IN THE HIGH COURT FOR ZAMBIA **2015/HP/2313**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

CHARLES C. MWEEMBA **PLAINTIFF**

AND

KENNEDY MUMA **1ST DEFENDANT**
MORGAN MUMBI **2ND DEFENDANT**
ROADMIX CONSTRUCTION
COMPANY LIMITED **3RD DEFENDANT**

BEFORE THE HONOURABLE MRS. JUSTICE M. C. KOMBE

For the Plaintiff: *In - Person*

For the Defendants: *Ms. C.M. Mwansa – Messrs EBM Chambers*

R U L I N G

Cases referred to:

1. **Rosemary Bwalya, Attorney General and Commissioner of Lands v. Mwanamuto Investments Limited (2012) ZMSC 16.**
2. **Cropper v. Smith (1884) 26 QBD.**
3. **Zambia Seed Company Limited v. West Co-op Haulage Limited and Western Province Cooperative Limited (SCZ Appeal No. 112 of 2013).**
4. **Zambia Consolidated Copper Mines Limited v. Joseph David Chileshe (SCZ Judgment No.21 of 2002).**
5. **NFC Africa Mining PLC v. Techro Zambia Limited (2009) Z.R 236.**

6. **Manharial Hartji Patel v. Surma Stationers Limited, Shashikanji Devraj Vaghela and Emmanuel Mwansa (S.C.Z Judgment No 12 of 2009.**
7. **J.S Wardell v. Universal Engineering Limited and NCCM Limited (1977) Z.R 62.**
8. **Bowmaker Finance Limited v. Buck (1967) Z.R 79.**
9. **The Republic of Botswana & Others v. Mitre Limited SCZ Judgment No. 20 of 1995.**
10. **Kearney Company Limited v. Agip (Z) Limited and Asphalt and Tarmac (1985) Z. R. 7.**

Legislation referred to:

1. **The High Court Rules, Chapter 27 of the Laws of Zambia.**
2. **The Rules of the Supreme Court, 1999 Edition (White Book).**

The delay in rendering this ruling is regretted. This is due to overwhelming work load and the Court being indisposed for a long time after the application was heard.

This is a ruling on an appeal by the Plaintiff against the decision of the Learned Deputy Registrar delivered on 11th August, 2017 in which he set aside his *ex-parte* order to amend the writ of summons and statement of claim with costs.

At the hearing of the appeal, the Plaintiff, Mr. Mweemba relied on the documents filed into Court, being the Notice of Appeal, the arguments in support and also in reply.

The Plaintiff filed four grounds of appeal and also arguments in support.

On ground one of his appeal, he contended that the Learned Registrar erred in law and in fact when he set aside the *ex-parte* order for leave to amend the Plaintiff's writ of summons and statement of claim when such an order was granted freely provided it was made before trial.

He submitted that our laws lean heavily in favour of amendments and in this regard, he cited several provisions relating to amendments and argued that amendments to pleadings could be made before, at or after trial and or even after judgment.

He submitted that the Supreme Court in the case of **Rosemary Bwalya, Attorney General and Commissioner of Lands v. Mwanamuto Investments Limited**[1] aptly guided with respect to when an amendment could be granted when the Court held *inter alia* that:-

> **"It is trite law that pleadings may be amended at any stage of the proceedings before judgment is passed as provided by Order 18 of the High Court Rules and by Order 20/5 of the Rules of the Supreme Court....the law is very clear...this is that an amendment may be**

granted at any stage of the proceedings so long as it is before judgment."

In ground two he contended that the Learned Registrar erred in law and in fact when he held that it was a mandatory requirement that orders for leave to amend pleadings ought to be made subject to costs without taking into consideration that costs were only granted when it had been shown that a party had suffered actual prejudice as a result of the order to amend or the party amending had acted fraudulently.

He submitted under this ground that the object of amendment of pleadings was to enable a party alter its pleadings. This was to ensure that litigation was conducted, not on false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of facts or the true relief or remedy which a party really and finally intended to rely on.

He argued that an amendment should not cause any injustice to the other party. He referred the court to the case of **Cropper v. Smith**[2] and argued that with respect to this authority, the Court emphasized that there was no kind of error or mistake which, if not fraudulent the Court ought not to correct, if it could be done without injustice to the other party.

In this respect he also referred to the case of **Zambia Seed Company Limited v. West Co-op Haulage Limited and Western Province Cooperative Limited** (3) in which the Supreme Court of Zambia held that the policy of the law was that amendments to pleadings sought before hearing should be freely allowed if they were made without injustice to the other side.

