

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA

2017/HPC/0010

(Commercial Registry)

B E T W E E N:

**YAHYA ABDI HUSSEIN
AFDUB ABDINUR SAID FARAH**



**1st PLAINTIFF
2nd PLAINTIFF**

AND

BNM FREIGHT FORWARDERS COMPANY LIMITED

DEFENDANT

RULING

Cases referred to:

1. *BP Zambia Plc v Interland Motors (2001) Z.R. 37;*
2. *Kelvin Hang'andu & company (a Firm) v. Webby Mulubisha (2008) 2 Z.R. 82;*
3. *Development Bank of Zambia and Another v. Sunvest Limited and Another (1995-1997) Z.R. 187;*
4. *Bakewell Bakeries Limited vs. Steyn Jempa, Cause No. 2012/HPA/002*

Legislation and Other Materials referred to:

1. *Order III, rule 2, High Court Rules, Chapter 27 of the Laws of Zambia;*
2. *Order 33, Rule 3 and Order 29/1A/33 of the Rules of the Supreme Court of England, 1965, Supreme Court Practice (White Book, 1999 edition).*

This is an application on the part of the Defendant to set aside the Originating Process filed on 10th January, 2017 for irregularity. Additionally, the Defendant seeks to have the injunction granted by Order of Court on 12th January, 2017 discharged.

The application was made by way of Summons dated 23rd May, 2017, issued pursuant to **Order III, Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia**, as read with **Order 33, Rule 3 and Order 29/1A/33 of the Rules of the Supreme Court of England, 1965, Supreme Court Practice (White Book, 1999 edition)**.

The Summons was filed together with an Affidavit in Support deposed to by Ali Kreik, the Assistant Managing Director for Business Development in the Defendant Company and Skeleton Arguments and List of Authorities.

According to the Affidavit in Support, the Plaintiffs commenced an action against the Defendant on 6th January, 2017 in Tanzania, under cause No. 2 of 2017 before taking out the process that is subject to this application. The deponent attested that the two actions sought the same redress, including an injunction, which was granted in Tanzania by order of 6th January, 2017.

I find it necessary, at this stage, to recount the nature of the Plaintiffs claim under this cause and the injunctive relief that was granted.

The claim endorsed on the Writ of Summons taken out of the High Court for Zambia is for: (i) the sum of US\$ 222, 600 being money accrued as demurrage at the rate of \$350 per day from the 6th of June, 2016 to the 2nd of January, 2017; (ii) damages for loss of income; (iii) costs; and (iv) such other relief the court may deem fit.

The injunction that was granted to the Plaintiffs by this Court on 12th January, 2017 restrained the Defendant, their agents or their servants or howsoever otherwise from interfering, moving or doing anything with containers bearing serial numbers MEDUB 545606, BMOU 5505430 and GATUB 530080 that stood loaded on a truck.

The injunction that was granted in Tanzania on 6th January, 2017 restrained the Respondents in that action from, *inter alia*, offloading and doing anything in respect of the consignment that was loaded on three trucks bearing registration numbers ALC 571, ACP 6515 and ACR 5514 that carried containers MEDUB 545666, BMOU 505430 and GATUB 530080 which were within Tunduma TRA vicinity.

Moving back to the application before me, the argument presented by the Defendant was that the commencement of two different actions, with the same facts, before two different courts amounted to multiplicity of actions, abuse of court process and forum shopping. The argument was premised primarily on the strength of two Supreme Court decisions.

The first decision that the Defendant relied on was the case of **BP Zambia Plc v. Interland Motors (2001) Z.R. 37¹**, where it was held that *"A party in dispute with another over a particular subject should not be allowed to deploy his grievances piecemeal in scattered litigation and keep on hauling the same opponent over the same matter before various courts."*

The Defendant also took refuge in the case of **Kelvin Hang'andu & Company (a Firm) v. Webby Mulubisha (2008) 2 Z.R. 82²**, where it was held, *inter alia*, that *"Once a matter is before court in whatever place, if that process is properly before it, the court should be the sole court to adjudicate all issues involved, all interested parties have an obligation to bring all issues in that matter before that particular court. Forum shopping is abuse of process which is unacceptable."* (Court emphasis)

As regards the injunction, the Defendant invited this Court to quash the interim injunction that it granted on 12th January, 2017 on the basis that there already existed an injunction under the

Tanzanian cause. The invitation rode on the back of the case of ***Development Bank of Zambia and Another v. Sunvest Limited and Another (1995-1997) Z.R. 187³***, wherein the Supreme Court guided that the injunction in that cause should be quashed on account of an already existing action on the same subject matter. In making its determination, the Court expressed its disapproval of the commencement of a multiplicity of procedures, proceedings and actions in different courts which could result in the courts making contradictory decisions on the same matter.

