

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

(Civil Jurisdiction)

2017/HPC/0114



IN THE MATTER OF: Properties comprised in a First Legal Mortgage relating to Stand No. 50 and 51 Ndola

AND

IN THE MATTER OF: Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia as read with Order 88 of the Rules of the Supreme Court of England 1965, (White Book) 1999 Edition

BETWEEN:

**FIRST ALLIANCE BANK (Z) LIMITED
AND
NEIGHBOURS CITY ESTATES LTD
WESTON PHIRI
MAKUKU PHIRI**

APPLICANT

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT**

**Before the Honourable Mr. Justice W. S. Mweemba in Chambers
at Lusaka**

For the Applicant: Ms. T. Sakala – Messrs Fraser Associates

For the Respondents: No Appearance

RULING

LEGISLATION REFERRED TO:

1. Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia.
2. Order 14A Rule 1 of the Rules of the Supreme Court of England 1965, (White Book) 1999 Edition.
3. Order 15 Rule 2 of the Rules of the Supreme Court of England 1965, (White Book) 1999 Edition.

CASES REFERRED TO:

1. **Development Bank of Zambia and Another V Sunvest Limited and Another (1995-1997) ZR 187.**
2. **B.P. Zambia Limited V Interland Motors Limited (2001) ZR 14.**

This is an application by the Respondents for an Order to dismiss this matter for multiplicity or duplicity of actions pursuant to **Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia** and **Order 14A Rule 1 of the Rules of the Supreme Court of England 1965, (White Book) 1999 Edition.**

The application is supported by an Affidavit sworn by Weston Phiri the 2nd Respondent herein as well as Skeleton Arguments filed into Court on 5th April, 2017.

It is deposed by Mr. Phiri that on 2nd November, 2016 Mubende Mining Services Limited (as Plaintiff) under Cause No. 2016/HN/336 commenced legal proceedings against the parties herein in the High Court at Ndola. A true copy of the Writ of Summons and Statement of Claim dated 2nd November, 2016 is exhibited marked "WP1".

That the 1st and 2nd Defendants in Cause No. 2016/HN/336 (i.e. the 2nd and 1st Respondents herein) entered Appearance and Defence and Counterclaim. A copy of the Defence and Counterclaim is exhibited marked "WP2". That similarly the 3rd Defendant in the said Cause (i.e. the Applicant herein) entered Defence and in addition a Counterclaim against the 1st and 2nd Defendants in that

Cause. A copy of the Defence and Counterclaim filed by the Applicant in that Cause is exhibited marked "WP3".

Further that as will be noted from exhibit "WP3" the 3rd Defendant (herein the Applicant) counterclaimed the following reliefs against the 1st and 2nd Defendants:

- (a) Payment of K21,190,358.91 and accruing interest until debt is liquidated.
- (b) Foreclosure and sale of the mortgaged property.
- (c) Any other relief and
- (d) Costs of the suit.

That in the current action the Applicant is claiming the following reliefs from the Respondents:

- (a) Immediate payment of monies secured by a 1st Legal Mortgage dated 13th November, 2009 which as at 19th March, 2017 stood at K23,069,720.00.
- (b) Delivery and Possession of Stand No. 50 and 51 Ndola being the mortgaged properties.
- (c) Foreclosure and Sale of Stands No. 50 and 51 Ndola.
- (d) Further or other relief.
- (e) Costs.

Mr. Phiri deposed that as can be seen the reliefs sought under Cause No. 2016/HN/336 and in this matter are substantially the same. That he is advised by his Advocates and believes that there

is duplicity of actions and the legal issues have been addressed in the Skeleton Arguments.

There is also an Affidavit in Opposition filed into Court on 29th June, 2017 sworn by Stephen Zulu the Head of the Credit Control Department of the Applicant Bank.

He stated that the Applicant has endeavoured to regularize these proceedings and has since written to its Advocates on Record under Cause Number 2016/HN/336 to forthwith discontinue the matter as per the counter claim. A copy of the said letter is exhibited marked "SZ1".

That he had been advised by the Applicant Bank's Advocates and verily believed that in light of firm instructions to discontinue Cause Number 2016/HN/336 the 2nd Defendant's application may be a mere academic exercise as only one cause will subsist before any Court in Zambia involving the parties and the subject matter.

He further deposed that there is in any event a meritorious claim on the Applicant's part and thus the Applicant is desirous to prosecute its claim herein.

Counsel for the Respondents Mr. L. M. Matibini filed Skeleton Arguments in support of the application to dismiss this matter for multiplicity or duplicity of actions.

