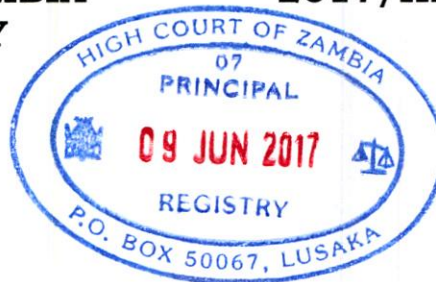


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2017/HP/0587



B E T W E E N :

MIKE M . PHIRI
COMFORT LOZILO PHIRI

**1ST APPLICANT
2ND APPLICANT**

AND

THE REGISTERED TRUSTEES OF THE
CATHOLIC DIOCESE OF MPIKA

RESPONDENTS

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the 9th
day of June, 2017**

For the Plaintiffs: Mr. L. Mayembe, Ms. N. Liswaniso, Messrs KBF
Partners
For the Defendants: Ms. S. Namusamba, Messrs Shamwana & Co.

EX TEMPORE RULING

Case Authorities Referred To:

1. *New Plast Industries v The Commissioner of Lands and The Attorney General* (2001) ZR 51
2. *Dr. Ludwig Sondashi v Godfrey Miyanda sued as National Secretary for MMD* (1995) S.C 1

Legislation Referred To:

1. *Rules of the Supreme Court 1999 Edition*

By this application, the Respondent has raised an issue *in limine* pursuant to Order 33 Rule 3 of the Rules of the Supreme Court. It is supported by Skeleton Arguments. The issue before Court is:

“1. Whether or not the Applicant can commence this action under Order 113 of the Rules of the Supreme Court in view of a fact that the Respondent is not a squatter and the Applicants are aware of the real dispute with the occupier Respondent.”

In support of the preliminary issue, the main arguments canvassed by the Respondent are that the Applicants employed the wrong mode of commencement for this action given that there are contentious issues. The Respondent relies on the case of **New Plast Industries v The Commissioner of Lands and The Attorney General**¹, which requires parties to employ the correct mode of commencement of actions.

The Respondent contends that since the Respondent is well known to the Applicant and there are certain arrangements which the parties are privy to on the Respondent's occupier status; it is inappropriate that an action should be commenced under Order

113 of the Rules of the Supreme Court. By and large, the Respondent argues that because there is a contentious dispute between the parties, the end of justice would be best served if the action against the Respondent is commenced outside Order 113 of the Rules of the Supreme Court.

The Applicants did not file an Affidavit in Opposition. At the hearing, Learned Counsel for the Applicant made submissions on points of law. The argument posited is that the Notice to Raise Preliminary issue contains factual circumstances which cannot be advanced by Counsel at the bar. The Applicants' Counsel also submits that Order 113 Rule 8 (1) of the Rules of the White Book, only permits serious disputes to be determined outside Order 113, in default of which, a matter could be disposed of under the summary procedure.

The Applicants' Counsel contends that since the Respondent did not depose to an Affidavit which could have disclosed the facts about the serious dispute. That being the case, the preliminary issue is incompetently before Court. Counsel further stated that the real issue before Court was on the mode of commencement of this

action and if the Court held the view that it had been wrongly commenced, then it could redeem it on the authority of the case of **Dr. Ludwig Sondashi v Godfrey Miyanda sued as National Secretary for MMD²**.

I have anxiously considered the notice to raise issue *in limine* and the arguments advanced by the contesting parties. In my considered view, the issue that falls for determination is very narrow, and it is whether this action has been rightfully commenced under Order 113 of the Rules of the Supreme Court.

Without having to chatter a difficult legal discourse, it is trite that, where a wrong mode of commencement has been adopted, it can be corrected. A wrong mode of commencement does not destroy a case, which should otherwise be determined on the merits.

As the Supreme Court has ably guided in the case of **Dr. Ludwig Sondashi²**, cited by the Applicants' Counsel, proceedings which have been wrongly commenced should not be refused but be allowed to continue as though they had been correctly commenced.

In this case, there is clearly an apparent contentious dispute between the parties which I find can only be determined on the merits. I shall therefore deem this case to have commenced by Writ and that the Applicant should forthwith attend to issuing Writ of Summons. I find no merit in the issue *in limine*, which I dismiss forthwith. I make no order as to costs.

Dated this 9th day of June, 2017.

M. Mapani

M. Mapani-Kawimbe
HIGH COURT JUDGE