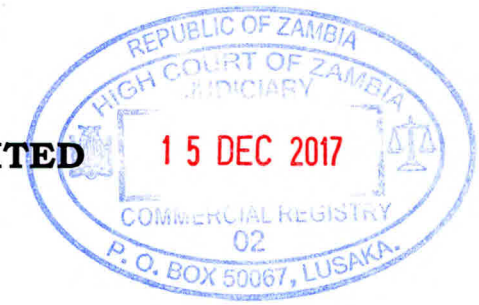
IN THE HIGH COURT FOR ZAMBIA **2015/HPC/0419**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:



BOMACH FINANCE LIMITED **PLAINTIFF**

AND

DANNY LUSANSO **DEFENDANT**

Before the Hon Justice Irene Zeko Mbewe in Chambers

For the Plaintiff : *Mr. T. Chali of Messrs HH Ndhlovu & Company*

For the Defendant: *Mr. L. M. Chikuta of Messrs Mumba Malila & Partners*

RULING

Cases Referred to:

1. *R v Appeal Committee of County of London Quarter Sessions, Ex parte Rossi (1956) 1 All ER 670 page 674*
2. *Willowgreen Ltd v Smithers (1994) 2 All ER 533*
3. *Khalid Muhamed v The Attorney General (1982) ZR 49*
4. *B.P Zambia Plc v Interland Limited Motors (2001) ZR 37*
5. *Zambia Revenue Authority v Jayesh Shah SCZ Judgment No.10 2001*

Legislation and Other Works Referred to:

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Rules of the Supreme Court of England (White Book) 1999 Edition*
3. *Court of Appeal Act No.7 of 2016*
4. *Black's Law Dictionary, 2nd Edition, Reuters Thomson*

This is a Ruling on the Applicant's Notice of Motion to raise preliminary issues filed on 9th October 2017 which was necessitated by the Respondent's prior application for an Order to set aside the Court Order dated 22nd November 2015 and subsequent Orders of Court therein and to set aside the sale of subdivision No 764 of Subdivision B of Farm No 378a, Lusaka for irregularity filed into Court on 15th August, 2017.

In determining the preliminary issues raised, the subsequent finding shall have a bearing on the Court's determination of the Respondent's summons to set aside the Court Order dated 22nd November 2015, subsequent and Orders of Court therein, and to set aside the sale of Subdivision No 764 of Subdivision B of Farm No 378a for irregularity.

The preliminary issues raise the following questions of law:

1. Whether this Honorable Court is not functus officio.

2. Whether an executed Judgment can be stayed.

The preliminary issues are raised pursuant to **Order 33 Rule 3** and **Order 14A Rule 2 of the Rules of the Supreme Court of England (White Book) 1999 Edition**.

The facts leading to this application are as follows. The Respondent was availed a loan facility by the Applicant in the sum of K150,000.00 with monthly compound interest of 5%. The Applicant commenced proceedings against the Respondent by way of Originating Summons dated 28th September, 2015 for payment of the sum of K393,532.54. The Respondent did not file any affidavit in opposition which fact the trial Judge noted and considered at the hearing on 20th October 2015 when rendering Judgment in favour of the Applicant. Subsequent to the said Judgment, the Court issued an Order dated 22nd November, 2017 stating that the Judgment sum should be paid within 60 days failure to which the Applicant would be entitled to enforce the mortgage without further application to the Court. On 22nd January, 2016 the Applicant took possession of the mortgaged property and later sold the said property.

On 15th August 2017, the Respondent brought an application to set aside the Court Order said Judgment contending that he was not served with court process apart from the notice of hearing, and that he was not given an opportunity to be heard. It is against this background that the Applicant has raised the preliminary issues.

In support of the Notice of Motion to raise preliminary issues, a supporting affidavit was deposed to by Bornface Chirwa the Chief Executive Officer in the employ of the Applicant. The salient facts are that the Applicant commenced an action on 28th September, 2015 against the Respondent and according to the Plaintiff, the court process was duly served on the Respondent as shown in the letter of service (Exhibit "BC1"). It is deposed that on 21st October, 2015 Judgment was entered which was officially signed on 22nd November, 2015 and the Applicant applied to have the same registered out of time at the Ministry of lands. It is deposed that on 22nd January 2017 the property was repossessed and subsequently sold. That the deponent was advised by the Applicant's lawyers that the High Court has determined this matter by way of Judgment hence the matter is finalised. The Applicant urged this Court to

dismiss the application to set aside the Judgment and sale of the property.

