

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

2020/HP/0694

03 FEB 2021

BETWEEN:

PATSON MBAO

PLAINTIFF

AND

MAILA RODGER CHILELE

1ST DEFENDANT

MWEENE HABATWA VINCENT

2ND DEFENDANT

Before the Honourable Mrs Justice Ruth Chibbabbuka on the 11th
November, 2020.

For the Plaintiff: Ms M. Nambao, Messrs Mulungushi Chambers

For the 1st Defendant: Ms N Mbuyi & Mr C Nkhata, Messrs Paul Norah
Advocates

For the 2nd Defendant: N/A

RULING

Cases referred to:

1. *Sakala vs Mangani Phirt (suing as administrator of garden north Baptist Church)*
Selected Judgment No. 36 of 2018
2. *Chikuta vs Chipata Rural Council (1974) Z.R 241*
3. *African Banking Corporation Zambia vs Mubende Country Lodge Limited Appeal No.*
116 of 2016
4. *Access Bank (Zambia) Limited vs Group Five/ Zcon Business Park Join Venture (suing
as a firm) SCZ/8/52/2014*

Legislation referred to:

The Rules of the Supreme Court 1999 Edition (White Book)
The Limitation Act, 1939

This is a ruling in the 1st defendant's application to raise a preliminary issue filed on 11th September, 2020. The application is made by way of a notice and pursuant to *Order 14A rule 1*, *Order 33 rule 3* and *Order 2 rule 2* of the *Rules of the Supreme Court*. The preliminary issue raised is follows;

"That whether this Honourable Court can proceed to hear and determine this matter when the said matter is statute barred."

The notice is supported by an affidavit deposed to by the 1st defendant. He deposed that in 1991, he was in occupation of the property in dispute known as Farm No. 4423, Mukonchi, as the plaintiff's tenant. That the plaintiff had mortgaged the property with Lima Bank at the time he was in possession of the same. That when the bank desired to repossess the property, the 1st defendant offered to repay the loan in exchange for title being passed to him. That upon repayment of the loan, the bank handed him all the documents relating to the property for purposes of changing ownership, which he did and a certificate of title to Farm No. 4423, Mukonchi was issued to him in 1991. That at the time the transaction relating to the property was taking place, the plaintiff was present. That the plaintiff's sister has always resided with the 1st defendant at the said property and that the plaintiff has always been aware of the status of the property. That the transaction relating to the property was concluded in 1991 and the plaintiff having been aware of the same cannot bring an action in 2020 as it is statute barred.

The 1st defendant's counsel filed skeleton arguments wherein she argued that *Order 33 rule 3* of the *Rules of the Supreme Court* gives this court the power to determine the application herein. That the *Limitation Act of 1939* applies to all actions for which a period of limitations is laid down by the Act. Counsel relied on *section 4 subsection 3* of the *Limitation Act, 1939* to argue that the period of limitation of actions in respect of claims relating to land should be brought to court within a period of twelve years from the date the right of action first accrued. That in determining whether this action is statute barred, the issue to consider is when the cause of action in this matter

accrued. That as evidenced by the contents of the writ of summons and statement of claim, the transaction relating to the property in dispute was entered in to by the plaintiff and 1st defendant in 1991. Counsel argued that the time within which the plaintiff ought to have brought this action elapsed in 2003.

In opposition, the plaintiff filed an affidavit on 25th September, 2020 wherein he deposed that to the best of his knowledge, the 1st defendant had always been his tenant until the year 2016 when he discovered that the property in dispute had been transferred to the 1st defendant. That he made efforts to resolve the matter but the same proved futile. That he did not take out any mortgage on the property in dispute.

Counsel for the plaintiff filed skeleton arguments wherein she argued that a party seeking to rely on *Order 14A* of the *Rules of the Supreme Court*, must give notice of his intention to defend, which notice must be given before the full trial of the action has commenced. The court was referred to case of **Alick Sakala vs Mangani Phiri (suing as administrator of Garden North Baptist Church)**¹.

