

IN THE HIGH COURT FOR ZAMBIA

2005/HK/027

AT THE KITWE DISTRICT REGISTRY

HOLDEN AT KITWE

(Civil Jurisdiction)

BETWEEN:

RZ & MCM ENTERPRISES LIMITED

PLAINTIFF

AND

GERMANO MUTALE KAULUNG'OMBE

1st DEFENDANT

DOMINIC NED MUSONDA

2nd DEFENDANT

Before Lady Justice Abha N. Patel S.C, the 8th day of July, 2021

For the Plaintiff: Mr. C. M. Bwalya

Messrs K. B. F. & Partners

For the 1st Defendant: Mr. K. Chali of G.M. Legal Practitioners Agents for

Messrs Ferd Jere & Company

For the 2nd Defendant: Mr. T. M. Chabu

Messrs Terrence Chabu & Co

RULING

Cases referred to:

1. Mulenga and Others vs Investrust Merchant Bank Limited (1999) Z.R. 101 SCZ
2. John Kunda (suing as Country Director of and on behalf of the ADRA vs Keren Motors (Z) Limited (2012) 2 Z.R. 228
3. Oliver John Irwin v Joan Irwin & Leopard Investment Company Limited (2006) ZR 66
4. Chikuta V Chipata Rural Council (1974) ZR 241
5. Barclays Bank Zambia Limited v Walisko and Company and Mohamed Ashrof Mansoor (1980) ZR 7
6. New Plast Industries v The Commissioner of Lands and the Attorney General (2001) ZR 51
7. Faramco Limited and 4 Others vs Kavanda Investments Limited SCZ No. 50/2006
8. Access Bank (Z) Limited vs Group Five/ZCon Business Park joint Venture SCZ/8/52/2014
9. Henry Kapoko v The People 2016/CC/023
10. The Republic of Botswana and others vs Mitre Limited SCZ No. 2 of 1995
11. Post Newspapers and others vs CBU Council and Others Appeal No. 84 of 1997
12. D.E Nkhuwa vs Lusaka Tyres Services Limited (1977) ZLR at 43

Legislation and other materials referred to:

1. *The High Court Rules Cap 27 of the Laws of Zambia*
2. *The Rules of the Supreme Court (RSC) White Book 1999*
3. *The Lands and Deeds Registry Act Cap 188 of the Laws of Zambia*

1. Introduction

1. The Plaintiff moved this Court by way of ex parte Summons dated 18 March 2021 by its composite application for leave to register and execute Judgment and Consent Order out of time, and leave to issue Writs of possession.

1.1 This application was accompanied with a certificate of urgency, supporting affidavit and skeleton arguments all filed on the same date urging the Court to grant the ex parte Order by which the Plaintiff seeks leave to register and execute:

- a. the Judgment dated 2nd June 2010 against the 2nd defendant; and
- b. the Consent Order dated 24th September 2010 against the 1st defendant, out of time.

1.2 The Plaintiff further seeks:

- a. leave to file and execute Writs of Possession against both lots No. 1524/M "Sesheke" and Lot No. 10201/M 'Lusaka" to recover the Judgment sums respectively due from the Defendants.

(hereinafter referred to as *the application*.)

1.3 The Court declined to grant the Orders sought ex parte and endorsed a date of hearing for the Summons returnable on 8th April 2021.

1.3 The Plaintiff filed a further affidavit dated 6th April 2021.

1.4 At the inter parte hearing, Counsel for the Plaintiff was ready to proceed to argue its application, save that both Counsels for the 1st and 2nd defendant respectively applied to adjourn the matter on the ground that they had just been retained and needed time to place themselves on record and file their clients respective opposing arguments.

1.5 Amid the protestations of the Plaintiff, the Court noting that the Judgments and Consent Order sought to be enforced were dated on diverse dates in 2010, and further noting that there had been a long weekend in between, did allow the Defendants an adjournment and issued directions for the filing of documents as follows:

The 1st and 2nd Defendants were ordered to file their opposing documents and skeleton arguments by or before 19th April 2021 and the Plaintiff was given leave to file its reply, if any, by 27th April 2021 and the Court would proceed to deliver its Ruling on the documents before it.