In the skeleton arguments filed herein, the Applicant's Counsel Mr. Chali drew my attention to Sections 4, 22 and 23 of the **Court of Appeal Act No 7 of 2016** and contends that according to the said provisions an appeal from a Judgment of the High Court shall lie to the Court of Appeal. Mr. Chali submits that based on the aforementioned provisions this Court is functus officio having delivered Judgment on 22nd November, 2015 and that the only recourse available to the Respondent is an appeal. Further, that the only way this Court can revisit its concluded matter is by review pursuant to **Order 34 of the High Court Rules Cap 27 of the Laws of Zambia**.

Mr. Chali submits that the Judgment in question was entered in the presence of the Respondent and that he was even served with a copy of the same but he refused to sign. Mr. Chali argues that the said Judgment was executed fully in line with **Order 52 High Court Rules, Cap 27 of the Laws of Zambia** of which the Respondent is aware of.

The Respondent filed an affidavit in opposition to the Notice of Motion to raise a preliminary issue in which he deposed as follows. That he was not served with court process by the Applicant or his Advocates whether personally or at his residence. According to the Respondent, he has never resided at Subdivision No. "B" of Farm No.378a Salama, Lusaka which is the demised premises and never offered the same address as his address for service. The Respondent admits to having collected the principal amount of K45,000.00 pursuant to a loan agreement from the Applicant's agent at his work place namely Bank of China. According to the Respondent, had Exhibit "BC/1" been in the possession of the Applicant as now alleged, an affidavit of service to that effect would have been filed in Court as proof of the Order. It is deposed that the Applicant is attempting to lead evidence through the back door after failing to oppose the applications already heard before this Court on 2nd October, 2017.

It is deposed that after the Respondent's attendance of the hearing before Judge Mutuna, no subsequent court process in respect of this matter was served on him but that he only came to know that

subsequent applications were made by the Applicant upon conducting a search through his Advocates. That he is advised by his Advocates that an application to set aside an Order or Judgment is properly before Court if the same is not made after Court has already adjudicated on a similar application where claims are made or could have been made before a Court of competent jurisdiction. It is deposed that he did not in this case make any similar earlier application to set aside the Judgment dated 22nd November, 2015.

According to the Respondent, the Court at its last sitting pronounced itself on the issue of stay of execution pending hearing of the application and that the Respondent's Advocates conceded that the application had been overtaken by events as the same was indicated to be pending hearing of the main application. It is further deposed that in the current circumstances, the notice to raise preliminary issues is baseless and the same should be dismissed with costs.

In the Respondent's skeleton arguments dated 30th November 2017, Counsel for the Respondent Mr. Chikuta argues that the

application to set aside the Order granted by this Court, the subject of the Notice of Motion to raise preliminary issue is not available to such application as no earlier similar application has been made before this Court. That it is settled law that any Order or Judgment of the Court is liable to be set aside if it can be shown that the same was not obtained on merit, and or, without hearing the other party that makes the application to set it aside. My attention was drawn to the case of **R v Appeal Committee of County of London Quarter Sessions, Ex parte Rossi[1] (1956) 1 All ER 670 page 674** where Denning LJ said:

> *"....it is a fundamental principle of our law that no one is to be found guilty or made liable by an order of any tribunal unless he has been given fair notice of the proceedings so as to enable him to appear and defend them. The common law has always been very careful to see that the defendant is fully apprised of the proceedings before it makes any order against him..."*

I was also referred to the case of **Willowgreen Ltd v Smithers[2] (1994) 2 All ER533**, where it was held that:

"The word 'address'.....it did not include a place at which the person was never present and at which the service of a summons did not come to his notice, albeit that it was a place which, in the circumstances, had a direct and immediate connection with him. It followed that the summons had not been properly served on the defendant and that the judgment would be set aside."

Mr. Chikuta submits that the right to be heard is inherent at common law and as such, the application to set aside can only be disposed of based on the merits, and not on a technicality and in the absence of a demonstration that a similar application was brought before Court. Mr. Chikuta contends that the Court cannot in this case be said to be functus officio. In support of this proposition, the case of **Khalid Mohamed v The Attorney General[3] (1982) ZR 49** was cited in which it was said that:

"An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to

judgment. I would not accept proposition that even if a plaintiff's case has collapsed of its inanition or for some reason or other, judgment should nevertheless be given to him on the ground that defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need defence."

