

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

2015/HP/0311

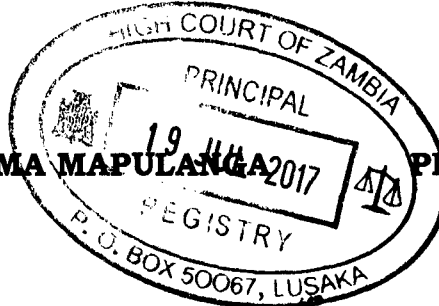
BETWEEN:

AARON BRISBANE SIANGOMA MAPULANGA PLAINTIFF

AND

ZAMBIA NATIONAL COMMERCIAL BANK PLC 1st DEFENDANT

AMIR HUSSAN DEWAN 2nd DEFENDANT



Before the Honourable Mrs. Justice M. C. Kombe

For the Plaintiff : *Mr. L. Mwanabo from Messrs LM Chambers.*

For the 1st Defendant : *Mrs. A. Mwalula – Manager Legal-Zambia National Commercial Bank*

For the 2nd Defendant : *Mr. P. Songolo – Messrs Philsong and Partners*

R U L I N G

Cases referred to:

- 1. James Milling Company Ltd v. Imex International Pty Ltd (2002) Z.R. 79.**
- 2. Thompson v. Henry Bath & Sons Limited (1920) WN 355.**
- 3. Midland Bank Limited v. Stamps (1978) 3 ALL ER 1.**
- 4. Mukumbuta Mukumbuta v. Meat Corporation (2003) SCZ No. 8.**

Legislation and other work referred to:

- 1. The High Court (Amendment) Rules, 2012.**
- 2. The Rules of the Supreme Court (White Book) 1999 Edition.**

This is a Ruling on the Plaintiff's application for an order that this action commenced at the Principal Registry be transferred to the Commercial List. The application is made pursuant to **Order 53 rule 11** of the **High Court Rules Chapter 27 of the Laws of Zambia** and is supported by an affidavit deposed to by **AARON BRISBANE MAPULANGA** the Plaintiff herein.

The gist of the application is that he believes that the dispute in this action arose from a business and bank transaction and is therefore a proper action to be considered on the Commercial List.

The 1st Defendant did not oppose the application. However, the 2nd Defendant opposed the application and he filed an affidavit in opposition to that effect. He explained that he believed the matter was properly before the correct forum because every High Court Judge including Judges serving on the Principal List had original and unlimited jurisdiction to deal with any dispute of whatever nature brought before them.

He deposed that while it was true that the action arose from a mortgage transaction the Plaintiff commenced this action with the aid of Advocates and that the Plaintiff and his advocates made a well informed and conscious decision to commence this matter in the Principal list of the High Court.

He further added that he had been advised that the transfer of actions in the High court had nothing to do with the litigants desire as claimed by the Plaintiff but that the real determinants of the success or otherwise of such applications were the subject matter and the urgency of the case; that he had been advised that there was nothing urgent in this matter to warrant it being suddenly transferred from the Principal list to the Commercial list after the Plaintiff waited

for more than twelve (12) years to commence legal proceedings to challenge the subdivision of ten (10) acres of his land that was sold to him over seventeen (17) years ago; that he had been further advised and verily believed that the Plaintiff's application was nothing but a sad attempt at forum shopping and that the issues of prejudice and inconvenience were totally irrelevant in an application for transfer of cases between the two lists.

At the hearing of the application learned Counsel for the Plaintiff Mr. L. Mwanabo relied on the affidavit in support, the skeleton arguments and the arguments in reply filed into court.

In the skeleton arguments in support of the application, Mr. Mwanabo referred the court to Order 53 rule 11 (1) which provides *inter alia* that:

'A party to an action may at any stage prior to the scheduling conference, apply to a Judge for the transfer of the action to or out of the commercial list.'

