

IN THE HIGH COURT FOR ZAMBIA

2017/HPC/0034

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

AFRICAN BANKING CORPORATION (T/A Bancus ABC)

PLAINTIFF

AND

YANGSTS JIAN ENTERPRISES LIMITED

1ST DEFENDANT

XU JIAN XUE

2ND DEFENDANT

CHANG ZHI DAN

3RD DEFENDANT

DATONG CONSTRUCTION LIMITED

4TH DEFENDANT

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

For the Plaintiffs: Mr R. Mwala – Messrs A. M. Wood & Co.

For the 4th Defendants: Mr J. Zimba - Messrs Makebi Zulu Advocates.

RULING

LEGISLATION REFERRED TO:

1. *Order 14A of the Rules of the Supreme Court of England (1999 Edition (Whitebook) Vol 1.*

CASES REFERRED TO:

1. *Hamalambo v Zambia National Building Society Appeal No. 64/2013.*
2. *Registered Trustees of Archdiocese of Lusaka v Office Machine Services Ltd (133/2005) (2007) ZMSC (13 August 2007)*
3. *Finance Bank v Monokandilos & Anr (Appeal No. 21/2015) (2016) ZMSC 218 (28th October, 2016).*
4. *Access Bank and Group Five Zcon Business Park Venture (suing as a Firm) 2016 SCZ 52.*
5. *Ashmore v British Coal Corporation (1990) 2 All ER 981 CA.*
6. *BP Zambia Plc v Interland Motors Limited SCZ Judgment No. 5 of 2001.*
7. *Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals Limited (1997) S.J 10 (SC).*
8. *Abel Mulenga & Ors v Mabvuto Adan Avuta Chikumbi & the AG (SCZ Judgment No. 8 of 2006).*

This is an application by the 4th Defendant for an order to dismiss the matter for abuse of court process and multiplicity of actions pursuant to Order 14A of the Rules of the Supreme Court (1999) Edition.

The application is supported by an Affidavit sworn by Yu Wang Ping the Managing Director in the employ of the 4th Defendant and Skeleton Arguments filed into Court on the 24th of April, 2019.

It is deposed by Mr Wang Ping that the record would show that there is a Charging Order Absolute issued by this Court. A copy of this was exhibited and marked as "YWP1."

The Deponent also states that the record would also show that the properties set out in the schedule to the Charging Order which included Sub b of Sub No. 242 of Sub A of Farm 609 and Stand No 1521 Chelston Lusaka were conveyed to the 4th Defendant herein and as such the 4th Defendants is the legal owners of the said properties. A copy of the Certificate of Title and marked exhibited as "YWP2."

It is further deposed that the properties set out in the schedule are still a subject of litigation under cause no. 2014/HP/0031 and the said matter had a scheduled date of hearing for an application for an order to discharge the Charging Order on 3rd May, 2019. A copy of the application is and exhibited and marked as "YWP3."

Mr Wang Ping further stated that the said property was also a subject of litigation under cause No. 2018/HP/1460 and the said matter had a scheduled date of hearing for an application for an order to dismiss the matter for irregularity scheduled for the 15th day of April, 2019. A copy of the said application is and marked exhibited as "YWP4."

That the properties set out were sold to the 4th Defendant save for the property number F/2883/A the rest are in the names of the 4th Defendant.

The Deponent added that he had been advised by their advocates that this action by the Applicants is therefore an abuse of the Court process and a multiplicity of actions.

There is also an Affidavit in Opposition filed into court on 21st August, 2019 sworn by Zelia Agnes Mwale the Recoveries and Collections Manager in the Plaintiff Company.

Ms Mwale deposed that she had been advised by their lawyers and verily believed that the application was incompetent and not properly before Court.

She further stated that the said 4th Defendants were not the legal owners of the properties despite the alleged conveyance of title.

That the said conveyance and the subsequent transfer of the title was irregular as there was a registered Charging Order Absolute on the properties way before the conveyance. A true copy of the print out from the Ministry of Lands was and exhibited and marked as "ZAM1."

She also averred that in prior applications particularly under Cause No. 2014/ HPC/0031 before this Court, the interest of the 4th Defendant had been purported to arise from an alleged assignment dated the 11th day of December, 2014 and not the purported certificates of title both dated 30th June, 2017 exhibited in this application.

