

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2017/HP/2205

BETWEEN:



GRACE ZULU

PLAINTIFF

AND

ELEMESI ZULU

DEFENDANT

**BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 08TH APRIL, 2024 - IN CHAMBERS**

For the Plaintiff : **Mrs. J. Chifwembe & Mrs. R. Mawera Banda both** from
Messedemas. Chifunda Chifwembe & Company.
For the Defendant : **Mrs. R. Samanjaomba** from Messrs. Nkusuwila
Nachalwe Advocates.

RULING

CASES REFERRED TO:

1. *Fin Three Hundred and Sixty limited v Zambia National Commercial Bank PLC 2023/HPC/0554*
2. *EcoBank Zambia Limited v National Association of Savings and Credit Union 2022/HPC/0519*
3. *JCN Holding Limited v Development Bank of Zambia SCZ No. 22 of 2013*
4. *Citibank Zambia Limited v Suhayi Didhia CAZ Appeal No. 16/2020*
5. *Law Association of Zambia and Another v Attorney General 2019(CCZ) 0014*

LEGISLATION & OTHER WORK REFERRED TO:

1. *High Court Act Rules Chapter 27 of the Laws of Zambia*
2. *Rules of the Supreme Court (1999) Edition*

1.0 INTRODUCTION

- 1.1 This is the Ruling of the application by the Defendant to dismiss this matter for want of jurisdiction. The application is made by way of a notice of motion pursuant to Order 2 Rule 4 of the High Court Rules and **Order 14A of the Rules of the Supreme Court (Whitebook) 1999 edition. Order 2 Rule 4 of the High Court Rules** provides that:

“Summonses may be issued and pleadings may be amended, delivered or filed during the last eleven days of the Michaelmas and Christmas vacations respectively, but pleadings shall not be amended, delivered or filed during any other part of such vacations unless by the direction of the Court or a Judge.”

While **Order 14A Rule 1 of the Whitebook** provides that:

- “(1) 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.*
- (2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.*
- (3) The Court shall not determine any question under this Order unless the parties have either—*
- (a) Had an opportunity of being heard on the question, or*

- (b) Consented to an order or judgment on such determination.*
- (4) *The jurisdiction of the Court under this Order may be exercised by a master.*
- (5) *Nothing in this Order shall limit the powers of the Court under Order 18, rule 19 or any other provision of these rules.”.*

2.0 AFFIDAVIT EVIDENCE

- 2.1 The affidavit in support was sworn by Defendant himself. It was deposed that the Plaintiff previously commenced an action relating to the ownership of the subject property under cause No. 2013/HP/0393 against the Defendant and the Defendant's father Charles Zulu. That the Defendant was wrongly cited as a party instead of the Defendant's Mother, Esther Zulu and on that score, the Defendant was removed and the Defendant's mother remained as the person interested in the matrimonial property.
- 2.2 It was the deponent's further averment that on the 15th December 2017, the Plaintiff filed originating summons and affidavit in support under cause No. 2017/HP/2205. That the Plaintiff misled the Court that the Defendant was duly served with the court process relating to the matter when in fact, the Defendant was never served or made aware of the same by any means available to the Plaintiff. That on the 27th January, 2020 this Court entered judgment against the Defendant at the instance of the Plaintiff.

2.3 It was averred that on 28th April, 2021, the Plaintiff filed into Court a writ of possession to execute the judgment. That in pursuance of the writ of possession, in July 2021, bailiffs from the Sheriff's office forcefully entered in the Defendant's house in his absence and ejected his property from the premises, leaving them on the street. The Sherriff's only informed passer-by that they were from the High Court and had orders to remove his possessions from the house.

2.4 That the Defendant proceeded to engage Counsel to establish the validity of the bailiff's actions and the authority upon which the said actions were carried out. That upon the Defendant's counsel conduct of a search at the High Court, they came across this matter commenced on the 15th December, 2017, wherein the Plaintiff proceeded to obtain judgment and subsequently filed a writ of possession without serving the Defendant any process. That on 19th September, 2023, the Court ruled that the affidavit filed by the parties of the summons shall stand as pleadings. Further that on 18th July 2022, the Defendant filed an affidavit in opposition and entered an appearance on 15th October, 2023.

2.5 It was averred that the Defendant was advised by his advocates and verily believe the same to be true that the 15th December, 2017 was within the Christmas vacation and the summons were commenced without leave or direction of the court. That the Christmas vacation commences on 11th December and

terminates on the 9th January of each calendar year. That it is mandatory when filing of summons in that period, for one to obtain leave of or the direction of the court or filed in the last 11 days of the vacation. That the record shows that the Plaintiff did not file the summons in the last 11 days of the Christmas vacation or indeed sought the mandatory leave of court.

