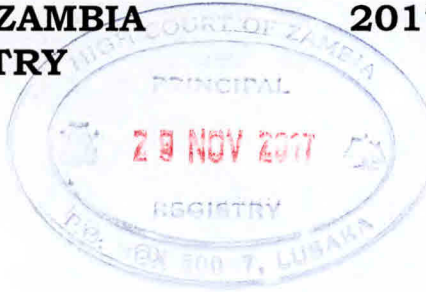


**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**

**2017/HP/1443**

*(Civil Jurisdiction)*



**B E T W E E N :**

KENNEDY CHIBWE KALONGA

**PLAINTIFF**

**AND**

AFRICAN BANKING CORPORATION ZAMBIA LIMITED

**DEFENDANT**

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the  
29<sup>th</sup> day of November, 2017**

*For the Plaintiff* : *In Person*  
*For the Defendant :* *Mr. K. Chenda, Messrs Simeza Sangwa &  
Associates*

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**R U L I N G**

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**Cases Referred To:**

1. *Inyati Construction Limited v Pouwels Construction Zambia Limited and Pouwels Hotels and Resorts Limited 2013/HPC/0285*
2. *Twampane Mining Cooperative Society Limited v E and M Storti Mining Limited, (2011) ZR 67*
3. *Phillip Mutantika and Mulyata v Kenneth Chipungu SCZ Judgment No. 13 of 2014/Appeal No. 94 of 2012*
4. *Communications Authority of Zambia v Vodacom (2009) ZR 196*

**Legislation Referred To:**

1. *High Court Act, Chapter 27*
2. *Rules of the Supreme Court 1999*

**Other Works Referred To:**

1. *Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 36 (1)*

This is the Defendant's motion for an order to set aside Writ of Summons and Statement of Claim for irregularity. It is filed pursuant to Order 7 Rule 2 and Order 11 Rule 21 of the Rules of the High Court and Order 2 Rule 2 of the Rules of the Supreme Court.

The grounds upon which the application is made are as follows:

- (i) *The Plaintiff has not endorsed on the Writ of summons his occupation, electronic address and postal address contrary to Order 7 Rule 2(1) of the High Court Rules; and*
- (ii) *The statement of claim pleads evidence over material facts contrary to Order 18 Rule 7 of the Rules of the Supreme Court.*

The motion is supported by Skeleton Arguments wherein Learned Counsel stated that the Plaintiff issued a Writ of Summons on 25<sup>th</sup> August, 2017 endorsed with the following claims:

- (i) *Reimbursement of all moneys illegally deducted from his salary account.*

- (ii) *A sum of K1,500,000.00 as damages for effecting the illegal deprivation of the Plaintiff's hard earned funds resulting in being refused to write exams at his university.*
- (iii) *Damages for mental stress, anguish and substantial financial loss occasioned on Plaintiff by reason of the said illegal deductions.*
- (iv) *Interest on the sums found due and payable to the Plaintiff, and*
- (v) *Costs*

Counsel submitted that the Plaintiff has failed to comply with the Rules of Court and this amounts to an irregularity. He cited Order 2 Rule 1(1) of the Rules of the Supreme Court, which defines irregularity as:

**“Where in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity.”**

Counsel stated that irregularity implied that there was a failure to comply with the Rules of Court. A party pleading the failure was required to demonstrate the particular Rule of Court, which served as the yardstick of the failure.

Counsel also cited Order 2 Rule 1(2) of the Rules of the Supreme Court, which provides that:

**“Subject to paragraph (3) the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment...”**

Based on that Rule, Counsel asserted that the Court has power to set aside any proceedings or documents that offend the Rules of Court. Counsel adverted to Order 7 of the High Court Rules, which prescribes the mandatory endorsements for originating process. It reads:

**“A Plaintiff suing in person shall endorse upon the writ of summons his place of residence, his postal address and electronic address and his occupation.”**

He buttressed his submissions with reference to the case of **Inyati Construction Limited v Pouwels Construction Zambia Limited and Pouwels Hotels and Resorts Limited<sup>1</sup>**, where the Court set aside the writ of summons for failure to comply with the mandatory requirement.

Counsel contended that the Plaintiff's Writ of Summons, which is not endorsed with his postal address, electronic address and occupation is irregular. He prayed to the Court to set aside the writ.

Counsel further contended that the Plaintiff's Statement of Claim violated Order 18 Rule 7 of the Rules of the Supreme Court and cited Order 18 Rule 7 which reads:

**"Subject to the provisions of this rule, and rules 7A, 10, 11 and 12, every pleading must contain and contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence as the case may be but not the evidence by which those facts are to be proved and the statement must be as brief as the nature of the case admits."**

He then referred me to the explanatory note of that Order which states:

**"Facts not evidence**

**Every pleading must contain only a statement of the material facts on which the party pleading relies and not the evidence by which they are to be proved (per Fanwell L.J in N.W Salt Co. Ltd v Electrolytic Alkali Co. Ltd (1913) 3 KB, 422 at 425) All facts which tend to prove the fact in issue will be relevant at the trial but they are not 'material facts' for pleading purposes "It is an elementary rule in pleading that when a statement of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of proving it, or the evidence sustaining the allegation. (per Lord Denman C.J. in Williams v Wilcox (1838) 8 A & E 314 at 331 and Stuart v Glastone (1879) 10 Ch D 644"**

As to the contrast between material facts and evidence, Counsel called in aid the learned authors of **Halsbury's Laws of England 4<sup>th</sup> Edition, Volume 36 (1)** at paragraph 16 citing the exposition of Farwell L.J. in *N.W Salt Co. Ltd v Electrolytic Alkali Co. Ltd*, (1913) 3 K.B 422 that:

