IN THE HIGH COURT FOR ZAMBIA **2017/HP/0721**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN

HUSTY MOFFAT MWACHILELE **APPELANT**

AND

JUNKO INVESTMENT **1ST RESPONDENT**

ABDALLAH LUKANIKA **2ND RESPONDENT**

Before the Honorable Lady Justice C. Lombe Phiri in Chambers

For the Plaintiff: *G. Lungu – Muleza Mwiimbu & Co*

For the Defendant: *Ms. N. Multi– Vantra -Lukona Chambers*

RULING

CASES REFERRED TO:

1. **R.B Policies at Lloyds vs Butter (1949) 2 ALLER 226**
2. **William David Carlise Wise vs E F Hervey Limited (1985) ZR 179 (SC**
3. **Rosemary Chibwe v Austin Chibwe (2001) ZR 1**
4. **Edward Shamwana v The People (1985) ZR 41 (SC)**
5. **Krige and Another vs Christian Council of Zambia (1975) ZR 152 (SC**

6. **Arthur Nelson Ndhlovu and Dr. Jacob Mumbi Mwanza v L Shams Building Materials Company Limited and Jayesh Shar (SCZ Judgement No. 12 of 2002)**
7. **Galaunia Farms Ltd V National Milling Company Ltd(2002) ZR 135**

LEGISLATION AND OTHER MATERIALS REFERRED TO:

1. **Order 14, Rule 5(1) HCR Cap 27 of the Laws of Zambia**
2. **Order 15, Rule 4 RSC 1999 Edition (White Book)**
3. **Section 4 (e) of the Limitations Act, 1939**

This is an appeal by Husty Moffat Mwachilele herein after referred to as the Appellant against the Ruling of the Deputy Registrar delivered on 20th February at Lusaka.

The background of the matter is that the Appellant filed a Writ of Summons wherein he claimed that he had offered stand No. Lus /20910 Kafue Road, Lusaka to the Respondents at a price of K35,000.00 and that the Respondents only paid K1,000.00 leaving a balance of K34,000.00 unpaid at the time of the suit. The Appellants main claim in the lower court was for termination of the contract of sale entered into between the Appellant and the Respondents on 18th November, 2002. Damages for inconvenience and any other relief.

The Respondents filed summons to dismiss cause of action for bringing the action out of time pursuant to the Limitation of Actions Act, 1939 sections

2 (1),(3) and (4(3) before the Deputy Registrar. Upon hearing the application, the Deputy Registrar dismissed the action on grounds that it was statute barred.

It was against this background that the Appellant appealed to this Court advancing one ground of appeal

GROUND ONE

That the Court below erred both in Law and in fact when it dismissed the Appellant's action for being statute barred when the evidence on record clearly shows that there was a matter involving Junko Investment Zambia Limited and Kenneth Konga vs Sinozam Investments Limited and 4 Others under cause No. 2004/HP/1034 which took long to be concluded touching on the same plot No. 20910 Lusaka hence the failure by the appellant to commence an action during this time when the said cause was still active.

In the heads of argument in support of the appeal it was submitted that the Appellant offered for sale stand No. Lus /20910 Kafue Road, Lusaka to the Respondents on 18th November, 2002 at a price of K35,000.00 and that the Respondents only paid K1,000.00 leaving a balance of K34,000.00 in breach of the agreement. It was further submitted that the Respondent stated that he could not complete the balance due to the fact that the Respondents had taken out an action against Sinozam Investments Limited and 4 Others Persons who wanted to consolidate their stand with stand No. Lus /20910.

It was further submitted that when the matter between the Respondents and Sinozam Investments Limited and 4 Others was concluded by consent in favour of the Respondents, the Appellant demanded for payment of the balance but the respondent refused to pay in total breach of the agreement hence the action. The Appellant further submitted that he was never out of time to take out legal action against the Respondents since time only started running after the matter involving the Respondents and Sinozam Investments Limited and 4 Others was concluded.

The Court was referred to the case of **R.B Policies at Lloyds vs Butter (1949) 2 ALLER 226**[1] where the Court stated that:

> ***"one of the principles of Limitation Act 1939 is that those who go to sleep on their claims should not be assisted by the Courts in recovering their property".***

The Appellant however, in this case argued that the Respondent made a statement which technically amended the agreement by stating that they would pay the balance only after the matter involving themselves and Sinozam was concluded.

