

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

2017/HP/0050

IN THE MATTER OF:

**ORDER 30 RULE 11 OF THE HIGH  
COURT ACT CHAPTER 27 OF THE  
LAWS OF ZAMBIA AND ORDER 5  
RULE 4 OF THE RULES OF THE  
SUPREME COURT, 1999 EDITION**

BETWEEN:

**KENNETH MUUKA**

AND

**ALTRON POWER ZAMBIA LIMITED****POWERTECH QUADPRO SA (PTY) LIMITED****APPLICANT****1<sup>st</sup> RESPONDENT****2<sup>nd</sup> RESPONDENT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 12<sup>th</sup> DAY OF  
MAY, 2017**

*For the Applicant : Ms D. Mulondiwa, A. Mbambara Legal Practitioners*

*For the Respondents : Mrs Celine Mwiya, Corpus Legal Practitioners*

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## **R U L I N G**

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### CASES REFERRED TO:

1. *Chikuta V Chipata Rural Council 1974 ZR 241*
2. *Leopold Walford (Z) Limited V Unifreight 1985 ZR 203*
3. *Polythene Products (Z) Limited V Cyclone Hardware and Another 2012 VOL 3 ZR 396*
4. *Mutembo Nchito V The Attorney General 2016/CC/0029*
5. *Henry M. Kapoko V The People 2016/CC/0023*

LEGISLATION REFERRED TO:

- 1. The High Court Rules, Chapter 27 of the Laws of Zambia**
- 2. The Rules of the Supreme Court, 1999 Edition**

The Applicant in this matter, on 12<sup>th</sup> January 2017 commenced this action by way of originating summons claiming;

- i. An order for the payment of outstanding four months salary in the sum of United States Dollars fifty four thousand, five hundred (\$54, 500)*
- ii. Costs incidental thereto and interest thereon*
- iii. Any other relief that the court may deem fit*

On 31<sup>st</sup> March 2017, the Respondents filed an application to set aside the originating process for irregularity, pursuant to Order 2 Rule 2 of the Rules of the Supreme Court, 1999 Edition.

Counsel for the Respondent relied on the affidavit filed in support of the application on 31<sup>st</sup> March 2017, as well as the list of authorities of even date. She stated that the gist of their application was that the Applicant should not have commenced the action without seeking leave of the court to issue process for service outside jurisdiction, as the address endorsed on the originating summons for the 2<sup>nd</sup> Respondent reflects as being in South Africa.

Further that the 2<sup>nd</sup> Respondent is a non-Zambian entity, and therefore prior to issuing the process, the Applicant should have obtained the leave of court to issue for service out of jurisdiction. However the leave was not obtained.

She also submitted that of primary importance was that the action has been commenced by originating summons, instead of by writ of summons and statement of claim. The case of **CHIKUTA V CHIPATA RURAL COUNCIL 1974 ZR 241** was referred to which held that;

***“Where an action is brought to the High Court by means of an originating summons, when it should have been commenced by writ, the court has no jurisdiction to make any declarations.”***

Counsel submitted that Order 30 Rule 11 of the High Court Rules, Chapter 27 of the Laws of Zambia, categorically sets out the matters that can be commenced by originating summons. Further that Order 5 Rule 4 of the Rules of the Supreme Court 1999 edition, also gives guidance on which matters can be commenced by writ.

It was Counsel's further submission that this action is for debt recovery, and does not fall within Order 30 Rule 11 of the High Court Rules. Further that there was no choice in commencing the matter by either writ or originating summons in this matter. Therefore this court has no jurisdiction to entertain this matter, and Counsel prayed that the action be set aside for irregularity with costs to the Respondents.

Counsel for the Applicant in response stated that with regard to the submission that the action has been wrongly commenced by originating summons, it was their argument that Order 30 Rule 11 sets out matters that may be commenced by originating summons.

However Order 5 Rule 4 of the Rules of the Supreme Court 1999 edition provides that in any proceedings in which the sole or principal issue for determination is likely to be the construction of a contract or other document, or there is unlikely to be any substantial dispute, such a matter is appropriate to be begun by originating summons.

That since the main issue for determination in this matter is remuneration arising out of a contract of employment, Order 5 Rule 4 of the Rules of the Supreme Court, gives the court jurisdiction to hear the matter if it is commenced by originating summons. Counsel further argued that as the rules of the Supreme Court of England 1999 edition are available to fill in the gaps in our law, the action is not irregularly before court.

