

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

2018/HP/2010

(Civil Jurisdiction)



BETWEEN:

**IN THE MATTER OF: COMMITTAL PROCEEDINGS PURSUANT TO
ORDER 52 OF THE RULES OF THE SUPREME
COURT 1965 (WHITE BOOK) 1999 EDITION**

**IN THE MATTER OF: RULE 3 OF THE LANDLORD AND TENANT
(BUSINESS PREMISES) ACT RULES CHAPTER
193 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: RULE 5(1) OF THE LANDLORD AND TENANT
(BUSINESS PREMISES) ACT RULES CHAPTER
193 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: SECTION 4 OF THE LANDLORD AND TENANT
(BUSINESS PREMISES) ACT CHAPTER 193 OF
THE LAWS OF ZAMBIA**

**IN THE MATTER OF: SECTION 10 OF THE LANDLORD AND TENANT
(BUSINESS PREMISES) ACT CHAPTER 193 OF
THE LAWS OF ZAMBIA**

**IN THE MATTER OF: THE LANDLORD AND TENANT (BUSINESS
PREMISES) ACT CHAPTER 193 AND THE
RULES MADE THEREUNDER**

**IN THE MATTER OF: AN APPLICATION FOR A NEW LEASE ON THE
PREMISES KNOWN AS RECREATION CLUB
INCLUDING THE TENNIS COURT DUNSHAMBE
ROAD, NIPA AREA, LUSAKA**

BETWEEN :

TEXACO LIMITED

AND

**NATIONAL INSTITUTE OF PUBLIC
ADMINISTRATION**

SOMBO MULIMBIKA

EMMANUEL SIMPANZI



APPLICANT

RESPONDENT

1ST ALLEGED CONTEMNOR

2ND ALLEGED CONTEMNOR

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Applicant: Mr. J. Zimba of Messrs Makebi Zulu Advocates

For the Respondent: Ms. M. Kopulande

For the 1st & 2nd Contemnors Mr. M. Mwanza of Messrs J.B Sakala & Co.

RULING

Legislation referred to:

- 1. Supreme Court Rules of England (1999) White Book Edition*
- 2. High Court Rules, Chapter 27 of the Laws of Zambia*

Cases referred to:

- 1. Enock Kavindele and Dorothy v. Bologna Properties Limited and Diego Casilli ZMHC 13*
- 2. Beatrice Nyambe v. Barclays Bank Zambia Plc (2008) ZR 195*

3. *Khalid Mohamed v. The Attorney General* (1982) ZR 13
4. *Ethel Nyalungwe v. Katumba* (1977) ZR 443 (HC)
5. *Kalonga M'poyou and Kane Mounourou* (1979) ZR 280 (Reprint)
6. *Re – Bramblevale* (1969) 3 All ER 1062

The genesis of this matter in so far as it relates to the notice to raise preliminary issues relating to the signaling of commencement of committal proceedings against the alleged 1st and 2nd contemnors herein after called the alleged contemnors is that on 22nd November, 2018 the Court granted an interim injunction to the Applicant restraining the Respondents either by themselves, their agents, employees or agents and by whosoever from evicting or stopping or interfering with the operations at NIPA recreation Club operated by the Applicant herein on the usual undertakings as to damages and penal notice in event of disobedience by the Respondent.

On 1st October, 2019, the Applicant's Advocates filed an *ex parte* summons for leave to issue notice of motion pursuant to Order 52 of the Rules of the Supreme Court of England¹.

The summons was supported by an affidavit deposed to by one **Ignace Uwizera**, the essence of which was that the Respondent and

its Advocates were eventually served with the interim injunction order. That the Applicant was occupation of the demised premises and continued to pay rent as shown by receipt issued in August for payment up to December, 2019 marked "**I.U 1**".

That on 12th September, 2019, the 1st alleged contemnor an employee of the Respondent in the company of an unnamed police officer did order the 2nd alleged contemnor a security guard in the employee of G# Security Zambia, a security company contracted by the Respondent to close business of the Applicant company and ordered the employees to leave the Business Premises.