It was his submission that the Plaintiff in Cause Number 2016/HN/336 entered into a Contract and Condition of Sale with the 1st and 2nd Defendants (herein the 2nd and 1st Respondents)

relating to Stand Nos. 50 and 51 Ndola. The aforesaid Contract of Sale was subject to the redemption of the mortgage with the 3rd Defendant Bank (herein the Applicant). That the reliefs sought therein are:-

- (a) Specific performance of the said Agreement.
- (b) Damages for breach of contract in lieu of or in addition to specific performance, or alternatively.
- (c) Re-imbusement of the said deposit of K1,528,028.10.
- (d) Interest on the said amount pursuant to Section 4 of the Law Reform (Misc. Provisions) Act Cap. 74.
- (e) Further or other relief as may be just.
- (f) Costs.

That as stated in the Affidavit in Support of the application herein the Defendants entered Appearance and Defence. That the Applicant Counterclaimed against the 1st and 2nd Defendant as follows:

- (a) Payment of K21,190,358.91 and accruing interest until debt is liquidated;
- (b) Foreclosure and sale of the mortgaged property;
- (c) Any other relief; and
- (d) Costs of the suit.

It is stated that notwithstanding the Counterclaim by the Applicant against the Respondents in Cause Number 2016/HN/336 the Applicant on 10th March, 2017 commenced legal proceedings

against the Respondents seeking substantially the same reliefs as in the Counterclaim.

It is submitted that the application is brought pursuant to **Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia** and **Order 14A rule 1 of the Rules of the Supreme Court of England 1965, (White Book) 1999 Edition**. Section 13 of the High Court Act provides that:

“In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and all matters in which there is any conflict or variance between the rules of equity and the rules of the common

law with reference to the same matter, the rules of equity shall prevail". (Emphasis Provided)

Whereas **Order 14A Rule 1 of the White Book** provides that:

"The Court may upon application of a part or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that –

- (a) Such question is suitable for determination without a full trial of the action, and**
- (b) Such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein".**

It is submitted that from the above legislative provisions, the Court is under a duty to determine all controversy between the parties including all multiplicity of legal proceedings concerning the same subject matter. The case of **DEVELOPMENT BANK OF ZAMBIA AND ANOTHER V SUNVEST LIMITED AND ANOTHER (1)** was brought to the Court's attention. In that case Ngulube C.J. (as he then was) stated as follows:

"We listened to the arguments in this appeal; and would like to immediately affirm the Judge on his disapproval of the action taken in this matter whereby one action is pending and some other steps are being pursued. We also disapprove of parties commencing a multiplicity of

procedures and proceedings and indeed a multiplicity of actions over the same subject matter. The objection raised by the borrowers in this action to the bank pursuing the remedy of self-redress in this action, that an action was pending, applies with equal force to the whole idea of the borrowers commencing a fresh action when there is already another one pending in the Court with the result that various Courts may end up making various conflicting and contradictory decisions because the parties have started another action in the Courts”.

It is submitted that from the above case, it is clear that the Courts have frowned upon parties commencing multiple procedures, proceedings and or action over the same subject matter. That in the matter in *Casu*, the Respondents have demonstrated through Affidavit evidence that the Applicant seeks substantially the same reliefs herein and under Cause No. 2016/HN/336. That it is trite law that a counterclaim constitutes a separate claim and should be adjudicated like any other claim. That the Respondents are fortified by Order 15 Rule 2 which provides thus:

“15/2 (1)...

- (2) Rules 1 shall apply in relation to a counterclaim as if the counterclaim were a separate action and as if the person making counterclaim were**

the Plaintiff and the person against whom it is made a defendant.

(3)

The Respondents submitted that this matter is a duplicity of the claims under Cause No. 2016/HN/336 and should be dismissed with costs.

The Applicant filed Skeleton Arguments in Opposition on 30th June, 2017. Learned Counsel for the Applicant stated that multiplicity of actions arises where litigants are parties to an action under the same action between or among different courts with the same jurisdiction. That this is succinctly stated in the provisions of **Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia as well as Order 14A Rule 1 of the Rules of the Supreme Court of England 1965 (White Book) 1999 Edition.**

It is submitted that in the matter herein, there is no multiplicity of actions as the Applicant herein has since discontinued its Counterclaim against the Respondents in the matter before the High Court in Ndola as evidenced by the Applicant's Affidavit in Opposition to Summons to dismiss matter for duplicity and multiplicity. That the Court has the power to hear and determine this matter as the subject matter in this action and the action in Ndola, under Cause No. 2016/HN/336 are separate and distinct matters.

It is the Applicant's prayer that the Respondents' application be dismissed with costs.

During the hearing on 5th July, 2017 the Respondents and their Advocates were not in attendance and no grounds were given for non-attendance. Counsel for the Applicant was in Court and she proceeded with the Applicant's opposition to the Respondents' application.

