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

2017/HP/1218

IN THE MATTER OF: ORDER 113 RULE 1 OF THE RULES OF THE SUPREME COURT, 1999 EDITION

AND

IN THE MATTER OF: STAND NO 2436 AND STAND NO 11299 SITUATE AT LUSAKA IN THE LUSAKA PROVINCE OF THE REPUBLIC OF ZAMBIA

BETWEEN:

STANLEY PETER BARTOSZ **APPLICANT**

AND

PIETER ELIZA MARGARET BARTOSZ **RESPONDENT**

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 7th DAY OF SEPTEMBER, 2017

For the Applicant : Mr N.K. Mulikita, NM. Mulikita and Partners

For the Respondent : Mr S. Mambwe, Mambwe, Siwila and Lisimba Advocates

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RULING

CASES REFERRED TO:

1. ***Chikuta V Chipata Rural Council 1974 ZR 241***
2. ***Kafue District Council V James Chipulu SCZ No 13 of 1997***
3. ***Kelvin Hangandu and Company (a firm) V Webby Mulubisha 2008 Vol 2 ZR 82***

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 commenced this action by way of Originating Summons on 24th July, 2017, claiming;

1. *An order of vacant possession of the properties known as Stand No 2436 and Stand No 11299 situate at Lusaka in the Lusaka Province of the Republic of Zambia*
2. *Damages caused and arising from the Respondent and all the other person's illegal occupation of the said properties*
3. *Interest*
4. *costs*

On 10th August, 2017, the Respondent filed a notice of intention to raise preliminary issues, pursuant to Order 14A Rule 1, Order 33 Rule 7 of the Rules of the Supreme Court, 1999 edition, and Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.

At the hearing of the notice, Counsel for the Respondent stated that they had raised three preliminary issues, and relied on the affidavit in support of the notice. With regard to the first issue raised, it was submitted that the issue was whether or not Counsel for the Applicant was competent to swear the affidavit in support of the Originating Summons. Reliance was placed on the case of ***KAFUE DISTRICT COUNCIL V JAMES CHIPULU SCZ No 13 of 1997,*** where it was stated that the practice of advocates swearing affidavits was highly undesirable when matters were contentious.

Counsel also relied on the case of ***CHIKUTA V CHIPATA RURAL COUNCIL 1974 ZR 241*** stating that the Supreme Court in that matter had condemned the increasing practice of advocates swearing affidavits containing hearsay evidence, especially in contentious matters. It was

Counsel's submission was that the affidavit in support of the originating process was sworn by Counsel for the Applicant, and this was an affidavit supporting originating process, as opposed to interlocutory applications, which are routine. That the said affidavit gives no reason why Counsel had sworn the application, and not the Applicant himself. He added that the affidavit filed in opposition to the notice will show that the relief sought is keenly contested. Therefore the Originating Summons is irregular on that basis.

On the second preliminary issue raised, Counsel submitted that the issue is whether the application for possession is competent in view of the undertaking taken by the Applicant in cause number 2007/HP/674, that he had no intention of removing the Respondent from the property, who is in fact his biological mother.

It was stated that a perusal of the judgment exhibited as 'NMM3' to the affidavit in support of the Originating Summons, at page J9, shows that the undertaking played a major role in the decision that Hon Madam Justice Lengalenga made in that cause. Therefore it was their humble submission that in light of the undertaking that was made by the Applicant, he must be estopped from reneging on the same.

Further in the submissions, Counsel asked that court to note from paragraph 9 of the affidavit in support of this application, that in reliance of the undertaking that was made, the Respondent did not deem it necessary to appeal against the said judgment, since the Respondent's stay on the property was guaranteed for the rest of her natural life. That the Respondent would suffer great prejudice if the Applicant would be allowed to go back on the undertaking that he made in court, and that this was no ordinary undertaking, as it was made on oath.

On the last preliminary issue raised, Counsel stated that the issue is whether or not the application is an abuse of court process for multiplicity, for not having been made in cause number 2007/HP/674. That their submission was that the proper course of action was for the Applicant to make the application for possession in the earlier cause, where the subject matter was discussed and determined.

The case of ***KELVIN HANGANDU AND COMPANY (a firm) V WEBBY MULUBISHA 2008 VOL 2 ZR 82,*** was relied upon in support of this position, and Counsel argued that the Supreme Court in that matter had stated that once a matter is before court in whatever place, if the process is properly before the court, the court should be the sole court to adjudicate all the issues involved, and that all interested parties have an obligation to bring all the issues in that matter before that particular court. That the court had stated that forum shopping is an abuse of court process, and unacceptable.

