

**IN THE HIGH COURT OF ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2022/HPC/223

BETWEEN:

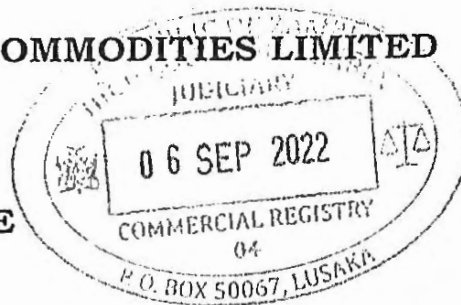
CENTRAL AGRI COMMODITIES LIMITED

PLAINTIFF

AND

HENRY KAMWALE

DEFENDANT



Delivered *extempore* in Chambers before the Honourable Mrs. Justice K.E. Mwenda-Zimba on the 6th day of September, 2022.

For the Plaintiff : Mrs. E. Mwale of Shamwana & Company
For the Defendant : Mr. M. Chikuta and Mr. N. Nsamba of LM Chikuta Legal Practitioners
and Mr. F. Gwaba of Keith Mweemba Advocates

RULING

Cases referred to:

1. G4S Secure Solutions Zambia Ltd v. Lupupa Kabezya Lewis, Appeal No. 170 of 2015.
2. Quah Su-Ling v. Goldman Sachs International (2015) EWHC 759.
3. Vedanta Resources PLC and Another v. Lungowe and Others (2019) UKSC 20.
4. Celtic Freight (Z) Limited v. Kasly International Limited CAZ No. 87 of 2020.

Legislation referred to

The High Court Rules, Chapter 27 of the Laws of Zambia, Order 18.

1.0 INTRODUCTION AND BACKGROUND

1.1 This is a Ruling on the Defendant's application for amendment of his defence and counter-claim. The Ruling discusses, among other things, considerations to be taken

into account when dealing with an interlocutory application that leads to vacation of agreed dates for trial or further delay the dates for trial. It further discusses the application of **Order 19 rule 3(3) of SI 58 of 2020** that restricts entertainment of interlocutory applications 14 days before trial.

- 1.2 The facts leading to the application are well known to the parties. I shall therefore not repeat them. In summary, the Defendant contends that there are documents which came to his attention after the Plaintiff served him the supplementary bundle of documents. That for the interests of justice to be served, he needs to address the issues raised in the documents in his defence. The Plaintiff contends that it will be prejudiced if the application is granted. That the Defendant seeks amendment so that it recasts its case to suit the evidence contained in the Plaintiff's witness statements. Further, that the Plaintiff's documents do not introduce new matters that are not already before Court.

2.0 CONSIDERATIONS AND CONCLUSION

2.1 I have considered the application for leave to amend the amended Defence and counter-claim, the parties' affidavits, skeleton arguments and authorities cited.

2.2 The Defendant makes this application pursuant to **Order 18 of the High Court Rules Chapter 27, Order 18** relied upon is to the following effect:

“The Court or a Judge may, at any stage of the proceedings, order any proceedings to be amended, whether the defect or error be that of the party applying to amend or not; and all such amendments as may be necessary or proper for the purpose of eliminating all statements which may tend to prejudice, embarrass or delay the fair trial of the suit, and for the purpose of determining, in the existing suit, the real question or questions in controversy between the parties, shall be so made. Every such order shall be made upon such terms as to costs or otherwise as shall seem just.”

2.3 Before considering the application before me, I wish to put the events of this matter into perspective.

2.4 The Defendant entered appearance in this matter on the 29th of April, 2022. On the 5th of May, 2022, the Defendant filed an amended defence and counter-claim. What followed was a

scheduling conference on the 6th of June, 2022. At that conference, it was agreed that trial would be held on the 2nd and 3rd of August, 2022. The order also stated that there would be liberty to apply only until 14 days before trial.

2.5 On the 29th of June, 2022, the Defendant applied to join parties to the suit. On the date of hearing, none of the parties appeared. I struck out the application with liberty to restore within 7 days. The application was restored. I heard the application on the 28th of July, 2022 and delivered my Ruling on the 2nd of August, 2022. This was the date scheduled for the first day for trial. The date had been automatically vacated as a result. In my Ruling, I ordered that the parties appear for a status conference the following day, being the 3rd of August, 2022, as it was a date we had already agreed as the 2nd date for trial.

