

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



2018/HP/0904

BETWEEN:

MAPEPI BIBLE COLLEGE REGISTERED TRUSTEES

PLAINTIFF

AND

**PATRICK KAWINGA
WALLACE MUKUPA
OBDEN MESSCOOK
SONNY NGWIRA
ISAAC MWIYA
ALEX KAMBULU
JOSEPH MANDYATA**

**1st DEFENDANT
2nd DEFENDANT
3rd DEFENDANT
4th DEFENDANT
5th DEFENDANT
6th DEFENDANT
7th DEFENDANT**

*(Sued in their individual capacities and as trustees of
Chelstone Church of Christ)*

AND

2018/HP/1763

BETWEEN:

GLENN MWIKA AND 21 OTHERS

PLAINTIFFS

(Elders and leaders of their respective churches as attached)

AND

**CHARLES KAMBOYI
HUBREY MILTON MSALU
PATRICK ZIMBA
ERNEST CHILEYA
GIBSON LIKASI KALENGA**

**1st DEFENDANT
2nd DEFENDANT
3rd DEFENDANT
4th DEFENDANT
5th DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CAHMBERS THIS 27th
DAY OF AUGUST, 2020**

*For the Plaintiffs in the first cause : Messrs K. Mwale and Company and LM
and Defendants in the second cause Chambers*

For the Defendants in the first cause : Messrs Sambo Kayukwa and
and Plaintiffs in the second cause Company and Messrs Chonta Musaila
and Pindani Advocates

R U L I N G

CASES REFERRED TO:

1. **Mohamed A. Omar v Zambia Airways Corporation Ltd 1986 ZR 23**
2. **African Banking Corporation Zambia v Mubende Country Lodge Limited**
3. **Col Paul Chikuswe Chilanga RTD v Lt Gen I.S.A. Chisuzi RTD Appeal No 53/2017**

LEGISLATION REFERRED TO:

1. **The High Court Rules, Chapter 27 of the Laws of Zambia**
2. **The Rules of the Supreme Court of England, 1999 Edition**

OTHER WORKS REFERRED TO:

1. **Odgers' Principles of Pleadings and Practice, 22nd Edition by D.B. Casson and I.H. Dennis, London, Stevens and Sons, 1981**

This is an appeal against the decision of the Deputy Registrar that was delivered on 14th February, 2020, on a ruling on an application made by the defendants in the second cause raising preliminary issues, and to dismiss the action for lack of locus standi.

I wish to state right at the outset that in line with the case of **Mohamed A. Omar v Zambia Airways Corporation Ltd** ⁽¹⁾, an appeal from the decision of the Registrar, who includes the Deputy Registrar and the District Registrar is by way of rehearing. In that matter it was held that;

“An appeal to a judge in Chambers is treated as an actual rehearing of the application and the judge should have regard to the contents of supplementary affidavits”.

As such, in this appeal, I will consider the application afresh, and take into consideration the affidavits and skeleton arguments that were filed before the Deputy Registrar in relation to the application, as well as the affidavits and skeleton arguments filed in support of the appeal.

The background leading to the application is that the second cause was commenced on 10th October, 2018, in which the plaintiffs seek the following reliefs;

1. *A declaration that the former Board of Trustees of Mapepi Bible College Registered Trustees elected in 2012 under the Constitution of 2010 had no authority to convene any meeting after its five year tenure expired in 2017.*
2. *A declaration that the election of the defendants as members of the Board of Trustees of Mapepi Bible College Registered Trustees was unconstitutional, and therefore null and void, as it was done under an illegally convened meeting.*
3. *A declaration that the constitution of April, 2018 and titled ‘Constitution of Mapepi Bible College Registered Trustees’ was adopted at an illegally convened meeting called by the members of a board whose term had expired, and was attended by some Churches of Christ in Lusaka is illegal, null and void, as the same was not adopted by a meeting convened in accordance with the*

current constitution in relation to the calling and convening of general meetings.