It was also submitted that the court in that matter had disapproved of parties commencing procedures, proceedings, and actions over the same subject matter. That it is not in dispute the property sought to be possessed in this action, is the same property that was adjudicated on in the 2007 cause. Therefore rather than commencing this action, the Applicant had an obligation to seek an order of possession in that cause. Counsel prayed that the originating process be accordingly dismissed.

In response, Counsel for the Applicant stated that they relied on the affidavit in opposition to the notice filed on 16th August, 2017. His submission was that the Applicant in the affidavit in opposition to the notice at paragraph 5 states that the contents of the affidavit in support of the Originating Summons are not in dispute. Further that it was their

contention that the contents of the affidavit in support of the originating process are based on circumstances and events that took place, and are therefore not hearsay.

Counsel further submitted that the Applicant in the affidavit in opposition to the notice deposes that the filing of the application was prompted by events, conduct and agreements between the Applicant and the Respondent, which superseded the state of affairs that was current at the time the 2007 cause was decided, and therefore could not have been expected to have been pleaded at the time.

Counsel referred to page J9 of the judgment stating that it has a proviso that the Respondent would only worry about the undertaking if there was something that she had not disclosed to the court. He stated that these matters could not be disclosed to the court, but had come to pass. It was also stated that the judgment was delivered ten years ago, and events since then had prompted the application. He added that despite the judgment, the Applicant and the Respondent had decided to agree to dispose of the properties, as seen in paragraphs 8 to 13 of the affidavit in opposition to the notice.

Counsel stated that the Applicant is the rightful owner of the property, and he is entitled to possession and control of it, and commencing this action was aimed at bringing about the state of affairs that were agreed on, and not to prejudice the Respondent.

On the allegation of forum shopping, this was denied, stating that the application was the most appropriate manner that would allow the Applicant to take control and possession of the property, bearing in mind the interests of his biological mother, with whom he had agreed that the property be disposed of. Counsel also submitted that it would be in the

interests of justice to have the matter heard on the merits, as the stakes to each party were high. That whatever misgivings the Respondent had over the affidavit in support of the Originating Summons, the affidavit in opposition to the notice had dealt with them, and the matter should be heard.

Counsel for the Respondent in reply stated that the attempt to use the affidavit in opposition to the notice to augment the affidavit in support of the originating process should not be entertained, as the said affidavit did not support the originating process, but was a response to a preliminary issue. Therefore it could not be used to cure any perceived irregularities associated with the affidavit in support of the originating process, and the court was urged to consider it on its own, only with regard to the objection to the notice before the court.

Counsel maintained that it was undesirable for Counsel to swear affidavits particularly in support of originating process, as it places Counsel in the position of a witness, capable of being cross examined on the said originating process. On the reference to page J9 of the judgment exhibited as 'NMM3', arguing that it has a proviso to the undertaking made by the Applicant, it was stated that a perusal of the same, shows that there is no such proviso.

With regard to the submission making reference to an alleged agreement as contained in paragraphs 8 to 13 of the affidavit in opposition to the notice, the reply was that no such agreement had been tendered before the court, and the said averments ought to be taken as mere allegations. That as the undertaking was made in court on oath, there should be something more than a mere allegation by a party who was himself not in court, to get out of the undertaking.

That the justice referred to by Counsel for the Applicant, was not to throw the Respondent out of a home that she had lived in most of her life, in preference for some unknown accommodation. Counsel went on to submit that the court using its powers under Order 3 Rule 2 of the High Court Rules should refuse to allow the Applicant to get out of the undertaking that he had made by using this application, which they maintained was irregularly before the court.

I have considered the application. The preliminary issues raised are:

1. *Whether or not Counsel is competent to swear the affidavit in support of the originating process*

2. *Whether or not the application for possession is competent in view of the undertaking mentioned in the judgment of this court dated 14th January, 2009 under cause number 2007/HP/674 at page J9*

3. *Whether or not this application is abusive of the court process for multiplicity, not having been made under cause number 2007/HP/674*

Order 14A Rule 1 of the Rules of the Supreme Court, 1999 edition provides that;

> ***"1. (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.

Order 33 Rule 7 of the said Rules of the Supreme Court, 1999 edition on the hand states that;

"If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just".

Order 3 Rule 2 of the High Court Rules states that;

"Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not".