2.6 On this day, both parties informed me that they had not complied with the order for directions. In the interest of justice, I extended the time for the parties to conduct further discovery, file and exchange witness statements and file any supplementary bundles of documents by the 12th of August,

2022. We agreed that trial would be on the 23rd and 25th of August, 2022.

2.7 On the 11th of August, 2022, the Defendant filed an application for leave to extend time within which to file witness statements. To save on time, I granted the application *ex parte* and ordered that the parties exchange their witness statements by the 17th of August, 2022. I stated that I would not vacate the trial dates already agreed upon.

2.8 On the 16th of August, 2022, the Defendant made an application for an order to amend its pleadings. I endorsed on the summons that since trial was scheduled in less than 14 days, I had no jurisdiction to hear the application. I relied on **Order 19 Rule 3(3)**. I refused to entertain the application.

2.9 When the matter came for trial on 23rd August, 2022, at 9 hours, the Defendant's counsel were not before Court. State Counsel for the Plaintiff informed me that counsel for the Defendant had called him the previous night to inform him that the Defendant had filed an application and that they had also lodged an appeal before the Court of Appeal.

2.10 As I had not seen the application talked about, I stood down the matter and retired to chambers to consider the application referred to. There was no application found in the Registry. As I was preparing to go back to Court, I was informed that counsel wanted to see me in chambers.

2.11 When the lawyers came to chambers, counsel for the Defendant apologised for the delay and stated that the Defendant had filed an application but sought leave to withdraw it. He sought an adjournment of the trial to make another application.

2.12 I allowed the adjournment to allow the Defendant make the application. As a result, the trial dates were vacated for the second time.

2.13 **Order 19 Rule 3(3)** relied upon in refusing to entertain the first application for amendment is in the following terms:

“(3) A party shall not lodge, and a Judge shall not consider any interlocutory application fourteen days before commencement of trial.

(4) subject to subrule (3), a Judge may, in the Judge’s discretion, which decision shall not be subject of an interlocutory appeal, entertain an interlocutory application which, with reasonable diligence, could

not have been made before the time specified under subrule (3).”

2.14 The present application has been made after the dates for trial were vacated as a result of the Defendant’s application to adjourn the trial. My reading of **Order 19 Rule 3(3)** reveals that it was promulgated to assist the Courts with case management and to ensure that litigants prosecute and defend their cases with diligence.

2.15 Further, the Supreme Court, in guiding this Court on case management had the following to say in **G4S Secure Solutions Zambia Ltd v. Lupupa Kabezya Lewis**:⁽¹⁾

“We must emphasise that proceedings before our courts are court-driven and the court is expected to be in control of the proceedings and ensure that matters are not delayed by unnecessary adjournments. It is trite that adjournments are one of the major causes of delays in the dispensation of justice. Proper case management, therefore, requires that the Court should only grant an adjournment in the most deserving of case, bearing in mind all relevant circumstances of the case...”

2.16 Although the **G4S** case was dealing with an application for an adjournment, it resonates with the present case in that the ultimate detriment if the application is granted is delay.

2.17 The Courts in England have had occasion to consider applications for amendment that lead to vacation of trial dates. This was in **Quah Su-Ling v. Goldman Sachs International**.⁽²⁾ In this case the Claimant, Mrs Quah, made an application for permission to amend her claim some 3 weeks before trial. Application led to the vacation of trial dates. The Court discussed the following principles that ought to be considered:

1. Reasons for lateness and delay. The Court made the following interesting observation: "The fact that the delay occurred in the context of an expeditious timetable is nothing to the point. The timetable was a reasonable one and was there to be complied with. If anything, the Court's directions made it clear that inertia on the part of the parties in the conduct of the action at any stage was not an option..."
2. Strength of the new case- here the Court is expected to examine the prospects of success of the proposed amended claim. The Court was of the view that the fact that the proposed amendments raised a totally different and inconsistent case to the original case is relevant background which heightened the need for careful scrutiny of the merits of the new case.
3. Prejudice- a late amendment is one which would cause the trial date to be lost. Parties and the court

have a legitimate expectation that the trial fixtures will be kept.

4. Striking the balance on the interests of the two parties- between injustice to the applicant if the amendment is refused and injustice to the opposing party and other litigants in general.

5. In conclusion, the application was dismissed. The Court observed that this is modern day commercial litigation. Very late applications to amend, where there are no good reasons for delay, amendment would result in disruption or prejudice to parties and/or court are unlikely to be allowed irrespective of the merits of the proposed amendment.

2.18 Despite the above decision being from the High Court of England and Wales, I am persuaded by it. The decision implores this Court to balance the interest of the parties as well as those of the Court. Further, any prejudice to the other party and to the Court overrides any consideration of the merits of the proposed amendment.

