**IN THE HIGH COURT FOR ZAMBIA** **2015/HP/2430**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*


**B E T W E E N :**

KUMASONDE CHAMBERS **PLAINTIFF**

**AND**

ZAMBIA DEVELOPMENT AGENCY **DEFENDANT**

**Before Honorable Mrs. Justice M. Mapani-Kawimbe on 26th September, 2016**

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| *For the Plaintiff* | : | *Mr. K.I. Mulenga, Messrs Kumasonde Chambers* |
| *For the Defendant* | : | *Mr. N.M. Mulikita of Messrs N.M. Mulikita and Partners* |

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# JUDGMENT

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**Case Authorities Referred To:**

1. *Lyons Brooke Bond (Z) Limited Vs Zambia Tanzania Road Services Limited (1977) Z.R. 317*
2. *William David Charlisle Wise Vs E.F. Hervey (1985) Z.R. 179*
3. *Letang Vs Cooper (1965) 1 Q.B. 232*
4. *Zambia Revenue Authority Vs Jayesh Shah (2001) Z.R. 60*
5. *Attorney General Vs Marcus Kampumba Achiume (1983) Z.R. 1*
6. *Costellow Vs Sommerset County Council (1993) 1 ALL ER 956*
7. *Attorney General Vs Roy Clarke (2008) Z.R. 38 Vol. 1*
8. *Rosemary Chibwe Vs Austine Chibwe (2001) Z.R. 1*
9. *NFC Africa Mining Plc Vs Techro Zambia Limited SCZ Judgment N0. 22 of 2009*
10. *Blair Freight International Limited Vs Credit Bank Limited SCZ Appeal No. 209 of 1997*

**Legislation Referred To:**

1. *High Court Act, Chapter 27*
2. *Rules of the Supreme Court 1999 Edition, (White Book)*

I was moved in this matter by way of notice of appeal dated 12th May, 2015. In that notice, the Plaintiff advanced a sole ground of appeal, that is, it was wholly dissatisfied with the Ruling delivered by the lower Court on 29th March, 2016. Although one ground was advanced, there appears in my view to be three fronts of contention namely:

1) *That the conditional memorandum of appearance and defence entered by the Defendant on 4th January 2016, were filed out of time. That being the case, the Defendant was not entitled to file an application to dismiss the Plaintiff's action pursuant to Orders 18 and 19 of the Rules of the Supreme Court.*

2) *That the lower Court should have regarded the Plaintiff's prayer to refer the matter to taxation.*

3) *That the lower Court misdirected itself when it found that the Plaintiff's claim was improperly instituted and did not disclose a cause of action.*

With regard to the first contention, the Plaintiff submitted that it filed writ of summons and a statement of claim on 18th December, 2015. Further, that Court process was served on the Defendant on the same day. The Plaintiff also submitted that according to the writ of summons, the Defendant was required to enter an appearance within 14 days after service of writ, including the day of service. The Plaintiff contended that the Defendant only entered a memorandum of conditional appearance, on 4th January, 2016, four days after the prescribed period endorsed on writ of summons.

The Plaintiff submitted that there was no evidence before Court showing that the Defendant had applied for leave to file its memorandum of conditional appearance out of time. The Plaintiff thus argued that since leave had not been sought by the Defendant, then the lower Court should not have allowed it to file an application to dismiss the Plaintiff's action.

The Plaintiff contended that by allowing the Defendant's application, the lower Court did not adhere to the rules on the requirements of pleadings. The Plaintiff relied on the cases of **Lyons Brooke Bond (Z) Limited Vs Zambia Tanzania Road Services Limited**, **Blair Freight International Limited Vs Credit Bank**

**Limited**, **NFC Africa Mining Plc Vs Techro Zambia Limited**, which state the law on pleadings.

I have given serious consideration to the Plaintiff's contention. In my view, what I am being invited to determine is whether the memorandum of conditional appearance entered by the Defendant on 4th January, 2016 was properly before the Court. By way of spin off, I am invited to determine whether the Defendant's application to dismiss the Plaintiff's cause of action was rightfully instituted before the lower Court.

Order VI Sub rule 4 of the High Court (Amendment) Rules, provides that:

> "***4. Every writ of summons shall be endorsed with a statement of the nature of the claim made, or of the relief or remedy required and shall, subject to the other provisions of these Rules, state a time (to be fixed by the Registrar) within which appearance must be entered by the party sued or to be served."***

In addition, Order XI Sub rules 1 and 2 of the High Court (Amendment) Rules states that:

> ***1. (1) A defendant shall enter appearance to a writ of summons by delivering to the proper officer sufficient copies of memorandum of appearance in writing dated on the day of their delivery, and containing the name of the defendant's advocate, or stating that the defendant is defending in person. The defendant shall at the same time deliver to the proper officer sufficient copies of the defence and counter claim if any:***

***Provided that before delivering the memorandum and defence, the defendant shall be at liberty to apply for further and better particulars of the statement of claim within the period specified for delivery of the memorandum and defence.***

***(2) On receipt of these documents the proper officer shall forthwith enter the appearance as of the date of receipt of the memorandum of appearance and defence and shall seal them with the official seal showing the date on which they are sealed and shall post a copy to the defendant:***

***Provided that no appearance shall be accepted which is received out of time.***

What I discern from Order VI Sub rule 4 of the High Court (Amendment) Rules, is that the Registrar is required to fix the time within which a party sued must enter an appearance. This Sub rule in my considered view is prescriptive. That is, a party that has been served with Court process must respond to writ of summons within the time stated on the writ.