Mr. Chikuta contends that it is not in dispute that an application to stay execution of an executed Judgment was made. That the Court inter alia sitting of an application to set aside Order of the Court granting the sale, directed that it would not consider the application to stay execution as the matter subject to which the stay was to be made was being heard. Mr. Chikuta argues that it is on the second preliminary issue that the Court is functus officious as a decision was made. Based on the foregoing, Mr. Chikuta submits that the Respondent has ably demonstrated that he is entitled to the application sought and that the preliminary issues raised should be dismissed with costs.

When the matter came up for hearing of the preliminary issues, Counsel for the Applicant Mr. Chali relied on the Notice of Motion

and the supporting affidavit filed on 9th October, 2017. Mr. Chali submits that the gist of the Applicant's argument is that this Court having delivered Judgment on 21st October, 2015 in the presence of the Respondent, bars the Respondent from coming to Court to claim that he had not been heard. Further, that when the matter came up for hearing, the Respondent did not bring it to the attention of the Court that he or his agent was served late with court process. As regards the argument that he was not served with the Judgment, it was submitted that the Respondent was present when Judgment was delivered. Mr. Chali argues that the Applicant has demonstrated that the Respondent was in the habit of refusing to acknowledge receipt of court process as shown in the affidavit of service dated 7th October, 2017 (Exhibit "BC1").

Mr. Chali argues that there is a misrepresentation of the word "Order" by the Respondent, as what is being termed as an Order is actually a Judgment of the Court. Mr. Chali submits that the Respondent has acknowledged that this Court cannot stay an executed Judgment, as such the only issue left is that this Court becomes functus officio after rendering Judgment and that the only

recourse available is an appeal or review, but that no such steps have been taken by the Respondent.

In response, Counsel for the Respondent, Mr. Chikuta argues that it can be noted that the Respondent has shown that he resided at Plot No.637 Salama Park, off Ibex Road and that he has never stayed at Subdivision No.764 of Subdivision B of Farm No.378a Salama Park being the demised premises herein. In respect to the issue of service of court process, Mr. Chikuta submits that the evidence led by the Applicant that there was service but the Respondent refused to acknowledge it, is misleading as it has not been mentioned whether it was personal service or otherwise. Mr. Chikuta contends that the only document that was served on the Respondent was the notice of hearing and that the record will show that service was effected at the demised premises where the Respondent never resided and the recipient of the said documents is unknown. That it is for that reason that the application to set aside the Order or Judgment was made to demonstrate that although the Respondent appeared at the hearing he was not served with any originating process.

Mr. Chikuta submits that on the facts before Court, there has not been any earlier application to set aside the Order of the Court and the sell of the mortgaged property, and therefore this Court is not functus officio as to determine the application on its merit. As to whether this Court can stay an executed judgment, Mr. Chikuta submits that the Respondent has not admitted that but stated in the opposing affidavit that this Court has already determined the matter and that it will not hear or grant an Order as the same has been overtaken by time. Mr. Chikuta further argues that the application sought to be dismissed by the preliminary issue has merit, whilst the preliminary issue raised is baseless and should therefore be dismissed with costs and that the Court proceeds to render its Ruling on the unopposed application which was heard on 2nd October, 2017.

I have carefully addressed my mind to the affidavit evidence, skeleton arguments, list of authorities and oral submissions by both Counsels in this application.

Mr. Chikuta made lengthy submissions on the non service of court process on the Respondent by the Applicant which I opine has a

bearing on the question as to whether this Court is functus officio in this cause. In my considered view, personal service is an inescapable procedural aspect of a court action and is regulated by **Order 10 High Court Rules, Cap 27 of the Laws of Zambia**. Mr. Chikuta argues that there is no evidence as to the mode of service as no personal service of the court process was effected on the Respondent. Mr. Chikuta relied on the supplementary affidavit of one Eunice Lupupa Kunda. I find that the supplementary affidavit is improperly before Court as leave was not granted to the Respondent to file a further affidavit beyond the customary affidavits of an affidavit in support, affidavit in opposition and an affidavit in reply.

Mr. Chikuta argues that the court process was served at the wrong address, and owing to the failure by the Applicant to effect the requisite personal service, the Respondent was unable and unfairly so to be heard in the matter by settling an affidavit in opposition. I have assessed the documentary evidence on record, and a perusal of the record shows in the affidavit of service dated 7th October 2015 that the Originating Summons, supporting affidavit and skeleton

arguments were served on the Respondent. In the affidavit of service dated 16th October 2015, it shows that the notice of hearing was served by the process server on the Respondent. I have not seen any evidence to support the Respondent's assertion that he was never served with court process. According to the process server, the Respondent refused to sign and acknowledge receipt of the served documents on both occasions. This to me indicates, even assuming that it was at the wrong address as purported by the Respondent, that the Respondent was physically present at the time of serving the court process. The significance of the affidavit of service on record shows the mode of service which was personal service, the date of actual service and the manner in which it was effected, name and address of the Respondent. All things considered, the probabilities on personal service lean in favour of the Applicant. I do not see any reason to doubt the process server's credibility or reliability as to how service was effected on the Respondent herein.