Moreover, that the said Assignments were never registered within the timeframe provided for under the law and were thus null and void.

She also deposed that it was therefore surprising how the 4th Defendant obtained title pursuant to a deed that is null and void and on properties that were charged.

Further that the 4th Defendant in its application to Discharge Charging Order filed on the 14th day of November, 2014 under Cause No. 2014/HPC/0031 did not contend that they were the owners of the Properties with title but argued that they had an interest in the Properties

pursuant to Contracts of Sale and Assignments when in fact their Certificates of Title was dated 30th June, 2017.

That the contents of paragraph 6 were disputed and the Plaintiff would aver as follows:

- (i) That the Plaintiff commenced proceedings under Cause Number 2014/HP/0031 for a Charging Order.
- (ii) That by an Order dated the 27th December, 2016 the Court granted the Charging Order Absolute and it was on the record.
- (iii) That pursuant to this Charging Order Absolute, the Plaintiff commenced enforcement proceedings under this Cause.
- (iv) That pending the substantive hearing of the application to enforce Charging Order, the 4th Defendant applied to be joined to the proceedings under the above cause.
- (v) That upon being joined to the action, the 4th Defendant raised a preliminary issue to dismiss the action under Cause No. 2017/HPC/0034 on the basis that the purported 1st Defendant was a Company in liquidation and leave of Court was not obtained by the Plaintiff before commencing this action.
- (vi) That following the unsuccessful application by the purported 4th Defendant and being dissatisfied with the Court's decision, the purported 4th Defendant appealed to the Court of Appeal.
- (vii) That by a Judgment dated the 18th of September, 2018 the Court of Appeal found that Yangsts Jiang Enterprises Limited (purported 1st Defendant) was under liquidation at the time of the suit and that the Plaintiff did not seek leave of Court beforehand. The action was thus dismissed as against the purported 1st Defendant to that effect.
- (viii) That the Court in its Judgment stated that, "the eventual outcome of our judgment is that we order that the matter is dismissed only against the 1st Defendant Company and it shall proceed to trial, as against the remaining three Defendants including the Appellant herein."

The Deponent also stated that based on the above she had been advised that this action was duly commenced and was awaiting a Ruling.

That she had also been advised by the Plaintiff's lawyers that proceedings for the Charging Order involves a two – stage process namely proceedings to obtain the Order and proceedings to enforce the Order.

On that premise, she had been advised that there was no multiplicity of action or abuse of court process as alleged.

In any event this matter was commenced on 26th January, 2017 way before the 4th Defendant's alleged disputes under Cause No. 2017/HPC/0031 arising in 2019.

It is also averred that the contents of paragraph 6 of the Affidavit in Support were denied and that the 4th Defendant applied for a Summons for Discharge of the Charging Order. Following this application, the Plaintiff filed a Notice of Motion to raise a preliminary point of law challenging the above application.

Further that by an order of the Court, the 4th Defendants application was dismissed on the grounds that the 4th Defendant were not party to the proceedings.

That as it stands the 4th Defendant applied for joinder in the same matter and at the date of this affidavit, there is no order of Court joining the 4th Defendant to this Cause.

Ms Mwale also averred that the contents of paragraph 7 and 8 of the Affidavit in Support were denied and the Plaintiff states aver that the Charging Order Absolute had never been set aside and the issue of beneficial interest in the properties was unquestioned.

That as such she had been advised that the application herein could not be sustained and ought to be dismissed.

It is lastly stated that this Court has jurisdiction to decline granting the order sought and have the application dismissed with costs.

Counsel for the 4th Defendant filed in Skeleton Arguments in support of the application. He began by citing Order 14A of the Supreme Court Whitebook which provides that:

“(1) The Court may upon the application of a party 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.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.”

According to Counsel, this Order empowered this Court to make a final determination of a question of law without the need for a prior Order of the Court under Order 33 Rule 3 and 4(2) for the determination of a preliminary question of law whether raised on the pleadings under O.18, r 11 or otherwise.

In the case *in casu*, the question for determination is whether the matter could proceed considering the fact that the subject matters in this matter were also active under Cause No. 2018/HP/1460 and Cause No. 2014/HPC/0031.

A further look at the above mentioned provision also made it clear that an application under it may be made orally in accordance to order 14A/2 of rules of the Supreme Court of England 1965, Whitebook 1999 Edition.