It was also stated that the Respondents made a statement to the Appellant which affected the Legal relationship between themselves which eventually altered the Appellants position since the Appellant relied on the same statement that the Respondent would only pay the balance after the case was concluded. It was further submitted that the Respondents should be estopped from denying that they made this statement to the Appellant. The

Court was referred to the Legal Dictionary at page 122 on the definition of the doctrine of Estoppel where it states that:

> ***"a rule of Evidence preventing a person from denying the truth of a statement he has made previously, or the existence of facts in which he has led another to believe."***

It was stated in the heads of arguments filed for the Respondents against the appeal that some issues alluded to in the Appellants heads of arguments in support of the appeal relate to averments in the Amended Statement of Claim filed into Court on 11th September 2017. The Respondents further submitted that the other issues alluded to in the Appellant's heads of arguments amounted to adducing evidence from the bar which was never tendered before the learned Deputy Registrar at the hearing of the application to dismiss the action under the Limitation Action 1939 (UK)

The Respondents also contended that the Appellant has tendered into court a letter purportedly written by the Commissioner of Lands dated 29th January, 2018 and addressed to the Director Physical Plainning, Ministry of Local Government and Housing Lusaka and that the said document is not exhibited in any of the Affidavits that are before Court. It was further argued that the act by counsel for the Appellants amounts to giving evidence at the bar. The Court was referred to the case of **William David Carlise Wise vs E F Hervey Limited (1985) ZR 179 (SC)**[(2)] where it was held that:

> ***"pleadings serve the useful purpose of defending the issues of fact and of law to be decided; they give each party distinct notice of the case intended***

to be set up by the other; and they provide a brief summary of each party's case from which the nature of the claim and defence may be easily apprehended."

It was further submitted that the said letter and any reference to it in the heads of arguments by the Appellants must be expunged from the record. Further that by sneaking in the letter not exhibited in any of the affidavits filed before Court, the Appellants committed a fundamental breach of the rule of court that is incurable. The Court was referred to the case of **Rosemary Chibwe v Austin Chibwe (2001) ZR 1**[3] where it was held that:

"we are not persuaded by the assertion by the respondent that the appellant was the by the time we heard the appeal cohabiting with another man as this was not supported by evidence on record and the learned counsel for the respondent tried to sneak in that evidence by giving it from the bar. It is with those reasons that we intend to interfere with the order by the learned High Court Commissioner."

It was further submitted that the Appellant was aware of the proceedings under cause No. 2002/HP/1034 and had an opportunity to join the proceedings. The court was referred to **Order 14, Rule 5(1) HCR Cap 27 of the Laws of Zambia** which states that:

5. (1) If it shall appear to the Court or a Judge, at or before the hearing of a suit, that all the persons who may be entitled to, or claim some share or interest in, the subject-matter of the suit, or who may be likely to be

affected by the result, have not been made parties, the Court or a Judge may adjourn the hearing of the suit to a future day, to be fixed by the Court or a Judge, and direct that such persons shall be made either plaintiffs or defendants in the suit, as the case may be. In such case, the Court shall issue a notice to such persons, which shall be served in the manner provided by the rules for the service of a writ of summons, or in such other manner as the Court or a Judge thinks fit to direct; and, on proof of the due service of such notice, the person so served, whether he shall have appeared or not, shall be bound by all proceedings in the cause:

Provided that a person so served, and failing to appear within the time limited by the notice for his appearance, may, at any time before judgment in the suit, apply to the Court or a Judge for leave to appear, and such leave may be given upon such terms (if any) as the Court or a Judge shall think fit. The Court or a Judge upon the application of any party may give directions for service upon a new party of copies of any writ of summons or other document or process and also may give such other directions in relation to the adding of such new party as justice and the circumstances of the case may require.

And a further reference was made to **Order 15, Rule 4 RSC 1999 Edition (White Book)** over the same principles governing joiner of a party.

It was further argued that it was not correct as submitted in the Appellants heads of argument in support of the Appeal that Cause No. 2014/HP/1034 have been concluded. The Court was urged to call for the record and verify

pursuant to the holding in the case of **Edward Shamwana v The People (1985) ZR 41 (SC)**[4] at page 111 where A Silungwe stated that:

> ***"in an appropriate case, therefore, particularly where, as in this case, facts may be judicially noticed after an enquiry has been made, a judge has power, not only to look at his own records, but also at those of another judge and take judicial notice of their contents. This applies to all courts in the Republic."***

As regards the principle of estoppel alluded to by the appellant in the heads of argument in support of the appeal, the Court was referred to the case of **Krige and Another vs Christian Council of Zambia (1975) ZR 152 (SC)**[5] where it was held that:

> ***"as to estoppel the matter is in my view concluded against the plaintiff by the principle that one cannot set up an estoppel against a statute and I entertain no doubt that the same rule applies whether the basis upon which a party is alleged to be precluded from relying on the particular state of affairs is estopped properly so called or some analogous principle or "quasi-estoppel".***

