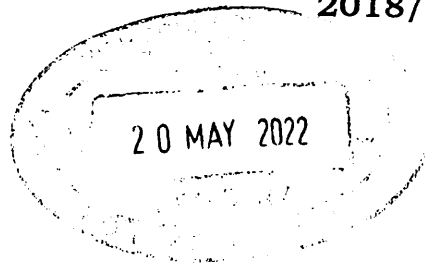


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2018/HP/0112



BETWEEN:

ARCADES DEVELOPMENT PLC

PLAINTIFF

AND

ALLIANCE MEDIA (ZAMBIA) LTD
LUSAKA CITY COUNCIL

1ST DEFENDANT

2ND DEFENDANT

Before Honourable M. Nkole in Chambers on the 20th day of May 2022

For the Plaintiff : *Mr. S. Bwalya Jr of Solly Patel Hamir & Lawrence*

For the 1st Defendant : *Mrs. C.S. Mwamba of SCPM legal Practitioners*

For the 2nd Defendant : *Mrs. C. Kabaso - Legal Officer*

R U L I N G

Cases referred to:

1. Enock Kavindele and Dorothy Kavindele Vs Bologna Properties Limited and Diego Casili CAZ Appeal No. 136 of 2020.
2. Chief Mwanatete Vs Innocent Munyikwa Lushoto and Mweene Mutondo 2014/HP/1043.
3. Edward Chilufya Mwansa Vs Konkola Copper Mines SCZ Appeal No. 99/2015

Legislation Referred to:

The High Court Rules, Cap 27 of the Laws of Zambia

This is a ruling on the 1st defendant's application for leave to file an affidavit in reply. The application was accompanied by an affidavit in support sworn by Catherine Mashiko, the Country Manager for the 1st defendant. Her affidavit disclosed that on 14th December 2020, the 1st defendant's Advocates filed a Notice for assessment of damages pursuant to the judgment of Mrs. Justice M. Mapani-Kawimbe dated 20th November 2019.

On 4th May 2021, the plaintiff filed an affidavit in opposition to the Notice of assessment for damages.

The deponent went on to aver that she wishes to file an affidavit in reply to the affidavit in opposition in order to add information relating to correspondence and contracts between the 1st defendant and its prospective clients. She contended that the plaintiff and the 2nd defendant will not be prejudiced in any way if leave to file an affidavit in reply is granted by this Court.

The application to file an affidavit in reply was opposed by the plaintiff by way of an affidavit in opposition filed on 15th December 2021. This attendant affidavit was sworn by Steven Bwalya, the learned Advocate for the plaintiff. The gist of his depositions were that the

application for assessment of damages was filed into Court over a year after the judgment that awarded damages to the 1st defendant was delivered. He went on state that the 1st defendant did not file into Court and serve on the plaintiff a Notice of Intention to proceed before filing its application for assessment.

The deponent went on to assert that the correspondence relating to contracts between the 1st defendant and its prospective clients which the 1st defendant intends to add to its evidence in the affidavit in reply is evidence that the 1st defendant could have reasonably anticipated and included in its affidavit in support for assessment of damages.

It was further averred that in any event, the 1st defendant has not exhibited or produced the said correspondence relating to the contracts with its prospective clients to enable this Court assess whether the same would assist in determining the subject matter.

The plaintiff's counsel filed skeleton arguments which were also relied on at the hearing. He also made brief oral submission to augment. The thrust of his argument was that the failure to file a Notice of Intention to proceed renders all applications by the 1st defendant a nullity. It was contended that consequently, this

Honourable Court has no jurisdiction to entertain the 1st defendant's application. As authority for this proposition, counsel called in aid the case of **Enock Kavindele and Dorothy Kavindele Vs Bologna Properties Limited and Diego Casili¹**.

As regards the conditions that must be met for granting leave to file an affidavit in reply, my attention was drawn to the case of **Chief Mwanatete Vs Innocent Munyikwa Lushato and Mweene Mutondo²**.

It was contended that in light of the cited case, the 1st defendant has not met the conditions to persuade the Court to grant an order for leave to file the affidavit in reply.

In her arguments in response Mrs. Mwamba conceded that the Notice of Intention to proceed was not filed after the lapse of one year from the date the judgment from the learned Judge was rendered on 20th November 2019. She submitted that the failure was as a result of the *ex curia* discussions which the parties were trying to explore.

It was her further submission, however, that the failure to file the Notice of Intention to proceed is not fatal to the assessment. Counsel

beseached the Court to allow the 1st defendant file a Notice of Intention to proceed or give guidance on how the matter should proceed.

In his reply, Mr. Bwalya vehemently argued that *ex curia* discussions do not arrest the statutory time required of a party to take necessary steps. For this preposition, reliance was placed on the case of **Edward Chilufya Mwansa Vs Konkola Copper Mines**³ where the Supreme Court emphasized the restated the position of the law.

I have examined the evidence and the submissions of counsel as well as the authorities cited. As earlier indication, the application before me was for leave to file an affidavit in reply by the 1st defendant. That notwithstanding, the issue that the plaintiff raised concerns the failure to file a Notice of Intention to proceed, in view of the fact that the application for assessment was filed over a year after the judgment by the Honourable Lady Justice Mapani-Kawimbe. I propose to deal with the latter issue first.

The requirement to file a notice of intention to proceed when a matter has been dormant for over a year is provided for in Order **2 Rule 3 of the High Court Rules, Cap 27**. This rule enacts as follows:

“In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give one month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial although countermanded shall be deemed a proceeding within this rule.”

The Court of Appeal had occasion to express itself on the consequences of failure to comply with this Order in the case of **Enock Kavindele and Another Vs Bologna Properties Limited and Diego Casili⁴** where it observed:

“In our view, there being no notice of intention to proceed having been filed/issued as prescribed under Order 2 Rule 3 of the High Court Rules, the learned Deputy Registrar lacked jurisdiction to proceed with the application for an order of inquiry as to damages.”

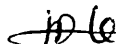
Thus from the provision of the law and the guidance of the Court, it is clear that where a matter has been dormant for over a year, a party who intends to proceed must give the other party notice of intention to proceed. Failure to do so renders the proceedings a nullity on account of the fact that the Court lacks jurisdiction to entertain such an application.

In *casu*, there is no dispute that the application for assessment was filed after a year without the requisite Notice of Intention to proceed. I thus find the non-compliance with the mandatory provisions of **Order 2 Rule 3 of the High Court Rules** renders the entire assessment application and proceedings a nullity. In view of the aforesaid, the application for leave to file an affidavit in reply consequently fails.

However, the failure to file a Notice of Intention to proceed does not affect the judgment of the Honourable Judge and the 1st defendant is granted leave to file the same and serve the plaintiff. The 1st defendant may, thereafter, file its notice of assessment after one month.

All in all, I find merit in the plaintiff's objections. I accordingly set aside the 1st defendant's application for assessment of damages with costs to the plaintiff to be taxed in default of agreement.

Dated at Lusaka this 20th day of May 2022



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M. NKOLE
DISTRICT REGISTRAR

