

IN THE HIGH COURT FOR ZAMBIA 2017/HP/0127
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

RICHARD M. CHIZYUKA PLAINTIFF

AND

FIRST ALLIANCE BANKING LTD DEFENDANT



Before the Hon. Mr. Justice M.L. ZULU
in Chambers on the..... day of July, 2017

For the Plaintiff: Mr. M. HAIMBE – Of Messrs
Sinkamba Legal Practitioners

For the Defendant: Mr. M. ACHIUME – Of Messrs
KCK and Associates.

J U D G M E N T

Cases referred to:

- 1. Development Bank of Zambia and Peat Marwick v. Sunvest Limited and Sun Pharmaceuticals Limited (1995/1997) Z.R. 187.**
- 2. ANZ Grindlays Bank (Zambia) Limited V. Chrispine Kaona (1995/1997) Z.R. 85.**

3. Bank of Zambia V. Jonas Tembo and Others (2002) Z.R. 103.

Legislation referred to:

- 1. The Rules of the Supreme Court, 1999, Order 18 rule 13(1)**
- 2. The High Court Rules Chapter 27 Order 21 rule 6.**
- 3. Halsbury's Laws of England, 4th Edition, Volume 16, at paragraph 1528**

This is the Plaintiff's application to set aside the Defence for irregularity as well as enter Judgment on admission.

The background to this matter is that on the 26th of January, 2017, the Plaintiff took out an action against the Defendant, by way of Writ of Summons, for allegedly going back on an assurance one of its officers made to the Plaintiff which caused the Plaintiff suffer damages in form of rental income. On the 9th of February, 2017, the Defendant filed a Defence in which it denied the Plaintiff's assertions.

On the 20th of February, 2017, the Plaintiff filed this application together with an affidavit in support. The affidavit in support was deposed to by the Plaintiff. He stated that the statement of claim

he filed was very specific as to the allegations and claims. He explained that paragraphs 7-31 of the statement of claim showed that pursuant to a meeting between Mr Bandari, the Defendant's Branch Manager, and himself on the 5th of September, 2016, an assurance was made by Mr Bandari that they would not enforce the Judgment obtained against him if an amount was paid towards the mortgage. That as a result of the assurance, he obtained US\$12,000 from a tenant out of which he paid US\$10,000 to the Defendant.

It was his evidence that after receiving the money, the Defendant went ahead to issue a Writ of Possession and took possession of stand No. 24 Mwambula Road, Jesmondine, Lusaka, thereby going back on its assurance not to enforce the Judgment. That as a result of the above, the Plaintiff has suffered damages for loss of business amounting to US\$82,800.00. The Plaintiff went on to depose that in its defence, the Defendant has failed to traverse each and every allegation made in the statement of claim and consists only of bare denials to all the material allegations made. He urged this Court to set aside the defence for irregularity and enter judgment on admission.

On the 16th of May, 2017, the Defendants filed an affidavit in opposition to the application. It was deposed to by Steven Zulu, the Credit Manager of the Defendant. He stated that the reliefs sought by the Plaintiff relate to a Writ of Possession issued in the Commercial Division under cause Number 2015/HPC/53. That in that case, the Plaintiff has applied to have the said Writ of Possession set aside to which the Defendant has objected. That instead of completing the matter before the Commercial Court, the Plaintiff has come to this Court for, *inter alia*, a declaration that the said Writ of Possession is irregular. Mr Zulu stated that the Plaintiff was forum shopping and abusing the process of the High Court.

In the Affidavit in reply, the Plaintiff deposed that this matter is different from the one in the Commercial Division. He stated that this matter arose out of the Defendant's post Judgment conduct which has caused injury to the Plaintiff. He added that he believed that the two matters are different and urged this Court to grant the application herein.

When this application came up for hearing on the 23rd of May, 2017, Mr, Haimbe, Counsel for the Plaintiff relied on the Affidavit filed in support of the application. He also relied on **Order 18 rule**

13(1) of the Rules of the Supreme Court, 1999, which provides that when an allegation of fact is made in the pleadings, it is deemed to be admitted by the opposing party unless it is traversed in the pleadings by the other party. He also relied on **Order 21 rule 6 of the High Court Rules Chapter 27**.

Mr Achiume represented the Defendant. He argued that the defence was not irregular as it contained paragraphs which answer all allegations contained in the statement of claim. He stated that it is necessary to restate the whole statement of claim before the Defendant can be said to answer the allegations. He reiterated Mr Zulu's deposition that this matter is substantially before the Commercial Court and hence the Plaintiff was forum shopping. Counsel requested this court to invoke its jurisdiction and refer this matter to the Commercial Court.