When the application came up for hearing on 20th June, 2017 the Defendant was not in attendance. The Plaintiffs, on the other hand, was represented by Counsel who articulated the Plaintiffs' opposition to the application.

Counsel for the Plaintiffs relied on the Affidavit in Opposition deposed to by the 2nd Plaintiff which was filed into Court on 15th June, 2017. Reliance was also placed on the Plaintiffs' Skeleton Arguments in Opposition and attendant List of Authorities that were filed together with the Affidavit in Opposition.

The Affidavit in Opposition confirmed that the 2nd Plaintiff commenced an action against the Defendant in Tanzania prior to commencing this action. The Affidavit revealed that the action in Tanzania was commenced when the goods subject to this claim

were in Tanzania and that after the goods moved into Zambia, the claim in Tanzania was discontinued.

The Plaintiff argued that the discontinuance of the cause in Tanzania extinguished the possibility of having a multiplicity of actions. The gravamen of the Plaintiffs' contention, as I understand it, is that the absence of other pending proceedings over the same subject matter rendered the argument of irregularity occasioned by multiple actions redundant.

In aid of the Plaintiffs' argument, the Court's attention was drawn to the case of ***Bakewell Bakeries Limited vs. Steyn Jempa, Cause No. 2012/HPA/002***⁴. In that case, the High Court considered an appeal against part of a Magistrate's ruling that there was no multiplicity of actions. The Court dismissed the appeal. In so doing, the learned Judge F.M. Lengalenga observed that the potentially competing cause in those proceedings had been dismissed and as a result ratiocinated as follows:

"Therefore, the said action having been dismissed and the decision not having been challenged means that the same cannot be revisited ... Therefore, the possibility of having two conflicting decisions cannot arise as cause number 2009/CRMP/1040 was dismissed and is dead and buried and cannot be resurrected."

I see no fault with the aforementioned reasoning applied by Hon. Judge Lengalenga and I am persuaded to adopt it.

Coming to the application before me, I have carefully considered all the Affidavit evidence before me, together with the associated arguments, authorities and submissions.

At the outset, I note that the parties are agreed that the Plaintiffs initiated proceedings in Tanzania and subsequently in Zambia. The parties are also of one mind in acknowledging that the existence of multiple actions on the same subject matter is frowned upon by the Courts.

This application, however, turns on the motivation behind the birthing of the two actions and the impact of the subsequent discontinuance of the action commenced in Tanzania.

The undisputed Affidavit evidence revealed that the case in Tanzania was instituted on the basis that the goods subject to the proceedings were in Tanzania at all times germane to that action. The said evidence also disclosed that the action before this Court was commenced after the goods moved into Zambia, following which the action in Tanzania was discontinued.

The context of the institution and discontinuance of the action in Tanzania incites me to begin by addressing the argument related to forum shopping. It is trite law that it is the deliberate pursuit of multiple actions before multiple courts or jurisdictions between the

same parties over the same issues with the intension of securing the forum likely to give the searching party the outcome it desires that forms the bedrock of forum shopping.

In casu, the Affidavit evidence revealed that the institution of proceedings in both instances were provoked by the location of the goods. This calls to mind the maxim *actor sequitur forum rei*, that is, the plaintiff follows the forum of the property in the lawsuit. In my view, the Plaintiffs cannot be faulted for opting to adopt sound principles of jurisdiction in instituting proceeding based on the *forum rei*.

Given the fact that the Plaintiff withdrew process in Tanzania after the goods moved to Zambia and after the action in Zambia was activated, I am persuaded that the Plaintiffs did not institute the proceedings in Zambia merely in pursuit of a court or jurisdiction that was more likely to give them a favourable outcome. That being the case, I disagree with the contention that the Plaintiffs were forum shopping.

Coming to the effect of the discontinuance of the cause in Tanzania on this application, I employ the ratiocination that the discontinuance of a claim of a similar nature before another court, which would have otherwise exposed the existing claim to the possibility of a conflicting outcome, effectively extinguishes the materialisation of such an objectionable outcome.

In view of the foregoing, I find and hold that as it stands *in casu*, there is no multiplicity of action, nor any abuse of process nor any forum shopping. Accordingly, the Defendant's application for an order to set aside the originating process as well as to discharge the injunction for irregularity fails and the application is dismissed.

Costs shall be borne by the Defendant, the same to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 29th day of November, 2017



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Lady Justice B. G. Lungu

HIGH COURT JUDGE