My understanding of these provisions is that the court has power to determine any questions of law or the construction of any statute arising in any cause or matter at any stage of the proceedings, where it considers that such questions of law or construction of any document is suitable for determination without a full trial of the matter.

In this application, the first question raised is whether Counsel is competent to swear the affidavit in support of the originating process. Counsel for the Respondent argued that it was undesirable for Counsel

for the Applicant to have sworn the affidavit in support of the originating process, as the reliefs sought are keenly contested. That by Counsel swearing the affidavit, he has placed himself as a witness, and is liable to be cross examined on that process, when it will be heard.

Counsel for the Applicant on the other hand stated that the concerns raised by Counsel for the Respondent had been addressed in the affidavit in opposition to the notice, which shows that the facts deposed to in the affidavit in support of the Originating Summons are not hearsay, as they are facts that are not in dispute. Further that the averments are based on circumstances and events that took place, and are therefore not hearsay.

In submitting on the issue, Counsel for the Respondent relied on the cases of ***KAFUE DISTRICT COUNCIL V JAMES CHIPULU SCZ No 13 of 1997*** and ***CHIKUTA V CHIPATA RURAL COUNCIL 1974 ZR 241.*** In the ***CHIKUTA V CHIPATA RURAL COUNCIL 1974 ZR 241*** case it was stated that;

> ***"the evidence in the case was entirely contained in affidavits made by the respective advocates on each side. These affidavits were entirely hearsay. I would like to say that I have noticed an increasing practice amongst lawyers in introducing evidence in such a manner. In my view this is not merely ineffective, but is highly undesirable, particularly where the matters are contentious. In the instant case the affidavit made by the advocate on behalf of the defendant made serious allegations against the chairman of the Council, and it was clearly improper for the defendant's advocate personally to make such hearsay allegations.***

> ***Furthermore, as the deponents of affidavits may be cross-examined thereon, the position can arise in which each of the advocates would be cross-examining the other. I hope that this practice will now cease".***

The undesirability of Counsel swearing affidavits especially in contentious matters was reiterated in the ***KAFUE DISTRICT COUNCIL V JAMES CHIPULU SCZ No 13 of 1997*** case. As can be seen from the cases, the undesirability of Counsel swearing affidavits is premised on the fact that Counsel by swearing an affidavit places themselves in the position of a witness, and is liable to being cross examined on the facts deposed to, which is clearly not desirable for their position as an advocate.

Therefore in this matter, while Counsel for the Applicant argued that the affidavit in opposition to the notice had addressed the concerns of him having sworn the affidavit in support of the Originating Summons, this is not the position. I say so because the affidavit in support of the Originating Summons is what is relied on, in arguing the reliefs sought. He is therefore a witness of the facts deposed to in the affidavit, and can be cross examined on those facts, and his credibility assessed on that basis, which in my view is undesirable.

I will return to this issue after I have considered the other two preliminary issues raised.

The second issue raised is whether the application for possession is competent in view of the undertaking made by the Applicant under cause number 2007/HP/674, which is at page J9 of the judgment. The arguments in support of this issue are that the Applicant should not be allowed to go back on the undertaking that he made, as this would be

prejudicial to the Respondent, especially that it was made on oath, and on that basis the Respondent did not deem it fit to appeal the judgment.

Counsel for the Applicant did not address this issue in his submissions, but made reference to subsequent agreements that were made between the parties over the properties in contention. Therefore the question is whether the Applicant's application for possession should be dealt with as a preliminary issue, on the basis that he made an undertaking in cause number 2007/HP/674? In my view this would not be appropriate, as making such determination would entail not hearing the evidence in support of the application. To make such a determination at this point, would be to curtail hearing of the application on its merits, and for that reason I find that the second issue raised is not suitable for determination as a preliminary issue, and it fails.

The last issue raised is whether this application is an abuse of court process for multiplicity, as it was not made under cause number 2007/HP/674. Counsel in arguing this issue stated that the Applicant made an undertaking in cause number 2007/HP/674 allowing the Respondent to continue staying on the properties now sought to be possessed for the rest of her natural life, and therefore the application for possession should have been made under that cause, and he should not have commenced as a fresh action.

Counsel for the Applicant in response to that argument, stated that the application for possession had been necessitated by events that had happened after the judgment in cause number 2007/HP/674 had been delivered, and which events were not in existence at the time of the judgment. Counsel for the Respondent had relied on the case of ***KELVIN***

HANGANDU AND COMPANY (a firm) V WEBBY MULUBISHA 2008 VOL 2 ZR 82 to argue that instituting this matter amounts to multiplicity.