He further cited Order 18 of the High Court Rules Chapter 27 of the Laws of Zambia which provides that:

> **"The Court or a Judge may, at any stage of the proceedings, order any proceedings to be amended, whether the defect or error be that of the party applying to amend or not; and all such amendments as may be necessary or proper for the purpose of eliminating all statements which may tend to prejudice, embarrass or delay the fair trial of the suit, and for the purpose of determining, in the existing suit, the real question or questions in controversy between the parties, shall be so made. Every such order shall be made upon such terms as to costs or otherwise as shall seem just."**

He submitted that the law provided that every order to amend should be made upon such terms as to costs or if not as shall seem just. It was his argument that this provision of the law placed

discretionary powers on the court to grant costs were it seemed just to do so and that it did not command a mandatory requirement that an order to amend should be made subject to costs. Hence, the Court would only grant costs with respect to an amendment if the same caused some prejudice merely aimed at delaying the fair trial of the suit.

He argued that in the circumstances of this case, a careful consideration of the amendments could not reasonably be seen to have caused any injustice to the Defendants to warrant costs because on the face of it, the amendments brought conclusive information before the Court.

In ground three he contended that the Learned Registrar erred in law and fact when he set aside the *ex-parte* order to amend despite there being no material before the Court with respect to any fraudulent conduct or prejudice suffered by the Defendant as a result of the order to amend.

He submitted that according to Order 32 rule 6 of the Rules of the Supreme Court (White Book) 1999 Edition, the Court had the discretion to set aside any order granted *ex-parte* but he argued that in order to set aside any order made *ex-parte* there must be

material before court to enable the court exercise such discretion. He contended that the Defendants did not show or bring before the Court any material to show how they were prejudiced by the said amendments.

He submitted that the Learned Deputy Registrar should have considered whether or not the Defendants actually suffered prejudice, loss or injury as a result of the grant of the order to amend the writ of summons and statement of claim.

He therefore urged the Court that the order setting aside the order to amend with costs by the Deputy Registrar be set aside as there was no prejudice shown to have been caused and occasioned by the order for leave to amend the writ and statement of claim that was brought before the Court.

In relation to ground four, he contended that the order setting aside the *ex-parte* order to amend by the Honourable Registrar be set aside with costs to the Plaintiff as the same was not made judiciously.

He argued that it would be just for the Court to order an amendment with costs if it had been shown that the other party had suffered prejudice as a result of the amendment being made.

He referred the court to the case of **Zambia Consolidated Copper Mines Limited v. Joseph David Chileshe**[4] in which the Supreme Court stated that amendments to pleadings should not be allowed if they caused prejudice to the rights of the opposite party as existing at the date of the amendment.

He contended that taking into consideration the amendments made herein, the application for leave to amend was brought in good faith and not designed to abuse the court process. Therefore, the Registrar did not exercise his discretion judiciously when he set aside the order to amend with costs.

Counsel for the Defendants also relied on the heads of arguments and list of authorities in opposition filed into Court.

The Defendants argued in their submissions that the Learned Registrar did not error in law and in fact when he set aside the *ex-parte* order for leave to amend the Plaintiff's writ of summons and statement of claim. That the Learned Registrar was in fact on firm ground to hold that it was a mandatory requirement that orders for leave to amend pleadings ought to be made subject to costs.

It was her contention that applications for leave to amend the pleadings ought to be made *inter-partes* by way of Summons as

provided under Order 20/ 8/4 of the Rules of the Supreme Court (White Book) 1999 Edition which provides that:

> **"If the application is before trial, it should be made by Summons before the Master, or it may be made on the summons for directions or by notice for further direction..."**

Counsel argued that the Plaintiff in this case proceeded to make an application for leave to amend his pleadings by way of an *ex-parte* application. This conduct did not only go against the rules of the court and natural justice but also caused an injustice to the Defendants as the Plaintiff by his *ex-parte* application and order, had usurped the Defendants legal right to peruse the amended pleadings before being filed into court to ensure that the said once filed would not amount to mala fide, fraudulent conduct, prejudice or an intended overreach which would cause an injustice to the Defendants.

It was submitted that the Plaintiff's amended writ and statement of claim on the court's record showed that the Plaintiff had amended the entire statement of claim and the claims as endorsed in the writ of summons save for two paragraphs under the statement of claim. She contended that it was therefore not correct for the Plaintiff to

state that everything in his amended pleadings was the same save for the format.

She added that considering the nature of the amendments it would have been prudent for the Plaintiff to make the application *inter-partes* to ensure that no injustice was caused to the Defendants before filing and placing the same on record. This would have given the Defendants an opportunity to respond or and or oppose the said application.

