

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2001/HP0849

BETWEEN:

JOSEPHINE MONDE MUBITA CHIKWENDA

1ST PLAINTIFF

*(Suing in her own Capacity and as Administrator
of the Estate of Levina Mubita)*

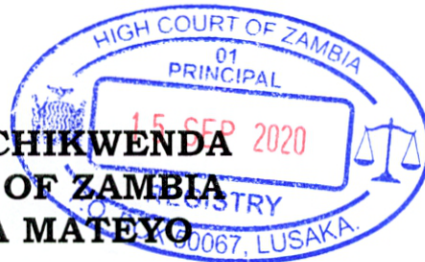
SARAH SAKALA

2ND PLAINTIFF

AND

**JACOB STANLEY CHIKWENDA
TOBACCO BOARD OF ZAMBIA
EPHRAIM MULUBA MATEYO**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT**



Before:

The Hon. Mr. Justice Charles Zulu.

For the Plaintiff:

Ms. I.E. Suba, Mesdames Suba,
Tafeni and Associates.

The 1st and 2nd Defendant: No Appearance.

For the 3rd Defendant:

Mr. F. Pumbwe, Messrs N & P
Advocates.

RULING

Cases referred to:

- 1. *Mukula and Another v. Chiwala and Another (2014) Vol. 2 Z.R. 21.***
- 2. *Stanley Mwambazi v. Morrester Farms Ltd (1997) Z. R. 108.***

Legislation referred to:

- 1. *The High Court Rules (HCR) Chapter 27 of the Laws of Zambia.***
- 2. *The High Court Act Chapter 27 of the Laws of Zambia.***

This ruling is in respect of an application by the third Defendant, for leave to allow the third Defendant time to “Plead and Produce Documents”. The application was made pursuant to **Order XXX Rule 11(a)** of the **High Court Rules (HCR) Chapter 27 of the Laws of Zambia.** The said Order XXX rule 11(a) provides as follows:

11. The business to be disposed of in chambers shall consist of the following matters, in addition to the matters which under any other rule or by statute or by law and practice for the time being observed in England and applicable to Zambia may be disposed of in chambers:

(a) applications for time to plead, for leave to amend pleadings, for discovery and production of documents, and generally all applications relating to the conduct of any cause or matter;

A brief background to this application is that, the Plaintiff took out a writ of summons and statement of claim against the first Defendant and second Defendant on September 17, 2001, and in a subsequent amended writ of summons and statement of claim, the third Defendant was joined to the proceedings. Consequently, the third Defendant filed his defence dated June 14, 2019. When the matter came up for trial on July 17, 2019, only the Plaintiffs and their Advocates were in attendance. Leave was granted to the Plaintiffs to proceed to trial in the absence of the Defendants, given the fact that the absence of the Defendants was inexcusable. Therefore, the whole matter was deemed closed and adjourned for judgment.

While the matter was pending judgment, the third Defendant filed the present application. The application was supported by an affidavit deposed to by Ephraim Maluba Mateyo. In his affidavit,

the third Defendant deposed that when the matter came up for trial, he was not in attendance owing to a pending interlocutory application for misjoinder, which was scheduled to be heard on September 24, 2019. He added that even though the third Defendant's evidence in form of exhibits was already on the record, he was desirous as a matter of right to be heard on the main matter.

An affidavit in opposition was deposed to by Ms. Josephine Monde Mubita Chikwenda. She deposed that the third Defendant was notified of the date of trial through his Advocates, but opted to stay away and thereby slept on his right to be heard.

In support of the application, Mr. Pumbwe submitted that the object for the application was for leave to give the third Defendant an opportunity to file documents and testify in the matter. He made reference to the memorable case of **Stanley Mwambazi v. Morrester Farms Ltd (1997) Z. R.108** wherein it was held:

It is the practice in dealing with bona fide interlocutory applications for courts to allow triable issues to come to trial despite the default of the parties:

Where a party is in default he may be ordered to pay costs, but it is not in the interest of justice to deny him the right to have his case heard.

In response, Ms. Suba argued that the Order relied on by the third Defendant to make the present application, did not allow for the reopening of the case where trial was closed. She further argued that the case of ***Stanley Mwambazi*** was distinguishable from the current case in that the former was not dealing with a matter where trial had already taken place.