Having stated this Counsel submitted that the above scenarios as envisaged under Order 14A of the Whitebook fit well with the manner in which they made the application and believed that this Court had power to hear the preliminary issues raised by them.

That is well known that the Court in time past has frowned against the abuse of Court process and multiplicity of actions. In the case, **HAMALAMBO V ZAMBIA NATIONAL BUILDING SOCIETY (1)** the Court indicated that,

“Multiplicity of actions refers to commencement of more than one action on the same facts or transaction. Piece meal litigation is the same as multiplicity of action; it is litigation that is split and instituted in chapters.”

He also added that the Courts had for a long time frowned against it. In the case of **REGISTERED TRUSTEES OF ARCHDIOCESE OF LUSAKA V OFFICE MACHINE SERVICES LTD (2)** for instance the Court stated:

“We are satisfied that from the wording of the above section, the claim for compensation of the applicant should have been made as alternative to the claim for the renewal of the tenancy before the Hon. Mr Justice Mwanza, instead of commencing a fresh action after the action for renewal of the tenancy had been declined. In the least, the applicant should have made its application for compensation in the same cause before the Hon. Mr Justice Mwanza.

Indeed, this Court has on many occasions expressed its displeasure on multiplicity of actions over the same subject matter. In rescinding his earlier order, the Hon. Mr Justice Zikonda was in fact promoting or encouraging multiplicity of actions.”

Counsel also cited the case of **FINANCE BANK V MONOKANDILOS & ANR (3)** where the Court indicated that the idea of commencing matters dealing with the same subject matter in the manner as illustrated above was not only multiplicity of actions but indeed an abuse of court process.

In this case, the record shows that there is a Charging Order Absolute issued by this Court. The record also shows that the properties set out in the schedules to the Charging Order which included Sub b of Sub No. 242 of Sub A of Farm 609 and Stand No. 1521 Chelstone Lusaka were conveyed to the 4th Defendant herein.

According to Counsel, it is the said properties aforementioned that are still a subject of litigation under Cause No. 2014/HP/0031 and the said matter had a scheduled date of hearing for an application for an order to discharge Charging Order on the 3rd of May, 2019. The said property is also subject of litigation under Cause No. 2018/HP/1460 and the said matter has a scheduled date of hearing for an application for an order to dismiss the matter for irregularity scheduled for the 15th day of April, 2019.

Counsel also added that this was a clear indication of multiplicity of actions as all the above mentioned causes including the one herein related to the same subject matter and as the same alluded to multiplicity of actions, it was also an abuse of court process.

In summation it was emphasised in that rules of procedure must be complied with as held the case of **ACCESS BANK AND GROUP FIVE ZCON BUSINESS PARK VENTURE (SUING AS A FIRM) (4)** that:

“...justice also requires that this court, indeed all courts, must never provide succor to litigants and their Counsel who exhibit scanty respect for rules of procedure.

Rules of procedure and timeliness serve to make the process of adjudication fair, just, certain and even-handed. Under the guise of doing justice through hearing matters on their merit, courts cannot aid in the bending or circumventing of these rules and shifting goal posts, for while laxity in application of the rules may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules ...In our considered view, it is in the even-handed and dispassionate application of the rules that courts can give assurance that there is a clear method in which things should be done so that outcomes can be anticipated with a measure of confidence, certainty and clarity. This is regardless of the significance of the issues involved or questions to be tried.”

Based on the above, it was therefore Counsel's contention that this matter be dismissed for failure to abide by the rules of Court that guard against the abuse of court process and multiplicity of Court actions.

Counsel lastly prayed that the matter be dismissed with costs to be borne by the Plaintiff herein.

The Plaintiff filed in Skeleton Arguments to oppose the 4th Defendant's application. It was submitted that the law regarding abuse of Court process and Multiplicity of Actions was unwavering.

Regarding abuse of Court process, Order 18 Rule 19/15 of the Rules of the Supreme Court of England 1999 Edition (Whitebook) states that: "Abuse of the process of the Court" – this term connotes that the process of the Court must be used bonafide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation.

Counsel also cited the case of **ASHMORE V BRITISH COAL CORPORATION (5)** in which Stuart Smith LJ said that Abuse of Court process includes "The words 'frivolous' or 'vexatious' generally refer to a groundless action with no prospect of success, often raised to embarrass or annoy the other party to the action. It would be an abuse of court process for her to relitigate the same issues since that would defeat the whole purpose of having test claims."

