IN THE HIGH COURT FOR ZAMBIA **2018/HL/39**
AT THE DISTRICT REGISTRY
HOLDEN AT LIVINGSTONE
(Civil Jurisdiction)

BETWEEN:

MAINGA MBUYE MBUYE **PLAINTIFF**

AND

WILSON SITALI & 15 OTHERS **DEFENDANTS**

Before the Hon. Mr. Justice Mathew L. Zulu in Chambers on the ...14th...day of September, 2020

For the Plaintiff: ***Mr. Switz Mweemba, of Mweemba Switz and Associates.***

For the Defendants: ***Major Isaac Masonga (Rtd), of Messrs. KBF and Partners.***

RULING

Cases referred to:

1. ***Sir Lindsay Parkinson and Company v Triplan Ltd (1973) Q.B. 609.***
2. ***Henry Nsama and 1341 Others v Zambia Telecommunications Company Limited, Appeal No. SCZ/8/296/2011***
3. ***Isaac Lungu v Mbewe Kalikeka, Appeal No. 114/2013.***

Legislation referred to:

1. ***The High Court Rules, Cap 27 of the Laws of Zambia.***

Works referred to:

1. ***The Rules of the Supreme Court, (White Book) 1999 Edition.***
2. ***Stuart Sime, "A practical Approach to Civil Procedure", 8th Edition (Oxford University Press, 2003).***

This is an appeal against the Ruling of the Deputy Registrar dated 15th June, 2020, ordering the Defendants to pay a sum of K16,000.00 as security for costs before proceeding with their application for review of a Judgment dated 10th March, 2020.

The brief background to this appeal is that on 10th March, 2020, this Court delivered a Judgment which declared the Plaintiff as the legal owner of Farm No. 11715, Livingstone, and granted him an Order to evict the Defendants from the Farm. On 24th April, 2020, the Defendants filed a summons for special leave of the Court to file an application for review of the Judgment out of time and for a stay of execution of the judgment. Leave was granted and the Defendants filed a summons for review of the Judgment.

On 9th June, 2020, the Plaintiff applied for an order that the Defendants should give security for costs in the sum of K160, 000.00 before proceeding with their application for review. In

support of his application, the Plaintiff filed an affidavit the gist of which was that the Defendants had not paid the costs as earlier ordered by the Court and also that the Defendants moved out from their usual place of residence and it was going to be difficult for him to recover his costs as their current abode was unknown. The application was heard by the learned District Registrar on 11th June, 2020.

By a Ruling dated 15th June, 2020, the District Registrar held that security for costs should not be exorbitant but minimal. He expressed the view that the Defendants were no longer legally aided and there was nothing that stopped them from paying security for costs, notwithstanding that Counsel for the Defendants had put a claim under **Order 1 Rule 4 of the High Court Rules**. The District Registrar allowed the application and made the following order: -

> ***"I therefore order that the defendants pay the sum of K16,000.00 translating into each defendant contributing K1,000 which is minimal and not K160,000.00 which is exorbitant"***

Disenchanted with this Ruling, the Defendants appealed against the decision of the learned District Registrar advancing the following two grounds of appeal: –

1. **that the Honourable Lower Court erred in both law and fact when it ordered that the Defendants herein pay security for costs considering the circumstances of this matter; and**

2. **that the Honourable Lower Court erred in both law and fact when it ordered that the Defendants herein pay security for costs without stating the period within which to pay the security for costs.**

In support of this appeal, learned Counsel for the Defendants filed submissions into Court on 2nd July, 2020, and Counsel for the Plaintiff filed submissions opposing the appeal on 9th July 2020. The appeal was scheduled to come up on 10th July, 2020, but Counsel for the parties informed the Court that they were desirous of having the appeal determined on their respective submissions filed into Court.

In support of the appeal, Counsel for the Defendants argued both grounds of appeal together. He referred to a number of authorities that espouse principles on security for costs. He submitted that in the case of **Sir Lindsay Parkinson and Company v Triplan Ltd**[1], **Lord Denning M.R.** observed that the following issues are vital, in an application for security for costs:

a) whether the claimant's claim is bona fide, and not a sham. Factors to be taken into account in this regard are;

(i) whether the claimant has reasonably good prospects of success;

(ii) whether the defendant has made any admissions in its statement of case, or elsewhere; and

(iii) whether there has been substantial payment into court (as opposed to a small amount in order to get rid of a nuisance claim.)

b) whether the defendant is using the application for security oppressively so as to stifle a genuine claim; and

c) delay in making the application.

On the prospects of success, Major Masonga argued that in view of the authorities cited, and considering the evidence produced by the Defendants in their affidavit in support of the application for review, the Defendants have high prospects of succeeding.