2.19 In the present case, the rules of court were followed as regards giving each side an opportunity to present their cases. The Defendant amended his defence and counter-claim once before the present application. The Defendant

made applications for joinder and for extension of time. Therefore, he cannot come and state that because of certain documents that the Plaintiff adduced he needs to amend his defence. The rules assume that once the statement of claim is filed, it gives a defendant information which is relevant for the Defendant to defend himself. In fact, the Defendant raised a counter-claim showing that he knew the case he needed to meet and beyond. In this case, the statement of claim was filed on the 14th of April, 2022. The Reply and defence to counter-claim was filed on 23rd May, 2022. The Defendant filed his amended defence and counter-claim and reply to defence to counter claim on 5th May, 2022 and 2nd June, 2022, respectively. Clearly, the Defendant has had more than sufficient time to ensure that his pleadings are in the manner that secures his interests.

2.20 The Defendant contends that the Plaintiff only served him with the supplementary bundle a day after it was filed and not on the day it was filed. That had it been served on him early, he would have made the application on time. However, even if this was the case, the supplementary bundle is not a pleading. Pleadings respond to pleadings. A bundle of

documents contains documents relied upon by a party's witnesses. They are not meant to dictate or guide what should be in the pleadings. Further, witness statements are supposed to be exchanged to avoid parties gaining advantage by structuring their evidence to answer to the other party's evidence after seeing the witness statements for the other side. In any case, what this court seeks is the truth and the evidence will show this. Further, the Defendant having had the benefit of seeing the Plaintiff's witness statements, the Plaintiff stands to suffer prejudice as the Defendant will structure its defence and consequential witness statements to counter the evidence of the Plaintiff.

2.21 In addition, the Defendant is represented by two senior lawyers who know the case their clients' needs to meet both on the defence side and on prosecuting his counter-claim. Allowing the application will cause further prejudice to the Plaintiff as well as the Court. More so that the application is being made after the trial dates have been vacated twice. I would also be failing in my duties to case manage my cases if I allowed this application which has come so late in the day.

2.22 Apart from the above, this Court has a duty to ensure that that cases are determined with proportionality. More so in the Commercial Court where time is of the essence. The United Kingdom Supreme Court has had occasion to discuss this issue. This was in a case that is close to home of **Vedanta Resources PLC and Another v. Lungowe and Others**.⁽³⁾ The Court held, among other things, that the effort, costs and time allocated to a case should be proportional to the issue.

2.23 The issues in the present case revolve around a settlement agreement for the shares held by the Defendant in the Plaintiff Company. The Plaintiff proposed to pay him ZMW200,000.00 for the shares. He however contends that he is entitled to more as the Company was undervalued by the Plaintiff. The Plaintiff alleges that an agreement exists which supports its case while the Defendant denies the existence of the agreement. He states that it was a proposal which he denied immediately he discovered that the ZMW200,000.00 pay out was fraudulent. The dispute centres on the foregoing. Clearly, the issues are not complicated. The time and court resources that should be attached should be proportionate to the issues. As can be seen from the events outlined above,

this Court has invested a lot of time and resources on this case at the expense of other cases. Granting the application for amendment would warrant a further investment of the Court's resources in one case to the prejudice of other commercial cases.

2.24 The Defendant invited me to grant the application in the interest of Justice. Counsel relied on **Celtic Freight (Z) Limited v. Kashy International Limited**⁽⁴⁾ I have read this decision. Firstly, it was decided before the promulgation of **SI 58 of 2020**. Secondly, the Court found that there was no prejudice suffered by the other party. It is therefore different from the present case in that in the present case, the Plaintiff will suffer prejudice.

2.25 I am therefore of the view that the present application is not one which is fit to benefit from the discretion given to me under **Order 19 rule 3(4)** quoted above. The Defendant has not presented sufficient reason for the failure to bring the application before the 14 days' time-limit lapsed. With reasonable diligence required under **Order 19 rule 3(4)**, he could have sought an amendment earlier despite not having

had the documents he claims not to have had, which documents have not been named, in any case.

2.26 I accordingly find no merit in the application and dismiss it forthwith.

2.27 For progress in this matter, I order that the parties appear on the 13th of September, 2022 at 8:30 for setting of fresh trial dates.

2.28 I award costs of this application to the Plaintiff. To be taxed in default of agreement.

Dated at Lusaka this 6th day of September, 2022.

A handwritten signature in dark ink, consisting of a large, stylized 'K' followed by a horizontal line and a smaller, more fluid signature.

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K. E. Mwenda-Zimba
HIGH COURT JUDGE