

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

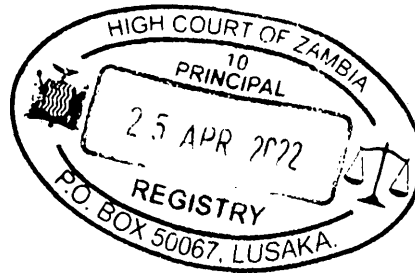
2020/HP/1336

BETWEEN:

MAHMOOD PATEL

AND

**THE ATTORNEY GENERAL
RAPID TRAVEL AND TOURS LIMITED**



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

**BEFORE THE HONOURABLE MRS JUSTICE RUTH CHIBBABBUKA ON
THE 14th July, 2021.**

For the Plaintiff: Ms N.C Mulenga and Mr S. Bwalya, Messrs
Solly Patel Hamir & Lawrence

For the 1st Defendant: Ms N Nkhazi, State Advocate, Attorney
General's Chambers

For the 2nd Defendant: Mr. R Musumali, Messrs SLM Legal
Practitioners

RULING

Cases referred to:

1. *Polythene Products Zambia Limited vs Cyclone Hardware and Construction Limited & The Attorney General*
2. *New Plast Industries Limited vs Commissioner of Lands and The Attorney General (2001) ZR 51*
3. *Chikuta vs Chipata Rural Council (1974) ZR 241*
4. *Law Association of Zambia vs The President of Zambia, The Attorney General and The National Assembly Petition No. 13/CCZ/2019.*
5. *Freddy Hirsch Limited vs Auto Care Limited 2016/HPC/0085.*
6. *African Banking Corporation Zambia vs Mubende Country Lodge Limited Appeal No. 116 of 2016*
7. *Hakaide Hichilema and Others vs The Government of the Republic of Zambia Appeal No. 28 of 2017*
8. *The Attorney General and Others vs Amber Clothing Manufacturers Limited Appeal No. 134 of 2013*
9. *Harrison Moonga & Essiah Kalonga Moonga vs Peter Chisi & Winstone Chisi 2014/HP/1977*

Legislation referred to:

The Rules of the Supreme Court (1999) Edition, The White Book
The High Court Act, Chapter 27 of the Laws of Zambia
The Land Tribunal Act No. 39 of 2010
The Lands Act, Chapter 184 of the Laws of Zambia.

1.0 INTRODUCTION

This is the 2nd defendant's application for the disposal of this action on a point of law. The application is made by summons filed pursuant to *Orders 14A*, and *33 Rules 3 and 7* of the *Rules of the Supreme Court*, as well as *Order 3 Rule 2* of the *High Court Rules, Chapter 27* of the *Laws of Zambia*.

2.0 THE 2ND DEFENDANT'S AFFIDAVIT EVIDENCE

The application is supported by an affidavit of even date deposed to by one Raymond Musumali. He deposed that this action, commenced by way of an amended writ of summons and statement of claim filed on 21st January, 2021, is improperly before this court as this court lacks the jurisdiction to hear and determine the same.

2.1 THE 2ND DEFENDANT'S SUPPORTING EVIDENCE

The application is further supported by skeleton arguments wherein counsel argued that on the authority of *Orders 14A Rule 2*, and *33 Rules 3 and 7* of the *Rules of the Supreme Court* as read together with *Order 3 Rule 2* of our *High Court Rules*, this court has been invited to make a determination on whether this action is not liable to be dismissed on a point of law on the ground that it is improperly before this court. That a perusal of the originating process in this matter reveals that this action emanates from a re-entry by the Commissioner of Lands, in pursuance of *Section 13* of the *Lands Act*, on Stand No. 38409, Lusaka, the property subject of this action.

Counsel argued further that paragraphs 22 and 23 of the statement of claim contend that a letter was written to the Commissioner of Lands requesting the Commissioner of Lands to reverse his decision to re-

enter on the subject property and allocation of the same to the 2nd defendant but the plaintiff's efforts were futile. He argued further that *Section 13 subsection 3* of the *Lands Act, Chapter 184* of the *Laws of Zambia* provides that a lessee aggrieved with the decision of the President to cause a certificate of re-entry to be entered on the land register may, within 30 days of the decision, appeal to the Lands Tribunal for an order that the register be rectified. Counsel relied on the case of **Polythene Products Zambia Limited vs Cyclone Hardware and Construction Limited & The Attorney General**¹ to support his argument.

