

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

(Civil Jurisdiction)

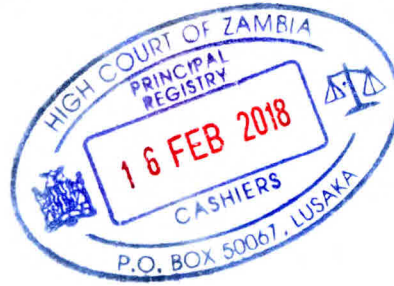
2014/HP/1554

BETWEEN:

EDRICK JERE

AND

MALISON MUKONDE



PLAINTIFF

DEFENDANT

**Before Honourable Mrs. Justice S. M. Wanjelani on 16 day of
February, 2018**

*For the Plaintiff: Mrs. P. Chisanga-Miti, Messrs KMG Chisanga
Advocates*

For the Respondent: N/A

RULING

Cases referred to:

1. *Zulu v The People* (1990-1992) ZR 62
2. *Balogh v The Crown Court at St. Albans* [1974] 3 All E.R. 283.
3. *Beatrice Nyambe v Barclays Bank Zambia Plc* (2008) ZR Vol. 2 page 195
4. *Rosemary Chibwe V Austin Chibwe* (SCZ Judgment No. 38 of 2000),

Legislation and other material referred to:

1. *Rules of the Supreme Court, 1999 Edition*
2. *Black's Law Dictionary, 8thEdn (2004)*

This is a Ruling on the Plaintiff's Ex-parte application for Leave to commence Contempt Proceedings pursuant to **Order 52, the Rules of the Supreme Court, 1997**.

The application is supported by an Affidavit in Support sworn by **EDRICK JERE**, in which he deposed that on 23rd March 2015, a Judgment in Default of Appearance and Defence was entered in favour of the Plaintiff for specific performance of the Contract for the sale of the property known as **Stand Number 34797**, Lusaka. as per exhibit copy of the same marked "**EJ1**".

He further deposed that despite the Order in the Judgment made by the Court, the Defendant failed or neglected to perform his obligation under the Contract of Sale and in a bid to finalize the sale, the Deponent sought an Order to have the Deputy Registrar of the High Court execute the Assignment on behalf of the Defendant on 23rd December 2015 as per copy of the Order marked "**EJ2**".

The Deponent contends that he was advised by his Counsel of record that they had been making frantic and repeated efforts to get the Defendant to specifically perform the assignment by settling the property transfer tax payable on the sale and allow the Zambia Revenue Authority to grant clearance of the transaction but the Defendant has continued to disregard the Order of the Court, and all attempts to have him perform his obligation under the Contract of Sale have proved futile. The Deponent concluded by stating that he was advised by his Advocates of record that the conduct of the Defendant was calculated at undermining the Judgment of the

Court and was an act of contempt of the Court and thus he ought to be granted the Order for leave to commence Committal proceedings against the Defendant.

During the hearing, Counsel for the Applicant relied on the Affidavit in Support of the Application and reiterated that the Defendant has continued to disregard the Judgment of the Court despite their efforts.

I have considered the evidence on record and Counsel's submissions. According to Black's Law Dictionary:

*"**contempt**' is conduct that defies the authority or dignity of a Court or Legislature and because such conduct interferes with the administration of Justice, it is punishable usually by a fine or imprisonment, until the contemnor complies with the Court order".*

In relation to the authority of this Court to deal with contempt, **Order 52 of the Rules of the Supreme Court** empowers the Court to punish for contempt. Applications for contempt are normally made for the purposes of enforcing court judgments and/or Orders as illustrated in **Order 52/1/4** of the Rules. Thus the Leave being sought by the Plaintiff falls under the realm of and for purposes of enforcement of Court Orders.

The sequence of this matter shows that the Plaintiff commenced this action by way of Writ of Summons and Statement of Claim on

23rd September, 2014. The Judgment in Default of Appearance and Defence was granted on 23rd March, 2015, and on the Order for Execution of an Assignment by the Deputy Registrar was granted on 23rd December while the Assignment duly executed on 11th February, 2016.

The record further shows that all these applications and Orders were served on the Defendant's Advocates as evidenced by the various Affidavits of Service.

As alluded to in the definition of contempt, it is trite that the Court has jurisdiction to enforce its own orders to prevent any attempts to interfere with the administration of justice through Committal Orders. However, the Supreme Court in the case of **Zulu v The People**⁽¹⁾ citing the case of **Balogh v The Crown Court at St. Albans**⁽²⁾ cautioned that:

“this power is to be exercised with scrupulous care, and only when the case is clear and beyond reasonable doubt.”

In addition, Wood J, High Court Judge then, in the case of **Beatrice Nyambe v Barclays Bank Zambia Plc**⁽³⁾ stated:

“Contempt of Court quite apart from being concerned with the authority and dignity of the Court, also ultimately deals with the liberty of the individual. The consequences of disobeying Court Orders whether properly or improperly obtained are very serious. It is for this reason that the Court must exercise great care when dealing with applications relating to contempt of

court. It is therefore imperative that the rules are strictly followed.”

In this regard, I had recourse to **Order 45 Rule 7** on the prerequisites to enforcement of Orders and it states:

“an order of the Court shall not be enforced under Rule 5 unless (a) a copy of the order has been served personally on the person required to do or abstain, from doing the act in question ;and...”

A perusal of the evidence on record does not show that the alleged contemnor, **Malison Mukonde**, was personally served with the Judgment in Default while the Affidavit in Support of the Ex-parte Summons for an Order of Execution of Assignment sworn by the Plaintiff and filed on 2nd October, 2015, shows that Defendant’s Counsel was served, as per exhibit marked "**EJ2**" attached thereto. However, according to **Order 52 Rule 3**, non compliance with personal service may not be fatal to the process. It states:

"Failure to comply with a proper procedure, such as personal service, is not necessarily fatal to the lawfulness of a contempt order. The court has complete discretion to perfect an invalid committal order in a contempt case, but that power should only be used in exceptional cases and should be dictated by the need to do justice having regard to the interests of the contemnor, the victim of the contempt and other court users. Where a contemnor has not suffered any injustice by the failure to follow the proper procedures (such as service) the committal

order could stand subject to variation to take account of any technical or procedural defects".

In the case in casu, and considering the nature of the offence, I find that the alleged contemnor may suffer any injustice due to lack of personal service as there is nothing on record to show that the alleged Contemnor was aware of these Orders. I am fortified in my view by the Supreme Court's holding in the case of **Rosemary Chibwe V Austin Chibwe**⁽⁴⁾, where it was stated, inter alia, that:

"It is a cardinal principle supported by a plethora of authorities that court's conclusions must be based on facts stated on record".

Thus based on the evidence on record and guided by the above authorities, I find that it is not appropriate in these circumstances to exercise my discretion to grant the Plaintiff leave to commence committal proceedings against **Malison Mukonde** and consequently decline to grant the application as sought by Plaintiff. I make no order as to costs.

Leave to appeal is granted.

Delivered at Lusaka this 16th day of February, 2018.

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S.M. WANJELANI
HIGH COURT JUDGE