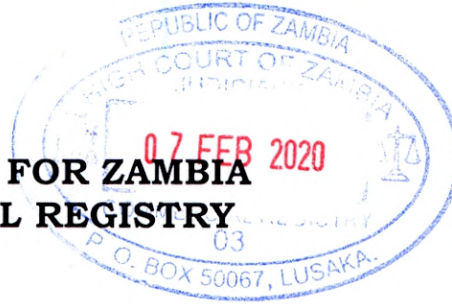


**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



**2017/HPC/0108**

**BETWEEN:**

**CAVMONT BANK LIMITED**

**APPLICANT**

**AND**

**NDOWERA PHIRI (T/A EDMA MOTORS)**

**1<sup>ST</sup> RESPONDENT**

**EDWARD ENOCK PHIRI**

**2<sup>ND</sup> RESPONDENT**

**RACHEAL MWEEMBA PHIRI**

**3<sup>RD</sup> RESPONDENT**

**CORAM: Hon. Lady Justice Dr. W. S. Mwenda in Chambers at  
Lusaka the 7<sup>th</sup> day of February, 2020**

*For the Applicant: Mr. B. Luo of Palan and George Advocates and  
Ms. C. Mwenya of Mwack and Associates*

*For the Respondents: Ms. C. Mwambazi of Central Chambers*

---

**RULING**

---

**Cases cited:**

- 1) *Oliver John Irwin v. Joan Irwin and Leopards Investments Company Limited (Intervening Party) (2006) Z.R. 66 (HC).*
- 2) *Zam Zam Halaal Beef Company Limited v. Zambia Electricity Supply Corporation Limited (2013) 1 Z.R. 378 (HC)*
- 3) *Leopold Walford (Z) Limited v. Unifreight (1989) Z.R. 203 (SC).*

**Legislation cited:**

- 1) *Order 33, rule 3 of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book).*
- 2) *Order 3, rule 6 of the White Book.*
- 3) *Order 3, rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.*
- 4) *Order 2, rule 3 of the High Court Rules.*

- 5) *Editorial Note 3/6/2 of the White Book.*
- 6) *Section 10 of the High Court Act, Chapter 27 of the Laws of Zambia.*
- 7) *Article 118 (2) (e) of the Constitution of Zambia (Amendment) Act, 2016.*

This is the Applicant's preliminary issue brought pursuant to the provisions of Order 33, rule 3 of the Rules of the Supreme Court of England and Wales, 1999 Edition (the White Book). The Notice of Intention to Raise Preliminary Issue was filed on 14<sup>th</sup> October, 2019 and the issue in *limine videlicet* is as follows:

*"That the matter is incompetent and/or improperly before this Honourable Court and as such, it is an abuse of process as the Respondents herein proceeded without filing in the requisite Notice of intention to proceed."*

The Notice of Intention to Raise Preliminary Issue is augmented by an Affidavit in Support of Notice of Intention to Raise Preliminary Issue (hereinafter called "the Affidavit in Support"), and List of Authorities and Skeleton Arguments in Support, also filed on 14<sup>th</sup> October, 2019, sworn by one Carol Kaputo, the Rehabilitation and Recoveries Officer in the Applicant Bank.

It was the deponent's testimony that on or about 23<sup>rd</sup> September, 2019, the Respondents herein caused to be issued before the Commercial Registry, an *ex-parte* Summons for an Order to Stay Execution of Judgment and its accompanying Affidavit in Support. That, the Respondents procured an *ex-parte* Order of Stay. It was averred further, that a cursory perusal of the court record indicates that the *ex-parte* Summons for an Order to Stay Execution of Judgment was lodged without the requisite notice of intention to

proceed. That, she was advised by her advocates that this application is incompetent and/or improperly before this Court and as such, it is irregular and/or a nullity and an abuse of process as the Respondents herein proceeded without filing in the requisite notice of intention to proceed.