**"If a party relies on a fact and will fall in his claim or defence unless at the trial that fact is proved, that fact will be a material fact or factum probandum. However, where that fact relied on is such that if the party fails to prove it at trial he may nevertheless succeed on his claim or defence, that fact will in general not be material fact, but only evidence of a material fact. Facts of this kind are known as facta probantia and should not be pleaded. Thus where an oral agreement is relied on, it should be alleged as a fact that such agreement was entered into. The interviews which will be proved in support of such allegation should not be described in the pleadings even though what took place at them must be proved at the trial. So generally, when a state of facts is relied on, it is enough to allege it without setting out the subordinate facts which are the means of proving it or the evidence sustaining the allegation."**

Counsel submitted that it was trite that pleadings must contain only the material facts on which a party relies and not the evidence by which they are to be proved. He contended that the Plaintiff violated the facts not evidence rule of this Court when he pleaded evidence in his Statement of Claim as follows:

**"Paragraph 5**

**Material fact:** *Plaintiff paid loan balance of K16,998 in full on 24<sup>th</sup> November 2016.*

**Evidence pleaded:** *Manner and mode in which loan balance was paid i.e. "by way of depositing a Zambia National Commercial Bank cheque number 008115 in the sum of K17,320.00 a copy of which is here annexed to, for your case reference.*

**Paragraph 7:**

**Material fact:** *There were internal written requests for deductions to stop.*

**Evidence pleaded:** *The names and designations of the authors of the letters and the context of the letter, the said letters being the letter written by the Defendant Bank's own employees being one written by a customer service officer one Bertha C. Chibwe and dated 12 January, 2017 and a subsequent letter dated 10<sup>th</sup> April, 2017 written by one Mr. Simon Mwansasu, the Bank Manager advising the bank to stop effecting the said unlawful and unjustifiable monthly deductions from Plaintiff's salary."*

Counsel went on to refer to the case of **Twampane Mining Cooperative Society Limited v E and M Storti Mining Limited<sup>2</sup>**, where it was held inter alia that:

**"Indeed there is no need to appeal for the sake of appealing when the appeal has no prospect of success. In this regard, we cannot over-emphasise the importance of adhering to Rules of Court as this is intended to ensure that matters are heard in an orderly and expeditious manner. Allowing this appeal would be tantamount to us encouraging laxity and non-observance of rules by practitioners and litigants in general. We repeat what we said in *Nkhuwa v Lusaka Tyre Services Limited (3)* that those who choose to ignore Rules of Court will do so at their own peril."**

Counsel also called in aid the case of **Phillip Mutantika and Mulyata v Kenneth Chipungu**<sup>3</sup>. Counsel prayed to the Court to set aside the Plaintiff's Statement of Claim because it is in breach of the mandatory rules of Court. It mattered less that the Plaintiff is acting in person as ignorance of the law was no defence. He added that the Plaintiff's Writ of Summons and Statement of Claim were grossly irregular for non-compliance with the mandatory Rules of Court and the result was that they were incompetent. He prayed for costs to be paid by the Plaintiff before taking any further steps.

The Plaintiff filed an Affidavit in Opposition, where he admits that his Writ of Summons and Statement of Claim are irregular. He avers that he has a good case, and if granted leave, he can amend his originating process. In his oral arguments, the Plaintiff stated that Article 1 (3) and (4) of the Constitution proscribes subordinate legislation, which is incompatible with its provisions. He prayed to the Court to allow his Statement of Claim and to dismiss the Defendant's application.



I have anxiously considered the affidavit evidence and submissions of Learned Counsel and the Plaintiff. From the outset, I wish to state that this application does not turn on the Constitution and the Plaintiff's submission made thereon are wholly misplaced. It is not difficult to discern that the Writ of Summons is not endorsed with the Plaintiff's postal address, electronic address and occupation. This fact has not been challenged by the Plaintiff. Be that as it may, I find that the Plaintiff's writ offends Order 7 of the Rules of the High Court. I accordingly set aside for irregularity.

I have carefully considered paragraphs 5 and 7 of the Statement of Claim and agree in toto with learned Counsel for the Defendant that the paragraphs contain evidence and not material facts. I also find that paragraphs 8 and 9 of the Statement of Claim plead evidence as opposed to material facts. This is a complete departure from the well settled principle of law on pleadings. I therefore, have no hesitation in setting aside the Statement of Claim. I am fortified by the case of **Phillip Mutantika**<sup>3</sup>, where the Supreme Court stated that:

**“On our part, we have always underscored the need for parties to strictly adhere to the Rules of Court and that the failure to comply can be fatal to a party’s case.”**

In the present case, even though the Plaintiff appears in person, he is not exonerated from the Rules of Court as guided by the case of **Communications Authority of Zambia v Vodacom<sup>4</sup>**, where the Supreme Court stated that:

**“The Plaintiff was told that it would be issued. So, it was incumbent upon it to check for its publication in the Government Gazette. This is so because the Plaintiff had an interest in its issuance. Additionally, a statutory instrument is law. It is often said that ignorance of law is no defence for the foregoing reasons, ground three succeeds.”** (*my emphasis*)

The Plaintiff sought leave to amend his originating process vide his Affidavit in Opposition. I find this highly irregular when there is a process in which the Court can be summoned for such an application. I therefore, direct the Plaintiff to amend his Writ of Summons and Statement of claim within the next fourteen (14) days, failing which, this action shall stand dismissed.

Costs shall abide the event to be taxed in default of agreement.

R11

Dated this 29<sup>th</sup> day of November, 2017

*M. Mapani*  
M. Mapani-Kawimbe  
**HIGH COURT JUDGE**