

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

2005/HP/0893



BETWEEN:

**ROSEMARY BWALYA
LYNETTE GUEST HOUSE LIMITED**

**1ST PLAINTIFF
2ND PLAINTIFF**

AND

**ZAMBIA NATIONAL COMMERCIAL BANK
(Z) LIMITED**

1ST DEFENDANT

**MWANAMUTO INVESTMENT LIMITED
CROSSBORDER TRADERS ASSOCIATION**
(Sued through the Secretary General)

**2ND DEFENDANT
3RD DEFENDANT**

ESTHER KANENGOKI

4TH DEFENDANT

Before:

The Hon. Mr. Justice Charles Zulu.

For the Plaintiff:

Mrs. L. Mushota, Mmes. Lillian
Mushota & Associates.

For the 1st Defendant:

Mrs. S. Wamunyima, Mesdames
Ndemanga, Mwalula & Associates.

The Other Defendants: No Appearance.

R U L I N G

Cases referred to:

- 1. *BP Zambia PLC v. Interland and Motors Ltd (2001) Z.R. 37.***
- 2. *Hamalambo v. Zambia National Building Society (SCZ Appeal No. 64/2013).***

Legislation referred to:

- 1. *The Rules of the Supreme Court of England 1965 (White Book, 1999 Edition).***

2. The High Court Rules Chapter 27 of the Laws of Zambia.

This ruling is in respect of a preliminary objection raised by the first Defendant (ZANACO) made pursuant to Order 14A & Order 33 rule 3 of the **Rules of the Supreme Court of England 1965 (White Book, 1999 Edition)** and Order III rule 2 of the **High Court Rules Chapter 27 of the Laws of Zambia.** The preliminary objection was couched as follows:

Whether it is not an abuse of Court process for the Plaintiff to enforce a judgment on a matter that was dismissed by a competent court of jurisdiction.

At the outset, I wish to state that the record being used is a reconstructed record. The original record is reported to be missing. Therefore, the background to the case is distilled from the reconstructed record based on documents provided by both parties.

The Plaintiffs took out a writ of summons and a statement of claim against the Defendants under the present Cause No. 2005/HP/0893. The Plaintiffs were *inter alia* seeking for an order for release of Stand No. 441/8137 Lusaka (Guest House); whereby it was alleged that the said Guest House was wrongfully and unlawfully seized by ZANACO without a court order.

In the present cause, the Plaintiffs obtained a judgment in default of appearance and defence dated November 28, 2007, before the learned Deputy Registrar, Mr. E.L. Musona (as he then was). In the said default judgment it was *inter alia* adjudged that the said property be restored to the first Plaintiff. Further, it was ordered that a sum of K13, 000,000.00 (unrebased) be restored to the

second Plaintiff, and that the first Defendant was to refund to the first Plaintiff the sum of K9,000,000.00 (unrebased).

In view of this, the Plaintiffs took out the pending application to enforce part of the default judgment, alleging that the said default judgment was still in force, and was not set aside, and that they were desirous to harvest the fruits of the said default judgment. It is this application which is pending herein, which precipitated the preliminary objection. The gist of the preliminary objection is that, the action under the present cause, in which the default judgment was obtained, was dismissed for abuse of court process.

The record further shows that there was an earlier action under Cause No. 2002/HPC/0400, between Zambia National Commercial Bank (ZANACO) and Rosemary Bwalya, which also involved the subject property. The action was essentially a mortgage suit. In that cause of action, judgment was rendered in favour of ZANACO in 2004. And after the judgment, ZANACO as mortgagee in possession sold the property to the fourth Defendant. Thereafter the Plaintiffs lodged an appeal to the Supreme Court.

In 2008, under the present cause of action, the Plaintiffs filed an application to set aside a notice of eviction issued by ZANACO. A ruling to that effect by the then learned Deputy Registrar, Mr. Musona was delivered on May 29, 2008. In that ruling, the learned Deputy Registrar gave a brief background regarding the dispute between the parties as alluded to hereinbefore. The learned Deputy Registrar dismissed the whole action under the present Cause No. 2005/HP/0893. In dismissing the action for abuse of court process, the learned Deputy Registrar had this to say at R5:

I agree with Counsel for the 2nd, 3rd and 4th defendant that it is an abuse of court process to commence a fresh action based on the same facts, same disputed property and involving the same parties as in an earlier case. I also agree with Counsel for the defendants aforesaid that I have no jurisdiction to preside on an issue which has since been adjudicated upon by superior Courts. What the plaintiff has done in this case amounts to forum shopping and Courts cannot entertain that because litigation must have finality. In view of the foregoing reasons I am unable to entertain either application in this matter except to wholly dismiss this action for being an abuse of court process in that the action is premised on the same facts, same disputed property and same parties as those in the earlier matter upon which the High Court and Supreme Court have since adjudicated upon.