The Respondents filed an Affidavit in Opposition to Affidavit in Support of Notice of Intention to Raise Preliminary Issue (hereinafter called "the Affidavit in Opposition), on 15<sup>th</sup> October, 2019, buttressed by a List of Authorities and Skeleton Arguments in Opposition of even date. The Affidavit in Opposition was sworn by one Edward Enock Phiri, the 2<sup>nd</sup> Respondent herein.

It was his evidence that the Respondents did indeed cause to be issued before the Commercial Registry, an *ex-parte* Summons for an Order to Stay Execution of Judgment and accompanying Affidavit, pending application to determine the sum due to the Applicant. He averred that the record would show that the said application was lodged without the notice of intention to proceed. That, he was advised by his advocates and believed the same to be true and correct, that the application in issue is competent and properly before this Court and is in no way a nullity or an abuse of court process on account that the Respondent proceeded without filing the notice of intention to proceed.

The preliminary issue came up for hearing on 16<sup>th</sup> October, 2019. Mr. Luo, learned Counsel for the Applicant submitted that the Applicant would rely on the documents filed for the preliminary issue

but added that it was on record that the last proceedings in this matter was a judgment which was handed down on 26<sup>th</sup> May, 2017 and the action was dormant until 23<sup>rd</sup> September, 2019, which was a period of over two years from the date of judgment.

Mr. Luo submitted further, that the rules of this Court are very clear as regards matters in which there have been no proceedings for over one year and what a party wishing to proceed in such circumstances ought to do. He contended that the Respondents had not complied with the rules of this Court and as such, the matter as it stood before the Court was incompetent and consequently, the applications arising after the judgment made by the Respondents ought to be dismissed.

In response, Ms. Mwambazi, learned Counsel for the Respondents submitted that her clients would rely on the Affidavit in Opposition and Skeleton Arguments in Opposition filed on 15<sup>th</sup> October, 2019. She augmented the filed documents by submitting that it should be noted that the Applicant's advocates admitted that there was a judgment handed down on 26<sup>th</sup> May, 2017. That, Order 3, rule 6 of the White Book, provides for what should be done after a matter has been dormant for a year or more. That, the rule, in the editorial notes, gives a definition of "since the last proceeding". Counsel contended that the said rule relates to matters before the final judgment and not post-judgment, as was the case with the application in contention. That, thus, the rule relating to giving of notice of a party's intention to proceed did not apply to the

circumstances or issue at hand. That, it is on that basis that the Applicant's preliminary issue is misconceived and should be dismissed with costs to the Respondents.

Counsel submitted that in the alternative, Order 3, rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia, allows the Court to make orders which it considers necessary for the doing of justice. Counsel contended that there is an important question before this Court as to whether or not the sale of the property in question should be done owing to the fact that the Applicant has been receiving rentals and also that a payment has been made into Court. That, in the interests of justice, the Court is allowed to make orders in such regard. Counsel prayed that the Applicant's preliminary issue be dismissed with costs to the Respondents and that justice should prevail.

In reply, Mr. Luo submitted that the commentary in the White Book referred to by Counsel for the Respondents is inapplicable to the matter herein because the Applicant is relying on the provisions of Order 2, rule 3 of the High Court Rules which are couched in very clear language and does not contain any such commentary. Further, that the provisions of Order 2, rule 3 of the High Court Rules are supported by case law, and in this regard, Counsel cited the case of *Oliver John Irwin v. Joan Irwin and Leopard Investment Company Limited (Intervening Party)*<sup>1</sup>. Furthermore, that the Supreme Court has stated time and time again, that rules of court ought to be followed for orderly dispensation of justice. That, it is in this light

that the Applicant's argument suffices, notwithstanding the existence of an important issue to be tried. Further, that this is a court of justice which ought to do justice and in doing so, the rules of the Court ought to be followed, a position that has been restated by the Court in numerous decided cases. That, it is therefore, the Applicant's prayer that these proceedings be dismissed for failure by the Respondents to comply with the rules of court.