4. *A declaration that the constitution of June 2010, Mapepi Bible College Registered Trustees and registered at the Lands and Deeds Registry is still valid.*
5. *An order of interim injunction restraining the defendants by themselves, their agents or servants or whomsoever otherwise from performing, acting or putting themselves out or carrying out any functions of the Board of Trustees of the Mapepi Bible College Registered Trustees until further order of this court;*
6. *Costs of and incidental to this action.*

In that cause, on 15th October, 2018, the defendants filed a notice of motion to raise preliminary issues, and to dismiss the action for being an abuse of court process, pursuant to Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia and Order 33 Rules 3 and 7 of the Rules of the Supreme Court of England, 1999 edition.

The basis of filing that application was that there was an order of injunction that had been granted under cause 2018/HP/0904, which was at the time the only cause that was pending before me, restraining members of the Chelston Church of Christ from exercising the powers of the Mapepi Bible College. The other issues raised were whether the action was competent in view of the action that was pending under cause number 2018/HP/0904, and whether the defendants could be sued in their individual capacities when they

were exercising the powers of the Board of Trustees of Mapepi Bible College.

When the matter came up for hearing before Hon Mrs Justice M Mapani Kawimbe on 25th October, 2018, Counsel for the plaintiffs applied that the action be consolidated with cause number 2018/HP/0904 which was pending before me. There being no objection by Counsel for the defendants, the matter was consolidated with cause number 2018/HP/0904.

On 5th December, 2019, the defendants in cause number 2018/HP/1763 filed the notice of motion to raise preliminary issues and to dismiss the action. The preliminary issues raised were as follows;

1. *Whether the respondents have legal standing to sue without being registered, and meeting the mandatory requirements under the Societies Act and other laws.*
2. *Whether the applicants can be sued in their individual capacities when the applicants are members of the Board of Trustees of Mapepi Bible College which is a registered organization under the Land (Perpetual Succession) Act.*

In the skeleton arguments filed in support of that application on 28th January, 2020, the defendants argued that any party that commences an action must have capacity or locus standi. In arguing this ground four issues were raised. The first issue related to what is locus standi, and in this regard, **Black's Law Dictionary** at page 960, was referred to. It defines locus standi as;

“The right to bring an action before the court or the right to be heard in each forum by the court”.

The case of ***Col Paul Chikuswe Chilanga RTD v Lt Gen I.S.A. Chisuzi RTD*** ⁽³⁾ was relied on, stating that it was held in that matter that locus standi is intertwined with the issue of disclosing a reasonable cause of action. Thus, when one brings an action before court, they must demonstrate that they have a reasonable cause of action.

Further reliance was placed on ***Odgers’ Principles of Pleadings and Practice, 22nd Edition by D.B. Casson and I.H. Dennis, London, Stevens and Sons, 1981.*** It defines a reasonable cause of action as a cause of action with some chance of success. That in this matter, the plaintiffs have not demonstrated their capacity to commence the action under cause number 2018/HP/1763, as they have not been registered with the Registrar of Societies, as well as the Zambia Revenue Authority (ZRA) among other government institutions that would enable them to commence the action.

It was further argued that in order for the church to sue, it must comply with the various statutory requirements to enable the church have locus standi to institute the proceedings. In that regard, it was stated that registration with the Registrar of Societies and being issued with a certificate of registration, as shown on exhibit ‘HMM1’ the certificate of registration for Bauleni, Woodlands, and Chazanga Churches of Christ, is one such requirement.

The argument was that none of the churches that has commenced the action under cause number 2018/HP/1763 is registered with the Registrar of Societies, and consequently they have no certificate of registration, which would entitle them to commence the action.

The second issue raised with regard to locus standi was that the plaintiffs are required to be registered with ZRA, and to obtain tax certificates permitting them to pay tax.

The defendants on the third issue argued that arising from a dispute with the Livingstone Church of Christ, which attempted to create an umbrella body of the Churches of Christ in Zambia, a consent order was executed between the parties to the dispute on 29th October, 2015, which recognized the independence and autonomy of the individual Churches of Christ in Zambia.