That the interim injunction order was marked as "**IU2**" was in blatant disobedience disobeyed.

That a consequence the Applicant has suffered great loss and damage thus the need to apply for leave to commence contempt proceedings so that the alleged contemnors should show cause why they should not be cited for contempt of Court and commit them to prison unless they should sooner comply with the Court Order.

The notice was supported by a statement as required by Order 52 of the Rules of the Supreme Court Rules of England.

On 3rd October, 2019, I granted leave to the Applicant signaling the commencement of committal proceedings for contempt of Court. It is that order that provoked the Respondent to launch proceedings on 12th May, 2020 by notice to raise preliminary issues pursuant to Order 14A as read together with Order 33 Rule 3 of the Supreme Court Rules of England¹ raising the following preliminary issues on points of law:-

- (i) Whether the Applicant's application for an order for committal filed on 23rd of October, 2019 is proper before this Court when there is no proof of service of the order of interim injunction on the 1st and 2nd alleged contemnors.
- (ii) Whether the Applicant's affidavit in support of notice of motion for an order of committal can be relied upon by this Court to make an informed decision when the affidavit exhibits a purported order of interim injunction that is incomplete nor filed nor executed by the Court and which said exhibit has been marked incorrectly as exhibit "IU1"

instead of exhibit "**IU2**" as stated in paragraph 10 of the said affidavit.

- (iii) Whether the Applicants' entire application is proper before this Court on the premise that there is no evidence whatsoever that has been exhibited that proves beyond all reasonable doubt that the 1st contemnor ordered the 2nd contemnor to close the Applicant's business.
- (iv) That consequent to the foregoing, the process for contempt of court commenced by the Applicant before this court is defective and incompetent and therefore must be discharged.

The notice of motion was supported by an affidavit deposed to by one **Sombo Limbika**, the 1st alleged contemnor, the gravamen of which is that the application alleges that the 1st and 2nd contemnors disregarded an order of interim injunction in favour of the Applicant. That on the basis of legal advise he verily believes that the applicant's entire application is defective and has been improperly on account of the affidavit in support of the notice of motion for an order of committal sworn by one **Ignace Wizerwa**.

That firstly, the affidavit does not show proof of service of the Order of interim injunction upon the 1st and 2nd contemnors and therefore the Court should not assume that the injunction Order was served on the alleged contemnors.

That a search by his Advocates reveals that there was no affidavit of service of the injunction order on the alleged contemnors as shown by exhibit "**SM1**".

Secondly, that the affidavit exhibits are incorrectly marked as exhibit "**IU1**" instead of "**IU2**".

Thirdly, that in the absence of proven service of the injunction order, the claimed service is speculative. The deponent finally invited the Court to discharge the injunction.

The notice of motion was supported by skeleton arguments the essence of which is that Order 52 Rule 2 (1) of the Supreme Court Rules requires leave to be obtained before committal proceedings can be commenced.

It was Counsel's submission that Order 52 Rule 3 ordains it that the notice of motion accompanied by a copy of the statement and

supporting affidavit must be personally be served on sought to be committed. Reliance was placed on the case of ***Enock Kavindele and Dorothy v. Bologna Properties Limited and Diego***¹.

It was further submitted that contempt proceedings deal with authority and dignity of the Court and also with liberties of an individual and it is for that reason that the Court must take great care when dealing with applications for contempt of Court. it is imperative that the rules are strictly followed. Reliance was placed on the case of ***Beatrice Nyambe v. Barclays Bank (Z) Limited***².

The Advocates for the alleged contemnors filed in their submissions. The essence of which was that Order X Rule 6 of the High Court Rules² directs that personal service be done on the affected person, which was not the case in the case in casu as there was no proof of service.

Reference was made to Order 45 Rule 7/4 of the Rules of the Supreme Court dictates that personal service be effected on the person required to be served except where substituted service is granted.