With regard to the submission on service of the writ outside jurisdiction, Counsel stated that the Applicant's affidavit in support of an order for substituted service dated 10<sup>th</sup> February, 2017, states that the action was commenced with a view to serving the principals in Zambia, and when this failed, an application for an order for substituted service was made.

Counsel added that in any case Article 118 (2) (e) of the Constitution of Zambia, as amended, states that in exercising judicial authority, the courts shall be guided by the principles that justice shall be administered without undue regard to procedural technicalities. That the case of **MUTEMBO NCHITO V THE ATTORNEY GENERAL 2016/CC/0029** followed the said provision.

It was submitted that in that case the court had cautioned against undue regard to technicalities when adjudicating matters, when it stated that in the interests of speedy disposal of matters, the courts must guard against undue regard to technicalities.

It was Counsel's argument that no injustice would be occasioned to the Respondent in this matter if the rules with regard to the commencement of this action were not strictly followed, as the balance of convenience lies with determining the matter on its merits, instead of striking it out, which would entail commencing a fresh action.

Counsel also argued that as the High Court has unlimited jurisdiction, and by virtue of the fact that the application for service outside jurisdiction has been overtaken by events, the application by the Respondent should be set aside, so that the matter can be heard on its merits.

In reply Counsel for the Respondents reiterated that Order 5 Rule 4 of the Rules of the Supreme Court, 1999 edition sets out the circumstances under which a matter will be termed as competent. Further that the said rules of the Supreme Court only fills in the gaps in our law, and for that reason the action should be dismissed, as there is no gap in our law with respect to the commencement process.

This is so because Order 30 Rule 5 of the High Court rules is comprehensive and instructive as to what matters may be commenced by originating summons. By resorting to Order 5 Rule 4

of the rules of the Supreme Court, the Applicant had conceded that Order 30 Rule 11 precludes this matter from being commenced by originating summons.

Counsel stated that the argument that the application for substituted service was only made after a realization that the principals of the 2<sup>nd</sup> Respondent could not be served in Zambia, was not tenable in light of the fact that the address on the originating summons for the 2<sup>nd</sup> Respondent shows that at all material times it is resident and operational outside jurisdiction.

That the application for substituted service was erroneous as substituted service cannot be granted where an application for leave to issue for service of the originating process outside jurisdiction has not been obtained. Counsel's argument was that in light of this the court has no jurisdiction to hear this matter. It was added that it is trite that procedural rules are meant for the orderly determination of matters, and parties must be seen to have due regard to the same.

On Article 118 (2) (e) relied on by Counsel for the Applicant, it was submitted that the operative term is "*undue regard*" which goes to show that where necessary the rules must be adhered to as much as possible, and it is in only exceptional circumstances that the court will overlook them to serve the interests of justice. Counsel in conclusion stated that this is not a proper case in which to overlook the fatal errors. She prayed that the application be granted.

I have considered the application. Order 2 Rule 2 of the Rules of the Supreme Court states that;

***“(1) 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 this case the Respondents have filed the application before taking any steps in the action, in the form of filing an affidavit in opposition to the originating summons.

The application by the Respondent is two-fold, the first being that the Applicant should have obtained leave to issue process for service out of jurisdiction before commencing the action, as the 2<sup>nd</sup> Respondent in this matter is resident in South Africa. The second is that this action being for the recovery of a debt should have been commenced by writ of summons, and not originating summons.

The Applicant in opposing the application submitted that the process was commenced with a view to serving the principals in Zambia, and when that failed an application for substituted service was made.

Order X Rule 15 (e) of the High Court Rules Chapter 27 of the Laws of Zambia provides that;

***“15. Service out of the jurisdiction of a writ of summons, originating summons or originating notice of motion, or***

***of a notice of such writ of summons, originating summons or notice of motion may be allowed by the Court or a Judge whenever-***

***(e) The action is one brought to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract-***

***(i) made within the jurisdiction; or***

***(ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction; or***

***(iii) by its terms or by implication to be governed by Zambian law; or it is one brought in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction; or..."***

The affidavit in support of the originating summons in paragraph 3 states that the Applicant was employed by the 2<sup>nd</sup> Respondent as its representative in the establishment of the 1<sup>st</sup> Respondent. It is clear from the originating summons filed that the 2<sup>nd</sup> Respondent is a company whose domicile is in Johannesburg, South Africa.

