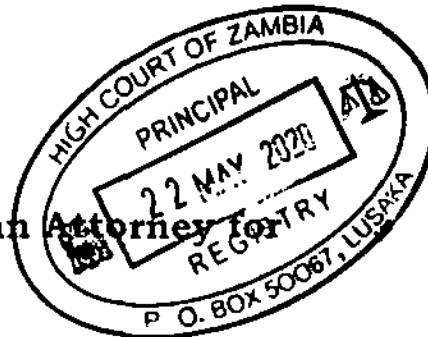


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2007/HP/0660

BETWEEN:

**ELIAS TEMBO (Suing as an Attorney for
Richard Chamanga)**



PLAINTIFF

AND

**GRACE ZIMBA
LUSAKA CITY COUNCIL
THE ATTORNEY GENERAL**

**1st DEFENDANT
2nd DEFENDANT
3rd DEFENDANT**

*Delivered in Chambers before Hon. Mr. Justice Mathew L. Zulu, at
Lusaka the 22nd day of May, 2020*

*For the Plaintiff:
For the 1st Defendant*

*Mr. R. Mainza, Messrs. Mainza and Company.
Mr. G. Pindani of Messrs. Chonta Musaila
Pindani Advocates*

*For the 2nd Defendant:
For the 3rd Defendant*

*Mrs. M. Mupeso, Council Advocate
Ms. D.M. Mwewa Acting Principal State
Advocate.*

RULING

Cases referred to:

- 1. Mohamed Suleman Itowala v. Mohamed Hanif Dalal (Sued as administrator of the estate of Sajid Mohamed Itowala) and another (2011/HP/0063)**
- 2. Hildah Mafula v. Elias Tembo (S.C.Z. Appeal No. 112 of 2010)**

3. *Hipgrave v. Case*(1885) 25 Ch.D.356
4. *Muchinka Farms Limited v. The Attorney General and 2 others*(CAZ Appeal no 47 of 2017) at page 11
5. *Pankaj Parmers v. Albidon Zambia Limited*(2011/ HP/0257)
6. *Kajimaga v. Chilemya* (S.C.Z Appeal No. 50 of 2014)
7. *Mukuka Nukwe v. Zambia Development Agency* (S.C.Z. Appeal No. 170 of 2008) at page 6.

Legislation:

1. *Order 3 rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia*

Other materials:

1. Lord Evershed, *Atkins Court Forms, Volume 15*(2nd Edition) 1972, page 72 para 2

This is a ruling on the plaintiff's application to expunge the plaintiff's list of documents filed into court in 2008 and DW1's evidence for irregularity.

The backdrop to this application is that trial commenced in this matter on 23rd April, 2019. The plaintiff proceeded to give his evidence and closed his case on 25th September, 2019. The 1st defendant opened her case and her witness gave evidence in chief. It is during cross examination of DW1 that counsel for the plaintiff made an application to expunge the plaintiff's List of documents

alleged to have been filed into court in 2008. The application is by summons and it is made pursuant to **Order 3 rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia.**

The application is supported by an affidavit deposed by the plaintiff dated 7th October, 2019. The gist of the affidavit is that after the commencement of the matter in 2009, his initial advocates on record Messrs. Nhari Mushemi and Associates filed into court orders for directions to facilitate the filing into court of a defence, counter claim, reply and the discovery and inspection of documents. The order was however not endorsed by the court. That the aforementioned advocates later misplaced their litigation file and wrote to the 1st defendant's Advocate on record for copies of the documents in the subordinate court as well as the High Court.

The plaintiff asserts that in 2014, he retained the now advocates on record who applied for orders for directions before the deputy registrar to facilitate the filing into court of a reply, discovery and inspection of documents which application was granted and directions according issued on 12th September, 2012. That he

complied with the order for directions and filed into court a reply and bundles of pleadings and bundles of documents after discovery and inspection of documents. The plaintiff asserts that he later amended his writ of summons and statement of claim in 2014 and consequently, Judge Chitabo issued fresh orders for directions on 1st December, 2014 which were reiterated on 18th April, 2016 due to the failure by the parties to comply with the initial order.

The deponent avers that in compliance with these orders for direction, he filed into court consolidated bundles of pleadings and documents. That during the plaintiff's case, the plaintiff was not referred to the purported plaintiff's bundle of documents filed into court in 2008. The plaintiff asserts that the said bundle only surfaced during the examination of DW1 in a bid to circumvent the course of justice. The deponent avers that the said bundle consist of an offer letter, a lease receipt(acceptance receipt) with serial numbers at variance with the serial numbers of the offer letter and lease receipt contained in the plaintiff's consolidated bundle of documents filed into court on 13th October, 2017.