In respect of the affidavit in support of Notice of Motion for an order of committal, it was pointed out that the same was defective as it exhibited incomplete injunction order and mixed up exhibits as shown in paragraph 10 of the affidavit.

In respect of the burden of proof, reliance was placed on the case of ***Khalid Mohamed v. The Attorney General***³ for the proposition that he who alleges must prove. The Court was lastly invited to dismiss the Applicants application on the basis of it being irregular.

At the hearing of the preliminary issues, the Respondents and the alleged contemnors Attorneys more or less relied on the respective affidavits and skeleton arguments they had filed.

On the part of the Applicants, the Learned Counsel for the Applicants informed the Court that they would respond on points of law. Thence, they had not filed an affidavit in opposition.

I wish to obiter dicta make the following observations on failure of a litigant to file an affidavit in opposition when confronted with an application which is supported by an affidavit.

The position is that opposing affidavit absent, in the face of a supporting affidavit in support of an application, summons, notices, motion or otherwise, the party who has not filed in an opposing affidavit will be deemed to have accepted the facts as narrated in the supporting affidavit by the mover.

Granted a litigant can argue an application purely on points of law, the undisputed facts may militate against such a party.

It was submitted by the Learned Mr. Zimba that it was not in dispute that the Court did grant the restraint order.

That it was served on the Respondent or its agents or employees.

It was his argument that the case of ***Ethel Nyalungwe v. Katumba4*** provides for dispensation of personal service if satisfied that the Respondent had notice of order. It was his contention that the Respondents Registrar was served thus there was constructive service.

That the very fact that the alleged contemnors had engaged Counsel meant that the alleged contemnors were aware of the restraint order.

I will now deal with the issues as raised in the preliminary issue notice and other relevant issues.

(1) Whether Applicants application for order for committal filed on 23rd October, 2019 is properly before Court when there is no proof of service

I have looked at the affidavit in support of notice for leave to commence contempt proceedings filed on 1st October, 2019 deposed to by **Ignace Uwizera**.

Firstly, the affidavit has not exhibited proof of service of the injunction order. Secondly, the affidavit makes mixed up exhibits “**IU1**” instead of “**IU2**”. Further, the exhibited injunction order is incomplete.

I must observe that it is the duty of Counsel to take great care in preparing and filing court documents. Modley, J had occasion to pronounce himself on the subject matter in the case of **Kalonga M’poyou and Kane Mounourou**⁵ he bluntly put it this way:-

“Finally I come to affidavits themselves, I find there are numerous spelling errors, some omissions and alterations have

not been initiated by the persons swearing the affidavits. In their present scale are disgraceful and appear and indicate considerable degree of carelessness on the part of the Advocates who drew up the affidavits. Judges have neither the time nor the disposition to act as Headmasters to correct each and every word in documents filed by Counsel. It is the duty of Counsel that all their paper work is in meticulous order before filing and that all documents for purposes of Court proceedings conform with legal requirements" (underlining for emphasis only)

I respectfully agree and endorse the pronouncement as a correct legal statement and I adopt it as my very own and I have nothing useful to add. It follows that I hold that the affidavit upon which the leave application to signal commencement of contempt proceedings in its form is defective.

1 (a) Proof of service

There is no proof of service on the alleged contemnors. I am guided by the holding in the case of ***Beatrice Nyambe v. Barclays Bank of Zambia*** to the effect that:

“Contempt of court quite apart from being concerned with the authority and dignity of the Court, also ultimately deals with the liberty of the individual. The consequences of disobeying Court Orders whether properly or improperly obtained are very serious. It is for this reason that the Court must exercise great care when dealing with applications relating to contempt of court. it is imperative that the rules are strictly followed”

Proof of service should therefore be proved strictly. Alternatively if leave is granted for substituted service, the service would be good. I would therefore not accept a proposition that service on the alleged contemnors can be by implication.