As regards the stifling of a genuine claim, Counsel submitted that the Defendants are individuals of no means who were represented by the National Legal Aid Clinic for Women, and are now being assisted by a charity organisation to meet their legal fees. According to him, the fact that the Defendants seem to be unable to pay the Plaintiff's costs should not be a reason to automatically entitle the Plaintiff to security for costs. Counsel cited the case of **Henry Nsama and 1341 Others v Zambia Telecommunications Company Limited**[2], where the Supreme Court stated that:

> ***"In exercising our discretion, we take the view that the Appellants being a group of people who are unemployed can be regarded as indigent persons and for this reason we believe that ordering security for costs will be tantamount to blocking them***

from prosecuting their appeal. At the same time, these are Zambians who are unlikely to go out of jurisdiction and the respondents can easily trace them as they have a group leader and Counsel."

The thrust of Counsel's submission was that the Defendants have a genuine claim which is likely to be stifled by the order for security for costs. Being indigents, the Defendants have no capacity to raise the sum of K16, 000.00 which they had been ordered to pay and will be denied the opportunity to pursue their claim which has prospects of succeeding.

Major Masonga argued that none of the issues provided under **Order 23 of the Rules of the Supreme Court**[1] formed the basis upon which the order of the District Registrar was granted; and that the amount was not determined in accordance with established practice. He referred to the learned authors of **Stuart Sime, "A practical Approach to Civil Procedure", 8th Edition (Oxford University Press, 2003)**[2], who at Paragraph 38:4 state that ***"The practice is that in fact a skeleton bill of costs should accompany the application or be exhibited."*** This, according to Counsel, is the only way the Court can be assisted to know the anticipated costs.

Counsel contends that the Ruling of the District Registrar is irregular as it does not indicate in what manner, at what time

and on which terms the Defendants were to pay the security for costs, contrary to the provisions of **Order 23 of the Rules of the Supreme Court**[1]. He beseeched this Court to set it aside and allow the Defendants to prosecute the application for review.

This appeal was opposed by the Plaintiff. On his behalf, Counsel submitted that the Plaintiff had demonstrated that Defendants had never been interested in paying costs whenever they were ordered to do so by the Court. He stated that the Plaintiff believes there are reasonable prospects that the Defendants' application may not succeed and the Court may again order the Defendants to pay costs, and the Plaintiff feels that the Defendants will again ignore any future order as to costs more so that their residential addresses are now unknown to the Plaintiff.

Mr. Mweemba submitted that the Defendants' application for review has no prospects of succeeding because the Defendants had not placed material evidence upon which the Court can review its judgement. According to him, the letter authored by the Deputy Chief Sekute is simply a statement commenting on the matter between the Plaintiff and the Defendants. But that the Plaintiff's land is on title and there is nothing in the letter to suggest that the title was obtained fraudulently. He argued that

the prospects of the Defendant's application succeeding are dim and this is a proper case in which the court should order the Defendants to pay security for costs.

Counsel invited this Court to uphold the Ruling of the District Registrar and dismiss this appeal with costs.

I have anxiously considered the grounds of appeal, the submissions by Counsel for the parties and the issues raised in this appeal. The issue to be determined in the first ground of appeal is whether, considering the circumstances of this matter, the District Registrar erred when he ordered the Defendants to pay security for costs. The second ground of appeal raises the question of whether the District Registrar did not state the period within which the Defendant was required to pay the costs.

The law in **Order 40 Rule 7 of the High Court Rules**[1], as read together with **Order 23 Rule 1 of the Rules of the Supreme Court**[1], confers discretion on the court in determining whether or not to grant security for costs. The Supreme Court explained this in the case of **Isaac Lungu v Mbewe Kalikeka**[3], when it held that:

> **"Clearly Order 40 Rule 7 places discretion on the Court or the Judge in deciding whether or not to grant security for costs. It is**

also clear from the foregoing rule and authority that security for costs can be ordered against a plaintiff or a defendant in a matter. Suffice to add that for a defendant it is only in proceedings taken in his interest, such as a counterclaim, that a plaintiff can apply for security in respect of the costs of that counterclaim.

Order 23 Rule RSC 1999, also deals with the circumstances in which the Court may, on an application made by a defendant order security for costs if having regard to all the circumstances of the case, it thinks it just to do so. The circumstances are (a) the plaintiff is ordinarily out of jurisdiction, or (b) the plaintiff (not being a plaintiff who is suing a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or (c) the plaintiff's address is not stated in the writ and other originating process or is incorrectly stated, or (d) the plaintiff has changed his address during the proceedings with a view to evading consequences of the litigation."

