

**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2012/HPC/0630

BETWEEN:

AGNES NGOMA

AND

ALPHAGE INVESTMENTS LIMITED



PLAINTIFF

DEFENDANT

Before the Honourable Mr Justice W.S Mweemba at Lusaka in Chambers.

For the Plaintiff : Mr Butler Sitali - Messrs Butler & Company for Mr M. Mutemwa S.C of Messrs Mutemwa Chambers.

For the Defendant : Mrs M. Siamoondo - Messrs Ranchod Chungu Advocates.

R U L I N G

LEGISLATION REFERRED TO:

- 1. Rules of the Supreme Court of England 1999 Edition (White Book).*
- 2. Order 3 Rule 2 High Court Rules, Cap 27 of the Laws of Zambia.*

CASES REFERRED TO:

- 1. Leopold Walford (Z) Limited V Unifreight SCZ Judgment No.223 of 1985.*
- 2. NFC Africa Mining PLC V Techno Zambia Limited (2009) Z.R 236.*

- 3. *Twampane Mining Corporation Society Limited v E. M Storti Mining Limited (2011) Z.R 67.***
- 4. *Zambia Revenue Authority V Jayesh Shah (2001) ZR 60.***
- 5. *Botswana, Ministry of Works Transport and Communications, Rinceau Design Consultants (sued as a firm previously trading as KZ Architects) V Mitre Limited (1995) ZR 113.***

This is an application by the Defendant for an order to set aside Writ of Summons for irregularity pursuant to Order III Rule 2 and Order VII Rule 1 (1) (a) of the High Court Rules, Cap 27 of the Laws of Zambia.

The application is supported by an Affidavit sworn by Malama M. Siamoondo an Advocate of the High Court for Zambia and Skeleton Arguments filed into Court on 5th February, 2016.

It was deposed by Mrs Siamoondo that on 6th November, 2012 the Plaintiff caused to be issued out of the Commercial Registry a Writ of Summons and Statement of Claim against the Defendant claiming the following:

- (i) Rescission of the Contract of Sale dated 4th May, 2012 relating to the remaining extent of Sub-division A of Lot 2623/M Lusaka and the Remaining Extent of 2623/M Lusaka.*
- (ii) Damages for breach of contract.*
- (iii) Further or other relief.*
- (iv) Costs.*

It was also deposed that a careful perusal of the said Writ of Summons revealed that the Plaintiff's Advocates had failed to disclose the Plaintiff's physical, postal and electronic address and only states that the Plaintiff carries on business at Lusaka.

That due to this the writ was rendered defective and should therefore be struck out for irregularity. Moreover that as a consequence of the irregularity it would be impossible to trace the Plaintiff should an order for costs be made in favour of the Defendant at the conclusion of the matter or indeed if she required to be contacted in relation to these proceedings or at all.

There was no Affidavit in Opposition filed into Court by the Plaintiff.

Counsel for the Defendant filed in Skeleton Arguments in support of the application. She contended that Order VII Rule 1 (a) of the High Court Rules Cap 27 of the Laws of Zambia states that:

“The Advocate of the plaintiff suing by an Advocate shall endorse upon the writ of summons-

(a) the physical, postal and electronic address of the Plaintiff”.

Counsel also cited the case of **LEOPOLD WALFORD (Z) LIMITED V UNIFREIGHT (1)** where the Supreme Court stated:

“Order VII Rule 1 of the High Court Rules is clear in its terms and requires not only that the address of the

Plaintiff's Advocates shall be endorsed on the writ, but also that the address of the Plaintiff shall similarly be endorsed thereon".

She also referred to the case of **NFC AFRICA MINING PLC V TECHNO ZAMBIA LIMITED (2)** where it was held as follows:

"Rules of the Court are intended to assist in the proper and orderly administration of justice and as such they must be strictly followed".

Counsel also relied on the case of **TWAMPANE MINING CORPORATION SOCIETY LIMITED V E. M STORTI MINING LIMITED (3)** where the Supreme Court held the following view on the need to comply with the rules.

"To choose to ignore rules is to do so at one's own peril".

Counsel also contended that a perusal of the Writ of Summons would show that only the town where the Plaintiff resided is disclosed and this showed a clear failure to disclose the physical, postal and electronic address of the Plaintiff as prescribed by law and an obstruction of Justice that the rules of Court invariably intends to administer.

The Plaintiff did not file any Skeleton Arguments in Opposition to the application.

During the hearing on 22nd February, 2016, Counsel for the Defendant relied on the Affidavit in Opposition and Skeleton Arguments filed into Court on 5th February, 2016.

Counsel for the Plaintiff opposed the application before Court and relied on Order 2 Rule 2 of the Rules of the Supreme Court of England 1999 Edition (White Book) which states that an application to set aside must be filed within a reasonable time and before the party applying has taken any steps in the matter.

According to Counsel for the Plaintiff, both these two criteria had not been satisfied by the Defendant. The process was served in 2012 and then 2013 and more than three years had elapsed from then.