I wish to add that Order VI Sub rule 4 is reinforced by Order XI, Sub rules 1 and 2. The said Sub rules require a sued party to enter an appearance within the time stipulated on a writ. There can be no deviation to the requirement in the said Sub rules except where time has been enlarged by the Court.

I have perused the Court's record and find that the writ of summons *in casu* was filed on 18th December 2015, together with the statement of claim. The Court's record also shows that Court process was served on the Defendant on the same date. The Court's record further reveals that the Defendant filed a memorandum of conditional appearance on 4th January 2016.

I have noted from the Court's record that there is no evidence to show that the Defendant sought leave to enter a memorandum of conditional appearance out of time. I find that this is a serious breach of the Court's rules by the Defendant. Because of that breach, the lower Court misdirected itself when it heard the Defendant's application to dismiss the Plaintiff's cause of action. The Defendant was not properly before Court and it did not take any steps to redress its circumstances. Therefore, it should not have been heard by the lower Court.

Accordingly, I hereby set aside the lower Court's Ruling dismissing the Plaintiff's cause of action. By setting aside the lower Court's Ruling, the Plaintiff's cause of action is reinstated. I will nevertheless have to determine it on merit.

In its cause of action, the Plaintiff's contends that it is entitled to the immediate recovery of party to party costs. The Plaintiff submitted that since it was awarded costs in cause no. 2015/HP/1384, its matter ought to be referred to taxation.

The Plaintiff referred the Court to the cases of **Rosemary Chibwe Vs Austine Chibwe** and **Attorney General Vs Roy Clarke.** In the former case the principle of law is that the Court's conclusions must be based on facts stated on record. In the earlier cases, the principle of law is ***"that a party cannot rely on unpleaded matter except where evidence on the unpleaded matters has been adduced in evidence without objection from the opposing party."***

I have no quarrel with the principles of law cited by the Plaintiff. However, I find that they are of very little value in this matter. I will therefore not make further reference to them.

I am however, spellbound by the principle in the case of **Attorney General Vs Marcus Kampumba Achiume** cited by the Learned Counsel for the Plaintiff which states that:

***"an unbalanced evaluation of the evidence, where only the flaws of one side but not of the other are considered, is a misdirection which no trial court should reasonably make, and entitles the appeal court to interfere."***

It is upon that authority that I will now embark on my point of departure in determining the issue at hand, being mindful of the arguments that have been canvassed by the Plaintiff.

To start with Order 62 Sub rules 2 and 3 of the White Book provides sets out thus:

***".....(2) No party to any proceedings shall be entitled to recover any of the costs of those proceedings from any other party to those proceedings except under an order of the Court.***

***(3) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."***

What I understand the Sub rules to mean is that costs abide the event. That is to say, party to party costs are only recoverable after a matter has concluded, except where the Court orders

otherwise. In other words, the Court can order a party to recover costs before the conclusion of a matter.

Order 62 Sub rules 2 and 3 of the White Book are buttressed by Order XL, Sub rule 2 of the High Court Act Rules, which provides that:

> ***"All questions relating to the amount of costs shall, unless summarily determined by the Court, be referred to a taxing officer, and, after notice of taxation to the parties, be ascertained by him".***

In my view the significance of the said Sub rule is that after a matter has concluded, and where a successful party has been awarded costs, that party can move to recover costs. In doing so, parties must as a matter of right agree on costs. It is only in the event of default of agreement that a matter can be referred to taxation.

It is not in dispute that the Plaintiff was awarded costs in cause no. 2015/HP/184, which cause was struck off and later restored. It is also not in dispute that there was no order given by the Court requiring the Plaintiff to recover costs immediately in cause no. 2015/HP/184.

I nevertheless, find it necessary to refer to the lower Court's Ruling at page 6 which provides that:

"..... ***the costs awarded to the now Plaintiff in cause 2015/HP/1384 when the matter was struck off the active list are not due to be paid forth with, as there was no order to that effect. Even in the event that there was an order that they be paid forthwith, the appropriate procedure would have been to commence taxation proceeding in the cause that they arose, and not commencing a fresh action to recover them. The plaintiff would have only been entitled to commence an action to recover the costs in fresh cause if what was sought to be recovered was advocate and client costs, after the expiration of one month after the bill was served on the client.***

My understanding of the lower Court's Ruling is that it did not challenge the fact that the Plaintiff was awarded costs in cause no. 2015/HP/1384 but the time of recovery. The lower Court insisted that the costs due to the Plaintiff in that cause were only recoverable at the conclusion of that matter. The lower Court also stated that the costs in cause no. 2015/HP/1384 could be sufficiently recovered therein. This I find is the position of law.

I also find that the lower Court was on firm ground when it decided that the Plaintiff can only recover costs after the conclusion of cause no. 2015/HP/1384. I further find that there is no need for this action as the Plaintiff can sufficiently recover party to party costs in cause no. 2015/HP/1384.

Accordingly, I hold that this appeal is misconceived and has no merit. It is hereby dismissed. I make no order as to costs.

Leave to appeal to granted.

**Dated this 26th day of September, 2016.**

.....M.Mapani.....
Hon. Mrs. Justice M. Mapani-Kawimbe
**HIGH COURT JUDGE**