It was contended that the **Limitation of Actions Act 1939 (UK)** places a statutory obligation on the Appellant to commence an action within the stipulated time set out in this Act. Failure to comply with this statutory duty cannot be set aside by pleading estoppel. It was further submitted that the Respondent have the right to plead a defence under the said Act and further

that estoppel does not stop time from running. The Court was referred to the case of **Arthur Nelson Ndhlovu and Dr. Jacob Mumbi Mwanza v L Shams Building Materials Company Limited and Jayesh Shar (SCZ Judgement No. 12 of 2002)**[6] where it was held that:

> *"the position at law is clear. There can be no estoppel against a statue. A litigant can plead the benefit of a statue at any stage."*

It was further argued that the reliance on estopppel is subject of proof at trial and that there is a defence as against the alleged estoppel. The Court was further referred to the case of **Galaunia Farms Ltd V National Milling Company Ltd(2002) ZR 135**[7] on the same principle where it was held that:

> *"the decision of Lord Denning, M.R in Panchaud Frerers S.A. v Etablissements General Grain Co. (3) is relevant. The Master of the Rolls, as he then was, espoused that the basis of estopped by conduct arose when a "a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs, another has taken to be settled or correct."*
>
> *In order to succeed under the doctrine of estoppel, there must be a representation of fact intended to be acted upon by the person to whom it is made; the person to whom it is made must actually act on the representation; and by so acting it must be to his detriment. In the case of Silver v Ocean Steamship Co. (4) two parcels of cans of frozen eggs were shipped on the respondent's ship under a bill of lading, signed by the master, stating that they were shipped "in apparent good condition."*
>
> *They were delivered damaged. The court held, as against the consignee of the eggs that the respondent was estopped from proving that the parcels*

were already damaged when they were shipped and consequently the respondent was liable in damages. The learned authors of Chatsworth Mercantile Law assert at page 85 by way of amplification, that:-

"...the cause of action was that the respondent had damaged the eggs during transit, but the statement that they were in good order on shipment was an essential fact to be proved. Had there been no statement in the bill of lading the consignee would not have paid for the eggs. It was because the statement (which may have been false) was made that damages were payable".

The submissions in the heads of arguments both in support and against this appeal have been duly considered. It is however, noted that the parties went in detail to argue over the issues that are a subject of the main matter herein. This appeal is against the Ruling of the Deputy Registrar holding that the matter is statute barred.

The Appellant raised only one ground that the Court below erred both in Law and in fact when it dismissed the appellant's action for being statute barred when the evidence on record clearly shows that there was a matter involving Junko Investment Zambia Limited and Kenneth Konga vs Sinozam investments limited and 4 others under cause No. 2004/HP/1034 which took long to be concluded touching on the same plot N0. 20910 Lusaka hence the failure by the appellant to commence an action during this time when the said cause was still active.

It is contended that the Appellant was aware of the proceedings under cause No. 2002/HP/1034 and had an opportunity to join the proceedings pursuant to Order 14 (5) of the High Court Act.

Section 4 (e) of the Limitations Act, 1939 provides as follows:

> **4.** ***The right to make an entry or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say-***
>
> ***(e) when the person claiming such land or rent, or the person through whom he claims shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.***

In the case of **R.B. Policies at Lloyds v Butter (1949) 2 ALLER, 226**[8] the court in analyzing the limitation of actions statute as regards when time starts running, had this to say:

> ***"Where, in the case of any action which a period of limitation is prescribed by this Act...;(b) the right of action is concealed by fraud of any such person as aforesaid...; the period of limitation shall not begin to run until the Plaintiff has discovered the fraud...; or could with reasonable diligence have discovered it.... A proviso protects third parties who take for valuable consideration without notice. The section does not say the cause of action shall accrue for the first time on the discovery of the fraud; but only that time "shall not begin to run" until that event.***

from running. I therefore agree with the Learned Deputy Registrar when she held that:

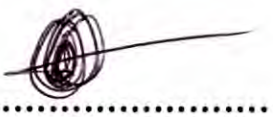
> ***"It is my considered view that the cause of action arose from the time that the condition in the letter of sale was breached as it was clear that the balance would be paid upon the transfer of the offer letter from the Plaintiffs to the 1st Defendant's name. The exhibits in the Defendants affidavit reveal that the 1st Defendant was offered stand No. 20910 Lusaka by the Commissioner of Lands on 22nd March, 2002".***

On the basis of what I have said in this ruling and on a balance of probabilities, the Appellants' claim must fail on the ground that the Litigation does not constitute an exception for time to stop running as regards limitation of actions.

The learned Deputy Registrar was on firm ground to have held that the action is statute barred.

Costs for the Respondents.

Delivered at Lusaka this 16th day of January, 2020.



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C. LOMBE PHIRI

JUDGE