1.6 The 2nd defendant filed its opposing process as directed by way of its skeleton argument and affidavit in opposition to the application on 16th and 19th April respectively.

1.7 The 1st defendant did not comply in time and filed an ex parte application for an Order seeking an extension of time within which to file its opposing process. In the interest of justice and to arrive at a fair decision, the Court allowed the application and the 1st defendant filed its opposing affidavit and skeleton arguments on 24th May 2021.

- 1.8 The Plaintiff also filed an application dated 30th April 2021 for leave to file its Reply out of time, which was allowed by the Court. The Plaintiff subsequently filed its affidavit in reply to the 2nd defendants opposing affidavit and its skeleton arguments on 28th May 2021.
- 1.9 The Court has considered all the documents, affidavits and skeleton arguments for, and against, the application on record, and is indebted to Counsel for their industry. The Court has equally taken note of all the authorities cited and has made reference to them where appropriate, save to say the Court has not repeated every averment or authority, as the record speaks for itself.

2. The Application

- 2.1 The Plaintiff seeks leave to execute by way of a Writ of Possession and has referred the Court to the enabling provisions of **Order 45 rule 3 (1) (a) 2** of the RSC. The Plaintiff has also urged the Court to note that its application, based on a full Judgment and a Final Order, both of which are exhibited to the Plaintiffs Affidavit in Support and marked **RM1** and **RM 2** respectively, is competently before the Court.
- 2.2 The Court has noted that the supporting Affidavit filed on 18th March 2021 is sworn by one **Regina Mpampi** in her capacity as director of the Plaintiff Company, and has exhibited and marked **RM1** and **RM2** to her affidavit the Judgment and Consent Order entered by the Court dated 2nd June 2010 and 24th September 2010 respectively.

2.3 The Plaintiff has further relied on the provisions of **Order 46 rule 2 (1) (a)** of the RSC in support of its submission that a Writ of execution to enforce a judgement or order may not issue without the leave of Court where six years or more have lapsed since the date of the Judgment or Order. The Plaintiff has further referred to the provisions of **Order 46 rule 4 (1)** of the RSC in support of its application made ex parte.

2.4 The Plaintiff has also referred to the provisions of **section 4 (1)** of the **Lands and Deeds Registry Act** and has submitted that the same is instructive as regards the requirement of leave to register the Judgment (**RM1**) and Consent Order (**RM2**) out of time. The Plaintiff has further referred the Court to the provisions of **section 5 (2)** and **section 6** of the said Lands and Deeds Registry Act.

2.5 The Plaintiff concedes that both the Judgment and Consent Order being out of time, require the leave of the Court to be registered.

2.6 In support of its submissions that a successful litigant should not be denied the immediate enjoyment of the fruits of litigation, the Plaintiff has referred the Court to several notable decisions of the Supreme Court in support, such as **Mulenga and Others vs Investrust Merchant Bank Limited** and **John Kunda (suing as Country Director of and on behalf of the ADRA) vs Keren Motors (Z) Limited**.

2.7 It is the Plaintiff's submission that both defendants not having satisfied the respective judgement debts, and further that both defendants having contributed to the Plaintiff's failure to register and execute the Judgment and Consent Order, by failing to deliver the respective certificates of title to

the Plaintiff's erstwhile Advocates, Messrs Wilson & Cornhill and the unfortunate passing of Mr Wilson Banda, counsel ^{seized} with conduct of the matter, seeks from the Court the necessary orders for leave to register the Judgment and Consent Order out of time, and leave to issue the writs of possession.

2.8 The deponent of the Plaintiffs supporting affidavit attempts to narrate the factual situation between the parties leading up to the application currently before the Court.

2.9 In its further affidavit filed on 6th April 2021, the Plaintiff has deposed that the 2nd defendant has attempted to sell off its property, the subject of the Judgment of the Court, namely Lot No. 10201/M Lusaka and has exhibited and marked **RM1**, a copy of a caveat placed by an intending purchaser and **RM2** a copy of the contract of sale.

3. The 1st defendant, filed its affidavit in opposition and skeleton arguments on 24th May 2021. The deponent one **Germano Mutale Kaulungómbé**, avers that the Judgment of the Court dated 2nd June 2010 does not make any order of possession of Lot No. 1524/M Sesheke. He has exhibited a copy of the said Judgment marked "**GMK1**".