It was argued in the Applicant's Skeleton Arguments that the failure by the Respondents to file or cause to be filed a notice of intention to proceed flew in the teeth of Order 2, rule 3 of the High Court Rules which provides as follows:

*"In any cause or matter in which there has been no proceeding for one year from the last proceeding, the party who desires to proceed shall give one month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial although countermanded shall be deemed a proceeding within this rule.*

It was further submitted that the Applicant was fortified in its submission by the case of Olive John Irwin (referred to above). That, to borrow the words of Silomba J., (as he then was), there were few essentials in terms of procedure, that the Respondents were supposed to undertake. That, therefore, the failure by the Respondents to comply with the procedure outlined in Order 2, rule 3 of the High Court Rules, renders the Respondents' application incompetent.

It was however, argued on behalf of the Respondents that the Applicant commenced this action by way of Originating Summons and supporting affidavit on 7<sup>th</sup> March, 2017 for an order that the Respondents pay the Applicant the balance of K119, 625.87; an order of possession, sale and/or foreclosure; any other relief and costs. That, the Court entered judgment on admission as prayed by the Applicant on 19<sup>th</sup> April, 2017. Further, that the Applicant drafted a judgment and had it filed before this Court on 26<sup>th</sup> May, 2017. The Respondents in turn, on 23<sup>rd</sup> September, 2019 made an application by way of Summons to Stay Execution of the said judgment pending an application to determine the sums due to the Applicant. That, the Applicant started receiving payments from the Respondents and also rentals from the property directly but have not acknowledged or accounted for the same. That, the Applicant thus, raised a preliminary issue alleging that the application is incompetent and improperly before this Court and is an abuse of court process as the Respondents proceeded without filing a requisite notice of intention to proceed.

The Respondents cited Order 3, rule 6 of the White Book which states as follows:

*“6. Where a year or more has elapsed since the last proceedings in a cause or matter, the party who desires to proceed must give to every other party not less than one month’s notice of his intention to proceed. A summons on which no order was made is not a proceeding for the purpose of this rule.”*

The Respondents cited Editorial Note 3/6/2 of the White Book, which gives an interpretation of “Since the last proceeding” as follows:

*“The rule refers to proceedings (not communications with the opposite party...It refers to interlocutory proceedings before final judgment, and has no reference to execution...”*

Reference was also made to the case of *Zam Zam Halaal Beef Company Limited v. Zambia Electricity Supply Corporation Limited*<sup>2</sup>, where Kabuka J., (as she then was), held, *inter alia*, that in terms of section 10 of the High Court Act, where our own rules of procedure are silent or not sufficiently exhaustive, the court may look to the practice and procedure obtaining in the High Court of Justice in England up to 31<sup>st</sup> December, 1999, as contained in the White Book.

The Respondents submitted that by Article 118 (2) (e) of the Constitution of Zambia (Amendment) Act, 2016, the Court is directed to be guided by the principle that justice should be administered without undue regard to procedural technicalities. Further, that in the case of *Leopold Walford (Z) Limited v. Unifreight*<sup>3</sup>, the Supreme Court held that as a general rule, breach of a regulatory rule is curable and not fatal, depending on the nature of the breach and the stage reached in the proceedings.

It was submitted on behalf of the Respondents that Order 2, rule 3 of the High Court Rules, Chapter 27 of the Laws of Zambia should be read together with Order 3, rule 6 of the White Book on the basis of the judicial pronouncement in the *Zam Zam Halaal Beef Company* case, cited above. That, on further reading of Editorial Note 3/6/2



of the White Book, it is clear that the rule relating to notice of intention to proceed after a year's delay refers to interlocutory proceedings, before final judgment and has no reference to execution. That, thus, the preliminary issue is misplaced as final judgment in this case was entered on admission n on 19<sup>th</sup> April, 2017 in favour of the Applicant as prayed and a formal judgment was filed before this Court on 26<sup>th</sup> May, 2017. Further, that the Respondents' application to stay execution of the judgment was filed together with a certificate of urgency necessitating the need to have the application heard and determined expeditiously as the Respondents were to suffer irreparable damage as the Applicant had advertised the mortgaged property for sale.