He also referred the court to Order 53 rule 1 which defines a commercial action as:

'Any cause arising out of any transaction relating to commerce, trade, industry or any action of a business nature.'

Based on the above definition, he submitted that this court had the discretion to either grant or refuse to admit this action to the Commercial List after due regard had been made to the following matters found in Order 72 rules 5 and 6 of the Rules of the Supreme Court, 1999 Edition namely;

- "(a) Contracts relating to ships and shipping,*
- (b) Insurance and reinsurance,*

- (c) *Banking, negotiable instruments, and international credit,*
- (d) *The international carriage of goods,*
- (e) *Contracts relating to aircraft,*
- (f) *The purchase and sale of commodities*
- (g) *The operation of international markets and exchanges,*
- (h) *The construction and performance of mercantile contracts,*
- (i) *The law and practice of arbitration and questions connected with or arising from commercial arbitration,*
- (j) *Any other matter or any question of fact or law which is particularly suitable for decision by a judge of the Commercial Court."*

In this regard, he submitted that the Plaintiff had denied that he owed the 1st Defendant any money in form of outstanding bank loan to justify its taking the Plaintiff's five (5) acres extra or additional land without the Plaintiff's consent and holding on to the Plaintiff's Certificate of Title thereby resulting in the loss of use of its land and income. Therefore if the matter was not transferred to the commercial list, the Plaintiff would suffer irreparable economic ruin.

In aid, he cited the case of **James Milling Company Ltd v Imex International Pty Ltd**⁽¹⁾ where the Supreme Court commented *inter alia* as follows:

"...The introduction of the Commercial List was a reaction to the business community's complaints that cases of commercial nature were taking too long to dispose of so that by the time judgment was rendered the parties had suffered economic ruin."

He concluded that by this action, the Defendants would not suffer injustice, prejudice or inconvenience.

On behalf of the 1st Defendant, Learned Counsel Mrs. A. Mwalula informed the court that they did not find it necessary to oppose the application.

Learned Counsel for the 2nd Defendant Mr. P. Songolo informed the court that the 2nd Defendant vigorously opposed the application. He relied on the affidavit in opposition and the detailed skeleton arguments filed into court.

In the skeleton arguments, Mr. Songolo submitted that the Plaintiff had moved this court to transfer this action from the Principal list to the Commercial list on the premise that the action stemmed from a mortgage action. He argued that Article 94 (1) of the Constitution conferred on the High Court original and unlimited jurisdiction to determine matters before it and that this included banking and mortgage actions.

He added that a similar discretion had been conferred upon Judges of the Commercial list under Order 72 Rule 5 and 6 of the White Book and submitted that it was not automatic that just because a matter arose from a banking or mortgage transaction then it meant that it should end up on the Commercial list. Mr. Songolo submitted that each matter had to be taken on its own peculiar set of facts. In this regard he referred the court to the case **Thompson v Henry Bath & Sons Limited** ⁽²⁾ where it was held that:

'The transfer of an action from the Chancery division to the commercial court may be refused and conversely the transfer of an action in the commercial court for the payment of money secured by a mortgage to the chancery division may be refused.'

Counsel further submitted that this position was emphasized in the case of **Midland Bank Limited v. Stamps**⁽³⁾ where it was held that:

' ...If a cause or matter is begun in a division other than that in which in accordance with the rules it should have been begun, the court or judge of the division to which it is for the time being assigned has a complete discretion whether to retain it in that division or to transfer it to the division in which it should have been begun.'

He went on and submitted that if this was an action to challenge the 1st Defendant's enforcement of a mortgage then it would have been commenced under the Commercial List in order to secure an expedited trial. However, in this case, there was nothing special or compelling that made the matter suitable for determination by the Commercial List. Counsel argued that this court was properly seized with the hearing of this matter given the facts before it. He relied on Order 53 rule 11 (2) of the High Court Rules and submitted that this court had the discretion to decide whether or not to transfer an action to or from the commercial list.

