

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

2014/HP/0114

**BETWEEN:**

**MARY NCUBE**



**APPLICANT**

**AND**

**SIPHO PHILIP MASEWERA PHIRI**  
(Sued in his capacity as Executor  
Of the Estate of David  
Able Ray Phiri)

**1<sup>ST</sup> RESPONDENT**

**Guy David ZINGALUME PHIRI**  
(Sued in his capacity as Executor  
And Trustee of the Estate of David  
Abel Ray Phiri)

**2<sup>ND</sup> RESPONDENT**

*Before Hon. Mr. Justice Mathew L. Zulu, at Lusaka the <sup>11th</sup>.....day  
of March, 2020*

*For the Applicant:  
For the Defendant:*

*Mrs. N. Vantra, Messrs. Lukona Chambers  
Mr. N.Ngandu with Ms. Fumbeshi, Messrs.  
Shamwana and Co*

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## **RULING**

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### **Cases referred to:**

1. *Chikuta v. Chipata Rural Council (1974) Z.R. 241*
2. *Competition & Consumer Protection Commission v. Omnia Fertilizer Ltd and Nyimbo( Selected Judgment No. 51 of 2017)*
3. *Rahim Obaid v The People(2) Nadehim Quasmi v. The People(19770) Z.R. 119(H.C)*

4. ***Esther Sitali Ngula v. The Attorney General and another(S.C.Z Appeal No. 132/2010)***
5. ***Chisha Karabasi and another v. Laston Mwale( Selected Judgment No. 40 of 2018)***

**Legislation referred to:**

1. ***The High Court Rules, Chapter 27 of the Laws of Zambia.***

**Other materials referred to:**

**The Rules of the Supreme Court, 1965(White Book)**

**The Atkins Court Forms, Volume 39(2<sup>nd</sup> Edition) 1994 at page 235**

This ruling relates to the Respondents' preliminary issue which is mainly challenging the mode of commencement of this action.

The brief facts of the case are that the Applicant commenced this action on 29<sup>th</sup> January, 2014 by way of originating summons seeking an order for a refund of K21,250.00 from the estate of the late David Abel Ray Phiri, an order that the education expenses towards Abelo Phiri a beneficiary of the Estate includes everything which goes with educational costs and that the same be paid out of the Estate in accordance with the Will and an order that she be given evidence of payment of educational expenses to facilitate her leaving the child at school.

On 25<sup>th</sup> April, 2014 the respondents raised a preliminary issue seeking determination of *inter alia* whether the action was properly commenced in accordance with the provisions of **Order 6 of the High Court Act**. In a ruling dated 5<sup>th</sup> June, 2015 F.M. Chisanga J as she then was observed that the claim for a refund was a pure debt while the second entailed interpretation of the Will. She found that the claim for a refund was supposed to be made by writ while the second by originating summons. The court observed that to avoid the danger of conflicting decisions from two courts she allowed the parties to litigate the issues in one action and that in the event that contentious issues arose, the matter could be adjourned to open court and oral evidence received as provided by **Order 30 rule 8 of the High Court Rules**.

On 14<sup>th</sup> June, 2019, the applicant was granted leave to amend her originating summons and the amended originating summons was filed into court on 26<sup>th</sup> August, 2019. In the amended originating summons, the applicant has only retained a claim for a refund of an amended sum of K58, 636.00 from the Executors of the estate in accordance with the Will.

The respondents have filed into court a notice of intention to raise preliminary issue made pursuant to **Order 33 Rule 7 of the Rules of the Supreme Court of England, 1965, the White Book**. The respondents seek determination of the following questions:

**Whether this court has requisite jurisdiction to adjudicate upon the reliefs sought in the amended originating summons dated 26<sup>th</sup> August 2019 given the mode of commencement of this action;**

**Whether the applicant can file a bundle of documents in a mater commenced by originating summons; and**

**Whether the applicant's Bundle of Documents dated 29<sup>th</sup> April 2019, is competently before the court in the absence of leave.**

When the matter came up for hearing on 11<sup>th</sup> November, 2019, the parties indicated that they would proceed by filing skeleton arguments. I consequently reserved my ruling pending the receipt of the skeleton arguments. The respondents filed into court their skeleton arguments on 18<sup>th</sup> December, 2019. A summary of the respondents' arguments is that the applicant's claim is for recovery

of a debt and this does not fall under the matters to be disposed of in chambers and consequently, the matter should have been commenced by writ. Counsel for the respondents contends that in the earlier preliminary issue on this issue prior the amendment, the court concluded that the claim for a recovery of a debt should be commenced by writ but because the other claim which required interpretation and to avoid multiplicity of action, the court ordered that the matters be tried in one action. It is argued that this has been superseded by the amendment of the originating summons wherein only the claim for the recovery of a debt is being pursued. It is argued that commencement goes to jurisdiction and that it follows that this court does not have jurisdiction to determine this matter. The respondents relied on **Chikuta v Chipata Rural Council<sup>1</sup>** and **Competition and Consumer Protection Commission v. Omnia Fertilizer Zambia Ltd and Nyiombo Investment Ltd<sup>2</sup>**.

On the second and third preliminary issue, counsel contends that the bundle of documents filed into court by the applicant is not properly before court as there was no order by the court to receive

oral evidence and even if the converse was true, the parties are restricted to the affidavit evidence. The respondents therefore applied for the bundle to be expunged from the record.

The applicant's counsel opposed the respondents' notice of preliminary issue by way of skeleton arguments dated 9<sup>th</sup> December, 2019. The kernel of their arguments in so far as they are relevant to this application is that this preliminary issue has already been determined in the ruling of 5<sup>th</sup> June, 2015 and that this court should stand on its decision. Counsel for the applicant contends that there are no reasons that would compel a departure from the earlier ruling. It is further argued that this court has the jurisdiction to adjudicate on this case because the applicant claims to be interested under the Will of the deceased as creditor and this court has the power to make a declaration of her rights to a refund for bearing the education expenses.