That by *Order 14A rule 2* of the *Supreme Court*, an application for disposal of a case on a point of law may be made by summons, motion or orally. That in *casu*, the 1st defendant's application is made by notice of intention to raise a preliminary issue, which was a wrong mode of moving this court to dispose of an action on a point of law. That in **Chikuta vs Chipata Rural Council**², the Supreme Court held that the court will not have jurisdiction to grant a relief sought where the manner of moving the court is irregular.

That the action herein is not statute barred as fraud has been alleged under paragraph 11 of the statement of claim, and that by *section 26* of the *Limitation Act 1939*, the law makes provision for postponement of the limitation period where fraud or mistake is alleged. That the time in *casu* started running after the plaintiff discovered the sale of the property. That the property had always been in the plaintiff's name and that the plaintiff has

always known the 1st defendant to be his tenant. That he only discovered that the property had been transferred from his name to the 1st defendant in 2016.

The 1st defendant filed an affidavit in reply on 26th October, 2020 wherein the 1st defendant deposed that the plaintiff has not provided any evidence that the 1st defendant was his tenant, nor has he provided proof of any rentals paid to him from 1991.

That it is misleading for the plaintiff to introduce a police call out dated 4th day of January, 2017 in his attempt to demonstrate that that was the period around which he became aware of the change in ownership of the property in dispute. That paragraphs 9 and 10 of the plaintiff's statement clearly state that it was upon the plaintiff's return from Congo to Zambia, after serving a purported 7 years prison sentence from 1991, that he became aware of the change of ownership. That the plaintiff has not shown proof of the alleged fraudulent transfer of the property.

At the hearing, counsel for the applicant, the 1st defendant herein, relied on the affidavit and skeleton arguments filed in support of the application, which arguments counsel reiterated. That the plaintiff became aware of the purported wrong upon his return from Congo where he had served a 7 year prison sentence. That it follows that the plaintiff was made aware of the wrong in 1998 and that the 12 year period within which he ought to have commenced this action expired in 2010.

In opposition, the plaintiff's counsel placed reliance on the affidavit in opposition to the application as well as skeleton arguments. She restated the arguments contained in the said documents and further argued that paragraph 9 of the statement of claim does not state that the plaintiff became aware of the change of ownership when he returned to Zambia as alleged by the 1st defendant but that that the paragraph merely states that the 1st defendant served a prison sentence in Congo. That the plaintiff only discovered that the property was transferred to the 1st defendant in 2016 and that this is the period when the time should start counting. That the application is without merit and should be dismissed with costs.

In response, counsel for the 1st defendant relied on the 1st defendant's affidavit in reply and argued further that paragraph 9 and 10 of the statement of claim clearly states when the plaintiff returned to Zambia as well as when he became aware of the transfer of the ownership. That the plaintiff's argument that he discovered the change of ownership in 2016 is merely an afterthought. That the fraud being alleged by the plaintiff has not been pleaded nor has any proof of the same being exhibited before the court. That the plaintiff has further not shown any evidence that any rentals were paid to him by the 1st defendant as proof of the existence of a landlord/tenant relationship.

That the law relied on by the 1st defendant in making this application grants this court the jurisdiction to determine the application. Further that the plaintiff's opposition to the application on its merits means that he has waived his right to oppose the same on the basis of an irregularity. That *Article 118 of the Constitution, Chapter 1 of the Laws of Zambia* requires the court to adjudicate on a valid question brought before it despite any procedural irregularities. Counsel prayed that the matter herein be dismissed for being statute barred.