Thus, being independent, each church is required to formulate its own constitution to govern its internal and external affairs, which also indicates who has authority to sue on behalf of each Church of Christ. Exhibit 'HMM4' is said to be the constitution of Bauleni, Woodlands and Chazanga Churches of Christ, and which also stipulates who is entitled to sue on behalf of the church.

It was therefore argued that none of the twenty two (22) persons listed as representatives of the said churches have capacity to sue, and the action should be dismissed for being an abuse of the court process.

As to what amounts to abuse of the court process, reliance was placed on the explanatory notes in ***Order 18/19/18 of the Rules of the Supreme Court of England, 1999 edition***. It states that;

“confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be "an abuse of the process of the Court." This term connotes that the process of the Court must be used bona fide 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”.

It was contended that commencing the action under cause number 2018/HP/1763 was an abuse of the court process, as it was an improper use of the legal machinery to institute proceedings to stifle the operations of the defendants, in order to pursue ulterior motives against the applicants with the full knowledge that the plaintiffs do not have legal capacity to institute the said proceedings.

The fourth issue raised in support of the argument that the plaintiffs have no locus standi to commence the proceedings, was that the plaintiffs are mandated to file annual returns with the Registrar of Societies in compliance with Section 16 of the Societies Act. That the annual returns for Bauleni, Woodlands and Chazanga Churches of Christ are exhibited as ‘HMM5’. It was argued that as the plaintiffs had not submitted their annual returns, they have no capacity to commence the action.

With regard to the second ground for raising the preliminary issues, it was argued that the defendants are a registered trust with capacity to sue and be sued. Section 2 of the Lands (Perpetual Succession) Act,

Chapter 186 of the Laws of Zambia, was referred to, stating that it provides for the registration of members of a community that come together for religious or educational purposes, and to appoint trustees with the result, that a certificate of registration is issued to them as a body corporate, as provided by Section 3 of that Act.

It was argued that the defendants are registered as members of the Board of Trustees of Mapepi Bible College, as shown on exhibit 'HMM6'. That being an incorporated body, the defendants have capacity to sue and to be sued, and they should have been sued as a Trust, and not in their individual capacities. That as the plaintiffs have no capacity to sue, the action ought to be dismissed.

On 18th June, 2020, the plaintiffs filed an affidavit in opposition, which is deposed to by Glenn Mwika, the 1st plaintiff. The gist of that affidavit is that the plaintiffs were unable to file an affidavit in opposition when the application was heard by the Deputy Registrar, as unbeknown to them, their advocate had travelled to Livingstone.

It is deposed that the notice to raise preliminary issues is incompetent as the defendants have not entered appearance or filed a defence in this matter after the writ of summons and statement of claim were filed on 10th October, 2018, and were amended on 8th February, 2019.

Further, that the application is incompetent as no objection was raised by the defendants when Counsel for the plaintiffs applied to consolidate the matter with cause number 2018/HP/0904, and neither was there an appeal against the order for consolidation.

It is deposed in the alternative, that all the various Churches of Christ in Lusaka, Chilanga and Kafue districts collectively own the land and the buildings where Mapepi Bible College is situated, under a trust called the Mapepi Bible College Registered Trustees. It is contended that all the Churches of Christ in Lusaka, Chilanga and Kafue Districts are registered with the Registrar of Societies, and are in good standing with the Registrar of Societies.

Further, that their certificates of registration have not been cancelled. The certificates of registration, constitutions and some of the certificates of registration from the Zambia Revenue Authority are exhibited as 'GM2' to the affidavit.

The deponent also avers that as Hon Mrs Justice M.M. Kawimbe ordered consolidation of the matter, there is no abuse of court process. The contention is further that the five (5) year tenure of the defendants as Trustees for Mapepi Bible College ran from January, 2012 until January, 2017. Thus, they have been sued in their personal capacities, as their continued stay in office does not have the blessings or legitimacy of all the various Churches of Christ, who have sued them.

It is also averred that the reliefs sought in the later action are clear, and the defendants have neglected to enter appearance and defence to the said claims. The contention is that the plaintiffs have sufficient interest in the matter.

No affidavit in reply was filed.

