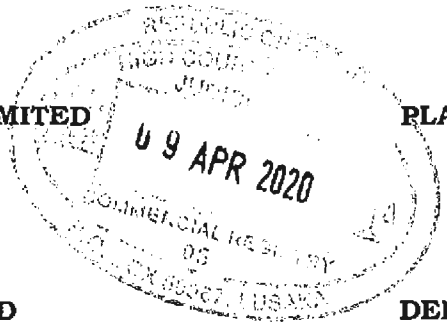
IN THE HIGH COURT FOR ZAMBIA **2019/HPC/0435**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Commercial Division)

BETWEEN:



BASE PROPERTY DEVELOPERS LIMITED **PLAINTIFF**

AND

FIRST ALLIANCE BANK (Z) LIMITED **DEFENDANT**

Before Lady Justice B.G. Shonga this 9th day of April, 2020

For the Plaintiff, Mr. O. Sambo, Messrs. Friday Besa & Associates

For the Defendant, Mr. M. K. Achiume, on behalf of Messrs. KCK & Associates

---

RULING

Cases referred to

1. ***Zambia Seed Company Limited and Chartered International (PVT) (1999) ZR. 151(SC).***
2. ***Sablehand Zambia Limited Vs Zambia Revenue Authority (2005) Z.R. 109 (S.C).***
3. ***Zambia Revenue Authority v. the Post Newspaper, Appeal No.36 of 2016.***
4. ***Mpongwe Farms Limited v. Dar Farms and Transport, (2016) Z.R 1.***

Legislation and Other Material Referred To:

1. ***Order 14A, rules 1 & 2, Rules of the Supreme Court, 1965, Supreme Court Practice of England, 1999 (White Book).***
2. **Mr. Justice Patrick Matibini in his literary work Zambian Civil Procedure; Commentary and Cases Volume 1 at p 141**
3. ***editorial introduction to Order 12 of the White Book***
4. ***Black's Law Dictionary, Eighth Edition, Bryan A. Garner (ed), Thomson West, 107.***
5. ***XI, rule 1 of the High Court Rules, High Court Act, Chapter 27, Volume 3 of the Laws of Zambia.***
6. ***Order 12, rule 10, paragraph 2 of the White Book.***

1.0 Application

1. This Ruling speaks to a preliminary point of law raised by the defendant that the plaintiff's action is res judicata and ought to be dismissed with costs. The application is made pursuant to ***Order 14A, rules 1 & 2, Rules of the Supreme Court, 1965, Supreme Court Practice of England, 1999 (White Book)*** and is supported by an affidavit in support and skeleton arguments filed on 27th September, 2019. The application was heard on 17th February, 2020.

   The application attracted opposition from the plaintiff who in turn filed an affidavit in opposition and skeleton arguments in response on 17th October, 2019.

2.0 Background

On 18th September, 2019, the plaintiff took out a writ of summons against the defendant. The principal claims made by the plaintiff, as endorsed on the writ are: (i) An order for the recovery from the defendant the sum of K4,500, 000.00 illegally paid to it; (ii) an order setting aside the consent order which was approved on 4th May, 2018; (iii) damages for loss of use of the money; (iv) interest at the current bank lending rate; and (v) costs of the proceedings.

3.0 The Facts underlying the application

The facts, as discerned from the affidavits on record, are that the plaintiff and defendant were parties to an action under cause no. 2016/HPC/0568. It is deposed that under that cause, the plaintiff herein was the 1st Respondent and the defendant herein was the Applicant. That action was escalated to the Court of Appeal under Appeal No. 159/of 2017. The appeal was withdrawn by Consent Order to withdraw dated 4th May, 2018.

4.0 Legal Arguments

4.1 Arguments presented by the defendants

In its skeleton arguments, the defendant argued that a party cannot commence an action in connection with a matter which has been adjudicated upon. The submission is premised on the erudition of Hon. **Mr. Justice Patrick Matibini**

in his literary work ***Zambian Civil Procedure: Commentary and Cases, Volume 1, LexisNexis, 2017 at p 141.***

4.2 *Arguments presented by the plaintiff*

The plaintiff's opposition is premised on two grounds. Firstly, that the preliminary issue is incompetent because the defendant has not filed a notice of intention to defend as required under Order 14A of the White Book.

Secondly, the plaintiff argues that it has never taken out process demanding the same reliefs as those contained in this action. Thus, it was submitted that this action could not be res judicata.

As to the consent order, the plaintiff referred to the case of ***Zambia Seed Company Limited and Chartered International (PVT) Limited (1999) ZR. 151(SC)***[1] where the Supreme Court held as follows:

> *"By law the only way to challenge a judgment by consent would be to start an action specifically to challenge that consent judgment."*

The plaintiff also cited the case of ***Sablehand Zambia Limited Vs Zambia Revenue Authority (2005) ZR. 109 (SC)***[2], believing that the case demonstrated that it is trite law that a consent order can be set aside by commencing a fresh action. Thus, the

plaintiff took the position that res judicata does not apply to a judgment obtained by consent.

5.0 Determination

I have carefully read and scrutinized all the affidavit evidence, legal arguments and submissions of both parties.

To begin with, I will consider whether the preliminary issue is properly before Court. In that regard, Order 14A, rule 1 of the White Book, under which this application was made, gives the Court power to, *inter alia*, determine a question of law at any stage of the proceedings.