The liberty of a citizen is sacrosanct and should not be tampered with except in very clear situations of proven personal service as ordained by the law. Order 52 Rule (3) of the RSC speaks to that, it reads:

“Subject to paragraph (4) the notice of motion accompanied by a copy of the statement and affidavit in support of the application for leave under rule 2 must be served personally on the person sought to be committed”

This was not the position in the case in casu.

(2) **Affidavit in support of notice of motion for an order of dismissal exhibiting an incomplete injunction order and incorrect reference to exhibits “IU1” instead of “IU2”**

I have already dealt with this issue in the immediate preceding paragraph.

(3)(a) **Proof of service**

The burden of proof lies on he who is alleging. The court of final resort put to rest the debate on the subject matter in the case of ***Khalid Mohamed v. The Attorney General***³. Ngulube, DCJ (as he then was) authoritatively and instructively put it this way:-

“An unqualified proposition that a plaintiff must succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and if he fails to do so, the mere failure of the opponent’s defence does not entitle him to Judgment. I would not accept a proposition that even if the plaintiff’s case has collapsed of its inanition or for some reason or other Judgment should

nevertheless be given to him on the ground that a defences set up by the opponent has also collapsed. Quite clearly, a defendand in such circumstances would not even need a defence”

The onus, that good service was effected on the Respondent and the contemnors rests on the shoulders of the Applicant.

(b) **Standard of proof**

Contempt proceedings have a criminal dimension. It is trite law that the standard of proof in criminal matters is beyond all reasonable doubt.

Lord Denning M.R had occasion to pronounce himself on the subject matter in the case of **Re: Bramblevale**¹. He crafted it this way:-

“A contempt of court is an offence of criminal character, a man may be sent to prison for it. It must be satisfactorily proved; it must be proved beyond all reasonable doubt”

Whereas I am strictly not bound by decisions from foreign jurisdictions, I however hold a view that the pronouncement made

by His Lordship is indeed highly persuasive. It is a correct statement of law and I feel duty bound to follow it as it is good law and should find favour in our jurisprudence.

In the case at hand, the standard bench mark of proof of service aforesaid has not been attained. The alleged contemnors objection under this limb is richly anchored and I uphold it.

(4) **Invitation to vacate the order issued on 3rd November, 2019**

I have traversed the affidavit evidence and submissions for and against the notice of motion to raise preliminary issues and I have reached upon the only irresistible conclusion that there is force in the Respondent's and alleged contemnors preliminary issues raised.

I accordingly accept the invitation to vacate my earlier order of 22nd November, 2018 and I do hereby vacate the same.

The discharge of the said order is not however a bar to renew the application upon proof of good service on the Respondent and the alleged contemnors.

(5) **Costs**

Ordinarily a successful litigant harvests the fruits of his or her or its judgment and or ruling consequent upon successful litigation. The award of costs is however not cast in concrete. It is in the discretion of the court. But in exercising that discretion the court should do so judiciously.

In casu, the record reveals that a search was effected on the court's file on 23rd April, 2020 by Messrs J & M Advocates. They clearly ought to have discovered a duly signed interim injunction order dated 22nd November, 2018 and as officers of the court ought to have conversed with their clients about the existence of the order of the Court.

As regards the Respondent, it was not contested that the Registrar at the National Institute of Public Administration (NIPA) was served with the Court process and interim injunction order granted there was no good proof of service.

The justice of the case is that each party will bear its costs on the preliminary issue legal contest irrespective of the outcome of the proceedings.

Before I leave the subject, this case which was commenced by mode of originating notice of motion on 20th November, 2018 is disgraceful and unacceptable backlog. It ought to have been heard and determined within 90 days but was beleaguered with interlocutory applications / preliminary issues amongst other factors.

I therefore appoint the 12th of October, 2020 at 09:15 hours as the return date to hear and determine the originating notice of motion.

Leave to appeal to the superior Court of Appeal is granted.

Delivered under my hand and seal this 11th day of September, 2020



Mwila Chitabo, SC
Judge