The plaintiff swears that the purported bundle was not filed into court pursuant to any order for directions and was not subjected to discovery or inspection, which is fatal and thus renders the said bundle inadmissible. The plaintiff also disowns the said bundle allegedly filed into court by his erstwhile advocates without his knowledge and instructions. He deposes that he will be greatly prejudiced if the said bundle is not expunged.

The application was opposed by the 2nd defendant vide an affidavit in opposition filed into court on 28th February, 2020 deposed by Niza Nachalwe a Senior Legal Assistant at the Lusaka City Council. She deposes that the plaintiff delayed in making the application as he has already closed his case and the said bundle was filed into court 12 years ago. She avers that by their actions the parties have accepted the list of documents. It is deposed that expunging the documents from the record will be prejudicial to the defendants as the said documents are relevant as they address how the property in dispute was acquired. The deponent states that this application can only be invoked in exceptional

circumstances and should not be used to aid litigants to recast their cases.

The plaintiff filed into court skeleton arguments on 28th February, 2020. The plaintiff states that according to **Order 19 of the High Court Rules and Order 24 rule 1 of the White Book** discovery and inspection of documents is mandatory and that non-compliance is fatal. It is argued that the function of discovery and inspection is to provide parties with the relevant documentary material before trial to allow parties assess the strength and weaknesses of their cases and provide a fair basis for fair disposal of proceedings before or at trial and to *inter alia* eliminate the element of surprise at trial. The plaintiff contends that where a party fails to comply with an order for discovery, the court may order for the matter to be dismissed, struck out or judgment entered. The plaintiff therefore prays for the documents to be struck out as they were not subjected to discovery of documents. Reliance was placed on the cases of **Hildah Mfula v Elia Tembo¹** and **Mohamed Suleman Itowala v. Mohamed Hanif Dalal(Sued**

as Administrator of the Estate of The Estate of Sajid Mohamed Itowala) and another².

The 2nd defendant filed into court skeleton arguments on 2nd March, 2020. Counsel for the 2nd defendant contends that the court will not allow an application the necessity of which was abundantly clear at an earlier stage which could have been made at an earlier stage. The 2nd defendant further contends that the fact that the plaintiff was represented by different advocates initially is immaterial as it was his duty to follow up on the progress on his case. It is argued that there has been inordinate delay in making the application and that the plaintiff slept on his rights and that by their conduct, the parties have waived their liberty. The 2nd defendant contends that the documents will enable the court to completely and finally determine the matter on its merits. The 2nd defendant has relied on *inter alia* the following cases: **Hipgrave v. Case³; Muchinka Farms Limited v. The Attorney General and 2 others⁴; Pankaj Parmer (T/A Mugodi Drillers and Building) v. Albidon Zambia Limited⁵.**

The 1st defendant filed into court her affidavit in opposition to the summons for an order to expunge the plaintiff's list of documents on 13th March, 2020 which was deposed by the 1st defendant. She asserts that this matter was commenced in the Subordinate Court where the plaintiff obtained an ex parte order of injunction. After the matter was transferred to the High Court, the 1st defendant applied to discharge the injunction and to dismiss the matter for want of prosecution in 2009. When the matter came up before Judge Mwanza, the parties were advised to file the requisite documents and to make the matter ready for trial and the parties accordingly executed a consent order and filed into court the requisite documents. It is pursuant to this order that the plaintiff filed into court its list of documents on 6th February, 2009.

The deponent avers that the plaintiff's advocates requested for certain documents from the 1st defendant's advocates which were availed. That thereafter, the matter was re-allocated to several judges and fresh orders for directions were issued by Judge Chitabo. The 1st defendant swears that the documents in the plaintiff's list of documents subject of this application are

manifestly inconsistent in details and particulars and it would be in the interest of justice for the court to consider all the inconsistencies. The deponent avers that the documents in issue are relevant and they were filed and served by the plaintiff through his advocates. The 1st defendant asserts that it would be prejudicial to her case if the said documents are expunged from the record and the application has been made rather belatedly.

The plaintiff filed into court an affidavit in reply on 19th March, 2020 which was somewhat couched in the form of arguments. The plaintiff denies the purported list of documents and asserts that no consent order has been exhibited by the 1st defendant to show that the parties agreed to file into court the requisite documents and also that the said consent order was purportedly executed in 2009 while the list was filed into court in 2008. The deponent avers that the said List is not even on the court record. He avers that his bundle contains authentic documents as opposed to the bundle the 1st defendant is attempting to sneak in which is not authentic. The plaintiff asserts that an application to expunge documentary evidence from the record can be made any time and that counsel

objected to this bundle as soon as the 1st defendant started referring to it.