3.1 He has exhibited the Consent Order of 23rd September 2010 marked "**GMK2**" and it is his averment that that the consent order does not make an order of possession of Lot No. 1524/M Sesheke.

3.2 In its skeleton arguments the 1st defendant has submitted that the circumstances have changed and there has been devolution of interest, and

that the property no longer belongs to the 1st defendant. It has relied extensively on the provisions of **Order 46 rule 2 (2)** of the RSC. It has further submitted that a writ of possession, in these circumstances, would be irregular and also maintains that the Plaintiff has failed to show proper cause for the delay to execute a Judgment entered 10 years ago and prays for the Plaintiff's application to be dismissed with costs.

4. The 2nd defendant has equally opposed the Plaintiffs application and seeks to rely on its opposing affidavit and skeleton arguments both filed on 16th and 19th April 2021.

4.1 The deponent one Dominic Ned Musonda has deposed that by a search conducted by its Advocates, it was discovered that the Plaintiff had not filed a notice of intention to proceed as the original file could not be traced and the plaintiff opened a temporal jacket for the purpose of the application before Court. He has exhibited these marked "**DNM1 and 2**" copies of the said search and letter to the Assistant Registrar respectively.

4.2 It is his averment that a period of 10 years having lapsed, the Plaintiff ought to have commenced a fresh action and further there being no notice of intention to proceed, the application is incompetent before the Court.

4.3 It is his further averment that a reading of the Judgment does not disclose that the Plaintiff was entitled to possession of Lot No. 10201/M Lusaka. He has also exhibited a copy of the said Judgment marked "**DNM3**".

4.4 It is his further averment that the Judgment not having been served on him, he was not aware of any purported obligation on his part, and further he

has exhibited the consent order marked "**DNM4**" and stated that a close reading of the same under **clause C**, does not entitle the Plaintiff to the claims it seeks from this Court.

- 4.5 He has also deposed that the Plaintiff has executed against the 2nd defendant in October 2010 and recovered the sum of K6,853,437.50 and has exhibited and marked "**DNM5**" being a copy of the receipt.
- 4.6 In its skeleton arguments, the 2nd defendant has urged the Court to dismiss the application on the ground of there being no notice of intention to proceed with the matter after a delay of 10 years. They have relied on the provisions of **Order 2 rule 3** of the HCR.
- 4.7 They have referred the Court to the decision of the Supreme Court in the case of **Oliver John Irwin v Joan Irwin & Leopard Investment Company Limited** in support of the above.
- 4.8 The 2nd defendant has further submitted that the Plaintiff's purported application is out of time under the proviso to **section 6** of the Lands and Deeds Registry Act and has relied on the provisions of **Order 6 rule 1** and **Order 30 rule 11** of the HCR in support of its submission that the Plaintiff ought to have commenced a fresh cause of action.
- 4.9 The 1st defendant has also relied on the decision in the case of **Chikuta V Chipata Rural Council and Barclays Bank Zambia Limited v Walisko and Company and Mohamed Ashrof Mansoor** in support of its submission that a wrong procedure has been invoked by the Plaintiff in the application before Court.

4.10 The 2nd defendant has also referred to the decision of the Supreme Court in the case of **New Plast Industries v The Commissioner of Lands and the Attorney General** in support of its submission that the Court has no jurisdiction to hear this application on account of wrong procedure.

4.11 To buttress the submission above, that the Court has no jurisdiction to determine the Plaintiff's application, the 2nd defendant has also relied on the decision of the Supreme Court in the case of **Faramco Limited and 4 Others v Kavanda Investments Limited**.

5. The Plaintiff, (upon seeking leave), filed its reply to the 2nd defendants opposing process by its affidavit and skeleton arguments of 28th May 2021.

5.1 The Plaintiff while conceding that it had inadvertently omitted to proceed by way of notice intention to proceed, that the Court should nonetheless determine the substantive application before it, as the defendants have not suffered any real prejudice by this oversight.