I have considered the notice of motion. It was raised pursuant to Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia, as well as Order 33 Rule 3 and Order 14A of the Rules of the Supreme Court of England, 1999 edition. **Order 3 Rule 2 of the High Court Rules** provides that;

“2. Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not”.

Order 33 Rule 3 of the Rules of the Supreme Court of England, 1999 edition provides as follows;

“The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated”.

Order 14A of the Rules of the Supreme Court states 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”.

Before I delve into the merits of the preliminary issues that have been raised by the defendants, the plaintiffs in responding to the issues raised stated that the application is incompetent as the defendants have not entered appearance and filed a defence in this matter. The case of ***African Banking Corporation Zambia v Mubende Country Lodge Limited*** ⁽²⁾ was relied on in support of that argument.

In that case, the appellant issued a writ of possession under cause number 2009/HPC/0735, which was executed at the premises where the respondent conducted its business. The respondent took out a notice of claim, and during the pendency of the interpleader pleadings, the respondent took out an action against the appellant in the High Court claiming damages for wrongful execution and trespass, consequential damages, aggravated and exemplary damages, and a mandatory injunction restraining the defendants from trespassing on the property.

The appellant filed a conditional memorandum of appearance, and sought to dismiss the action on points of law, which were whether the

matter was properly before the court, in light of the pending interpleader proceedings under cause number 2009/HPC/0735. The trial Judge dismissed the notice of motion that was raised, on the ground that the appellant had not satisfied the conditions under Order 14A/2/3 of the Rules of the Supreme Court of England, as it had not filed a defence.

On appeal, the Supreme Court referred to the requirements under the said Order 14A/2/3 of the Rules of the Supreme Court. The Supreme Court noted that under that provision, the giving of notice of intention to defend is a requirement, and that in that matter, the defendant had not filed a defence, but had only filed a conditional memorandum of appearance. The court went on to ask the question whether a conditional appearance amounts to the giving of notice of intention to defend.

It was observed that in answering that question, there was need to reconcile the provisions of the Rules of the Supreme Court of England with our High Court Rules. The Supreme Court observed that notice of intention to defend is defined in Order 1 Rule 4 of the Rules of the Supreme Court as;

“means an acknowledgment of service containing a statement to the effect that the person by whom or on whose behalf it is signed intends to contest the proceedings to which the acknowledgment relates;”

The court further observed that notice of intention to defend does not appear in our High Court Rules, but that however, Order 11 Rule 1 of

the High Court rules provides for the mode of entering appearance to a writ of summons. That going by that provision, what constitutes a notice of intention to defend is the filing of a memorandum of appearance which is accompanied by a defence. Thus, that it follows that the filing of a memorandum of appearance with a defence is a pre-requisite to launching an application under Order 14A of the Rules of the Supreme Court.

As to the appellant's argument that it had filed a notice of intention to defend by way of the conditional appearance, the Supreme Court stated that the filing of a conditional appearance without a defence is only applicable in circumstances where a defendant wishes to contest the validity of the proceedings with a view to applying to set aside the writ, in line with Order 11 Rule 1 (4) of the High Court Rules, which provides that;

“(4) Any person served with a writ under Order VI of these rules may enter conditional appearance and apply by Summons to the Court to set aside the writ on grounds that the writ is irregular or that the Court has no jurisdiction”.

That other than what is provided in the said Order, a conditional appearance can never be extended or over stretched to constitute a notice of intention to defend in the context of an application under Order 14A of the Rules of the Supreme Court, which is intended to fully determine a matter without a full trial of the action.

A perusal of cause number 2018/HP/1763 shows that after the plaintiffs commenced that action on 10th October, 2018, the

defendants did not enter any appearance to the writ or file a defence, but filed the notice of motion to raise preliminary issues. Order 14A/2/3 states the requirements of Order 14A as;

“The requirements for employing the procedure under this Order are the following:

- (a) the defendant must have given notice of intention to defend;***
- (b) the question of law or construction is suitable for determination without a full trial of the action;***
- (c) such determination will be final as to the entire cause or matter or any claim or issue therein; and***
- (d) the parties had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination”.***

Going by the requirements of Order 14A of the Rules of the Supreme Court of England, and the guidance given by the Supreme Court in the case of ***African Banking Corporation Zambia v Mubende Country Lodge Limited*** ⁽²⁾, the defendants in cause number 2018/HP/1763 cannot invoke the provisions of Order 14A unless they have entered appearance and filed a defence.

