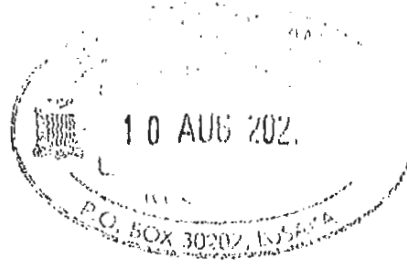


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2021/HP/0165

BETWEEN:

**MUNDIA SIMAINGA
BRENDA LUSUKO**



**1ST PLAINTIFF
2ND PLAINTIFF**

AND

KAFUE DISTRICT COUNCIL

DEFENDANT

Before the Honourable Mrs Justice Ruth Chibbabbuka 8th June, 2021

For the Plaintiffs: Mrs E. D Sakala, Messrs Frank Tembo & Partners
For the Defendant: Mrs F Chipoya, Messrs Nhari Advocates

RULING

Cases referred to:

1. *Zambia Revenue Authority vs Jayesh Shah* Selected Judgment No. 10 of 2001
2. *Leopold Walfold (Z) Limited vs Unifreight SCZ* Judgment No. 23 of 1985

Legislation referred to:

The Rules of the Supreme Court (1999) Edition, *The White Book*
The Constitution of Zambia, Chapter 1 of the *Laws of Zambia*

1.0 INTRODUCTION

This is the defendant's application to strike out the writ of fieri facias filed on 27th May, 2021. The application is made by summons pursuant to *Orders 14A Rule 2, 33 Rule 3 and 18 Rule 19 sub-rule 1* of the *Rules of the Supreme Court*, as read together with *Article 160* of

the *Constitution of Zambia, Chapter 1* of the *Laws of Zambia*. The application is supported by an affidavit of even date.

2.0 THE DEFENDANT'S AFFIDAVIT EVIDENCE

The affidavit deposed to by one Jonathan Mwanza, the Council Secretary, discloses that on 11th May, 2021, the plaintiffs caused to be issued a writ of fieri facias against the defendant based on an interlocutory Judgment of 28th April, 2021. He deposed that on 26th May, 2021, the Sheriff's officers seized several items from the defendant's premises. That a writ of fieri facias can only be issued against the defendant in satisfaction of a Judgment after one year from the date of the judgment.

2.1 THE DEFENDANT'S SUPPORTING EVIDENCE

The application is further supported by a list of authorities and skeleton arguments wherein counsel argued that *Orders 14A Rule 1*, and *33 Rule 3* of the *Rules of the Supreme Court* empowers this court to decide on this application. She argued that this court has the inherent jurisdiction to decide on this matter. That the plaintiffs herein caused to be issued against the defendant a writ of fieri facias as a way of enforcing the interlocutory Judgment obtained against it. However that by *Article 160* the *Constitution of Zambia*, the plaintiffs herein cannot enforce the Judgment against the defendant before the expiry of one year from the date of the Judgment. She prayed that the writ fieri facias be struck out.

3.0 THE PLAINTIFFS' AFFIDAVIT EVIDENCE

The plaintiff filed an affidavit in opposition on 4th June, 2021, deposed to by the 1st plaintiff. He deposed that on or about 28th April, 2021, this court granted the plaintiffs an interlocutory Judgment against the defendant, which was served on the defendant. That the defendant did not respond to the same, which prompted the plaintiffs to issue a writ of fieri facias on or about 11th May, 2021. The deponent deposed

further that on 27th May, 2021, this court granted an ex-parte stay of execution and sale of goods taken in execution. That *Article 160* of the *Constitution*, which the defendant is relying on in making this application, is not worded in mandatory form.

3.1 THE PLAINTIFFS' SUPPORTING EVIDENCE

The plaintiffs filed skeleton arguments wherein counsel argued that the wording of *Article 160* of the *Constitution of Zambia* is not couched in mandatory form as it uses the words "*may*", thereby giving the plaintiffs the option of enforcing the interlocutory Judgment at any point, even before the expiry of one year. That the defendant should not be allowed to rely on a provision of the law now, when it failed to do so in defending the action herein.