5.2 The Plaintiff has relied on a plethora of authorities handed down by the Supreme Court, as well as constitutional provisions and principles in equity, in support of its submission that justice in these circumstances, will best be served without adherence to technical and procedural rules of Court, if there has been no injustice occasioned to the defendants.

5.3 The Plaintiff has also attacked the 2nd Defendants submission with respect to having commenced a fresh cause of action, and have submitted that the application before the Court is to enforce the Judgment and Consent Order and can only be brought within the same cause of action.

- 5.4 The deponent of the Affidavit in Reply, one **Muteta Mpampi** has further sought to discredit the averments of the 1st defendant, wherein he has deposed that he was not aware of the Judgment in the matter by referring to contradictory paragraphs in the 1st defendant's Affidavit in Opposition.

6. The Issues

- 6.1 As I interrogate the submissions of the parties, I take note that there are 3 issues that require the determination of the Court :
- a. Is the Plaintiff's application competent before the Court, for failure to issue the Notice of Intention to proceed?
 - b. Is the application competent or should the Plaintiff have proceeded by way of a fresh cause of action?
 - c. Is the Plaintiff entitled to the composite Orders it seeks from this Court, ie for leave to register and execute the Judgment and Consent Order of 2nd June 2010 and 24th September 2010 against the 1st and 2nd defendants?

7. Application and Analysis of the Law to the facts

- 7.1 It is clear to my mind, that I must determine the first issue as the same is a challenge to the jurisdiction of the Court. The 2nd defendant has argued and the Plaintiff has conceded, that there was no Notice of Intention to proceed with the matter as required by **Order 2 rule 3** of the HCR. **Order 2 rule 3** states 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." (emphasis is by the Court).

7.2 To cut to the chase, there is no dispute here that the Plaintiff has not filed its notice of intention to proceed. My role is to determine what consequences, if any, should attend the failure to observe **Order 3 rule 2** of the HCR. I am alive to the mandatory wording in the Order above, and note the use of the word ***shall***. I am also alive to the holding in the cases referred to by the Plaintiff in its submissions, and its understanding of the said cases, that the omission notwithstanding, the Court ought to determine the matter on its merits and not on technicalities and piecemeal. The Plaintiff has urged this Court to proceed to hear the substantive application and treat this omission as a "*mere irregularity*" as the defendants have not suffered any tangible prejudice by a breach of this procedural rule.

7.3 I have anxiously considered the arguments advanced by both Parties as I have waded through the plethora of authorities cited for and against this objection. Whilst this Court in no way condones breaches of procedural rules, I ask myself what is the import of **Order 2 rule 3**. It is obviously to give notice to the other party of the applicant party's intention to proceed with a matter in Court after a **one-year lapse**. What is more glaring in the facts in *casu*, is the fact that the lapse has been over a **ten year period**.

7.4 The Plaintiff has relied on several celebrated cases such as, **The Republic of Botswana and others vs Mitre Limited** where in the Supreme Court has held that:

"The High Court rules were rules of procedure and were therefore regulatory and any breach should be treated as a mere irregularity which is curable."

The second case of **Access Bank (Z) Limited v Group Five/ZCon Business Park Joint Venture** where in the Supreme Court expressed the view that it is desirable for matters to be determined on their merits and in finality rather than on technicalities and piecemeal.

7.5 However, I am not persuaded that the effect of the decisions of the cases referred to by the Plaintiff, is to give any erring party *carte blanche* to proceed in any manner it chooses so to do, by bringing in arguments based on the constitution or equity, or to plead that there has been no prejudice to the other party.

In as much as the Plaintiff has invited the Court to turn a *blind-eye*, to what it terms a lapse in the observance of a procedural rule, I am minded that to casually gloss over such a fundamental rule of Court, would turn the wheels of justice on their head.

Having interrogated the facts at hand and having appreciated the guidance by the Supreme Court, I do not believe that the intention of the Supreme Court, in the authorities cited by the Plaintiff, was for any litigating party to proceed in a *gung-ho* approach and with impunity.

7.6 However, and in my considered opinion, the Plaintiff has taken a very dim view of its own omission, and has tried to convince this Court that its failure to give notice of intention to proceed after a **ten year lapse**, can be equated to the failure to cite an e-mail address (as in the **Access Bank case**). As already observed, and emphasized by the Supreme Court, the rules of Court are designed for a purpose and to ensure that there is a level playing field.