I have considered the application before me and I have looked at the parties' affidavits as well as considered their oral arguments and the authorities cited.

A review of the defence shows that the Defendant denied the allegations in the statement of claim and stated that it was entitled to foreclose and take possession of the property in question. It also

stated that the execution of the Writ of Possession complied with the orders contained in the Judgment granting possession of the property to the Defendant. The Defendant added that the Plaintiff was given a 30-day extension within which to settle the judgment debt. That he defaulted to pay in the 30 days after which the Defendant lawfully executed the Writ of Possession.

In addition, I note that the reliefs sought in this matter are -

- 1. A declaration that the Writ of Possession was irregularly executed;***
- 2. The sum of US\$82,800 being loss of rental income of US\$2,300 monthly for three years;***
- 3. A declaration that the Defendant's breach of the assurance was unreasonable and malicious and injurious to the Plaintiff;***
- 4. An order setting aside the 3rd party mortgage deed on stand No. 24 Mwambula Road Jesmondine, Lusaka in light of the Defendant's injurious conduct;***
- 5. Punitive and exemplary damages;***
- 6. Interest;***
- 7. Any other relief the court may deem fit; and***
- 8. Costs.***

It is clear from the reliefs sought that they arise from the mortgage deed executed between the parties over stand number 24 Mwambula Road, Jesmondine, Lusaka. It is also not in dispute that this mortgage was subject of a matter before the Commercial Court Division of the High Court where a Writ of Possession was issued. In addition, the reliefs sought require this Court to order that the Writ of Possession issued by the Commercial Court Division was irregularly executed as well as set aside the mortgage deed.

In my view, the Commercial Court Division, was the proper forum for the Plaintiff to seek the reliefs he is seeking. The Mortgage deed in issue was litigated upon in the Commercial Court Division and a Writ of Possession was issued by that Court. It follows that this Court cannot entertain matters that are already before another Court. The Plaintiff ought to have challenged the Mortgage deed or Writ of Possession before that Court. This type of conduct was frowned upon in the case of **Development Bank of Zambia and Peat Marwick v. Sunvest Limited and Sun Pharmaceuticals Limited**⁽¹⁾ as being multiplicity of actions. This is because the chances that such a scenario may bring about conflicting

decisions from two Courts on the same facts, is very high and this may cause embarrassment to the Courts.

Further, I wish to add that the matters sought to be decided upon in this case are *res judicata*. In the case of **ANZ Grindlays Bank (Zambia) Limited v. Chrispine Kaona** ⁽²⁾, it was held that:

“In order for a defence of res-judicata to succeed, it is necessary to show not only that the cause of action was the same but also that the plaintiff has had no opportunity of recovering in the first action that which he hopes to recover in the second.”

Further, in the case of **Bank of Zambia v. Jonas Tembo and Others** ⁽³⁾, it was held that:

“A plea of res judicata must show either an actual merger or that the same point had been actually decided between the same parties.”

Further, the Learned authors of **Halsbury’s Laws of England, 4th Edition, Volume 16, at paragraph 1528**, explained that:

“in order that a defence of res judicata may succeed, it is necessary to show that not only the cause of action was the same, but also that the plaintiff has had an opportunity of recovering, and but for his own fault, might have recovered in the first action that which he

seeks to recover in the second. A plea of res judicata must show either an actual merger, or that the same point had been actually decided between the same parties. Where the former judgment has been for the defendant, the conditions necessary to conclude the plaintiff are not less stringent. It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed.”

From the above, it is clear that for a plea of *res judicata* to succeed, it must be shown that the matter in question has been dealt with before and between the same parties. In the case before us-

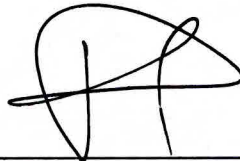
- 1. The matter was between the same parties;***
- 2. The Mortgage deed was adjudicated upon by the Commercial Court Division after which a Writ of Possession was issued; and***
- 3. The Commercial Court made a final decision on the Mortgage.***

In my view, the elements of a matter being ***res judicata*** have been satisfied. Accordingly, I find that this matter is ***res judicata***. I agree with the Defendant’s submission that it is also an abuse of the court process and I dismiss it.

I, accordingly award costs of this application to the Defendant to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 12th day of December, 2017.

A handwritten signature in black ink, consisting of a large, stylized 'Z' shape with a horizontal line crossing it.

M.L. ZULU
HIGH COURT JUDGE