Counsel referred this court to the case of **Zambia Revenue Authority vs Jayesh Shah¹** in arguing that cases should be decided on their merit. That in **Leopold Walfold (Z) Limited vs Unifreight²**, the Supreme Court directed that the breach of regulatory rules is curable and not fatal. That the writ of fieri facias should not be struck out on the basis of a regulatory rule, which can be cured. She argued further that the plaintiffs have been deprived of their monies for over 3 years now and should not have to wait another year before they can enjoy the fruits of the Judgment.

4.0 THE HEARING

- 4.1** At the hearing, counsel for the defendant placed reliance on the affidavit and skeleton arguments filed in support of the application. She added that *Article 1* of the *Constitution of Zambia* provides that the Constitution of Zambia is the supreme law and that any law that is inconsistent with it shall be void to the extent of its inconsistency. That it follows that *Article 160* of the *Constitution* is binding on the parties herein. She prayed that the application be granted.

- 4.2 In opposing the application, counsel for the plaintiffs argued that the defendant cannot rely on the law now when they failed to do so when they had an opportunity to defend the action. She argued that *Article 160 of the Constitution of Zambia* is not worded in mandatory form as it uses the word “*may*”, and thereby giving the plaintiffs an option to either wait for a year before enforcing the Judgment or not. She prayed that the application be dismissed with costs.
- 4.3 In response, counsel for the defendant argued that *Article 160 of the Constitution of Zambia* is mandatory and not discretionary as argued by counsel for the plaintiffs. That the word “*may*” in the provision gives the plaintiffs the option to enforce the Judgment or not.

5.0 DECISION OF THE COURT.

I am indebted to counsel for the submissions and arguments. I have carefully considered the same.

I must at the onset remind the parties that it is of paramount importance that parties in making their applications place reliance on the correct provisions of the law. The defendant herein has relied on *Orders 14A Rule 1*, and *33 Rule 3* of the *Rules of the Supreme Court* in making this application. The two provisions of the law are invoked to summarily determine matters on a point of law without need for a full trial. To rely on *Order 14A* of the *Rules of the Supreme Court*, there must have been prior entrance of a notice of intention to defend the action. *Order 33 Rule 3* of the *Rules of the Supreme Court* on the other hand cannot be independently invoked to the exclusion of *Order 14A*.

Further, *Order 18 Rule 19* of the *Rules of the Supreme Court* provides the law on striking out of pleadings and indorsements. This was equally not an appropriate law upon which this application could be brought before this court as a writ of fieri facias is not a pleading. I will however proceed to consider this application on the basis of the

reliance placed on *Article 160 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia.*

On 28th April, 2021, an interlocutory Judgment was entered against the defendant for failure to enter appearance and file its defence to the plaintiffs' writ of summons and statement of claim. The plaintiffs proceeded to issue a writ of fieri facias on 11th May, 2021.

This court is now tasked with the duty to consider whether the plaintiffs' issuance of a writ of fieri facias following the entry of an interlocutory Judgment against the defendant herein, contravened procedure, particularly as provided by the *Constitution of Zambia. Article 160 of the Constitution* provides that;

"Any person who obtains a Judgment against a Local Authority may enforce the Judgment against the Local Authority after one year from the date of delivery of the Judgment."

The plaintiffs have argued that the provisions of *Article 160 of the Constitution* are not worded in mandatory form. That the use of the word "*may*" gives a party the discretion to either levy execution immediately following the entry of Judgment or after expiry of one year from the date of the Judgment. I disagree with this interpretation of the law as *Article 160 of the Constitution* is worded in unambiguous terms. The use of the word "*may*" illustrates the option that a party has to either levy execution or not. To suggest that the use of the word "*may*" refers to a person being entitled to enforce a Judgment at any point in time even before the lapse of one year would result in an absurdity and defeat the purpose of *Article 160 of the Constitution*. Clearly the intention of the legislature was to provide for the period of one year before a Judgment could be enforced against the Local Authorities. Consequently, should a party opt to levy execution, the same can only be done after one year from

the date of the Judgment. In the premises, the plaintiffs must wait for the expiry of one year from the date of the Judgment herein before they can levy execution on the defendant. The writ of fieri facias issued on the 11th May, 2021, is therefore accordingly struck out as prayed by the defendant.

Costs are awarded to the defendant, to be taxed in default, of agreement.

Leave to appeal is granted.

Dated the.....10th.....day ofAugust.....2021

