

IN THE HIGH COURT FOR ZAMBIA

2015/HPC/0423

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN

ZAMBIA NATIONAL COMMERCIAL BANK

APPLICANT

PLC

AND

RACHEL MUDIYO BANDA (Sued as a

RESPONDENT

Customer and Mortgagor)

Before the Hon. Lady Justice Irene Zeko Mbewe

For the Applicant : Ms Mwalula In House Counsel ZANACO

For the Respondent : Mr. S Sikota SC of Messrs Central Chambers

R U L I N G

Cases Referred To:

1. *Zambia Revenue Authority v Hitech Trading Limited SCZ Judgment No 40/2000*
2. *Bond v Dangster Properties Limited [2011] EWCA 455*
3. *Marrion v Vibort [1962] 1 ALL E R 869*
4. *Roy v Prior [1970] 2 ALL E R 729*
5. *Dawkins v Lord Rokeby [1873] L.R 8 QB*

6. *Meadow v General Medical Council [2006] EWCH 146*

Legislation Referred To:

1. *High Court Act, Cap 27 of the Laws of Zambia*
2. *Rules of the Supreme Court, 1999 Edition*

This is a Ruling on the Notice of Motion to raise a preliminary issue pursuant to **Order 33 Rule 3 Rules of the Supreme Court, 1999 Edition** as read with **Section 38 (1) High Court Act, Cap 27 of the Laws of Zambia** on the ground that the Applicant's filed affidavits sworn by Mr. George Mubanga Kashoki, are contrary to **Section 38 (1) High Court Act, Cap 27 of the Laws of Zambia** and that in some portions of the said affidavits, perjury is committed before the Court in that:

1. *The said Deponent for the Applicant in their affidavit in Reply to the Respondents further affidavit filed on the 23rd of May 2017 has sworn in paragraph 9 that they deposited K55,000.00 in the Defendant 's current account shown as "GMK 10" but yet despite bearing the same loan account number this amount has not been reflected for over a year in all other statements*

exhibited by the deponent before this Honourable Court since the year 2015.

- 2. The said Deponent for the Applicant in their Affidavit in Reply to the Respondents further affidavit filed on the 23rd of May 2017 has further sworn in paragraph 10 that they issued a cheque of K1,882.17 to Lusaka City Council for consent to assign exhibited as **“GMK 11”** bearing the number 007416 yet correspondence from Lusaka City Council shown at page 1 and 2 of the Respondents Bundle of Documents before this Honourable Court reveal that a cheque bearing the same number of 007416 was indeed paid by the Applicant but that the amount was K1,735.76 and was paid as ground rent and not consent to assign as sworn by the Deponent.*
- 3. The said Deponent for the Applicant in their Affidavit in reply to the Respondent further affidavit on the 23rd of May 2017 has further sworn in paragraph 10 that they issued a cheque of K51,000.00 to Zambia Revenue Authority as payment of Property Transfer Tax, exhibited as **“GMK 11”** bearing the cheque number 007417 yet correspondence from Zambia Revenue Authority shown at page 2, 4 and 5 of the Respondent*

Bundle of Documents before this Honourable Court reveal that a cheque bearing the same number of 007417 has never been paid to the authority and the Respondents TPIN number reveals that it has no Property Transfer Tax Account contrary to the Deponent's sworn affidavit.

4. *The said Deponent for the Applicant in their Affidavit in Reply to the Respondent further affidavit filed on the 23rd of May 2017 has further sworn and exhibited **"GMK 13"** showing that there were monies paid into the Respondent's account on 5th, 10th, 12th, 17th February 2014, 7th April 2014, 4th June 2014, 6th August 2014 and 28th August 2014 but these amounts should have been reflected in the original bank statement marked "GMK 6" for the same period but they were not till now 3 years later and their source is unknown.*
5. *The conduct of the Applicant through its Deponent represents the hallmark of fraudulent attempts to misdirect the Honourable Court by performing acts of perjury which is frowned upon.*
6. *We urge this Honourable Court to condemn the Deponent to contempt proceedings for his acts of perjury.*

Counsel for the Respondent, Mr. S Sikota SC in his oral submissions contends that there is a requirement that all evidence must be truthful and factual so that the Court is not misled. According to Counsel for the Respondent, the deponent Mr. George Mubanga Kashoki who is the witness for the Applicant quite clearly and deliberately misled and lied to the Court thereby committing perjury. Counsel submits that this is a serious offence and seeks the Court's intervention as to what action should be taken in order to correct this attempt to mislead the Court.