The plaintiff also filed into court supplementary skeleton arguments of even date. In a nutshell, counsel for the plaintiff contends that the list of documents in issue did not originate from the plaintiff's erstwhile advocates and that the same is not on the court record as admitted by the court but only in possession of the 1st defendant. It is argued that the 1st defendant is attempting to sneak the said documents into evidence without subjecting them to inspection and discovery. Counsel contends that in the event that the 1st defendant seeks to rely on the said documents, she must apply for fresh orders for directions to allow the other parties to interrogate the documents in issue.

When the matter came up on 2nd March, 2020, it was resolved that the parties would proceed by way of their filed documents. I therefore, reserved my ruling which I now deliver.

I have considered the affidavit evidence and the arguments of the parties. The main issue is whether the plaintiff filed into court the

list of documents in issue and whether the same can be expunged from the record. Firstly before I get into the substantive application, it has been argued by the 1st and 2nd defendant that this application has been made too late in the day and that as such, it should not be allowed. The Supreme Court in the case of **Kajimanga v. Chilemya**⁶ guided that an objection to a document must be made timely to allow the opposing party to respond and if possible to make any relevant application. They further stated that objection cannot be validly made after the trial of the matter had closed. In this case, the objection was made by the plaintiff before the close of trial. The objection was therefore, validly made.

Coming to the substantive application, the plaintiff has disowned the plaintiff's list of documents and asserts that the 1st defendant is trying to sneak them into evidence without discovery and inspection of documents. It is argued that the said list was filed into without any order for directions. It is further contended by the plaintiff that in any event, if the said documents were filed into court by his erstwhile advocates, they did so without obtaining his instructions.

The objects of discovery have been described as being threefold and these are: to enable each party to use before the trial or adduce in evidence at the trial relevant documentary material to support or to rebut the case made by or against him and to prevent surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation. See: **Atkins Court Forms, Volume 15(2nd Edition) 1972, page 72 para 2**. The plaintiff contends that there can be no discovery without a court order for directions. However, Lord Evershed in the paragraph cited above further observes that-

In actions begun by writ, subject to certain exceptions (q), discovery must be made by the parties without a court order(r) and may thus be regarded as a matter of right. But a court may be necessary even in actions begun by writ and it is always necessary in all other classes of proceedings in the High Court, including proceedings begun by originating summons...

The above position is reflected in **Order 24 rule (1), 2(1) of the White Book**. From the foregoing, it is folly to argue as the plaintiff has that discovery can only be made where the court issues an order to that effect. On the contrary, in matters commenced by writ,

as is in this case, discovery is mandatory after pleadings are deemed to be closed without the necessity of a court order but, without prejudice to the power of the court to issue such an order. Parties are therefore, expected to give mutual discovery within 14 days after the pleadings are deemed to be closed.

Further, the plaintiff also disowns the documents on the basis that the said purported List of documents allegedly filed into court by his erstwhile advocates was filed into court without his knowledge and instructions. Once a litigant engages counsel, counsel becomes the agent of the litigant and any default on the part of counsel is ultimately a default on the part of the litigant. See: **Mukuka Winstone Bwali Nukwe v. Zambia Development Agency**⁷. I therefore, reject the plaintiff's argument that the said bundle was filed without his blessing. The plaintiff can therefore, not disown the documents in issue in the event that it is established that the same were filed into court by his erstwhile advocates.

Coming to the main issue which is whether the List of documents in issue was filed into court by the plaintiff's advocates. The plaintiff has disowned these documents. I must also hasten to point out that

the documents that are in issue which are the offer letter and the lease receipt were originally filed before the Subordinate Court and were attached to the affidavit in support of the ex parte summons for an order of interim injunction which is on record marked exhibit "RC1" and "RC2." These documents are however, missing from the record.

The above notwithstanding, I must hasten to mention that the List of documents in contention is not on the record. However, though the stamp on the first page of the said list is not legible, the bundle appears to have been filed into court in 2009 as may be deciphered from the third page thereof. I also note that from exhibit marked "GR4a" in the 1st defendant's affidavit in opposition, the plaintiff effected service on the 1st defendant's advocates a List of documents and a bundle of pleadings on 17th March, 2009 and reference was also made in the said letter of service to the orders that were filed into court on 6th February, 2008. This document has not been challenged.

In the circumstances, I find that it is more probable than note that the bundle in issue was filed into court by the plaintiff's erstwhile

advocates. I therefore, dismiss the application to expunge the said documents on the record. The defendants are therefore, not precluded from using these documents. Cost shall be in the cause.

Leave to appeal is granted.

Delivered at Lusaka the ^{22nd}..... day of May, 2020.



MATHEW. L. ZULU
HIGH COURT JUDGE

