IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2018/HP/0006

BETWEEN:

ELIAS TEMBO **PLAINTIFF**

AND

LUSAKA CITY COUNCIL **DEFENDANT**

For the Plaintiff: *In person*
For the Defendant: *Mrs. Y. N. Muwowo- In-house Counsel*

R U L I N G

Cases referred to:

1. **Auto Garage v. Motokov (1971) HCD 33.**
2. **Raphael Ackim Namung'andu v. Lusaka City Council (1978) Z.R. 358.**
3. **Development Bank of Zambia & KPMG v. Sunvest Limited & another (1995-97) Z.R. 187.**
4. **William David Wise v. E.F Harvey Ltd (1985) Z.R. 179.**
5. **Ramsden v. Dyson (1860) LR 1 HL 129.**
6. **African Banking Corporation v. Mubende Country Lodge Limited- Appeal No. 116/2016.**

Legislation referred to:

1. **The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.**

2. **The Urban and Regional Planning Act No. 3 of 2015.**
3. **The High Court Rules, Chapter 27 of the Laws of Zambia.**
4. **The Town and Country Planning Act Chapter 283 of the Laws of Zambia.**
5. **The Rules of the Supreme Court, (White Book) 1999 Edition.**
6. **Frederick S. Mudenda, <u>Land Law in Zambia; Cases and Materials.</u>**

The delay in delivering the ruling is regretted. This is due to heavy work load.

This is a Ruling on the Defendant's application to dismiss the matter on a point of law and fact. The application is made pursuant to Order 14A and Order 33 of the Rules of the Supreme Court (White Book) 1999 Edition and is supported by an affidavit deposed to by one **MASHAKA PHIRI**, an Assistant Land Surveyor under the employ of the Defendant.

He deposed that the Plaintiff commenced this matter on the 3rd January, 2018 by way of writ of summons and an attendant statement of claim, claiming that he should be declared the legal owner of extension of Stand No.2895 off Kalomo Road Chilenje South.

That the Plaintiff was issued with a call out notice on 2nd January, 2018 to submit the documents pertaining to ownership of the stand in

question. However instead of producing the necessary documents as requested, the Plaintiff went ahead and commenced these proceedings against the Defendant. A copy of the said call out was exhibited and marked **"MP1"**.

It was also deposed that the Defendant was just following procedure when it issued a call out notice to confirm ownership and whether planning permission was sought; that owing to the Plaintiff's failure to produce the necessary documentation as per request the Defendant thereafter issued a notice against the Plaintiff. A copy of the notice was exhibited and marked **"MP2".**

He explained that the Plaintiff had also instituted an action before the Urban and Regional Planning Appeal Tribunal. That this was a multiplicity of action because according to this Act the court meant "the Subordinate Court". Therefore, the Plaintiff was wrongly before this Court.

The deponent also explained that the Plaintiff was suspected to be in the habit of building on other people's property and had over twenty-five (25) matters before the High Court with questionable

documentation. That this matter should not be entertained as it was an abuse of the court process.

In opposing the application, the Plaintiff, **ELIAS TEMBO**, filed an affidavit in opposition in which he explained that by the time the call out/stop notice was delivered to him, Cause No.2018/HP/0006 was already in existence as evidenced by the said Appeal lodged with the Minister of Local Government and Housing and the Defendant herein. A copy of the said Appeal was exhibited and marked **"ET1".** That therefore he was not obliged to show the Defendant ownership documents as at all material times this matter was in existence and prejudicial to his interest.

Further that when the construction was instituted in 1998 under the repealed Act Chapter 283 of the Laws of Zambia, no planning permission was required for a structure measuring less than 48^{m2}; that the structure in question measured 24^{m2} in dimension which did not require planning permission at the time.

The Plaintiff also explained that paragraphs 6 and 7 in the affidavit in support were misplaced in that the Defendant's action was prejudicial to his interests. That the Appeal against the Enforcement Notice was

premised on the fact that the notice was to be suspended due to Cause No.2018/HP/0006 that was subsisting at the time it was issued on the 8th January, 2018; that the issuance of the notice by the Defendant was contemptuous and obnoxious to Cause No. 2018/HP/0006.

The Plaintiff also refuted the assertion by the Defendant that he possessed questionable documentation over other properties he owned. He also denied paragraph 11 of the affidavit in support and that the circumstances of the contention were that his right to own property was threatened by the Defendant's overtures in wanting to demolish his property that had been standing for twenty (20) years and done at huge cost.

