in execution exists in our own High Court Act. Order 50 RSC is premised on the Charging Order Act 1979 and it is incorrect to say that one can apply the provisions of Order 50 RSC in a vacuum, when that Order is premised on the Charging Orders Act 1979 of England. This is especially in light of the fact that

a charging order cannot be recoured at common law, in equity, by statute, or by English Acts extended to Zambia. It is obvious that although learned counsel argues that it is the procedure only of Order 50 that has been employed, the law on which learned counsel purports to premise the application for a charging order is not disclosed. This is because there is no such law outside the Charging Orders Act of England 1979.

I do not think 'default' means failure to provide for every situation provided for in the Laws of England. It simply means failure to provide legislation for the practice and procedure to be followed in seeking and obtaining the relief a party is entitled to obtain from the High Court under the applicable Laws. Section 10 of the High Court Act cannot have been intended to import every piece of Legislation in England to Zambia. In fact that is why the English Laws (Extent of application) Act was enacted; to prescribe the English Laws that would apply. It has not been shown that the application for a charging order is premised on the Laws pursuant to which relief may be obtained in the High Court in this jurisdiction by a litigant. Therefore, the Charging Orders Act 1979, falling outside the remit of the High Court's jurisdiction is unavailable

The **Kabwe Transport case** is actually illustrative. Order 18, Rule 7A RSC was held to be inapplicable because there is an Evidence Act in Zambia which does not allow the calling of evidence in criminal proceedings to assist a decision in civil proceedings. There is no legislative default. My understanding of that holding is that the Rules of the White Book are not to be applied when there is

specific provision in our law which does not allow the effect application of the Rules of the Supreme Court would bring about. Similarly, I think, the Rules of the Supreme Court are not to be applied if their application would be to extend a substantive piece of legislation that has not been extended to Zambia. In other words, substantive legislation not extended to Zambia is not to be made applicable through the back door, so to speak.

As earlier indicated, there is no procedural default in our High Court rules in so far as Charging Orders over land are concerned, as that mode of enforcement is alien to this jurisdiction. As such, there is no mode of enforcement of a judgment over a debtor's land similar to that obtainable under the Charging Orders Act 1979 of England, which it can be said the plaintiff desires to enforce. Were that the case, it could be said there is default in the practice and procedure to be followed as the High Court Rules make no provision for such. But no such relief is obtainable by the plaintiff outside the Charging Orders Act 1979 of England.

Therefore, there is no default in our rules, warranting recourse to order 50 RSC.

The third preliminary issue is not clear, but I gather the gist to be that a writ of Elegit should have first been issued before a charging order could be issued, as a charging order absolute confers the power of sale by summary procedure on the plaintiff.



Order 42 HCR provides, in rule 3 as follows:

*3 on any levy on the property of any person to satisfy an order or judgment of the court for the payment of money, the real property of such person shall only be sold if the personal property is insufficient.*

Rule 7 of order 42 is in the following terms:

*7 (1) In all cases the Sheriff, Under-Sheriff, bailiff or other person charged with the execution of any particular process shall render a return in Form 16 in the First Schedule within seven days after execution thereof, whether in whole or in part, or after any payment to avoid such execution, specifying the extent to which such process shall have been executed or payment made, and, in the event of the same not being fully executed or payment in full not having been made at the expiration of the first and each succeeding month thereafter, he shall render a return in similar form specifying the reason or reasons why such execution is so incomplete.*

*(2) Where the Sheriff, Under Sheriff, bailiff or other person is charged with the execution of a warrant of commitment or committal, he shall render a return of due execution within seven days after the same shall have been carried into effect or payment or pay payment made in lieu, and in the event of the same not having been carried into effect or payment made as aforesaid at the expiration of fourteen days from the date of receipt thereof and each succeeding fourteen days thereafter, he shall render a return specifying the reason or reasons for such non-execution.*

*(3) Any return required to be rendered under the foregoing sub-rules shall be rendered to the Court in duplicate, and the duplicate thereof shall thereupon be dispatched by the proper officer to the party's solicitor or to the party himself if he is acting in person, as the case may be, who has required such process or warrant to be executed.*

It is manifest that the real property of a judgment creditor can only be sold if personal property is insufficient. And that can only be ascertained after the Sherriff has rendered a return, indicating the extent to which execution has been satisfied on seizure of the debtor's personal property. It appears that a judgment creditor cannot issue process against the judgment debtor's land until a return is rendered. I do not therefore agree that a judgment creditor can enforce his judgment against a debtor's land, under the applicable rules of the court, without indicating that the personal property is insufficient.

According to **Strouds Judicial Dictionary, Fifth Edition Vol. 4 P-R London Sweet and Maxwell Ltd 1986 P. 1924**. Personal Chattels' are chattels which do not savour of real estate, that is goods, furniture and other articles, capable of complete transfer by delivery.

On the foregoing, I hold that it is incompetent for the plaintiff to obtain a charging order on stand No. 9170, Lusaka, pursuant to Order 50 RSC, as the substantive law on which a charging order on land is obtainable is inapplicable to Zambia. Outside of the Charging Orders Act 1979, there is no other law on which the plaintiff can recourse a charging order on land, and employ the practice and procedure outlined in order 50 RSC to that effect. This holding relates to a Charging Order on land only, and I make no pronouncement on other property, as I am here only concerned with a charging order on land.

I further hold that there is no legislative default in so far as enforcement of judgments by charging orders on Land is concerned, as that mode of

enforcement is not available in Zambia. I equally hold that a return must be rendered on execution by Writ of Fife before the real property of a judgment debtor can be resorted to by a judgment creditor. In sum, the preliminary issues are upheld. I will make no order for costs as charging orders over land have been obtained in this jurisdiction by other litigants before. It would be unjust to condemn the plaintiff in costs in the circumstances. The Charging Order nisi earlier granted by this Court is accordingly discharged. Leave to appeal is granted.

Dated the .....<sup>5<sup>th</sup></sup>.....day of .....<sup>May</sup>..... 2015

  
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**F. M. CHISANGA**  
**HIGH COURT JUDGE**