In the ***KELVIN HANGANDU AND COMPANY (a firm) V WEBBY MULUBISHA 2008 VOL 2 ZR 82*** case, the Plaintiff had sued the Defendant for payment of legal fees in the High Court after having represented him in a criminal matter before the Subordinate Court. The Plaintiff had obtained a default judgment, and he then filed a writ of fieri facias to execute the judgment, and the bailiff seized the Defendant's property. Before the sale of the seized goods could take place, the Defendant obtained an order of stay of sale of the seized goods, and the goods were returned to him.

The Plaintiff then applied for a mareva injunction before another Judge, which application was denied, as there was a stay of execution. The Plaintiff then proceeded to make an attachment of property application before the deputy Registrar, which was granted, but subsequently stayed, on an application made by the Defendant. Thereafter the Plaintiff commenced contempt proceedings before the subordinate court against the Defendant and the bailiff, but the Judge stayed the said criminal proceedings, which proceedings he quashed later in a ruling that was appealed against. The Supreme Court on appeal stated that ***"in the instant case, commencement of proceedings before the Hon. Mr. Justice Musonda, before the Deputy Registrar and before the Subordinate Court all amounted to commencing a multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter. We also disapprove and condemn the plaintiff for this conduct".***

In this case, the now Respondent, as Plaintiff, sued the Applicant, as Defendant, in cause number 2007/HP/674. According to the judgment exhibited as 'NMM3' on the affidavit in opposition to the notice, the now Respondent, as Plaintiff, in that cause sought an order of specific performance of a document surrendering the properties known as Stand No 11299 and 2436, Lusaka, Zambia. She also sought an order compelling the now Applicant, as Defendant, to execute all documents to transfer the said properties into her names. The now Applicant, as Defendant, had in that cause counterclaimed a declaration that he was the legal and rightful owner of the two stands, and an injunction restraining the now Respondent, as Plaintiff, from interfering with his quiet enjoyment of the properties.

The court declined to grant the reliefs that the now Respondent, as Plaintiff, sought in that matter on the ground that the now Applicant, as Defendant, in that matter was the registered owner of the properties, and had certificates of title to them, which was prima facie evidence of ownership them, and accordingly declared him owner of the said properties.

The Applicant has commenced this action seeking an order of possession of the properties, and it was argued that events have occurred since the passing of that judgment, which have necessitated this application being made. Having been declared a legal owner of the properties in cause number 2007/HP/674, it was most logical that the order of possession of the property should have been made under that cause. The only reasons advanced for commencing this fresh suit is that events have occurred since the judgment was made, warranting the order sought to be granted.

It must be noted that the ***KELVIN HANGANDU AND COMPANY (a firm) V WEBBY MULUBISHA 2008 VOL 2 ZR 82*** case does not apply to this matter, as the Plaintiff in that matter took out a number of proceedings before various courts over the same subject matter, while each action was still pending, hence the court finding that he was guilty of abusing the court process by engaging in a multiplicity of actions. In this case however, a judgment was delivered declaring the now Applicant owner of the properties that he now seeks to possess, and there is no risk of a contrary judgment being passed in regard to his having been declared owner of the properties.

However there is an undertaking that was made in cause number 2007/HP/674 allowing the now Respondent to remain on the properties, and Hon Madam Justice Lengalenga at page J9 of the judgment made note of that. It would therefore have been appropriate to commence these proceedings under that cause, as it is the court that dealt with issues from the outset, in the interests of good order.

I do note that the judgment in cause number 2007/HP/674 was delivered on 14th January, 2009, a period of over eight years ago. There having been no appeal in that matter, it is a closed file, and may not be readily available in the registry, as it could have been archived. Therefore seeing that this action does not amount to abuse of court process on account of multiplicity, I will proceed to hear it. However looking at the fact that the affidavit in support of the originating process is sworn by Counsel, which it is undesirable, I direct that the affidavit be expunged from the record, and another be sworn in its place by a competent person.

This shall be done within twenty one days from today, failure to which the originating process, shall be set aside for irregularity. Costs of the application go to the Respondent, to be taxed in default of agreement. Leave to appeal is granted.

DATED THE 7th DAY OF SEPTEMBER, 2017

Kaunda

S. KAUNDA NEWA
HIGH COURT JUDGE