In the affidavit in reply filed, it was explained that the call out notice served on the Plaintiff was served on 2nd January, 2018, and not later than the Plaintiff's court process. That the Defendant was merely carrying out its usual field inspection as per mandate when it came across the construction by the Plaintiff and then requested for documentation to ascertain whether the construction had the requisite permission. Instead of the Plaintiff producing the documents, he decided to institute proceedings herein.

It was deposed that the structure in question was not more than one year as it was recently constructed. A copy of a picture of the said structure was exhibited and marked **"MP1"**. That the Act cited by the Plaintiff was repealed by the Urban and Regional Planning Act No.3 of 2015, therefore the Plaintiff had an obligation to seek building permission for any developments in accordance with the existing law regardless of the size.

It was also deposed that the Defendant was acting under its obligation as a planning authority which obligation was towards every property owner in the city of Lusaka. Therefore the action of demanding for documentation was not prejudicial to the interest of the Plaintiff. The deponent added that the affidavit in opposition was misconceived and misplaced as court proceedings did not inhibit the issuance of an Enforcement Notice unless a party specifically made an appeal against its issuance.

The deponent also explained that the Plaintiff had a number of actions with the Defendant before this court and mostly his claims were declarations that he was the legal owner of the properties. A copy of the list of actions the Plaintiff was involved in was exhibited and marked

"MP2". Further, that the Defendant was not in contention with the property that had been in existence for over twenty (20) years, but for the current developments which extended from his property which commenced without building and planning permission.

It was also deposed that the Plaintiff's actions were vexatious and ill motivated as he had also appealed to the Minister of Local Government, and the Planning Appeals Tribunal thereby having multiplicity of actions.

At the hearing of the application, learned counsel for the Defendant, Mrs. Muwowo relied on the affidavit in support and the skeleton arguments.

In the written arguments, it was submitted that the Plaintiff's claims in his statement of claim in this matter were not only faulty at law but also a recipe for anarchy in situations where the Defendant as a public authority and having jurisdiction over land in Lusaka would be taken advantage of by illegal settlers.

She referred to Order 18 rule 19 of the Rules of the Supreme Court (White Book) 1999 Edition which provides that:

"The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that—

(a) It discloses no reasonable cause of action or defence, as the case may be; or

(b) It is scandalous, frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the Court."

She submitted that the intention of the above legal guidelines was to regulate matters that went before court and to ensure that there was a reasonable claim on the Plaintiff's side. It was not intended to give legal rights to a person who did not have any legal rights to be protected. In this case the Plaintiff did not have legal claim against the Defendant, hence no cause of action.

It was also submitted that in accordance with Section 33 of the Lands and Deeds Registry Act, a Certificate of Title was prima facie evidence of ownership of property. Therefore, the Plaintiff ought to have produced evidence regarding the extension as per his claim that he was the legal owner of the property and had title.

It was the Defendant's contention that the claims by the Plaintiff were frivolous and vexatious and intended to prejudice the Defendant and a waste of the Honourable Court's useful time. This was because the Plaintiff desired the backing of this Court to stop the Defendant from demolishing the structure built within the Chilenje South High School grounds. That the Defendant made this application to dismiss the matter on a point of law because the Plaintiff had no legal rights against the subject property and was merely a trespasser, who had no legal claim against the Defendant.

Counsel referred to Section 49 of the Urban and Regional Planning Act which prohibits any person from carrying out any developments on land, or change use of land or subdivide any land without planning permission. That if the Plaintiff believed that he had a right to be protected by the courts of law he should have come to seek the protection of his purported rights, with evidence as to the survey diagram showing the extent of his property that included the purported extension.

She reiterated that the Plaintiff had no legal claim of right relating to the subject property and urged this Court to take cue from the case of

Auto Garage v. Motoko[1] where it was stated that three essential elements must be disclosed to support the cause of action. These are:-

i) The Plaintiff enjoyed a right

ii) The right has been violated; and

iii) The Defendant is liable.

She contended that the Plaintiff's statement of claim had not revealed the right which was purportedly violated by the Defendant herein and that he could not adversely possess the Chilenje High School grounds without prior notice of the land owners.