The upshot of the above exposition is that there was proper service on the Respondent in the sense that there was a return of service to

prove that court documents and a notice of hearing were served on the Respondent. I am alive to the fundamental principle of natural justice that a person against whom a claim or charge is made must be given a reasonable opportunity to be heard by appearing and presenting his case. Much as one sympathises with the predicament of an unrepresented litigant, my considered view is that at the time the Respondent appeared in Court, it was incumbent upon him to inquire from either the Applicant or Court as to why he was appearing in Court, and to request the Court for an extension of time within which to file an opposing affidavit. In my considered view, the Applicant cannot be faulted for the Respondent's failure to file an opposing affidavit, and cannot therefore yell unfairness after the fact.

Mr. Chikuta further contends that there was no service of the Court Order. A perusal of the record shows that on 20th October 2015, the Court informed the parties that the matter was coming up for the hearing of the Originating Summons. At the said hearing, it is on record that the Respondent made a submission to the effect that he borrowed K45,000.00 but was confused as to how interest

was calculated and that he had repaid K45,000.00 and drew the Court's attention to the application of compound interest which he alleged was not agree to by the parties herein. In terms of parties having notice of a decision or Judgment made, instructive is **Order 36 Rule 3 High Court Rules, Cap 27 of the Laws of Zambia** which states as follows:

> *" (3) All parties shall be deemed to have notice of the decision or judgment, if pronounced at the hearing, and all parties served with notice to attend and hear judgment shall be deemed to have notice of the judgment when pronounced."*

It is on record that Judgment was entered in the presence of the Respondent, and I opine that he acquired knowledge of the existence of the said Court Order as the record shows that it was determined immediately after the hearing of the cause, though the formal Order was only signed by the Court on 22nd November, 2015.

The Applicant has raised a preliminary issue as to whether this Court is functus officio. According to the learned authors of **Black's Law Dictionary Free Online Dictionary, 2nd Edition,** it means:

"Having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority. Applied to an officer whose term has expired, and who has consequently no further official authority; and also to an instrument, power, agency, etc...which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect."

Functus officio is an enduring principle of law that prevents the re-opening of a matter before a Court that rendered the final decision. The purpose of this is to provide finality in litigation. This has been pronounced by the Supreme Court in a plethora of authorities such as **BP Zambia PLC v Interland Motors Limited[4] [2001] ZR 37** . The Applicant contends that this Court has fulfilled its function considering that Judgment in this matter was already entered and executed accordingly. I concur that when the Court delivered Judgment, the jurisdiction of this Court came to an end on the date that it adjudicated on the substantive matter and pronounced Judgment. I concur with the Applicant that this matter was disposed off by the Court by way of Judgment. I am of the settled

mind that the rights of the parties have been determined to finality and the parties cannot go back to the same Court on those rights. I am therefore divested of jurisdiction to grant the Order sought to set aside the Judgment herein as the Court is functus officio. I have taken into consideration the Respondent's submission that cases should be decided on their merit and substance as held in the case of **Zambia Revenue Authority v Jayesh Shah[5] SCZ Judgment No.10 of 2001**. I concur with the principles enunciated in this case in respect to hearing matters on their merit. I opine that in the present case, the Court decided the matter on its merit and rendered Judgment. I therefore uphold the first preliminary issue.

In respect to the second preliminary issue as to whether an executed judgment can be stayed, I opine that the Judgment that the Respondent seeks to stay was already executed in full and therefore cannot be stayed. I therefore find that there is nothing for the Court to stay, execution having been perfected, and the Court will not grant stays just for the sake of it. Based on the foregoing reasons, I uphold the second preliminary issue.

The upshot is that the Applicant's preliminary issues succeed.

In view of my findings that this Court is functus officio, the issue of setting aside the Court Order and sale of subdivision No 764 of Subdivision "B" of Farm No 378a Lusaka for irregularity becomes redundant.

I award costs to the Applicant to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 15th day of December, 2017.

HON IRENE ZEKO MBEWE

HIGH COURT JUDGE