In response, Counsel for the Applicant, Mrs. Mwalula made viva voce submissions. Counsel contends that **Order 14 A Rules of the Supreme Court, 1999 Edition** dictates how supporting evidence for a preliminary issue must be presented before Court. Counsel for the Applicant further argues that there is no supporting affidavit before Court as required under the rules of evidence as these have been adduced from the Bar. Counsel for the Applicant contends that the Notice of Motion is incompetently before the Court and in support of this proposition relies on **Zambia Revenue Authority v Hitech Trading Limited SCZ Judgment No. 40 of 2000** where the

Supreme Court held that arguments and submissions at the Bar is not a substitute to sworn evidence. Counsel for the Applicant submits that the application ought not to be entertained and that the parties proceed with the substantive matter before Court. Reliance was further placed on the case of **Bond v Dangster Properties Ltd (2011) EWCA 455**.

In response, Counsel for the Respondent argues that it made reference to exhibit "GMK 10, 11, and 13" in the affidavit deposed to by Mr. Kashoki and that these documents are before Court. Counsel for the Respondent relied on **Article 118 (2) of the Constitution** which states that substantial law should be met and technicalities should not impair the justice actually delivered. That if the Court feels **Order 14 A Rules of the Supreme Court, 1999 Edition** does apply, **Article 118 (2) of the Constitution** should be taken into account so as to allow for the preliminary issue to be heard in the absence of a supporting affidavit. In the alternative, in view of the seriousness of the allegations, Counsel for the Respondent implores the Court to grant leave to put in an affidavit

in support pursuant to **Order 2 Rule 2 Rules of the Supreme Court, 1999 Edition.**

The Respondent filed skeleton arguments dated 24th July 2017 citing **Order 33 Rule 3 Rules of the Supreme Court, 1999 Edition** and **Section 38 High Court Act Cap 27 of the Laws of Zambia.**

I have considered both Counsel's submissions and the evidence on record including authorities brought to my attention.

The Notice of Motion to raise a preliminary issue is made pursuant to **Order 33 Rule 3 Rules of the Supreme Court, 1999 Edition** which states:

“The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, or after the trial of the cause of matter, and may give directions as to the manner in which the question or issue shall be stated”.

Reliance is also placed on **Section 38 (1) High Court Act, Cap 27 of the Laws of Zambia** which provides that:

“38 (1) The Court, if it appears to it that a person has been guilty of perjury in any proceedings before it, may, after calling upon such person to show cause why he should not be punished as for a contempt of Court, commit him to prison for any term not exceeding six months, with or without hard labour, or fine him any sum not exceeding one hundred penalty units, or impose both such penalties upon him, in each such case as for a Contempt of Court”.

The Court therefore has the jurisdiction to deal with the preliminary issues before it.

Before I address the main preliminary issue on the alleged perjury by Mr. George Mubanga Kashoki, Counsel for the Applicant argues on two limbs, firstly that the Respondent's preliminary issue should have been read together with **Order 14A Rules of the Supreme Court, 1999 Edition. Order 14A** provides as follows -

“(1) The Court may upon the application of a party or of its own motion determine any question of law or

construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that-

- (a) such question is suitable for determination without a full trial of the action, and*
- (b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.*

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have either –

- (a) had an opportunity of being heard on the question, or*
- (b) Consented to an order or judgment on such determination.*

From a reading of **Order 33 Rule 3 Rules of the Supreme Court, 1999 Edition**, this Order deals with issues whether raised by the

pleadings or otherwise, to be tried before, or after the trial of the cause of matter, and the Court may give directions as to the manner in which the question or issue shall be stated. I opine that the Counsel for the Respondent cannot be faulted for bringing the preliminary issue under **Order 33 Rule 3 Rules of the Supreme Court, 1999 Edition** in seeking an order for perjury as the said Order envisages a trial or inquiry into the issue so as to establish it as a matter of fact in the determination of the whole cause or matter. It does not dispose of the matter. I opine that **Order 14A Rules of the Supreme Court, 1999 Edition** cited by Counsel for the Applicant is not suited for the matter at hand as the said Order has the effect of disposing of a cause or matter on a point of law as it empowers the Court to make a final determination of a question of law without the need for a prior order of the Court under **Order 33 Rule 3 Rules of the Supreme Court, 1999 Edition** for the determination of a preliminary question of law. I find that Counsel for the Respondent has correctly referenced **Order 33 Rule 3 Rules of the Supreme Court, 1999 Edition**.