She submitted that the possession was an adverse one and referred to the case of **Raphael Ackim Namung'andu v. Lusaka City Council** [2] where it was held that:

> **"Squatters build on their own risk and if the owners of the land withdraw their permission or license or if they decided to demolish a structure built in the absence of any permission or other lawful relationship the squatters lose though much regrettable are not recoverable in court."**

It was further submitted that the Plaintiff in this matter had commenced this action and placed reliance on the same facts and remedies that he had sought in another matter with the Urban and Regional Planning Tribunal, a matter which remained unheard. That this had caused a multiplicity of actions. The case of **Development Bank of Zambia v. Sunvest Limited and Another** [3] was cited in aid.

The Plaintiff relied on his affidavit in opposition and skeleton arguments. He submitted that the pleadings disclosed a reasonable cause of action as he did not need to obtain permission to build.

He argued that the Defendant's application was incompetently before Court because in order for a litigant to move the court pursuant to Order 14A of the Supreme Court Rules of England, there were certain conditions that had to be satisfied as follows:

i) The Defendant must have given notice of intention to defend;

ii) The question of law or construction must be suitable for determination without a full trial of the action;

iii) Determination of the question of law or construction must finally (subject to appeal) determine the entire action or any claim or issue therein;

iv) The parties must have had an opportunity of being heard on the question or consented to an order or judgment on such determination.

In this regard he argued that to appropriately invoke Order 14A, the question or questions of law must be suitable for determination without a full trial. He submitted that a question of law could not be suitable for determination without a full trial where there were contentious questions of fact that required the court to make findings of fact after a full trial.

He added that he raised an issue of prescription and requisite number of years and that the land in issue was not under title whilst the Defendant argued that it was under title. He contended that these issues were contentious facts that required evidence to be led and tested through the usual way of cross examination. The questions raised were therefore not suitable for determination under Order 14A.

He submitted that the issues that the Defendant had raised as preliminary issues should have been raised in the Defence as this was not sound at law and the Defendant's application ought to therefore fail because it was devoid of merit.

He further referred the court to the explanatory note 18/19/10 in the Rules of the Supreme Court which provides that a reasonable cause of action meant a cause with some chance of success when only the allegation in the pleading were considered.

He also referred the court to the case of **William David Carlisle Wise v. E.F Hervey Limited** (4) where the Court defined cause of action as follows:

> **"The words 'cause of action' have been said to refer to every fact which it will be necessary for a party to prove, if traversed, to support his right to the judgment of the court. We agree entirely with these expositions of the legal requirements as to what should be alleged in order to disclose a cause of action."**

He submitted that all that he had to show was that on the facts presented in the pleadings, there was some chance of success, then he had a reasonable cause of action.

He also directed the attention of the Court to the posit of the Learned author of Land Law in Zambia, Frederick S.Mudenda, at page 219 who stated that at common law, a grant was presumed if enjoyment dated

from time immemorial. That if a claimant could show actual enjoyment for a reasonable period, the court was bound to presume an actual grant which was later lost and twenty years or more could be sufficient for this purpose.

Reference was also made to the case of **Ramsden v. Dyson** [5] where **Lord Crannworth LC** stated that:

> **"If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; it would be dishonest in me to remain willfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented."**

He submitted in this regard that a person could acquire land by prescription by being in possession for more than twenty (20) years and that his case was premised on the fact that he had been in possession of the piece of land in issue for more than twenty years.

He argued that in Zambia there was also adverse possession where a person was deemed to be entitled to the land in issue if he had occupied it for a continuous period of twelve (12) years. That having been in occupation for more than twenty (20) years brought the doctrine of adverse possession into play as there was no evidence before Court that any person or entity held any title to the land in issue.

He added that since he had pleaded a set of facts that had some chance of success with respect to the piece of land, then the issue of planning permission became ancillary and would not by any stretch of imagination mean that he did not have a cause of action.

He argued that in any event, the building which the Defendant had taken issue with was constructed in 1998 and the provisions of law applicable was the Town and Country Planning Act, Chapter 283 of the Laws of Zambia.

He submitted that under the old Act, while there was need for planning permission, permission was restricted to certain developments. That there was no permission required where the development was with the same group of land and that the building in question was within the Plaintiff's land. He argued that if it was found that the Plaintiff had

acquired the land in issue by prescription then the building fell within the same group/stand No. 2895, off Kalomo Road, Chilenje South the Plaintiff's other buildings which negated the planning permission issue.

The Plaintiff further argued that there was no planning permission required for buildings measuring below 48m^2 and the building in issue was way below 48m^2 as could be seen from the affidavit in opposition. He added that his action was not a multiplicity of actions as the appeal to the Minister was against the stop notice while the action herein was for enforcement of prescriptive rights and adverse possession. He argued that only the court was entitled to make a decision on the piece of land but the Minister could not do so because the reliefs sought were distinct.