Moreover, that the Defendant had made several applications and filed a Defence. On 14th May, 2015 there was a Scheduling Conference at which the Order for Directions was issued and the Defendant complied by filing the List of Documents, Bundle of Pleadings and Documents.

Counsel also contended that since the Defendant had taken all these steps with a view to defend the matter on the merits the Defendant should be taken to have waived the irregularity.

Further that the address of the Plaintiff had been clearly set out in her Witness Statement should the Defendant want to know where to find her.

In response to these arguments Counsel for the Defendant maintained that the Writ was irregular in the absence of an application for amendment. Further that the Witness Statement was not a pleading hence the requirement for the physical, postal and electronic address to be placed on the Writ of Summons.

I have considered the affidavit evidence, the Skeleton Arguments as well as viva voce arguments.

The main issue for determination by this Court is whether or not the Writ of Summons herein should be set aside for irregularity since the Plaintiff did not endorse her physical, electronic and postal address on it.

The Defendant made this application pursuant to Order VII Rule 1 (a) of the High Court Rules, Cap 27 of the Laws of Zambia which states that:

“The Advocate of the Plaintiff suing by an Advocate shall endorse upon the writ of summons-

(a) the physical, postal and electronic address of the Plaintiff.”

It was contended that since the Plaintiff herein did not endorse the physical, electronic and postal address on the Writ of Summons then it was defective and ought to be set aside by this Court.

In response Counsel for the Plaintiff opposed the application based on Order 2 Rule 2 of the Rules of the Supreme Court (White Book) 1999 Edition which states that an application to set aside must be filed within a reasonable time and before the party applying had taken any steps in the matter. Further that both requirements had not been met as 3 years had passed since the matter was commenced which was not a reasonable time and that the Defendant had already taken steps in this matter and should be taken to have waived the irregularity.

Order 2 Rule 2 of the Rules of the Supreme Court of England (White Book) 1999 Edition states that:

“An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity”.

In view of this law I agree with the Defendants argument that the application by the Plaintiff has not been made within a reasonable time since it has been at least three years from the time this matter was commenced before Court. I have also noted that the Defendant has already taken significant steps in this matter such as filing of the Defence on the 20th of April, 2015 and complying with the Order for Directions issued by this Court on

14th May, 2015 by filing the Defendant's Bundle of Documents and Bundle of Pleadings.

Moreover I have considered the case of Republic of **BOTSWANA, MINISTRY OF WORKS TRANSPORT AND COMMUNICATIONS, RINCEAU DESIGN CONSULTANTS (SUED AS A FIRM PREVIOUSLY TRADING AS KZ ARCHITECTS) V MITRE LIMITED (5)** where at page 116 the Supreme Court held that:

“As regards whether or not the rule is mandatory or directory and therefore discretionary we wish to refer to Order 2 Rule 1(1) of the White Book, 1995 Edition, Volume 1 and to our decision in Leopold Walford case cited by Mr Kawanambulu. O.2 r 1(1) provides as follows:

“Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect the failure shall be treated as an irregularity and shall not nullify the proceedings any step taken in the proceedings or any document, judgment or order herein.

And in Leopold Walford case (2) at page 205 we said:

“As a general rule, breach of a regulatory rule is curable and not fatal.”

The High Court rules, like the English rules, are rules of procedure and therefore regulatory and any breach of these rules should be treated as mere, irregularity which is curable”.

I have also considered the Supreme Court case of **ZAMBIA REVENUE AUTHORITY V JAYESH SHAH (4)** where it was held that:

“Cases should be decided on their substance and merit. The rules must be followed, but the effect of a breach will not always be fatal if the rule is merely regulatory or directory”.

This being the case, I FIND that although the Plaintiff omitted to endorse her physical, postal and electronic address on the Writ of Summons it is not a ground upon which the originating process should be set aside or struck out. This is premised on the fact that the requirement of endorsing the physical, postal and electronic addresses although couched in mandatory terms in the High Court Rules is not something that cannot be cured and as was stated in **LEOPOLD WALFORD (Z) LIMITED V UNIFREIGHT (1)** the High Court Rules like the English rules, are rules of procedure and therefore regulatory and any breach of these Rules should be treated as a mere irregularity which is curable.

Based on the foregoing I have come to the conclusion that this is not a proper case where the Court can exercise its jurisdiction to set aside the Originating Process herein for irregularity. I accordingly refuse the Defendant's application to Set Aside the Writ of Summons for irregularity.

Pursuant to Order 18 Rule 1 of the High Court Rules, Cap 27 of the Laws of Zambia, the Plaintiff is allowed to amend the Writ of Summons and rectify the omission. I Order and Direct that the Plaintiff do file the Amended Writ of Summons on or by 30th June, 2016.

Costs to be in the cause.

Leave to appeal is granted.

Delivered in Chambers at Lusaka this 13th day of June, 2016.



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WILLIAM S. MWEEMBA
HIGH COURT JUDGE