I have considered the Affidavit evidence, the Skeleton Arguments and authorities cited by the parties. The issue for determination is whether this matter should be dismissed for multiplicity or duplicity of actions.

The gist of the Respondents' application is that the Applicant in the matter herein seeks substantially the same reliefs as it seeks against the Respondents in its Counterclaim in Cause No. 2016/HN/336. That therefore this matter is a duplicity of the claims under Cause No. 2016/HN/336 and should be dismissed for being a multiplicity of legal proceedings.

Counsel for the Applicant on the other hand contended that there is no multiplicity of actions as the Applicant herein has since discontinued its Counterclaim against the Respondents in Cause No. 2016/HN/336 and that the subject matter in the present action and the subject matter in Cause No. 2016/HN/336 are separate and distinct.

The authorities cited by both Counsel for the Respondents and Counsel for the Applicant clearly state the position of the law with regard to multiplicity of actions and an abuse of Court process. These authorities can only be relied on if the parties were the same, there were common questions of law and facts and the rights to relief were arising out of the same transaction or series of transactions.

The parties in the present proceedings are not the same as in Cause No. 2016/HN/336. The Plaintiff in Cause No. 2016/HN/336 namely Mubende Mining Services Limited is not a party to the present matter. The Applicant in this matter is a 3rd Defendant in Cause No. 2016/HN/336 while the Respondents in this matter are 2nd and 1st Defendants in Cause No. 2016/HN/336. Further one Makuku Phiri the 3rd Respondent in this matter is not a party to the Cause in the Ndola High Court. It is common cause that both causes of action deal with Stand Nos. 50 and 51 Ndola. However the dispute in Cause No. 2016/HN/336 concerns the Contract of Sale dated 1st March, 2016 relating to Stand Nos. 50 and 51 Ndola between the 1st and 2nd Defendants on the one hand as vendors and the said Mubende Mining Services Limited as purchaser on the other hand, while the current matter relates to various Overdraft Facilities and accommodation granted by the Applicant to the 1st Respondent under Facility Letters dated 24th July, 2013 and 16th July, 2014 to which the said Mubende Mining Services Limited (The Plaintiff in Cause No. 2016/HN/336) is not a party.

Although the Applicant was not a party to the sale transaction between the 2nd and 1st Respondents and the Plaintiff, in the Ndola High Court cause, it became tied to the action in Cause No. 2016/HN/336 when on 25th November, 2016 it entered Defence and a Counterclaim against the 2nd Defendant (Neighbours City Estates Limited) in that cause. It follows that when the Applicant filed the mortgage action herein on 10th March, 2017 the fresh action was a multiplicity or duplicity of action and abuse of Court process given that its claims herein are substantially the same as its claims in the Counterclaim against the 2nd Defendant in Cause No. 2016/HN/336.

The record shows that on 30th June, 2017 the Applicant discontinued its Counterclaim in Cause No. 2016/HN/336 and as such the proceedings herein are no longer a multiplicity or duplicity of action. The discontinuance of the Counterclaim means that the Applicant is no longer tied to Cause No. 2016/HN/336 because although the Plaintiff paid K1,000.028.10 to the Applicant towards redemption of the 2nd Defendant's outstanding mortgage the Applicant is not a party to the Contract of Sale dated 1st March, 2016.

The Courts also disapprove of the multiplicity of actions between the same parties re-litigating the same subject matter because this may result in the Courts making contradictory or conflicting decisions. The case of **DEVELOPMENT BANK OF ZAMBIA AND ANOTHER (1)** already cited above is authority for this legal

position. In another Supreme Court case of **B. P. ZAMBIA PLC V INTER LAND MOTORS LIMITED (2)** Ngulube C.J. as he then 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 administration of Justice would be brought into disrepute if a party managed to get conflicting decisions which undermined each other from two or more different judges over the same subject matter”.

The two causes can and should in my view, be decided separately as the two disputes arise from two separate contracts or transactions and it cannot be said that the two Courts are faced with the same question or issues or that the parties are the same. Neither the Plaintiff in Cause No. 2016/HN/336 nor the Applicant in the present case can get a conflicting or contradictory decision from the Ndola High Court or this Court as the disputes before the two Courts are separate and distinct.

For the foregoing reasons, I hereby decline to grant the Respondents' application to dismiss this matter for multiplicity or duplicity of actions. The application is accordingly dismissed.

As the Applicant's Counterclaim against the 2nd Defendant in Cause No. 2016/HN/336 was discontinued after the mortgage action herein had been commenced, each party is to bear own costs.

Leave to appeal is granted.

Delivered at Lusaka this 29th day of January, 2018.



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WILLIAM S. MWEEMBA
HIGH COURT JUDGE