He submitted that on or before 31st December, 2017 he was involved in discussions upon the Defendant's refusal to formalize the adjacent/extension of Stand No.2895 off Kalomo Road in Chilenje South Lusaka. On 3rd January, 2018 he caused to be issued the writ of summons and statement of claim and subsequently the same time served it on the Defendant. The Defendant upon receiving the writ of summons served the Plaintiff with a stop notice dated 2nd January,

2018 which prompted him to write a letter to the Minister of Local Government on the same day warning the Defendant that there was an active matter before courts of law. Consequently, on 8th January, 2018, the Defendant served him with Enforcement Notice.

He contended that these proceedings had in fact been commenced before the Defendant issued a stop notice. He submitted that the Defendant should be reprimanded for taking actions when there was an action before the Courts of law as the action was tantamount to disrespecting the authority of this Court.

It was his submission that the ***Development Bank of Zambia*** case cited by the Defendant was not applicable as the appeal to the Minister had no effect on this action and was in fact merely informing the Minister of the action before this Court. The appeal would not prejudice this action in any way.

It was his contention that the Supreme Court had on numerous occasions pronounced itself that matters must be heard on merit and could not be defeated on mere basis that there was an appeal to the Minister which appeal had no effect whatsoever on the action.

He contended that the Defendant's application had no merit and was nothing but a ploy to delay these proceedings so that they could enforce their illegal Enforcement notice which they issued despite being fully aware of these proceedings.

He added that the court must dismiss this application with costs to the Plaintiff.

The Plaintiff, in his oral submissions argued that the Defendant made reference to ownership documents but the court had not issued orders for directions to file bundles. Therefore the contention that there were no ownership documents was premature.

He argued that even the Defendant had not produced any ownership documents to show that they had *locus standi* in this matter. He submitted that they only produced a map which did not show any numbers to show where the disputed property was. He contended that the Defendant was merely fishing.

The Plaintiff also submitted that the list of cases produced by the Defendant which he was purportedly involved in was speculative as it did not give the status of the matters as to who won or lost.

He concluded that this application was misconceived at law as the Defendant had not demonstrated that this matter could not come to trial and it was hiding in the issue of multiplicity of actions. He argued that the Defendant was the one guilty of multiplicity of actions as they were aware that this matter was before a court of competent jurisdiction but did not wait for the outcome of this matter.

In reply, Counsel for the Defendant submitted that the sequence of events was that when the Defendant was carrying out inspection of properties, it came across a building where the Plaintiff was extending in the grounds of the school. The Defendant issued a call out to the Plaintiff on 2nd January, 2018 to submit planning permission documents but he instead came to court.

She contended that the list exhibited in the affidavit showed that the Plaintiff was in a habit of coming to court and that perhaps that was why he commenced this action. She argued that this matter was a waste of the court's time as the Plaintiff was used to coming to court.

She added that on the submission that the Defendant did not file a Defence, the record showed that they had filed a memorandum of appearance which was an indication that they intended to defend.

Furthermore, that the law did not preclude them from issuing an Enforcement Notice for as long as there was no injunction; that this matter did not need to go to a full trial as they were asking him to produce documents relating to planning permission.

Those were the submissions by the parties which I have carefully considered.

This is the Defendant's application to raise a preliminary issue on a point of law and fact. The application is made pursuant to **Order 14A and Order 33 of the Rules of the Supreme Court of England, 1999 Edition**. **Order 14A** for the avoidance of doubt provides as follows:

> **"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."

Order 33 Rule 7 provides that:

> **"If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just."**

The Plaintiff on the other hand contends that this application is incompetently before this Court as the Defendant has not given notice of intention to defend. Furthermore, that the question for determination is not suitable without a full trial.

As I have already alluded to, the application is made pursuant to Order 14A of the Rules of the Supreme Court. However, paragraph 14A/2/4 sets out the requirements for employing the procedure under this Order. These are:

i) The Defendant must have given notice of intention to defend;

ii) The question of law or construction must be suitable for determination without a full trial of the action;

iii) Determination of the question of law or construction must finally (subject to appeal) determine the entire action or any claim or issue therein;

iv) The parties must have had an opportunity of being heard on the question or consented to an order or judgment on such determination.

The question therefore which I have to consider is whether or not this application is competently before this Court as no Notice of intention to defend was filed.