Order X Rule 16 of the High Court Rules provides that;



***“16. An application for leave to issue for service out of the jurisdiction a writ of summons, originating summons, or originating notice of motion or a concurrent writ of summons, originating summons or originating notice of motion may be made ex parte to the Court or a Judge on deposit of the writ, summons or notice with the Registrar together with an affidavit in support of such application. The affidavit shall state-***

- (a) the grounds upon which the application is made and the facts which bring the plaintiff's case within the class in respect of which service out of the jurisdiction may be allowed;***
- (b) that the deponent is advised and believes that the plaintiff has a good cause of action or right to relief;***
- (c) in what place or country the defendant resides or probably may be found;***
- (d) whether the defendant is a citizen of Zambia or not”.***

The case of ***LEOPOLD WALFORD (Z) LIMITED V UNIFREIGHT 1985 ZR 203*** is very instructive in this regard. It was held in that case that;

***“(iii) Before a writ can be issued out of the jurisdiction, leave of the court must be obtained;***

***(iv) The steps to be taken before a writ can be issued out of the jurisdiction are: first the writ should be prepared,***

***second an application to issue the writ out of the jurisdiction must be made to the court; with the writ attached the application. Only after the court's leave has been obtained shown the writ be issued”.***

A perusal of the court record shows that this was not done. The Applicant on 10<sup>th</sup> February, 2017 applied ex-parte for an order for substituted process on the 1<sup>st</sup> Respondent. No effort was made to even serve the 2<sup>nd</sup> Respondent, although it was argued that the Applicant had hoped to serve the 2<sup>nd</sup> Respondent through the offices of the 1<sup>st</sup> Respondent. The procedure adopted to serve the 2<sup>nd</sup> Respondent went against the law and was therefore irregular. I will return to the fate of the irregularity later.

The second issue is that this action should have been commenced by writ of summons and statement of claim instead of by originating summons, as it is an action for mere recovery of a debt. Counsel for the Respondents argued that Order 30 Rule 11 of the High Court rules relied on by the Applicant in this matter is very specific about what matters may be commenced by originating summons.

Counsel relied on the case of ***CHIKUTA V CHIPATA RURAL COUNCIL 1974 ZR 241***, arguing that the case held that where a matter is commenced by originating summons when it should have been commenced by writ of summons, the court has got no jurisdiction to grant any reliefs in that action.

Counsel for the Applicant on the other hand submitted that Order 5 Rule 4 of the Rules of the Supreme Court 1999 edition allows the

commencement by originating summons where the matter involves the construction of a contract, or where there is likely to be no dispute of the facts.

Order 30 Rule 11 of the High Court Rules states that;

***“11. The business to be disposed of in chambers shall consist of the following matters, in addition to the matters which under any other rule or by statute or by the law and practice for the time being observed in England and applicable to Zambia may be disposed of in chambers:***

***(a) Applications for time to plead, for leave to amend pleadings, for discovery and production of documents, and generally all applications relating to the conduct of any cause or matter;***

***(b) An application by any person claiming to be interested under a deed, will or other written instrument for the determination of any question of construction arising under the instrument and for a declaration of the rights of the person interested;***

***(c) An application by any person claiming any legal or equitable right, in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of a statute, for the determination of such question of construction and for a declaration as to the right claimed;***

- (d) All proceedings in the Court under the Trustee Act, 1893, or under the Land Transfer Act, 1897, of the United Kingdom;***
- (e) Applications as to the guardianship and maintenance or advancement of infants;***
- (f) Applications connected with the management of property;***
- (g) Applications for or relating to the sale by auction or private contract of property, and as to the manner in which the sale is to be conducted, and for payment into Court and investment of the purchase money;***
- (h) All applications for the taxation and delivery of bills of cost and for the delivery by any Advocate of deeds, documents and papers;***
- (i) All matters which under any other rule or statute were formerly allowed to be commenced by originating summons;***
- (j) Such other matters as a Judge may think fit to dispose of in chambers”.***

Order 5 Rule 4 of the Rules of the Supreme Court, 1999 edition on the other hand provides that;

***“4. - Proceedings which may be begun by writ or originating summons***

***(1) Except in the case of proceedings which by these rules or by or under any Act are required to be begun by writ or originating summons or are required or authorised to be begun by originating motion or petition, proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate.***