We ought to add that the circumstances listed above have been widely used in our jurisdiction to apply for security for costs under Order 40 Rule 7 of the High Court Rules, Cap 27. Again, it is clear that the Court has a complete or real discretion whether to order security, and it will act in light of all the circumstances of the case. In other words, the court must carefully consider the effect of making such an order, and in the light thereof to determine to what extent or for what amount a plaintiff (or the defendant as the case may be), may be ordered to provide security for costs (see paragraph 23/3/3 RSC 1999)."

In this case, the Plaintiff made an application for security for costs because the Defendants had not paid the Plaintiff's costs as earlier ordered by the Court. The other reason is that the Defendants moved out from their usual place of residence at his Farm and it was going to be difficult for him to recover his costs because he does not know where the Defendants now live. In the case of **Sir Lindsay Parkinson and Company v Triplan Ltd**[1],

Lord Denning M.R. highlighted the circumstances that the Court might take into account on an application for security as follows:

1. ***Is the claim bona fide and not a sham?***
2. ***Does the claimant have a reasonably good prospect of success?***
3. ***Is there an admission by the Defendant on the pleadings or elsewhere that money was due?***
4. ***Is there a substantial payment into Court, or an 'open offer' of payment?***
5. ***Is the application for security being used oppressively so as to try to stifle a genuine claim?***

d) Is the claimant's want of means brought about by any conduct by the Defendant, such as delay in payment or doing their part of the work?

e) Is the application for security made at a late stage of the proceedings?

I have addressed my mind to the question as to whether the Defendants' application for review has prospects of succeeding, considering the letter from the Sekete Royal Establishment which speaks to the extent of the land offered to the Plaintiff. Without delving into the merits of the application for review, I am of the considered opinion that the Defendants' application has no prospects of succeeding even though they have a bona fide claim. The Judgment of this Court determined the issue of legal ownership of Farm No. 11715, Livingstone and not its extent. It held that a certificate of title is conclusive evidence of ownership

of land by a holder of the certificate and that the Plaintiff being a holder of a certificate of title to Farm No. 11715, Livingstone, which had not been challenged by the Defendants as having been fraudulently obtained, is the legal owner of the Farm.

Major Masonga has also argued that the Defendants' claim will be stifled by the order for security for costs, because the Defendants are legally aided indigents who have no capacity to pay the K16,000.00 ordered by the District Registrar and will be denied the opportunity to pursue their claim. This argument flies in the teeth of the law. **Order 23/3/32 of the Rules of the Supreme Court**[1], provides that:

> ***"Legal aid (rr. 1-3) – The fact that the plaintiff is an assisted person is not a sufficient reason why security should not be ordered, although (since the object of such an order is to give the defendant security against such costs as are likely to be awarded him, if successful, at the trial) the amount of security ordered may be smaller than usual..."***

The Plaintiff in this case pleaded for a sum of K160, 000.00 as security for costs, but the District Registrar was gracious enough to have considered the pleaded amount exorbitant, and ordered the Defendants to pay K16,000.00. As rightly pointed out by the District Registrar, the ordered amount is minimal. It should not therefore, stifle the Defendant's claim, considering that each Defendant will have to contribute a K1,000.00 only.

I wish to emphasize that the amount of security awarded in a particular case is entirely in the discretion of the court. **Order 23/3/39 of the Rules of the Supreme Court**[1], provides that:

> ***"Amount of security (rr. 1- 3) – The amount of security awarded is in the discretion of the Court, which will fix such sum as it thinks just, having regard to all the circumstances of the case... It is a great convenience to the Court to be informed what are the estimated costs, and for this purpose a skeleton bill of costs usually affords a ready guide."***

I therefore, do not agree with Counsel for the Defendant that the amount of security for costs awarded was not determined in accordance with established practice. The practice of exhibiting a skeleton bill of costs is merely a matter of convenience to the Court. Considering the circumstances of this matter, I am satisfied that the learned District Registrar properly exercised his discretionary power to award security for costs. Therefore, I first no merit in the first ground of appeal. It is hereby dismissed.

Coming to the second ground of appeal, the Defendants are impugning the Ruling of the District Registrar on the basis that it does not state the period within which the Defendant was required to pay. This argument is in my view, frivolous. The Plaintiff's application was that the Defendants be ordered to give

security for costs *"before proceeding with their application review of the Judgment dated 10th March, 2020..."* Therefore, the period within which the Defendants was required to pay is before proceeding with their application for review. The Ruling made it clear that the security for costs should be paid into Court. I find no substance in the second ground of appeal. I hereby dismiss it.

All the two grounds of appeal having failed, the entire appeal is accordingly dismissed for lack of merit.

I award costs to the Plaintiff.

Delivered at Lusaka this 14th day of September, 2020.

MATHEW L. ZULU
HIGH COURT JUDGE