In reacting to this issue which the Plaintiff has raised, the Defendant contends that it has filed a conditional memorandum of defence which was proof that it intended to defend the matter.

The issue raised by the Plaintiff is frequently raised by most litigants in relation to applications under Order 14A.

In this regard, the Supreme Court in the case of **African Banking Corporation v. Mubende Country Lodge Limited**[7] pronounced itself

on the requirement under Order 14A that the defendant must give a notice of intention to defend and whether a conditional memorandum of appearance amounts to an intention to defend for the purpose of invoking Order 14A.

To put matters in context, the Supreme Court in this case heard an appeal from a ruling of the High Court in which the court declined to grant the appellant's application to dismiss the matter on a point of law.

Just like in the present case, the appellant in the above case filed a conditional memorandum of appearance and a notice of motion for an order to determine a point of law and to dismiss the action pursuant to orders 14A and 33 of the Rules of the Supreme Court.

After considering the motion, the trial judge found that the conditions favourable to invoking Order 14A and Order 33, RSC were not present in the matter. He reasoned that under Order 14A/2/3, a defendant was required to give notice of intention to defend by entering an appearance with a defence in accordance with Order XI of the High Court Rules. The court thus dismissed the motion to dismiss the action on a point of law.

In considering the issue raised herein, the Supreme Court started by reconciling Order 1 rule 4 of the RSC and Order 11 of High Court Rules. Thus, it stated that:

> **"What constitutes a notice of intention to defend in the context of our rules is the filing of a memorandum of appearance which is accompanied by a defence. It therefore follows that the filing of a memorandum of appearance with a defence is a pre-requisite to launching an application under Order 14A."**

The Supreme Court went further and stated that:

> **"The filing of a conditional memorandum of appearance without a defence is only applicable in circumstances where a defendant wishes to contest the validity of proceedings with a view to applying to set aside the writ."**

In view of the forgoing, the Supreme Court stated that a conditional appearance could never be extended or over stretched to constitute a notice of intention to defend in the context of an application under Order 14A which was intended to finally determine a matter without full trial of the action.

In relation to Order 33, the Supreme Court had this to say:

> **"That Order 33 rule 3 cannot be invoked independently or to the exclusion of the mandatory requirements of Order 14A which require the filing of a notice of intention to defend as a pre-requisite to raising a preliminary point of law."**

In conclusion, the Supreme Court did not find merit in the appeal by the appellant and also stated that the appellant could not find solace under Article 118(e) of the Constitution as there was no merit that the procedural irregularity could be cured.

Therefore on the authority of the ***African Banking Corporation*** case which has clearly explained the pre-requisites to raising the preliminary point of law as required under paragraph 14A/2 12, I am satisfied that the Defendant did not meet the pre-requisites as it only filed a conditional memorandum of appearance. However, what constitutes a notice of intention to defend is filing a memorandum of appearance and a defence which were not filed in this case.

For this reason, I accept the Plaintiff's argument and I find that this application is incompetently before this Court as the first pre-requite

for launching under Order 14A and Order 33 of the Rules of the Supreme Court has not been satisfied.

Since this pre-requisite is fundamental, it is pointless to consider whether the questions of law can be determined without a full trial suffice it to mention that under paragraph 14A/2/7 on the mode of application, the summons should state out in clear and precise terms what the question of law or construction which is required to be determined is. However, the summons have not indicated in clear terms what the question for determination is.

Therefore, although the summons filed by the Defendant indicated that the reasons for raising the preliminary issue were contained in the affidavit in support, the view I hold is that this is contrary to paragraph 14A/2/7 and 8 as the affidavit is supposed to depose to all the material facts relating to the question of law or construction to be determined by the Court.

However, going by what is on record, it seems to me perfectly plain that there is no clarity on the actual questions to be determined by this Court. Counsel for the Defendant should have known that it is not the role of the Court to decipher the actual questions for determination as

there is a risk of failing to address the actual questions or even straying into other issues which may not be for determination.

On this score, I also find that the application is irregular as the mode of application was not complied with.

The net result of my findings is that the Defendant's application is incompetently before this Court as no notice of intention to defend was filed in the context of our rules which is filing a memorandum of appearance and defence. In short, the pre-requisite for launching an application under Order 14A and Order 33 has not been satisfied.

Consequently, the Defendant's application is dismissed. I award costs to the Plaintiff which are limited to his out of pocket expenses in relation to this application.

Delivered in Lusaka this 20th Day of August, 2020

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M.C. KOMBE
JUDGE