She also submitted that the affidavit in support of the application did not disclose reasons as to why the third Defendant was not in attendance on the date of trial. She, however, stated that the purported reason that there was a pending application before court was inexcusable in light of the fact that the third Defendant was served with the notice of trial.

In her submission she made reference to the case of **Mukula and Another v. Chiwala and Another (2014) Vol. 2 Z.R. 21** wherein it was held (head notes):

1. ...
2. ***Order 35(3) of the HCR empowers the High Court to hear evidence from the Plaintiff where a Defendant does not Appear or where no sufficient excuse for his absence is given and then given judgment on the basis of the evidence adduced by Defendants were absent on that day did not matter as the judge had received evidence from the Plaintiff's witness.***
3. ***It had not been shown that the judge exceeded his powers by proceeding as he did. The parties and, in particular, the Appellants, exhibited lack of interest towards timely disposal of the matter as evidence by numerous adjournments. In most cases, it was the Appellants and tehri Counsel who were absent. The parties eft the trail Judge no option other than to proceed as he did, especially in the light of his having issued a warning that the grant of the previous adjournment would be the last.***
4. ***As the case was partially heard, the Appellants, who had given no explanation for their absence, could on that day by insisting that the judge strike out the matter.***

Ms. Suba reiterated that there was no provision in our rules that allowed for the reopening of a case once trial was closed, except

where a defendant or a party had no notice of trial. And I was urged to dismiss the application.

In reply Mr. Pumbwe argued that the Order cited by the Plaintiff effectively represented the present application.

I have carefully considered the affidavits herein and the arguments thereof. Firstly, I agree with Ms. Suba that the Order relied on by the Plaintiff, thus Order XXX r. 11(a) of the HCR has no direct bearing to the present application. The said Order does not relate to applications to allow the reopening of a matter after close of trial in order to afford an opportunity to a party who was not present at trial to give his or her evidence. Similarly, it does not directly speak to an application for leave to allow a party time to plead and produce documents.

Order XXX r. 11 HCR generally speaks to the nature of business to be disposed of in Chambers. Needless to say, the nature of business for determination herein, is fit to be disposed of in chambers. While it appears possibly true that there is no specific Order in our High Court Rules, addressing reopening a matter closed after trial, in order to allow a party who was not present at trial to have his or her case heard, there is nothing in the rules that expressly prohibits the court from hearing and determining an application of this sort.

The Court in discharging its mandate to do justice has inherent jurisdiction to hear and determine this application. And apart from the court's inherent jurisdiction, I find solace in section 13 of the **High Court Act Chapter 27 of the Laws of Zambia** which provides:

In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.

And in determining an application of this sort, the court is entitled to delve into the reasons advanced for the non-attendance of a party at trial. While I agree with Ms. Suba that the reasons advanced by the third Defendant appear inexcusable, the issue does not necessarily end there. Most importantly, regard must be had to the defence raised. It is trite that courts must allow triable issues to come to trial despite the default of the parties. Notwithstanding the default of the third Defendant, the third Defendant in his defence raises seriously triable issues.

It is to be noted in the first place that the Plaintiffs in their claims seek to repossess Farm No. S/D432 of 401a Makeni, Lusaka. And it was averred that the farm was irregularly sold by the first Plaintiff's late husband to the third Defendant without her authority as Administratrix in respect of the said property. And in the second place, the third Defendant in his defence averred that

the Plaintiffs were not entitled to repossession. And that he was a *bonafide* purchaser for value because he bought the said property from the first Plaintiff's husband in his capacity as Attorney for the first Plaintiff.

In view of the foregoing, I am in no doubt that the ends of procedural justice require that the third Defendant must be heard so that all issues in controversy between the parties are heard and determined once and for all.

Accordingly, the case is reopened to allow the third Defendant or and his witnesses to testify. Furthermore, the third Defendant is granted leave to file his Bundle of Documents within 14 days from the date of this ruling subject to discovery and inspection.

Costs to be borne by the third Defendant.

DATED THIS 15th DAY OF SEPTEMBER, 2020.



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THE HON. MR. JUSTICE CHARLES ZULU