I am indebted to counsel for the arguments and submissions. I have carefully considered the same. In *casu*, the 1st defendant has raised a preliminary issue under *Orders 14A rule 1, 33 rule 3 and 2 rule 2 of the Rules of the Supreme Court* to have the matter determined on a point of law. Counsel for the plaintiff argues that the 1st defendant cannot invoke the provisions of *Order 14A* without prior entrance of a notice of intention to defend the action. I note that this action was commenced by way of writ of summons and statement of claim. A perusal of the record reveals that the defendants have not entered appearance by filing into court a memorandum of appearance and defence to register their intentions to defend the action herein. In the case of **African Banking Corporation Zambia vs Mubende Country Lodge Limited**³, the Supreme Court held that while the term "notice of intention to defend" does not appear in our *High Court Rules*, the filing of a memorandum

of appearance and defence is what constitutes a notice of intention to defend in the context of our rules. The question then is whether this action can be disposed of under *Order 14A rule 1* of the *Rules of the Supreme Court* in the absence of a notice of intention to defend the action. The said *Order 14A rule 1* provides as follows;

"The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that-

- (a) such question is suitable for determination without a full trial of the action, and*
- (b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein."*

Further to the above, *Order 14A/1-2/2* of the *Rules of the Supreme Court* states that;

"The requirements for employing the procedure under this Order are the following:

- (a) the defendant must have given notice of intention to defend;*
- (b) the question of law or construction is suitable for determination without a full trial of the action."*

Premised on the law above, it is evident that the giving of the intention to defend is a pre-requisite to applying to have a matter disposed of under *Order 14A rule 1* of the *Rules of the Supreme Court*. This was also the holding of the court in the **African Banking Corporation Limited** case. In that case, the court went on to further state that the filing of a conditional memorandum of appearance without a defence is only applicable in circumstances where the defendant wishes to contest the validity of the proceedings to apply to set aside the writ of summons. The conditional memorandum of appearance filed by the 1st defendant on 4th September, 2020 cannot therefore be said to constitute a notice of intention to defend

I am alive to the fact that the 1st defendant has not only relied on *Order 14A rule 1* to make his application but also cited *Order 33 rule 3* of the *Rules of the Supreme Court*. The Supreme Court in the **African Banking Corporation** case held that while *Order 33 rule 3* of the *Rules of the Supreme Court* can be invoked to determine a preliminary point of law at any stage of the proceedings, it cannot be so invoked independently or to the exclusion of the mandatory requirements of *Order 14A* of the *Rules of the Supreme Court*. *Order 2 rule 2* of the *Rules of the Supreme Court* is for the setting aside of court process for irregularity and not disposal of matters on a point of law.

Further, the Supreme Court in the said **African Banking Corporation** case went on to reconcile the provisions of the *Rules of the Supreme Court* with our *High Court Rules* in relation to the issue of defining a notice of intention to defend. The Supreme Court pointed out that, although the term 'notice of intention to defend' does not appear in our *High Court Rules*, *Order 11 Rule 1* of these rules makes it mandatory to file a memorandum of appearance accompanied by a defence which in its considered view, the Supreme Court held, that is what in our context constitutes a notice of intention to defend.

Counsel for the 1st defendant implored me not to dismiss the application herein as any procedural irregularities are curable as per the law under *Article 118 clause 2 (e) of the Constitution of Zambia (Amendment) Act No. 2 of 2016*. The Supreme Court has pronounced itself in several cases on the true intent of *Article 118 clause 2 (e) of the Constitution*. In **Access Bank (Zambia) Limited vs Group Five/Zcon Business Park Join Venture (suing as a firm)**⁴, the Supreme Court held that;

"All we can say is that the Constitution never means to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts"

Had the 1st defendant placed reliance on the provisions of *Order 11 Rule 1* of the *High Court Rules, Chapter 27 of the Laws of Zambia*, this court would


have been able to address the preliminary issue raised on the basis of jurisdiction.

Premised on the foregoing however, the 1st defendant's application is incompetently before this court, and is dismissed accordingly.

Costs are for the plaintiff, to be taxed in default of agreement.

Leave to appeal is granted.

Dated the ^{3rd} day of *February* 2021


**REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA**
13 FEB 2021
R. CHIBBABBUKA, J
P.O. BOX 50087, LUSAKA

**Ruth Chibbabbuka
High Court Judge**