Mr.Songolo also submitted that this matter was properly before the court and that the Plaintiffs application was simply an unfortunate attempt at forum shopping which the Supreme Court in the case of **Mukumbuta Mukumbuta v Meat Corporation**⁽⁴⁾ had frowned upon.

In conclusion, he submitted that there was nothing urgent or compelling to warrant the sudden decision by the Plaintiff to transfer this action to the

Commercial List. He urged this court to decline the Plaintiff's invitation to transfer this matter to the Commercial List with costs to the 2nd Defendant.

In his submissions in reply, Mr. Mwanabo reiterated his earlier position that this was a commercial action and that the consideration to be taken into account in considering the application of this nature were highlighted under Order 53 rule 11 sub rule 2. Therefore the issue of how early or late the action was commenced did not apply.

He further submitted that this matter had nothing to do with the jurisdiction of this court because the High Court General List and the Commercial List were both under the High Court therefore the constitutional jurisdiction did not apply. It was therefore his submission that this court had the jurisdiction and discretion to grant this application taking into account the legal parameters for consideration of such applications.

On the argument of forum shopping, counsel submitted that this did not arise as the Plaintiff had not commenced a fresh action as the application was well premised on the law and was provided for in the rules of the court.

Those were the submissions by the parties which I have carefully considered.

By this application, the Plaintiff seeks an order from this court to transfer this matter from the General List to the Commercial List. Before I consider the grounds for and against the application to transfer this action, it is important for this court to examine the provisions of the law under which the application has been made as counsel for the Plaintiff has argued that this court has the jurisdiction to transfer this matter.

The Plaintiff has made this application pursuant to Order 53 rule 11 of the High Court (Amendment) Rules, 2012. Order 53 deals with Commercial Actions. For the sake of completeness, Rule 11 reads as follows:

'11. (1) A party to an action may, at any stage prior to the scheduling conference, apply to a Judge for the transfer of the action to, or out of, the Commercial List.

(2) A Judge shall determine whether the cause of action and issues of fact and law likely to arise or the procedures to be followed in an action make the action suitable for inclusion or exclusion in the Commercial List.

(3) Where an order is granted to include an action in the Commercial List, the action shall be commenced and filed in the Commercial List in accordance with this Order.

It is clear from Rule 11 sub rules (1) and (2) that the application to transfer an action to or out from the Commercial List is made to a Judge. According to the Rule 1 sub rule (1) which is the Interpretation Rule, the Court refers to a High Court Judge dedicated to the commercial list and designated by the Chief Justice under rule 4.

This application by the Plaintiff has been made to the Judge on the General List and not the Commercial List. Based on the foregoing provisions, it is very clear to me that this court does not have the jurisdiction to grant an order to transfer this action from the General List to the Commercial List. I say so because

determinations under sub rule 2 whether the cause of action and issues of fact and law likely to arise or the procedures to be followed in an action make the action suitable for inclusion in the commercial list is reserved for the Judges on the Commercial List and not Judges on the General List.

For the reasons I have highlighted above, I find that the application for an Order to transfer this action commenced at the Principal Registry under Cause No. 2015/HP/0311 to the Commercial List is incompetently before this court. I therefore decline to grant the Order sought. Considering the circumstances of the case, I make no order as to costs.

DELIVERED at Lusaka this 19th day of July, 2017.

The stamp is an oval-shaped official seal. The outer border contains the text "HIGH COURT OF ZAMBIA" at the top and "PRINCIPAL REGISTRY" at the bottom. Inside the oval, there is a central rectangular box containing the date "19 JUL 2017". To the right of the date is a small icon of a scale of justice. Below the date, the name "M. C. KOMBE" is written in a stylized, handwritten font, followed by "JUDGE" in a bold, printed font. At the bottom of the oval, the text "50067, LUSAKA" is visible. A horizontal dashed line is drawn across the stamp, passing through the signature.