The record will further show that, there is a Ruling on record under the present Cause No. 2005/HP/ 0893 by Mwanamwambwa J. (as he then was, Judge of the High Court) dated November 25, 2008. The ruling involved three applications at the instance of Rosemary Bwalya (1st Plaintiff), and an appeal against the ruling of the learned Deputy Registrar, Mr. Musona dated May 29, 2008. It is important to note that in those proceedings, the Plaintiffs were represented by Mrs. Mushota, and ZANACO was represented by Mrs. Wamulume, In-house Legal Counsel (as she then was). In dismissing all the applications by the Plaintiffs together with the appeal, Mwanamwambwa J, had this to say in part at R34 and R37:

This is a clear case of multiplicity of actions over the same subject matter. I also agree with Mrs. Wamulume and Mr. Mwondela that what happened here is an abuse of the Court process and forum shopping....

I asked Counsel (Mrs. Mushota) that question to put her on notice that this was a case of multiplicity of actions

and an abuse of the court process. Then, I was not aware that the same dispute was also before Hon. Judge Gregory Phiri. The facts speak for themselves. I think no more needs to be said on Counsel's involvement in promotion of multiplicity of actions, forum shopping and abuse of the Court process. I am now asking Counsel to show cause why I should not order her, to personally pay half of the costs of this case, before this Court and before the learned Deputy Registrar. To that effect, I am giving her ten (10) days to apply before me, in Chambers. In default, she shall automatically pay half of the costs. In that event, the 1st Plaintiff shall pay the other half. I do so on the authority of Mukumbuta and Others v Lubinga and Others (2). (words in brackets supplied).

I now turn to the present application, in respect of the preliminary objection; whether the Plaintiffs' application premised on a dismissed action is or not an abuse of court process. The application was supported by an affidavit deposed to by George Mubanga Kashoki, a Recoveries Specialist in the employ of ZANACO. His recount of the background to this case is as alluded to hereinbefore. For the avoidance of doubt, he deposed that the present Cause No. 2005/HP/0893 was a dismissed matter.

An affidavit in position was deposed to by Rosemary Bwalya, on her own behalf and on behalf of Lynette Guest House Limited. The gist of the opposition was that, the Ruling by Judge Mwanamwambwa was not authentic because it did not bear the signature of the Court. And it was alleged that the present cause of action was distinct, and that it did not border on the same facts as Cause No. 2002/HPC/0400.

In reply, it was reiterated that the Plaintiffs' application was an abuse of court process.

In support of the application, Mrs. Wamulume Counsel for ZANACO argued that the Plaintiffs' action was an attempt to enforce a non-existent default judgment, in a matter that was dismissed by the High Court and appealed against to the Supreme Court. She contended that the conduct of the Plaintiffs should be frowned upon. In support of her argument, Counsel relied on the case of **BP Zambia PLC v. Interland and Motors Ltd (2001) Z.R. 37 at p42**, wherein it was held:

A party to a dispute with another over a particular subject should not be allowed to deploy his grievances piecemeal in scattered litigation and keep on hauling the same opponent over the same matter before various courts. The administration of justice would be brought into disrepute if a party managed to get conflicting decisions or decisions which undermine each other from two or more different judges over the same subject matter.

Regard was also had to the case of **Hamalambo v. Zambia National Building Society (SCZ Appeal No.64/2013)** wherein the Supreme Court held:

Res judicata, means a matter that has been adjudicated upon. It is a matter that has been heard and between the same parties, by a court of competent jurisdiction, the same should not be re-opened.

It was thus argued that the action having been dismissed for abuse of court process, the action was rendered *res judicata*. And it was further argued that the Plaintiffs' application to enforce a non-existent default judgment was a multiplicity of actions and an abuse of court process.

The Plaintiffs' Counsel, Mrs. Mushota, rejoined by arguing that the "Ruling" of Mwanamwamba J., lacked authenticity, and that

issues raised in an affidavit in opposition were not addressed in the affidavit in reply.

In reply Mrs. Wamulume, argued that the Ruling by Judge Mwanamwambwa was authentic, and to further deprecate the assertions that it was not authentic, she observed that by the said Ruling, Mrs. Mushota was even directed to take certain steps. Therefore, Counsel expressed surprise that Mrs. Mushota could doubt the authenticity of the Ruling. She also submitted that apart from the Ruling by Judge Mwanamwambwa, there were two other rulings speaking to the fact that the matter was dismissed. Reference was made to the Ruling by Judge Bowa. She argued that the matter was at an end, and no further applications could be entertained under the present cause of action.

