

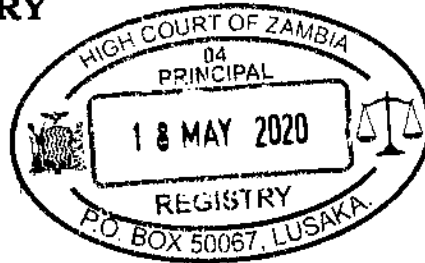
IN THE HIGH COURT FOR ZAMBIA

2020/HP/0322

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

TWENTY-FOUR SEVEN CAPITAL LIMITED PLAINTIFF

AND

EDWARD CHUNGU

DEFENDANT

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN
CHAMBERS, ON 18TH DAY OF MAY, 2020.**

For the Plaintiff: N/A

For the Defendant: N/A

RULING

CASES REFERRED TO:

1. *New Plast Industries vs. The Commissioner of Lands and the Attorney General (2001) Z.R. 51;*
2. *Joseph Gereta Chikuta vs. Chipata Rural Council (1974) Z.R. 241; and*
3. *B.P Zambia PLC vs. Zambia Competition Commission, Total Aviation and Export Limited and Total Zambia Limited (2011) Z.R. 222.*

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court, 1999 Edition, London Sweet & Maxwell; and*
2. *The High Court Act, Chapter 27, Volume 3 of the Laws of Zambia.*

1 INTRODUCTION

1.1 By way of Writ of Summons and Statement of Claim dated 19th March, 2020, the Plaintiff claims against the Defendant the following reliefs: -

- a) *An Order for possession of the property known as Subdivision C of Farm No. 11705, situate in the Central Province of Zambia;*
- b) *A declaration under Section 33 and Section 54 of the Lands and Deeds Registry Act that the Plaintiff is the bona fide owner of the property known as Subdivision C of Farm No. 11705, situate in the Central Province of Zambia;*
- c) *An eviction order of the illegal occupants;*
- d) *Any other relief the Court may deem equitable; and*
- e) *Costs.*

1.2 Immediately after filing the Court process herein, on 20th March, 2020, the Plaintiff strangely filed an *Inter Parte* interlocutory application for an Order for possession and eviction, pursuant to **Order 113, Rules 1 - 3** of **The Rules of the Supreme Court**¹. As if this paradox was not enough, on the same date, the Plaintiff also filed an *Ex Parte* application for possession and eviction pursuant to the same **Order 113, Rules 1 - 3** of **The Rules of the Supreme Court**¹. These two applications under **Order 113** of **The Rules of the Supreme Court**¹ were accompanied by one Affidavit in Support deposed to by Aaron Nkole Mwewa, a Director and Shareholder of the Plaintiff company, which processes under our civil

procedure ought to be independent causes of action commenced by way of Originating Summons.

1.3 Nonetheless, on 15th April, 2020, I directed the Plaintiff to serve the purported applications made pursuant to **Order 113, Rules 1 - 3 of The Rules of the Supreme Court¹** on the Defendant and that the parties file herein their respective Affidavits and skeleton arguments, if any, upon which this Court would proceed to render its Ruling, in view of the global pandemic of Covid-19, which demands social distancing.

1.4 The Plaintiff has not filled any Affidavit to confirm whether it complied with the Court's Order for Directions to serve the said process on the Defendant. As such there is no proof of service of the said Court process.

1.5 The Plaintiff's impropriety did not end here. Somehow it again filed an Originating Summons and Supporting Affidavit seeking the same relief of possession and eviction under the same cause number as the Writ of Summons! The delinquency of impropriety conduct was apparently acquiesced to by the registry that for some incomprehensible reason also accepted such irregular filing.

2 THE LAW AND ANALYSIS

2.1 This matter, to say the least, has been prosecuted by the Plaintiff and its Advocates in the most untidy fashion, casting a long shadow of doubt on Counsel for the

Plaintiff's proper appreciation of our civil procedure as it relates to actions commenced by a Writ of Summons and those under **Order 113, Rules 1 - 3** of **The Rules of the Supreme Court**¹. I say so because its procedurally perverse under our civil procedure to issue a Writ of Summons and under the same Writ of Summons for one to issue applications pursuant to **Order 113, Rules 1 - 3** of **The Rules of the Supreme Court**¹. The latter and former are supposed to be separate and distinct actions.