In terms of that Order, the determination may be made by the Court on its own motion or on the application of a party. ***Paragraph 14A/2/3*** specifies the inherent requirements for employing the procedure under Order 14A. One of the requirements is that the defendant must have given notice of intention to defend, ergo the plaintiff's contention that the preliminary issue is incompetent.

I have taken the liberty to venture into the historical background of the procedure requiring a defendant to give notice of intention to defend. I will quote, *in extensio,* the ***editorial introduction to Order 12 of the White Book*** for fortification and perspective. The editorial introduction states:

" All procedural codes have designed into them some machinery for testing the effectiveness of originating process and for requiring a defendant upon whom, process had been served to signal to the moving party and to the court, at least to some extent, his intentions as to the defence of the case, particularly any objections by him to jurisdiction or the regularity of the proceedings.

Germane to this matter, the editor guides that prior to 1979, a defendant indicated his intentions by completing a "memorandum of appearance". Further, users are informed that in England, before 1979, a defendant's appearance could be a "conditional appearance" if he wished to challenge the jurisdiction, or the regularity of the writ or of service; otherwise it was an unconditional (or general) appearance.

In 1979, the procedure contained in O.12 was substituted and thereafter, references in any enactment of rule of law to the "entry of appearance" was treated as an acknowledgment of service.

In addition, paragraph 12/3/4, Order 12 of the White Book explains that it may be taken that an acknowledgment of service containing notice of intention to defend, followed by an application disputing the jurisdiction of the Court is the practical equivalent of the former conditional appearance. Further, an acknowledgment of service, containing a notice of intention to defend that is not followed by an application that disputes the jurisdiction of the Court the practical equivalent of the former unconditional appearance.

In Zambia, we have retained the procedural concept of entering an appearance, whether conditional or unconditional.

Turning back to the case at hand, the record reflects that the defendant entered conditional appearance on 25th September, 2019 to facilitate this application to have the action dismissed. Considering the illumined exposition contained in the editorial introduction to Order 12 of the White Book, I opine that the entry of a conditional appearance constitutes the notice by the defendant of its intention to defend. Consequently, I am satisfied that the defendant has complied with the requirement under Order 14A.

Next, I observe that the consent order which the plaintiff seeks to be set aside by this Court is an order that was approved by the Court of Appeal. Given that the order was approved by the Court of Appeal, it would be remiss of me not to consider whether this Court, has jurisdiction to set it aside.

On the question of jurisdiction, I take the position that it would be outside this Court's dominion to fiddle with an order issued out of the Court of Appel. In that regard, I recall the caution given to the High Court by the Supreme Court in the case of ***Zambia Revenue Authority v. the Post Newspaper, Appeal No.36 of 2016***[3] where the High Court granted a stay for 90 days, after the decision of the Supreme Court, pending

appeal. The Court stated that the trial court went beyond its jurisdiction. The Court observed that it was for the Supreme Court, and not the High Court to decide whether to grant a stay of execution, after the disposal of the appeal. Similarly, I consider that it is for the Court of Appeal to determine whether to set aside a consent order to withdraw that was endorsed by the Court of Appeal. As a result, I am of the settled mind that the claim by the plaintiff for an order setting aside the consent order under appeal number 159/2017 is improperly before me and must be struck out. Consequently, I strike out that endorsement on the writ of summons.

With respect to whether the remaining claims are res judicata, I refer to the case of ***Mpongwe Farms Limited v. Dar Farms and Transport, (2016) ZR. 1***[4] where the Supreme Court sets out the following 5 conditions that must be satisfied for a party relying on the defence:

i. That the parties or their privies are the same in both the previous and the present proceedings.
ii. That the claim or issue in dispute in both actions is the same.
iii. That the res (or subject matter of the litigation) in the cases are the same.
iv. That the decision relied upon to support the plea of estoppel is valid, subsisting and final; and
v. That the court that gave the previous decision relied upon to sustain the plea, is a court of competent jurisdiction.

In my quest to apply the test to the preliminary issue before me, I scrutinized the affidavit evidence before Court. Neither affidavit in support nor affidavit in opposition spoke to or identified the parties or the clams endorsed in the originating process under cause no. 2016/HPC/0568. Additionally, neither of the affidavits addressed whether the entire cause was determined or whether it was certain issues that were disposed of. The affidavits do not reveal when the cause or issues, as the case may, be were determined. Moreover, the affidavits do not identify the instrument through which the cause was determined

Although I was not obligated to call for the record, I took the liberty to do so. Upon perusal of the record for cause no. 2016/HPC/0568. I discovered that the action therein was a mortgage action instituted by the Cavmont Bank Limited as Applicant against and Martha Mushipe (T/A Nyenyezi Christian Academy) and Martha Mushipe as 1st and 2nd Respondent respectively. Clearly, neither the parties nor the *res* are the same in the two actions.

Since neither the parties nor the *res* are the same in the two actions, it is with ease that I conclude that the defendant has failed to demonstrate that the plaintiff's claims are res judicata.

Considering the above, I find that the defendant's application lacks merit and is therefore dismissed with costs.

Costs are to be taxed in default of agreement.

Dated this 9th day of April, 2020

G. B. Shonga
JUDGE