I have also considered the Supreme Court case of **ZAMBIA REVENUE AUTHORITY V JAYESH SHAH** where it was held that:

"Cases should be decided on their substance and merit. The ⁴rules must be followed, but the effect of a breach will not always be fatal if the rule is merely regulatory or directory".

7.7 In the facts at hand, not only did the Plaintiff, fail to issue the mandatory notice of intention to proceed after a one year lapse, the facts in *casu* point to a lapse of a ten year period, and to compound to the failure to issue the notice, the Plaintiff attempted to obtain the composite orders for leave, by way of an ex parte application.

7.8 I note and the Plaintiff has submitted that the attitude of the Supreme Court towards breaches or omissions in procedure has not been a dismissive one, but a considerate and accommodating one to serve the ends of justice.

7.9 However, even if I were to move to consider the substantive application, I note that the Judgment and Consent Order the subject of this application

are dated 2nd June 2010 and 24th September 2010 respectively. The Plaintiff has equally admitted that the record cannot be traced and that this application was brought to the Court under a Temporal jacket. That being the case, the Court has no way of determining the authenticity or genuineness of the contents of the Judgment or the Consent Order which have been exhibited as exhibits to their respective Affidavits, let alone grant the orders the Plaintiff seeks.

7.10 It becomes more fundamental in the facts of this case that giving the notice as required by the Rules, would have served the ends of justice and would have allowed the Parties to find ways of bringing to the Courts attention the full record. To expect the Court to hear and determine this application, after a lapse of over ten years, and to expect it to make Orders detrimental to the interest of the defendants, and on a temporal record, is surely over stretching the demands of justice in favour of the applicant party alone.

7.11 It is cardinal that the rules of court and the associated rules of practice devised in the public interest to promote the expeditious dispatch of litigation must be observed. Consequently, for the proper administration of justice, and in the exercise and discharge of its inherent powers, the Court cannot and will not, entertain applications that fall short of the requirements. On this I am mindful of the pronouncement in the case of **Post Newspapers and others vs CBU Council and Others** wherein the Supreme Court said:

"While Parties must generally be heard on merits, litigants who sleep on their rights must expect the wheels of justice to turn in their absence for the sake of expedition and finality."

- 7.12 My attention is also drawn to the guidance issued by the Supreme Court in the cited case of **Access Bank Zambia Limited** (*supra*), cited by the Plaintiff. The Court stated as follows:

"Matters should as much as possible be determined on their merits rather than be disposed of on technical or procedural points. This, in our opinion is what the ends of justice demand.

Yet, justice also requires that this court, indeed all courts must never provide succor to litigants and their counsel who exhibit scant respect for rules of procedure. Rules of procedure and timelines serve to make the process of adjudication fair, just, certain and even-handed.

Under the guise of doing justice through hearing matters on their merit, Courts cannot aid in the bending or circumventing of these rules and shifting goal posts for while laxity in application of the rules may seem to aid on side, it unfairly harms the innocent party who strives to abide by the rules."

(emphasis is by the Court)

- 7.13 In the circumstances of the facts in *casu*, I am of the considered view that allowing the Plaintiff's argument, will not serve the interest of justice in this case.

I am also alive to the words of the Supreme Court in the case of **D.E Nkhuwa vs Lusaka Tyres Services Limited** when it reiterated the *prima facie* need for rules of court to be obeyed.

It is trite that there has to be an end to litigation and that justice must be available for all Parties to a suit, and not only to those who disregard rules of procedure in an almost cavalier manner, and then come to Court, armed with interlocutory applications, and claim the right to do so, relying on well cited authorities of the Supreme Court, but which in my considered opinion, are completely misapplied to suit the circumstances of the matter.

8. **Ruling**

8.1 Suffice it to state, and for the reasons above, having arrived at the determination that the matter is not properly before the Court, I will not venture into the other issues identified above.

8.2 The Plaintiff's application is dismissed with costs.

Leave to Appeal is granted.

Dated at Kitwe, the day of August, 2021.

Judge Abha Patel, S.C.