I have carefully considered the affidavits, the arguments and the entire reconstructed record. And I must admit that the record, notwithstanding its reconstructed state, is sufficient to help the Court to effectually determine the preliminary objection. The facts in issue and the background to this application have already been outlined. The question for determination was well put by Mrs. Wamulume: whether or not the Plaintiffs' application premised on a dismissed matter is not an abuse of court process. Out rightly, I wish to state that, it is an elementary principle of law that the Court has no jurisdiction to entertain applications of this sort on a matter or action that was wholly dismissed for abuse of court process.

I have no doubt whatsoever that the present Cause No. 2005/HP/0893 was dismissed for abuse of court process and

multiplicity of actions. This is because the dispute under the present cause of action was essentially the same as under Cause No. 2002/HPC/0400 in which judgment was rendered in favour of ZANACO.

The declaration as to the action being an abuse of court process was soundly made first by the learned Deputy Registrar and on appeal, the decision of the Deputy Registrar was categorically affirmed by Mwanamwambwa J. The argument questioning the authenticity of the Ruling by Mwanamwambwa J, is not only regrettable, but shocking as well.

The copy of the Ruling on the record provided by ZANACO cannot be doubted. As rightly observed by Mrs. Wamulume, it was shocking that the Ruling was doubted by Mrs. Mushota who in the first place was the one that represented the Plaintiffs during the proceedings giving rise to the said Ruling. However, it is not surprising that the Plaintiffs conveniently chose to distance themselves from the said Ruling because the Ruling is at variance with their misconceived attempts herein. The Plaintiffs cannot be allowed to get away or run away from the said Ruling by taking undue advantage that the original record is missing. And simply because the Ruling is against them, in which Judge Mwanamwamba fully chronicled the conduct of the Plaintiffs insofar as they repeatedly employed acts of abuse of court process by way of multiplicity of actions.

It is clear from the said Ruling that Mwanamwambwa J, was categorical in not only admonishing the conduct of the Plaintiffs, but also the conduct of Mrs. Mushota for relentlessly engaging in

the forbidden act of abuse of court process by means of multiplicity of actions. It is for this reason Mrs. Mushota was put on notice by Mwanamwambwa J, to show cause why she should not pay half of the costs incurred by ZANACO. It is absolutely unacceptable for the Plaintiffs to turn around now and question the validity of the Ruling. It is certainly not in the interest of justice for parties to seek to procure orders premised on deception and hoping that the court will be so gullible, to easily accept arguments that defy the truth.

Not too long ago, around February 2019, the Plaintiffs in the present action applied for an interim order of injunction. In that application, Counsel for ZANACO raised a preliminary issue, couched in similar fashion as the present objection. Judge Bowa, allowed the preliminary objection and dismissed the Plaintiffs' application for abuse of court process. Bowa J, in his Ruling made reference to the aforesaid Ruling by Mwanamwambwa J.

Clearly, despite the past rulings, the Plaintiffs are at it again, abusing process court, unfortunately at the expense of wasting judicial resources. And Mwanamwamba J, put it well at R35 of his Ruling when he said:

I must state that the High Court is over-burdened by cases. The time repeatedly spent by the High Court over this dispute should have been better spent on their deserving matters. I am aware that the same dispute has been dealt with about four times, by the Supreme Court, over execution, (twice by Hon. Judge Peter Chitengi in Chambers, once by Hon. Judge F. Mumba in Chambers and once by the full bench in open Court)...it is a nuisance for the Courts to repeatedly hear and deal with the same dispute.

Indeed, the Plaintiffs cannot be allowed to keep coming back to the Court on a matter that is dead and cannot be revived. The anti-administration of justice conduct by the Plaintiffs puts judicial resources to waste; parties should be sincere with themselves and with the Court. It is that sincerity and sense of duty to be truthfulness that will spare judicial recourses from wanton abuse.

It is unfortunate that the Plaintiffs have repeatedly shown disregard to decisions of this Court, insofar as declaring and advising them that the present action is a dismissed and dead action. Regrettably, they have continued to pretend and pursue applications on a matter that is wholly dismissed, a dead matter, which should be shelved eternally in the archives.

In view of the foregoing, the preliminary objection is allowed. Therefore, the Plaintiffs' misconceived application: "*Summons for Leave to Enforce Judgment dated 28th November 2007...*" is dismissed for abuse of court process. There is nothing to enforce because the action was dismissed for abuse of court process, concomitantly the said default judgment was rendered dismissed and redundant.

The preliminary objection is allowed with costs to ZANACO, to be taxed in default of agreement.

DATED THIS 30th DAY OF SEPTEMBER, 2020.



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THE HON. MR. JUSTICE CHARLES ZULU