That the plaintiff's commencement of this action by writ of summons and statement of claim was improper as the mode of commencement is governed by statute and not the reliefs being sought. He referred this court to the **New Plast Industries Limited vs Commissioner of Lands and The Attorney General**² case wherein the Supreme Court held that the mode of commencement is generally provided for by a relevant statute. That it in *casu*, the mode of commencement where a party is challenging a re-entry is by way of an appeal to the Lands Tribunal as per *Section 13 subsection 3* of the *Lands Act*. Counsel argued further that failure to adhere to procedure may be fatal to a party's action as illustrated in the case of **Chikuta vs Chipata Rural Council**³. That this court has no jurisdiction to grant the reliefs being sought by the plaintiff as this action was commenced by a wrong mode of commencement and should be disposed of with costs to the 2nd defendant.

3.0 THE PLAINTIFF'S AFFIDAVIT EVIDENCE

The plaintiff filed an affidavit in opposition deposed to by one Mwaba Chileya Mulenga. She deposed that the plaintiff commenced this action on 10th December, 2020 by way of a writ of summons and statement of claim for the reliefs outlined in the said documents. That she verily believes that the plaintiff was at liberty to commence the action for the reliefs being sought before this honourable court. The

deponent further averred that a perusal of the 2nd defendant's summons reveals that the same does not contain the questions of law or construction which the 2nd defendant required the court to determine. Further, that the said summons has equally not specified with particularity what judgment or order is being claimed by the 2nd defendant upon determination of the questions of law or construction.

3.1 THE PLAINTIFF'S SUPPORTING EVIDENCE

The plaintiff filed skeleton arguments wherein counsel opposed the 2nd defendant's application on both procedure and merit. Counsel argued that the plaintiff's opposition on the procedure employed by the 2nd defendant in taking out the subject application is justified by the direction given by the Constitutional Court in the case of **Law Association of Zambia vs The President of Zambia and 2 Others**⁴ wherein the court expressed its distaste of the practice by parties of raising preliminary issues which have a tendency of unnecessarily delaying proceedings.

Counsel argued further that the summons relating to an application made under *Order 14A* of the *Rules of the Supreme Court* require an applicant to state in clear and precise terms the questions of law and construction which the court is required to determine, and also to specify with sufficient particularity what judgment or order is being claimed upon the determination of the question of law or construction. Counsel submitted that summons that do not comply with the requirement under *Order 14A* and hence they are defective, and render the application in respect of which they are made liable to being struck out or dismissed as was the case in the case of **Freddy Hirsch Limited vs Auto Care Limited**⁵.

Further, that *Order 33* of the *Rules of the Supreme Court* operates in tandem with the provisions of *Order 14A* and can only be invoked if the summons comply with the requirements provided under the editorial note 14/2/7. Counsel referred this court to the case of

African Banking Corporation Zambia vs Mubende Country Lodge Limited⁶ to buttress the argument. In addition, counsel argued that *Order 3 Rule 2* of the *High Court Rules* only applies to interlocutory orders and not final orders as illustrated in the case of **Hakainde Hichilema and Others vs The Government of the Republic of Zambia⁷**.

That the 2nd defendant has purported in its summons to include the grounds in the affidavit in support but a perusal of the affidavit reveals that the grounds have not been expressly enumerated. And that even in assuming that they were expressly enumerated, it would be procedurally wrong for the 2nd defendant to include the grounds in its affidavit as the affidavit is strictly supposed to contain facts or evidence in support of the application.

In opposing the application on merits, counsel argued that the mere fact that there is another body with concurrent jurisdiction over the subject matter herein does not vitiate the plaintiff's election of choice of forum.

Counsel submitted that the Land Tribunal does not derive its jurisdiction to adjudicate over matters dealing with re-entry by virtue of *Section 13* of the *Lands Act* itself as the jurisdiction of the Lands Tribunal over land matters is established in *Section 4* of the *Lands Tribunal Act No. 39 of 2010*.

Counsel argued that the High Court enjoys both the appellate and original jurisdiction in land matters as demonstrated in the cases of **The Attorney General and Others vs Amber Clothing Manufacturers Limited⁸**. That while there admittedly appears to be a conflict between the Supreme Court's pronouncements in the **Polythene Products**, and **Ambex Clothing** cases, it is an elementary rule of judicial process that the latest pronouncement takes precedent. Counsel relied on the case of **Harrison Moonga & Essiah Kalonga Moonga vs Peter Chisi & Winstone Chisi⁹**. Counsel

submitted further that the **Polythene Products** case has been modified by the **Ambex Clothing** case.

Counsel prayed that the 2nd defendant's application be dismissed with costs.

4.0 THE HEARING

4.1 At the hearing, counsel for the 2nd defendant placed reliance on the affidavit and skeleton arguments filed in support of the application, which he proceeded to briefly reiterate. He prayed that the application be allowed, and the action be dismissed with costs.

