



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

2017/HP/0689

BETWEEN:

MARGARET KATUBILA

*(Suing as Administratrix of the estate of the
Late EMMA CHIBAMBA)*

PLAINTIFF

AND

AINESS SHIFWANKULA

1st DEFENDANT

SAMASON KACHEPA

2nd DEFENDANT

McBRIDE BRIAN KAITE

INTENDED PARTY

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 2nd DAY OF
FEBRUARY, 2018**

For the Plaintiff : Mrs M.M. Siansima, TMN Legal Practitioners

For the Defendants : Mr H. Mulenga, Philsong and Partners

R U L I N G

CASES REFERRED TO:

1. **NFC Africa Mining PLC V Techno Zambia Limited Appeal No 22 of 2009**
2. **Chama Chipli and another V Wellington Kashimike 2012 3 ZR 483**

LEGISLATION REFERRED TO:

1. **The High Court Rules, Chapter 27 of the Laws of Zambia**
2. **The Rules of the Supreme Court, 1999 edition.**

This is a ruling on an application, made by the Defendants pursuant to Order 11 Rule 4 (1) of the High Court Rules, and the court's ruling dated 21st July, 2017, as well as the court's inherent jurisdiction to set aside and or dismiss the amended writ of summons.

Counsel stated that they relied on the affidavit filed in support of the application on 13th October, 2017, whose main gist is that the Plaintiff was granted leave to amend the irregular writ of summons. However the amended writ of summons filed into court it shows that it is addressed to the Defendants advocates, which is irregular. It was Counsel's submission that Order 7 of the High Court Rules is instructive on what should be endorsed on a writ of summons, and the address of the Defendant's advocates is not one of them.

He went on to submit that a writ of summons is a prescribed document, and the one filed before the court does not comply. Counsel also submitted that Order 10 (5) of the High Court Rules deals with service of a writ of summons where the advocates for the Defendant have undertaken to be served the writ. That where this is the position, the name of the advocates should not be endorsed on the writ of summons. The case of **NFC AFRICA MINING PLC V TECHNO ZAMBIA LIMITED Appeal No 22 of 2009** was referred to stating that in that case it was held that the rules of the court are intended to be obeyed.

Therefore failure to obey the said rules by the Plaintiff for a second time was inexcusable, and the writ of summons should be set aside and or dismissed. Further that an examination of the writ of summons shows that it flies in the face of the court's ruling dated 21st July, 2017, as the court in that ruling misjoined the 2nd Defendant from the proceedings, and the intended party was joined as the 2nd Defendant. That filing a writ of summons that defied the court's ruling, was not only contemptuous of the court's order, but could not stand as the court could not reverse its order. Counsel prayed that the amended writ of summons be dismissed with costs.

In response, Counsel for the Plaintiff stated that they opposed the application and relied on the affidavit in opposition filed on 22nd November, 2017, especially paragraphs 5 to 10 of the said affidavit. That further reliance was placed on the case of **CHAMA CHIPLI AND ANOTHER V WELLINGTON KASHIMIKE 2012 3 ZR 483** which held that a procedural irregularity is not

fatal as corrective action can be taken to allow the action to stand, so that triable issues proceed to trial. Further that Order 2 Rule 2 of the Rules of the Supreme Court, 1999 edition clearly provides that a second chance can be given to a party that has occasioned an irregularity to correct it. That the omissions before court are curable, and it was prayed that the court dismisses the application, and allows corrective measures to be taken.

Counsel for the Defendants in reply submitted that Order 2 Rule 2 of the Rules of the Supreme Court relied on by the Plaintiff, merely gives a party a second chance and not a third chance as in this case. It was further stated that an action in disregard of the court's ruling could not stand, and the action was not merely irregular but fatal. The submission with regard to the reliance on the **CHAMA CHIPILI** case, was that the case was distinguishable from this case as in that case the irregularities occurred for the first time, unlike in this case where it was the third time. Further that case did not involve disregard of the court's order, and Counsel reiterated that the writ of summons be dismissed.

I have considered the application. Order XI Rule 4(1) of the High Court Rules, pursuant to which the application was made provides that;

“4. (1) The advocate of a defendant appearing by advocate shall state in the memorandum of appearance-

(a) his own place of business and the postal address thereof; and
(b) if his place of business and postal address or either of them be more than ten kilometres from the Registry in which the cause or matter is pending, a proper place and postal address or either of them, as the case may require, which shall be not more than ten kilometres from such Registry;

and either of the addresses which are not more than ten kilometres from such Registry shall be his address for service for the purposes of these Rules.”