Counsel pointed out that Order 20/8/4 of the White Book was very instructive in that applications for leave to amend ought to be made by summons and not *ex-parte* summons. She referred the court to the case of **NFC Africa Mining PLC v. Techro Zambia Limited** (5) where it was held that the rules of the court are intended to assist in the proper administration of justice and as such they must be strictly followed. It was her submission that the learned Deputy Registrar acted judiciously by setting aside the *ex-parte* order for leave to amend.

She further submitted that it is trite law and mandatory that all applications for leave to amend pleadings once granted, ought to be made subject to costs. The court was referred to the case of

Manharial Hartji Patel v. Surma Stationers Limited, Shashikanji Devraj Vaghela and Emmanuel Mwansa[6] where it was held *inter-alia* that:

> **"Order 18 rule 1 of the High Court Rules provides that the Court or a judge may at any stage of the proceedings order any proceedings to be amended, whether the defect or error be that of the party applying to amend or not and all such amendments as may be necessary or proper for the purpose of eliminating all statements which may tend to prejudice, embarrass or delay the fair trial of the suit, and for the purpose of determining, the existing suit, the real question or questions in controversy between the parties, shall be so made. Every order shall be so made upon such terms as to costs, or otherwise as shall seem just.**

It was submitted that in light of the above case and the provisions of Order 18 rule 1 of the High Court Rules, it was mandatory that the Plaintiff be ordered to and or condemned to costs for an order to amend pleadings.

It was further submitted that in the case of **J.S. Wardell v. Universal Engineering Limited and NCCM Limited**[7], the court allowed the Plaintiff to amend the statement of claim but

condemned the Plaintiff to costs for the costs that the Defendants had incurred as a result of the amendment.

It was submitted with regards to the above case that where an amendment was in no way likely to prejudice or injure the other party, then the Court would be inclined to grant an order for leave to amend and that such order would be made subject to costs for the costs that would have been incurred.

Counsel contended that it was a misdirection and misapplication by the Plaintiff to state that it would only be just for the Court to order an amendment with costs if it had been shown that the other party had suffered injustice as a result of the amendment being made. She added that the case of ***ZCCM v. Chileshe*** cited by the Plaintiff had been misapplied as it supported the Defendants.

It was further submitted that the *ex-parte* order to amend the writ of summons and statement of claim made no such reference or order as to costs for the allowance of such amendment and therefore the order ought to be set aside.

It was also submitted that Order 18 rule 1 of the High Court Rules and Order 20/5/8 of the White Book made an Order for costs mandatory where an application for amendment had been allowed.

In her oral submissions, Ms. Mwansa reiterated the arguments in her submissions. It was the Defendants prayer that the appeal be dismissed with costs to be paid forthwith for want of merit as was held and stated *inter alia* in the case of **Bowmaker Finance Limited v. Buck**[8].

In his arguments in reply, the Plaintiff submitted that the Defendants had an issue that the order was granted *ex-parte* when it should have been *inter-partes*. He referred the Court to Order 30 rule 1 of the High Court Rules which provided that every application in chambers shall be made by summons. He argued that this rule did not restrict itself to *inter-parte* summons for the term summons engulfed both *inter-parte* and *ex-parte* summons.

He added that a breach of Order 30 rule 1 did not give rise to consequences likely to render setting aside the *ex-parte* order.

He contended that if the Deputy Registrar saw it fit, he could have cancelled the *ex-parte* and replaced it with *inter-parte* and this was going to cure the defect which was a mere irregularity. In support of this assertion he cited the case of **The Republic of Botswana & Others v. Mitre Limited** [9]

He argued alternatively that the Defendants should have insisted on an *inter-partes* hearing to afford them an opportunity to raise objections for leave to amend but they did not do so and resorted to making an application to set aside the order.

I have considered the skeleton arguments and authorities cited by both the Plaintiff and the Defendants.

Although this is an appeal from the decision of the learned Deputy Registrar I am guided by the Supreme Court case of **Kearney Company Limited v. Agip (Z) Limited and Asphalt and Tarmac** (10) wherein the Supreme Court held *inter alia* that:

> **"An appeal from the Deputy Registrar to a Judge in chambers is an entirely fresh application."**

In this regard, I am not constrained to only consider the arguments made before this Court by the Plaintiff and the 2nd Defendant but also to take into account and consider carefully all the affidavits and submissions filed by the parties before the learned Deputy Registrar.

What led to this appeal was the application made by the Defendants to set aside the order for leave the writ o summons and statement of claim. The Defendants contended as they contend before this Court

that they had a right to be heard on the application to amend the writ of summons and statement of claim in the event that they wished to oppose the application.