2.2 Regrettably the Plaintiff's misadventures did not end. Somehow on 21st April, 2020, the Plaintiff also filed an Originating Summons and Supporting Affidavit, claiming the same relief as in the Writ of Summons and under the same cause number as the Writ of Summons!

2.3 Consequently, the Plaintiff's applications made pursuant to **Order 113, Rules 1 - 3** of **The Rules of the Supreme Court**¹ under this action which was commenced by way of Writ of Summons and Statement of Claim are improperly before this Court, therefore procedurally incompetent.

3 FINDINGS

3.1 I have also perused the pleadings herein, which clearly reveal that the Plaintiff seeks an Order for possession and eviction of the Defendant and unknown persons from the subject property. Accordingly, the procedure adopted for commencement of this action is irregular. It is the

firm view of this Court that the Plaintiff ought to have commenced this action by way of Originating Summons as opposed to Writ of Summons and Statement of Claim. It also follows, therefore, that it was an assault of our civil procedure for the Plaintiff to attempt to sandwich independent causes of action under **Order 113, Rules 1 - 3 of The Rules of the Supreme Court¹** into the processes under the Writ of Summons.

3.2 I addressed my mind to **Order VI Rule 1 and 2**, as amended by **Statutory Instrument No. 69 of 1998, The High Court (Amendment) Rules 1998²**, which is couched as follows: -

"(1) Except as otherwise provided by any written law or these Rules, every action in the High Court shall be commenced by Writ of Summons endorsed and accompanied by a full statement of claim.

(2) Any matter which under any written law or these Rules may be disposed of in chambers shall be commenced by an originating summons. (Court's emphasis)

3.3 It is clear from the above cited law that every action in the High Court is supposed to be commenced by Writ of Summons with the exception of what may be provided for under any written law or the High Court Rules. The Supreme Court of Zambia, in the case of **New Plast Industries vs. The Commissioner of Lands and the Attorney General¹**, held as follows: -

"...It is not entirely correct that the mode of commencement of any action largely depends on the relief sought. The correct position is that the mode of commencement of any action is generally provided by the relevant statute. Thus, where a statute provides for the procedure of commencing an action, a party has no option but to abide by that procedure..." (Court's emphasis)

3.4 The principle espoused above is what was affirmed in the earlier case of **Joseph Gereta Chikuta vs. Chipata Rural Council**², where the Court held as follows: -

"There is no case where there is a choice between commencing an action by a writ of summons or by originating summons. The procedure by way of originating summons only applies to those matters which may be disposed of in chambers. Where any matter is brought to the High Court by means of an Originating Summons when it should have been by writ, the Court has no jurisdiction to make a declaration."
(Court's emphasis)

3.5 The Supreme Court re-affirmed this position in the case of **B.P Zambia PLC vs. Zambia Competition Commission, Total Aviation and Export Limited and Total Zambia Limited**³, when it held as follows: -

"The mode of commencement of any action depends generally on the mode provided by the relevant statute... Since the dispute leading to this appeal arose from the decision of the Commission which was exercising this power under the Competition and Fair Trading Act, the applicable statute was the Act and not

Order 53 of the Rules of the Supreme Court because the statute prescribes the mode of commencement." (Court's emphasis)

3.6 What is clear from the above cited authorities, is that the mode of commencement of any action depends generally on the mode provided by the relevant statute. In my considered view, this is consonant with ***Order VI, Rule 1 of The High Court Rules***², cited above, which recognises that statute may provide for the mode of commencement of an action other than what the said Order provides, which is commencement by Writ of Summons. Since the law provides for commencement of the action by Originating Summons, this action was wrongly commenced and therefore the Court has no jurisdiction to entertain the action.

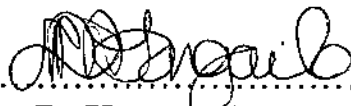
4 CONCLUSION

4.1 I find and hold that the Plaintiff invoked the wrong mode of commencement of this suit. Accordingly, I find no justification for me to grant its applications made under ***Order 113, Rules 1 - 3 of The Rules of the Supreme Court***¹ in this cause of action and further I also hereby dismiss this action for wrong mode of commencement.

4.2 I make no order as to costs.

4.3 Leave to appeal is granted.

Delivered at Lusaka on the 18th day of May, 2020.



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P. K. YANGAILO
HIGH COURT JUDGE