On 21st July, 2017, I delivered a ruling in which I granted leave to the Plaintiff to amend the writ of summons so that she was reflected as suing in a representative capacity, and I also granted an order of misjoinder, misjoining Samson Kachepa as 2nd Defendant in the proceedings, and joining McBride Brian Kaite as the 2nd Defendant, as the Plaintiff did not object to the application. On 20th September, 2017, an amended writ of summons was filed.

The Defendants contention is that the said amended writ does not comply with the rules of the court, as it is addressed to the Defendants advocate's address, which goes against the provisions of Order 7 of the High Court Rules, Chapter 27 of the Laws of Zambia. The said Order refers to endorsement of the Plaintiff's address on the writ of summons. Order VI Rule 2 of the said High Court Rules on the other hand provides for how a writ is formatted. It states that;

“Every writ of summons shall be in the appropriate form as set out in the First Schedule with such variations as circumstances may require.”

Form 2 in the first schedule to the High Court Act, Chapter 27 of the Laws of Zambia is a specimen writ. It is addressed to a Defendant in any suit requiring them to cause appearance within the relevant number of days applicable, and that in default thereof judgment may be entered against them. The specimen writ does not refer to the advocates of any defendant being addressed as they are not the person sued. Form 18 in the first schedule of the High Court Act, is a memorandum of appearance in which the Defendant to any suit enters appearance to the writ, and indicates whether they appear in person or by Counsel, and endorse their address, as well as that of their Counsel if they are represented.

In this case the amended writ is addressed to the Defendant's advocate's address. Counsel for the Defendants referred to Order X Rule 5 of the High Court rules as dealing with service of the writ of summons on the Defendant's advocates where they undertake to be served the writ. That even where this is

the position, the name of the Defendant's advocates should not be endorsed on the writ. I entirely agree with this argument as issue of the writ and service of the writ are two distinct acts or processes.

A writ that is issued is addressed to a defendant, but it may be served on the defendant's advocates where undertaking to receive the same has been made by the defendant's advocates, pursuant to Order X Rule 5 of the High Court Rules, as the general rule provided in Order X Rule 1 (1) of the High Court rules, is that service of any process must be personal. Therefore the writ in this matter having been addressed to the Defendants advocates, and not the Defendants is irregular.

Then there is the issue of the Defendants being cited in the writ, contrary to my ruling dated 21st July, 2017. I have already stated that the Defendants applied to misjoin Samson Kachepa as 2nd Defendant in these proceedings, and join McBride Brian Kaite as the said 2nd Defendant, and the Plaintiff did not object to the said application. I granted the order on that basis. Therefore to maintain Samson Kachepa as the 2nd Defendant and McBride Brian Kaite as an intended party after I delivered a ruling misjoining Samson Kachepa as the 2nd Defendant, and joining McBride Brian Kaite as the 2nd Defendant is disobedience of the ruling, and cannot stand, unless the ruling had been set aside.

Counsel for the Defendants asked me to set aside the amended writ of summons, and dismiss the action, arguing that the irregularities were occurring for the third time, and that Order 2 Rule 2 of the Rules of the Supreme Court relied on by the Plaintiff was not applicable to them, submitting that the said rule allows the rectification of irregularities the second time.

Order 2 of the Rules of the Supreme Court, 1999 edition states that; ***“(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the***

party applying has taken any fresh step after becoming aware of the irregularity.


(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion.”

In my view this order does not place any limitation on the number of times irregularities can be cured, but provides that any party wishing to set aside process for irregularity shall do so within a reasonable time, and before the party applying has taken fresh steps in the proceedings after becoming aware of the irregularity. This the Defendants have done as after the Plaintiff filed the amended writ on 20th September, 2017, they entered conditional appearance on 9th October, 2017, and filed the application to set aside the writ of summons.

There being no limitation as to how many times irregularities can be cured, and in view of the fact that procedural irregularities are curable and not fatal, I decline the application to set aside the writ of summons and dismiss the matter. I however direct that the Plaintiff shall amend the amended writ of summons to cure the irregularity relating to whom the writ of summons is addressed, as well as citing the Defendants as directed in my ruling dated 21st July, 2017. The amended process shall be filed within fourteen days from today, failure to which the amended writ of summons shall be set aside for irregularity.

Costs of and incidental to the application go to the Defendants to be taxed in default of agreement. Leave to appeal is granted.

DATED THE 2nd DAY OF FEBRUARY, 2018


S. KAUNDA NEWA
HIGH COURT JUDGE