Regarding Multiplicity of Actions, it was held in the case of **DEVELOPMENT BANK OF ZAMBIA AND KPMG PEAT MARWICK V SUNVEST LIMITED AND SUN PHARMACEUTICALS LIMITED (6)** that we 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 proceedings and indeed a multiplicity of actions over the same subject matter.

This Court was also reminded to consider a similar holding in the case of **ABEL MULENGA & ORS V MABVUTO ADAN AVUTA CHIKUMBI & THE ATTORNEY GENERAL (7)**.

Coming to the main arguments of the application, Counsel argued that the 4th Defendant's application lacked merit, was misconceived and ought to be dismissed. That the Affidavit in Support of the 4th Defendant's application had failed to demonstrate how these proceedings were an abuse of Court process and/ or Multiplicity of Action.

According to Counsel these proceedings were commenced in accordance with the law and that in order to obtain a Charging Order, an Applicant was required to commence proceedings for obtaining a Charging Order.

After that was done, the said Applicant was further required to commence proceedings for enforcement of the Charging Order.

Counsel then cited the learned author of Zambia Civil Procedure Commentary and Cases Volume II on page 1383 which states that:

“An application for a Charging Order involves a two-stage process. First, an application for an order nisi is made ex parte. The application is supported by affidavit-

- (a) Identifying the judgment or order to be enforced and stating the amount unpaid at the date of the application;**
- (b) Stating the name of the judgement debtor and of a creditor of his whom the applicant can identify;**
- (c) Giving full particulars of the subject matter of the intended charge...**
- (d) Verifying that the interest to be charged is owned beneficially by the judgment debtor.**

In the event that the Court exercises discretion in favour of granting the order, it will be an order to show cause, imposing the charge, but specifying the time and place for further consideration of the matter. Thereafter, the order nisi and the affidavit in support, must, unless the Court otherwise directs, be served on the judgment debtor at

least seven days before the appointed date for further consideration of the matter.

The second stage of the process is a hearing which the judgment debtor may attend. During the hearing, the judgment debtor may show cause why the order should not be made absolute. At the conclusion of the hearing, the order nisi may on the application of a judgment debtor either be discharged or varied. However, if the order nisi is made absolute, the effect of a Charging Order is the judgment creditor is treated as having a charge over the securities.

Upon grant and registration of a Charging Order, if the judgment debt remains unpaid, the judgment creditor can then enforce the charge by having the securities sold and paid from the proceeds. The proceedings for enforcement of a Charging Order by sale of the property charged (if that becomes necessary) must be begun by originating summons in the High Court.”

Counsel also submitted that the Rules of the Supreme Court of England 1999 Edition had procedure to be followed in the Charging Order application under Order 50 and Order 88.

It was also Counsel's submission that the Plaintiff commenced proceedings to obtain a Charging Order under cause 2014/HPC/0031 which culminated into a Charging Order Absolute dated 27th December, 2016. Subsequent to the above, the Plaintiff commenced enforcement proceedings under this cause. From the foregoing, it is clear that this action was neither an abuse of Court process or a Multiplicity of action.

In any event, the proceedings in this cause had advanced and were merely awaiting the Court's ruling on enforcement of the Charging Order Absolute. Further, the 4th Defendant had alleged that there was an application to discharge the Charging Order Absolute under cause 2014/HPC/0031 regarding the properties in issue.

In contradiction to the 4th Defendants assertions, it is submitted that the 4th Defendant's said application was dismissed and the Court found that

the 4th Defendants were not even parties to that action and were requested to apply to be joined if they had any interest in that cause. Furthermore, even in the event that there was indeed any dispute in any other Court which fact was denied, the same would not make these proceedings an abuse of Court process or a Multiplicity of actions. It should be noted that at the time of commencement of these proceedings, there was no such alleged disputes. It was therefore their submission that the law regarding abuse of Court process or Multiplicity of Action would not apply more so retrospectively on already duly commenced proceedings.

During the hearing of this application on the 28th of August, 2019 both Counsel for the 4th Defendant and Counsel for the Plaintiff were before court. Each of them relied on their respective Affidavits and Skeleton Arguments filed in support.

I have considered the affidavit evidence, the Skeleton Arguments and the authorities cited by both learned Counsel.