4.2 Counsel for the plaintiff relied on the affidavit in opposition as well as the skeleton arguments filed in opposing the application. Counsel prayed that the 2nd defendant's application be dismissed with costs.

5.0 DECISION OF THE COURT

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

The 2nd defendant herein has applied to have the action herein preliminarily disposed of on a point of law pursuant to *Orders 14A Rule 1*, and *33 Rules 3 and 7* of the *Rules of the Supreme Court*, as read together with *Order 3 Rule 2* of our *High Court Rules*. The plaintiff opposes the application on both procedure and merit.

On procedure, the plaintiff's opposition is on the basis that the 2nd defendant in making its application has not complied with the provisions of *Order 14A* of the *Rules of the Supreme Court*. The plaintiff argues that pursuant to the editorial notes under *14A/1-2/7*, the summons for an order to disposal of an action on a point of law pursuant to *Order 14A* of the *Rules of the Supreme Court*;

"...should state in clear and precise terms what is the question of law or construction which the Court is required to determine. If there is more than one such question, each should be stated

in the same terms, and it should be made clear whether the several questions are cumulative or in the alternative.

The summons should also specify, with particularity if necessary, what judgment or order is being claimed upon the determination of the question of law or construction.”

I note that by the use of the word “*should*”, it is clear that there is no room for discretion on how summons made pursuant to *Order 14A* ought to be prepared, and hence a party seeking to rely on the said *order* must comply with its mandatory requirements. I have perused the 2nd defendant’s summons and do indeed note that the same does not state the question of law or construction that the 2nd defendant requires this court to determine, nor does it state the judgment or order being claimed upon the determination of the question of law or construction.

In addition to *Order 14A*, the 2nd defendant has also relied on *Order 33 Rules 3 and 7* in bringing its application. While a party is at liberty to invoke *Order 33 Rules 3 and 7* of the *Rules of the Supreme Court* in a bid to dispose of an action preliminarily on a point of law, the Supreme Court guided in the **African Banking Corporation** case that the said *Order* cannot be so invoked independently or to the exclusion of the mandatory requirements of *Order 14A* of the *Rules of the Supreme Court*. The requirement under the editorial notes *14A/1-2/7*, is mandatory in nature as I have elaborated above. This entails that the 2nd defendant cannot rely on the provisions of *Order 33 Rules 3 and 7* without complying with the said requirement.

In addition to the two *Orders* expounded above, the 2nd defendant also relied on *Order 3 Rule 2* of the *Rules of the High Court Rules, Chapter 27 of the Laws of Zambia*, which provides as follows;

“Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such

order has been expressly asked by the person entitled to the benefit of the order or not” (Underling for court’s emphasis)

The above clearly illustrates that the orders that the court may make under *Order 3 Rule 2* of the *High Court Rules* are interlocutory in nature, and not orders that may determine the entire action as sought by the 2nd defendant herein. The **Hakainde Hichilema** case, cited by counsel for the plaintiff, is authoritative on this. Reliance on *Order 3 Rule 2* of the *High Court Rules* in making an application such as the one herein is therefore misplaced.

At this point, I am inclined to briefly comment on the merit of the application after noting that this is the second time the 2nd defendant has applied to have this action dismissed on a point of law on the basis that this court lacks the jurisdiction to hear this action for having been commenced before the wrong forum.

Even in assuming that this application was not procedurally defective, the Supreme Court has unambiguously pronounced itself in the **Ambex Clothing Manufacturing Limited** case that the provisions of the *Lands Tribunal Act No. 39 of 2010* do not oust the High Court’s original jurisdiction to hear and determine land matters. What a party is afforded is a choice of forum.

The question that follows then is which position should this court follow in light of the clear conflict between the decisions of the Supreme Court in the **Polythene Products Zambia Limited**, and **Ambex Clothing Manufacturing Limited** cases? The principle of stare decisis demands that where there is a conflict between two decisions of the Supreme Court, as is the case herein, it is the latest decision that the lower court is obliged to follow. I am thus persuaded by the holding of my learned sister, Justice Mrs M.M Kawimbe in the **Harrison Moonga & Essiah Kalonga Moonga** case, when she opined that;

"...where there is ostensible conflict in the decisions of the Supreme Court, a lower court is compelled to follow the most recent decision of the court."

Accordingly, I adopt the position as pronounced in the **Ambex Clothing Manufacturing Limited** case. In the premises, the 2nd defendant's application is dismissed with costs to the plaintiff, to be taxed in default of appearance.

Leave to appeal is granted.

Dated the..... day of2022

25th April
Ruth Chibbabbuka
HIGH COURT JUDGE