In the *African Banking Corporation Zambia v Mubende Country Lodge Limited* ⁽²⁾ case, the Supreme Court with regard to Order 33 Rule 3 of the Rules of the Supreme Court stated as follows;

“The import of Order 33 Rule 3 RSC, is that a preliminary point of law can be raised at any stage of the proceedings, including the period before trial.....We should quickly make the point however, that Order 33 Rule 3 cannot be invoked independently or to the exclusion of the mandatory requirements of Order 14A, RSC, which require the filing of a notice of intention to defend, as a prerequisite to raising a preliminary point of law”.

Therefore, the defendants in this matter cannot succeed in the notice of motion raised under Order 33 Rule 3 of the Rules of the Supreme Court of England, unless they have also satisfied the requirements of Order 14A of the Rules of the said Rules of the Supreme Court of England. This, as I have already stated has not been complied with, as the defendants have not entered appearance or filed a defence in cause number 2018/HP/1763.

The notice of motion was also raised pursuant to Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia. This rule, as can be seen from the heading under that Order, falls under miscellaneous provisions, and it is subject to any particular rules. Therefore, it can only be invoked in addition to what the other rules say.

Consequently, in this application, it can only stand where the requirements of Order 14A and Order 33 Rule 3 of the Rules of the

Supreme Court of England have been complied with. As they have not, the notice to raise preliminary issues is incompetent, and I accordingly dismiss it.

In this matter, and in cause number 2018/HP/0904, I issued orders for directions on 29th May, 2018. On 25th January, 2019, I directed that the causes would be heard one after the other and I would deliver one judgment. I also allowed the plaintiffs in cause number 2018/HP/0904 to file an amended writ of summons and statement of claim within fourteen (14) days of that date. The amended writ of summons and statement of claim was filed on 8th February, 2019.

Then on 30th May, 2019, the parties agreed to file agreed facts so that the matter could be heard simultaneously. In that regard, orders for directions were issued. When the matter came up for a status conference on 4th September, 2019, none of the parties had complied with the orders for directions. On the part of the defendants in cause number 2018/HP/1763, this was stated as being on account of the fact that they believed that the appeal on the application for an order of injunction would be prolonged.

I noted that under cause number 2018/HP/1763 no appearance and defence had been filed. I accordingly extended time for compliance with the orders for directions. There has been no compliance with the orders for directions and applications, being the one on which I have just ruled on, as well as an application for misjoinder were made before the Deputy Registrar.

The plaintiff in cause number 2018/HP/0904 on 24th September, 2019 applied to amend their pleadings, which application has not been heard. In view of the outbreak of the corona virus, I direct that the plaintiff in cause number 2018/HP/0904 serves that application forthwith on the defendants. The defendants shall file an affidavit in opposition and skeleton arguments if any by 7th September, 2020. The plaintiff shall file an affidavit in reply by 14th September, 2020, and I will thereafter deliver my ruling.

With regard to cause number 2018/HP/1763, I vary the orders for directions as follows;

1. That the defendants shall file a defence and counterclaim if any by 11th September, 2020.
2. That the plaintiffs shall file a reply and defence to the counterclaim if any by 25th September, 2020
3. That the defendants shall file a reply to the defence to the counterclaim if any by 5th October, 2020.
4. That there shall discovery of documents by 19th October, 2020.
5. That there shall be inspection of documents by 2nd November, 2020.
6. That the parties shall file a bundle of pleadings and bundles of documents by 16th November, 2020.
7. That there shall be liberty to apply by either party.

8. That the matter shall come up for a status conference on 3rd December, 2020 at 08:30 hours.

Costs shall be in the cause, and leave to appeal is granted.

DATED AT LUSAKA THIS 27th DAY OF AUGUST, 2020

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**