It was also contended that the Order for amendment made no reference to costs when it was clear that they had already filed a defence and that this Court had issued Orders for Directions.

I have carefully considered the grounds of appeal and the issues raised therein which basically assail the order granted by the learned Deputy Registrar to set aside the order to amend the writ of summons and statement of claim.

Since an appeal before to this Court is considered to be a fresh application, the starting point for my consideration is the law relating to amendments of originating process.

Order 18 rule 1 of the **High Court Rules, Chapter 27 of the Laws of Zambia,** provides as follows:

> **"The Court or a Judge may, at any stage of the proceedings, order any proceedings to be amended... Every such order shall be made upon such terms as to costs or otherwise as shall seem just."**

Order 20 rule 5 and 8 of the Rules of the Supreme Court, 1999 Edition also provide as follows:

> **"...the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just...For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct." (Underlining mine for emphasis only).**

The principle that emerges from these rules regarding amendments of pleadings is that pleadings may be amended at any stage of the proceedings. In granting an order for leave to amend, the Court has to grant such an order with costs. It is my considered view that when legislators promulgated such a rule, it was their intention that such leave be granted with costs incurred by the other party who has to respond and defend their case in line with the amendments so made.

Although the Plaintiff argued that our laws heavily lean in favour of the courts granting amendments however, I do not agree with the Plaintiff's argument that it is only just for the court to award costs where it has been proved that the other party has suffered a prejudice as a result of the amendments.

In this regard I am well guided by the case of ***Bowmaker Finance Limited*** case in which the court stated *inter-alia* that:

> **"However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs." (Underlining mine for emphasis only)**

Further, Evans, J went on to state in the same case that:

> **"I allow this appeal, but I order that the amendments be not made until the said consent has been filed and until all the costs (to be taxed in default of agreement) occasioned by the amendments have been paid by the plaintiff." (Underlining mine for emphasis only).**

Another relevant case to which I addressed my mind is ***Zambia Seed Company*** cited in the Plaintiff's submissions. In that case,

the Court stated *inter-alia* that the court should award costs to any delinquent party rather than decline an application to amend pleadings, or any fault in the proceedings before the hearing.

On the mode of the application, our High Court Rules are silent on that. However under Order 20/8/4 of the Rules of the Supreme Court, the application is made by way of summons and the intended amendments should be specified.

In the matter before this Court, a perusal of the record reveals that the application for leave to amend was heard *ex-parte* when it should have been heard *inter-partes*. The Plaintiff has argued that since the rules only provide that the application should be by summons, then it can be heard *ex-parte* or *inter partes*. The view I hold is that if the intention is to have the application heard *ex parte,* the provision of the law will specifically provide that the application shall be made *ex-parte*. To illustrate this point, Order 16/2/1 of the White Book relating to applications for leave to issue third party notice provides that an application for leave is made *ex parte* to the Master on affidavit.

Similarly, under Order 53 rule 3 of the White Book on application for leave to commence judicial review proceedings, the Order

specifically provides that the application for leave must be made *ex parte.*

It is for this reason that the Learned Deputy Registrar in his ruling acknowledged that in an application for leave to amend the pleadings, it was in the interest of justice that orders be granted after all the parties had been heard. Consequently, he set aside the order to amend the pleadings.

After considering this matter thoroughly and guided by the rules of procedure, I am inclined to agree with the Defendants. The application for leave to amend the writ of summons and statement of claim should have been heard *inter- partes* and not *ex-parte.* This is because the Plaintiff had made substantial amendments to the originating process and that the amendment was a second one after the learned Deputy Registrar had initially granted leave to amend and the Defendants had proceeded to file their defence based on the initial amendments.

On the alternative argument by the Plaintiff that the Defendants should have insisted on an *inter-partes* hearing to afford them an opportunity raise objections, I find this argument to be misconceived. This is because the Deputy Registrar had already

heard the Plaintiff's application *ex-parte* and made an order to that effect. The correct procedure therefore was to move the court to set aside the order if they felt aggrieved.

For the reasons I have highlighted above, I find no merit in the appeal that the learned Deputy Registrar ought not to have set aside the *ex-parte* order to amend as there was merit in the application to set aside the *ex-parte* order to amend the writ of summons and statement of claim. I accordingly uphold the order made by the Deputy Registrar and dismiss the appeal.

In view of the above order, I direct in the interest of justice that if the Plaintiff is desirous to amend the writ of summons and statement of claim, he is at liberty to file a fresh application which shall be heard *inter-partes* before this Court. Considering the circumstances of this case, I make no Order as to costs.

Delivered in Lusaka this 31st Day of August, 2020

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M.C. KOMBE
JUDGE