Counsel for the applicant further contends that the principle issue in this matter revolves on the construction of the Will "to pay for all educational expenses upto A-level or equivalent thereof for my son Abelo Thabo Phiri". Counsel for the Applicant submits that in any

event, this court is at liberty to order that the matter should continue as though it was commenced by writ. Regarding the issue of the bundle of documents in a matter commenced by originating summons, the applicant contends that the court in ruling of 5<sup>th</sup> June, 2015 gave directions for the matter to be heard in open court and receive oral evidence.

It is further argued that a bundle of documents may be filed in a matter commenced by originating summons to secure its expeditious and economical disposal. The applicant also contends that the documents filed in the bundle are the same documents as those filed in the affidavit in support and that they are relevant and this court has the power to admit the bundle of documents despite no order for discovery.

I am indebted to counsel for their skeleton arguments which I have considered and taken into account in delivering this ruling. The first issue for determination is whether this court has the jurisdiction to adjudicate on this matter having regard to the mode of commencement. From the outset, this preliminary issue has been raised before by the respondents and a ruling was delivered in that

respect by Chisanga J. as she then was. I am mindful of the decision in the case of **Rahim Obaid v. The People**<sup>3</sup> that once a matter has been determined by a judge of the High Court another judge of the high court does not have jurisdiction to entertain, interfere or overrule the decision.

I however note that at the time the earlier ruling was delivered, the applicant sought three reliefs. A perusal of the ruling shows that the court found that the claim for a refund was a pure debt while the second involved interpretation of the Will. It was also found that the claim for a refund was supposed to be commenced by writ while the second by originating summons. The court observed that to avoid the danger of conflicting decisions from two courts, she allowed the parties to litigate the issues in that action even if it was commenced by originating summons. In the event that contentious issues arose, the trial judge observed that the matter could be adjourned to open court and oral evidence received as provided by **Order 30 rule 8 of the High Court Rules.**

The applicant has now amended the reliefs and removed the other claims and retained the claim for a refund but of an amended



amount. The ruling of 5<sup>th</sup> June, 2015 was clear that the claim for a refund was a pure debt which can only be commenced by writ. I cannot interfere or overrule this finding. As the other reliefs have been removed, I am of the considered view that the circumstances have changed and as such I may determine this preliminary issue.

In the case of **Esther Sitali Ngula v. The Attorney General and another**<sup>4</sup>, the action was commenced by originating summons. On appeal to the Supreme Court on whether the matter was properly commenced, the Supreme Court observed that the issues raised were contentious which could be examined and evaluated well at trial. They therefore found that the matter should have been commenced by writ. The Supreme Court guided that where there are clear provisions of the law on the mode of commencement, such provisions must be complied with. The Supreme Court however found that the irregularity did not make the proceedings null and void. They therefore ordered the matter to proceed as though commenced by writ.

In the case of **Chisha Karabasi and another v. Laston Mwale**<sup>5</sup>, the Supreme Court pointed out that the trial court had the discretion to

choose to allow the matter to proceed as if commenced by writ and that once the discretion was exercised in the affirmative, the same would transition the action from the destiny of being null and void for want of jurisdiction to new proceedings under the freshly deemed mode of commencement under which the Court is clothed with jurisdiction.

In the light of the above authorities, I am of the considered view that the irregularity due to the change in the circumstances cannot make the proceedings null and void. I find that this is an appropriate action to exercise my discretion under **Order 28 rule 8 of the White Book** and I accordingly order that the matter be deemed as if it was commenced by writ. I will give further directions on how the matter shall proceed.

On the issue of the bundle of documents, Lord **Evershed in the Atkins Court Forms, Volume 29(2<sup>nd</sup> edition) 1994 at page 235** states that if the plaintiff intends to adduce evidence in support of the originating summons at the first hearing, he must do so by filing an affidavit. Unless the court orders that the matter should continue as if it was begun by writ of summons or it is transferred

to a county court or disposed of at the first hearing, the court must give directions as to the further conduct of the proceedings as it thinks best adapted to secure their just, expeditious and economical disposal. The directions the court may give include the filing of evidence, attendance of deponents for cross examination, discovery and other directions it could give if the matter had been commenced by writ. It may also include making an order that the summons be determined by oral evidence or partly on oral evidence or affidavit evidence. **See: Order 28 rule 1A, and Order 28 rule 4 of the White Book.**

Lord Evershed in the **Atkins Court Forms, Volume, 15 at para 16 at page 103** states that in proceedings begun by originating summons, discovery of documents is not automatic as it is in actions begun by writ. However, if general discovery is required, it must be obtained by a court order.

From the above passage, the provisions from the **White Book** and from a perusal of the earlier ruling of this court, no order was given for the matter to be determined by oral evidence or for the applicant to file into court bundles of documents. I therefore reject the

applicant's contention to that effect. The filing of the bundle of documents in the manner that the applicant has done would deprive the respondents to object to the production of any of any of the documents. The applicant has argued that documents in the bundle of documents are the documents referred to in the affidavit in support of originating. I have perused the affidavit and find the argument to be misleading. I therefore expunge the said documents from the record. However having ordered that the matter should proceed as though it was commenced by writ of summons, I will proceed to call for a status conference and give directions on the matter.

Leave to appeal is granted.

**Delivered at Lusaka the <sup>11<sup>th</sup></sup> day of March 2020.**



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**MATHEW. L. ZULU  
HIGH COURT JUDGE**