The main issue for determination by this Court is whether or not the main action can be dismissed for abuse of Court process and multiplicity of actions.

The gist of the 4th Defendant's application is that there was a Charging Order Absolute issued by this Court and the properties set out in the schedule had been conveyed to the 4th Defendant who was the legal owner of the said properties.

It was also stated that these properties were still a subject of litigation under 2014/HP/0031 and the said matter had a scheduled date of hearing for an application to discharge Charging Order on 3rd May, 2019.

That the same property was also a subject of litigation under Cause No. 2018/HP/1460 and the said matter had a scheduled date of hearing for an application for an order to dismiss the matter for irregularity scheduled for 15th April, 2019.

That these properties had been sold to the 4th Defendant except for Property No. F/2883/A.

The Plaintiffs on the other hand opposed the Defendant's application on the ground that the 4th Defendant had failed to show how these proceedings were an abuse of Court Process.

Moreover, that the 4th Defendant was not the legal owner of the properties despite the alleged conveyance of title.

That the said conveyance and the subsequent transfer of the title was irregular as there was a registered Charging Order Absolute on the property's way before the conveyance.

That the interest the 4th Defendant purported to have in Cause No. 2014/HPC/0031 before this Court arose from an alleged assignment dated 11th December, 2014 and not the Certificates of title both dated 30th June, 2017. These assignments were never registered within the timeframe provided for under the law and were thus null and void.

Moreover, that proceedings for a Charging Order involve a two – stage process namely proceedings to obtain the order and proceedings to enforce the order. Thus, there was no multiplicity of action or abuse of court process as alleged.

This matter was commenced pursuant to Order 14A of the Rules of the Supreme Court White Book 1999 Edition which provides that:

“(1) The Court may upon the application of a party 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.**

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.”

It is my considered view that the issues raised by the 4th Defendant can indeed be determined summarily without a full trial for the following reasons.

Firstly, where there is an abuse of court process alleged, one has to show that the matter they are trying to have dismissed is groundless and without any prospect of success. In the case of **BP ZAMBIA PLC V INTERLAND MOTORS LIMITED (6)** the Supreme Court on abuse of process held that:

“For our part, we are satisfied, as a general rule, that it will be regarded as abuse of process if the same parties re litigate the same subject matter from one action to another from Judge to Judge...”

Whilst in order to prove that there is multiplicity of actions one has to show that when the action is pending other steps are pursued in another matter over the same subject matter and by the same parties. This is in line with the Supreme Court decision of **DEVELOPMENT BANK OF ZAMBIA & KPMG PEAT MARWICK V SUNVEST LIMITED AND SUN PHARMACEUTICALS LIMITED (7)** where it was held that:

“We disapprove of parties commencing a multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter.”

However, in this case, it has not been proved that there was abuse of court process or multiplicity of actions due to the nature of the proceedings that had been commenced in this matter.

The Plaintiff has been able to demonstrate that the first matter under cause No. 2014/HPC/0031 was commenced in order to obtain a Charging Order for the aforementioned property whilst the proceedings herein that have the same properties listed are for enforcement. I have noted that this

matter has been commenced in accordance with the laid down procedures of an application for obtaining and enforcing a Charging Order.

The position of the law pertaining to the vesting in the High Court Jurisdiction to make a charging order for the purpose of enforcing advanced by the learned author of Zambia Civil Procedure Commentary and Cases Volume 11 on pages 1380-1385 is good law. Order Court (White Book) 1999 Edition which outlines the procedure to be followed in applying for a charging order applies to Zambia

It is clear from the above that once a Charging Order is obtained, and a judgment debtor is still unable to pay the debt, enforcement proceedings can be commenced as is the case herein.

I therefore accept the reasons advanced by the Plaintiff in urging me not to agree to dismiss the main matter before me.

The Plaintiff also went on to allege that it is surprising how the 4th Defendant obtained title pursuant to a deed that is null and void and on properties that were charged but this is an issue I cannot conclude without a full trial.

In the circumstances, I therefore dismiss the application of the 4th Defendant for an order to dismiss the action for abuse of Court process and multiplicity of action.

Leave to appeal is granted.

Costs follow the event.

DELIVERED IN CHAMBERS AT LUSAKA THIS 30TH DAY OF JUNE, 2020.



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WILLIAM S. MWEEMBA
HIGH COURT JUDGE