It was further argued that even if the Applicant's preliminary issue was legally sound, justice must be administered without undue regard to procedural technicalities as per the provisions of Article 118 (2) (e) of the Constitution and also, as per the holding in the Leopold Walford (Z) Limited v. Unifreight case, breach of a regulatory rule is curable and not fatal, depending on the nature of the breach and the stage reached in the proceedings. That, it was therefore, the Respondents' prayer that the Applicant's preliminary issue be dismissed with costs.

I have considered the documents filed both in support of and in opposition to the preliminary issue and the oral submissions by Counsel on both sides. The preliminary issue raised by the Applicant herein is to the effect that the application filed by the Respondents to

stay execution of judgment pending an application to determine the sums due to the Applicant filed before this Court, is incompetent and/or improperly before this Court because the Respondents did not file a notice of intention to proceed, contrary to Order 2, rule 3 of the High Court Rules, which requires a party desiring to proceed in a matter in which there has been no proceeding for one year from the last proceeding, to give the other party one month's notice of intention to proceed. According to the Applicant, the said application amounts to an abuse of court process.

On the other hand, the Respondents have argued that Order 2, rule 3 of the High Court Rules should be read together with Order 3, rule 6 of the White Book, on the basis of the judicial pronouncement in the case of *Zam Zam Halaal Beef Company Limited v. Zambia Electricity Supply Corporation Limited*<sup>2</sup>, where it was held, *inter alia*, that in terms of section 10 of the High Court Act, where our own rules of procedure are silent or not sufficiently exhaustive, the court may look to the practice and procedure obtaining in the High Court of Justice in England up to 31<sup>st</sup> December, 1999, as contained in the White Book. That, the Editorial Note to Order 3, rule 6 of the White Book gives an explanation of the phrase "since last proceeding" as referring to interlocutory proceedings before final judgment and has no reference to execution.

With respect to the Respondents' submission above, Mr. Luo submitted that Order 2, rule 3 of the High Court Rules is clear and does not have any explanatory notes, and therefore, since more than

one year has passed since the last proceeding, the Respondents should have filed a notice of intention to proceed before filing their application and since they did not do that, the Respondents' application is incompetent and/or improperly before this Court and must be dismissed with costs to the Applicant.

I am of the considered view that the Respondents are correct in their submission that where our own rules of procedure are silent or not sufficiently exhaustive, the Court may look to the practice and procedure obtaining in the High Court of Justice in England pursuant to section 10 of the High Court Act. The said section provides as follows:

*“The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act and the Criminal Procedure Code, or by any other written law, or by such rules, order or directions of the Court as may be made under this Act, or the said Code, or such written law, and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.”*

Therefore, since our Order 2, rule 3 of the High Court Act, which is very similar to Order 3, rule 6 of the White Book, does not have explain what is meant by “since last proceeding”, this Court may turn to the explanatory notes in the White Book for guidance. Hence, having been guided by the said notes, I am of the view that the requirement for notice of intention to proceed in Order 2, rule 3 of the High Court Act, refers to interlocutory proceedings before final judgment, and since the application by the Respondents herein is a

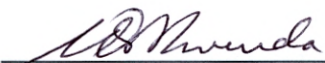
post-judgment application in connection with execution, the provisions of Order 2, rule 3 are not applicable.

Having found as above, it would be superfluous to consider the other arguments submitted by the Respondents relating to this Court being empowered by Order 3, rule 2 of the High court Rules to make orders which it considers necessary for the doing of justice; about there being serious issues to be determined and the requirement for justice to be administered without undue regard to procedural technicalities.

I find that the application by the Respondents is neither incompetent nor improperly before Court and further, that it is not an abuse of court process. Consequently, the preliminary issue is dismissed for lacking merit.

Costs are awarded to the Respondents. The said costs are to be agreed by the parties or taxed in default of agreement.

**Delivered at Lusaka the 7<sup>th</sup> day of February, 2020.**

  
**DR. W. S. MWENDA**  
**JUDGE**