***(2) Proceedings -***

***(a) in which the sole or principal question at issue is, or is likely to be, one of the construction of an Act or of any instrument made under an Act, or of any deed, will, contract or other document, or some other question of law, or***

***(b) in which there is unlikely to be any substantial dispute of fact, are appropriate to be begun by originating summons unless the plaintiff intends in those proceedings to apply for judgment under Order 14 or Order 86 or for any other reason considers the proceedings more appropriate to be begun by writ”.***

A reading of Order 30 Rule 11 of the High Court reveals that an action for the recovery of money owed under a contract is not covered in that provision. The Applicant relies on Order 5 Rule 4 of the Rules of the Supreme Court 1999 edition cited above, arguing that the said provision can be relied on to fill in the gaps in our law.

Amendment Act No 7 of 2011 which is an amendment to Section 10 of the High Court provides that;

**“2. The principal Act is amended by the deletion of section ten and the substitution therefore of the following:**

**2. (1) The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act, the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or any other written law, or by such rules, orders or directions of the Court as may be made under this Act, the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or such written law, and in default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book) of England and subject to subsection (2), the law and practice applicable in England in the High Court of Justice up to 31st December, 1999.**

**(2) The Civil Court Practices, 1999 (Green Book) of England and any civil court practice rules issued in England after 31st December, 1999, shall not apply to Zambia.**

Going by this provision, the Rules of the Supreme Court of England, 1999 edition will only be resorted to if there is lacuna in our laws. Order 30 Rule 11 of the High Court Rules states what matters may be commenced by originating summons. There is no lacuna in that provision that should be filled by resort to the Rules of the Supreme Court, 1999 edition. Thus the commencement of this action which

seeks the recovery of a debt owed by way of originating summons is irregular.

Counsel for the Applicant citing the case of **MUTEMBO NCHITO V THE ATTORNEY GENERAL 2016/CC/0029** urged me to overlook the irregularities on the basis that the case gave effect to the provisions of Article 118 (2) (e) of the Constitution of Zambia Act as amended, which provides that in exercising judicial authority, courts shall administer justice without undue regard to technicalities.

In the case of **HENRY M. KAPOKO V THE PEOPLE 2016/CC/0023** the Constitutional Court in interpreting the meaning of Article 118 (2) (e) of the Constitution of Zambia Act as amended observed that;

***“Article 118(2) (e) cannot be treated as a 'one size fits all' answer to all manner of legal situations. Article 118(2)(e) is a guiding principle of adjudication framed in mandatory terms. It is a basic truth applicable to different situations. Each court will need to determine whether in the peculiar circumstances of the particular case, what is in issue is a technicality and if so whether compliance with it will hinder the determination of a case in a just manner”.***

Going by the guidance given by the court in that matter, the question is whether there is a technicality in the case that will hinder the determination of this case in a just manner?

What has been breached are the procedural rules. Setting aside the process on the ground of breach of the procedural rules will not in my view hinder the determination of the case in a just manner, as if I were to allow the Applicant to blatantly disregard the rules governing commencement and service of court process outside jurisdiction, I would in essence be allowing the administration of justice to be brought into disrepute.

Counsel for the Applicant also referred to the High Court having unlimited jurisdiction so I can overlook the irregularities cited. I do not think that the unlimited jurisdiction of the High Court refers to condoning irregularities by parties.

It refers to the Court having power to decide cases. Moreover the unlimited jurisdiction of the High Court is within the law, entailing that where the law does not empower the High Court to exercise its power, it cannot do so. The case of **POLYTHENE PRODUCTS (Z) LIMITED V CYCLONE HARDWARE AND ANOTHER 2012 VOL 3 ZR 396** is instructive. It was held in that case that;

***“the High Court’s unlimited jurisdiction under Article 94 (1) of the Constitution is subject to compliance with prescribed procedure. It does not entitle a party to deviate from procedure prescribed by statute, and commence an action or raise a counterclaim in an action, in the High Court, in disregard of the prescribed procedure”***



Rules of the court are there to allow the orderly conduct of cases. I accordingly find that in light of the irregularities cited in this case, I cannot proceed to determine the matter, and i set aside the originating summons for irregularity with costs to the Respondents. Leave to appeal is granted.

**DATED THE 12<sup>th</sup> DAY OF MAY, 2017**

    *kaunda*      
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**