Counsel for the Applicant second limb of argument is that there is need for a supporting affidavit to support the Notice of Motion to raise a preliminary issue and relies on **Order 14A** and **Order 14A/2/8 Rules of the Supreme Court 1999 Edition**, which requires an application to be supported by affidavit evidence deposing to all material facts relating to the question of law or construction to be determined by the Court. Counsel for the Respondent made reference to the exhibits contained in the Applicant's affidavit as the source of the perjury (**Exhibit "GMK 10, 11 and 13"**). Conversely, Counsel for the Applicant argues that this is evidence from the Bar and the failure to file a supporting affidavit renders the Notice of Motion to raise a preliminary issue incompetent before this Court. Counsel for the Respondent submits that, if that is the position, reliance is placed on **Article 118 (2) of the Constitution of Zambia** and prays that the Court exercise its inherent powers and grant leave to the Respondent to file a supporting affidavit. In my considered view, since the application is correctly referenced under **Order 33 Rule 3 Rules of the Supreme Court, 1999 Edition** as stated in the preceding paragraph, I find that there is no requirement to file an affidavit. I

therefore find that the preliminary issue is competently before Court, and the issue of adducing evidence from the Bar is redundant.

I will now proceed to determine the substantive preliminary issue on perjury. Counsel for the Respondent submits that there is perjury committed by the deponent Mr. George Mubanga Kashoki. It is settled law that perjury is a criminal offence or act that occurs when a party has or makes statements that are not truthful whilst under oath. One has to show that the person intentionally lied about something and that the person is attempting to mislead the Court. In making the determination, I will first delve into the common law principle on the immunity of a witness. In my exploration of some good authorities I globally searched other jurisdictions, and in particular English authorities in civil cases in respect to immunity of a witness. The immunity of a witness from suit in respect of evidence given in Court was stated as a fundamental rule of law whose origins are traced in the Judgment of Kelly CB in **Dawkins v Lord Rokeby (1873) LR 8 QB at 263-265** where he stated as follows:

“Upon all these authorities it may now be taken to be settled law that no action lies against a witness upon any evidence given before any Court or Tribunal constituted according to law”.

The immunity of a witness is based on the reasoning as espoused by Salmon LJ in the case of **Marrion v Vibort (1962) 1 ALL E R 869 at 871** that:

“The administration of justice would be greatly impeded if witnesses were to be in fear that persons against whom they gave evidence might subsequently involve them in costly litigation”.

Any evidence given in Court includes the need for witnesses to give their evidence fearlessly. This was aptly stated in the case of **Roy v Prior (1970) 2 All ER 729 at 736** where it was held as follows:

“Moreover, the trial process contains in itself in the subjection to cross-examination and confrontation with other evidence, some safeguard against careless, malicious or untruthful evidence”

I concur that the administration of justice would be greatly impeded if witnesses were to be in fear that persons against whom they gave evidence might subsequently involve them in costly litigation. In **Meadow v General Medical Council (2006) EWCH 146**, it was pointed out by Collins J that the dishonest witness may be guilty of the criminal offence of perjury and can be prosecuted if sufficient evidence exists. However, if such evidence is not available, the immunity exists because of the requirement that a witness should be able to give evidence free from fear of any reprisal. I concur that a remedy against a witness who has given false evidence which is false and injurious to another is to indict that witness for perjury. I further concur that the conduct of legal procedures by the Courts involves the necessities of the administration of justice which is the immunity of witnesses from actions brought against them in respect of evidence they have given in a court of law. In all, I find the above legal positions persuasive and directive in this matter.

Counsel for the Respondent argues that the Applicant's deponent Mr. George Mubanga Kashoki has perjured and that the Court should take appropriate action herein, and relies on Section 38 of

the **High Court Act, Cap 27 of the Laws of Zambia**. Applying the present facts to the common law position on immunity of a witness and the principles of perjury, in order to meet the ends of justice, I invoke **Order 3 Rule 2 High Court Rules, Cap 27 of the Laws of Zambia**, and grant leave to the Respondent to cross examine Mr. George Mubanga Kashoki. In my considered view, cross-examination provides an opportunity to the Respondent to confront the Applicant with other evidence and to elicit the correct position in respect to Exhibits "GMK 10, 11, and 13" in the Applicant's affidavit in reply to further affidavit in opposition to Originating Summons. Therefore, the Respondent will test the veracity of the evidence of Mr. George Mubanga Kashoki by way of cross-examination. In the circumstances of this case, I find that it would be a travesty of justice for this Court to order the commencement of contempt proceedings against Mr. George Mubanga Kashoki.

The upshot is that the Respondent's preliminary issues fail.

The matter will be heard on 23rd January 2018 at 10:00 hours.

Costs to the Applicant to be taxed in default of agreement.

Leave to appeal granted.

Dated this 26th day of December, 2017.



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HON. IRENE ZEKO MBEWE
HIGH COURT JUDGE