2.6 That on the 8th November, 2023, the Defendant's advocates conducted a search on the court file to determine whether the Plaintiff sought leave before commencing this action during the Christmas vacation. A copy of the search form was exhibited and marked "EZ1".

2.7 That the omission is fatal and incurable as it goes to the jurisdiction of the Court and that should be dismissed for want of jurisdiction.

3.0 AFFIDAVIT IN OPPOSITION

3.1 The Plaintiff on the 22nd November, 2023 filed an affidavit in opposition reproduced below as follows:

- "4. That the contents of paragraphs 1-5 of the Respondents affidavit in support are not dispute.***
- 5. That the contents of paragraph 6 of the respondent's affidavit in support are in dispute***

- and the Respondent shall be put to strict proof thereof.*
6. *That the contents of paragraph 7 of the Respondent's affidavit in support are not in dispute.*
 7. *That the contents of paragraph 8 of the affidavit in support are denied.*
 8. *That in addition to paragraph 7 above, by the Respondents own disposition in paragraphs 5 and 6 of the affidavits in support he was fully aware of these court proceedings.*
 9. *That the contents of paragraphs 9 and 10 of the respondent's affidavit are not in dispute.*
 10. *That the contents of paragraph 11 of the said affidavit are admitted only to the extent that the Plaintiff engaged bailiffs to evict the Respondent following a court order.*
 11. *That the contents of paragraphs 12 and 13 of the Respondent's affidavit herein are within the peculiar knowledge of the Respondent.*
 12. *That the contents of paragraphs 14 to 20 of the said affidavits are not in dispute.*
 13. *That the contents of paragraph 21 of the Respondent's affidavit in support are in the peculiar knowledge of the Respondent.*

should contain the reasons why the plaintiff is disputing, as bare denials will be construed as admissions.

10. That the action under cause No. 2017/HP/2205 should be dismissed for want of jurisdiction.”

5.0 SKELETON ARGUMENTS

5.1 The Defendant began their submission by stating that the application to dismiss the proceedings commenced on the 15th December, 2017 for want of jurisdiction is one raising on a point of law and that the provision on which the application is anchored is enacted in mandatory nature, thus incurable. That the Plaintiff's affidavit in opposition is irregular as it provides only bare denials without stating why the Plaintiff denies the Defendant's averments, thus giving rise to the presumption of admission of the Defendant's application. Furthermore, that the Plaintiff's affidavit in opposition has deprived the Respondent of an opportunity to give a comprehensive reply.

5.2 It was argued that the Plaintiff deposed that “the Respondent has not shown any injustice occasioned to him by reason of the Plaintiff not obtaining leave at commencement of this matter”. The Defendant submitted that an application arising on a point of law, the applicant does not need to prove any prejudice to be suffered on his part save to show that there is a notice to dismiss and notice of intention to defend the

matter as per Order 14 A rule 2 (3) (a) of the rules of the Supreme Court.

- 5.3 Counsel submitted that on the 10th November, 2023, the Defendant filed the notice to dismiss the proceedings and, on the 5th October, 2023, entered an appearance and filed the defence and counter claim, exhibiting sufficient intentions to defend this matter. That the Defendant has fulfilled the threshold requirement for the court to grant the application.
- 5.4 The cases of *Fin Three Hundred and Sixty limited v Zambia National Commercial Bank PLC 2023/HPC/0554¹* and *EcoBank Zambia Limited v National Association of Savings and Credit Union 2022/HPC/0519²* wherein the proceedings were dismissed for lack of jurisdiction due to the Plaintiff's failure to obtain leave before commencing the action violating Order 2 Rule 4 of the High Court Rules.
- 5.5 It was then argued that the failure by the Plaintiff to obtain leave before commencing the action on Christmas vacation is in violation of order 2 Rule 4 of the High Court Rules. That this court is let without its jurisdiction to take any further step save for one to dismiss the proceedings for want of jurisdiction. Citing the case of *JCN Holding Limited v Development Bank of Zambia SCZ No. 22 of 2013³* the Supreme Court observed that:

“Also, it is settled law that if a matter is not properly before a court, that court has no jurisdiction to make any orders or grant any remedies”.

It was then argued that the effect of not dismissing the proceedings is that the court will continue with the proceedings without jurisdiction and any decision made shall be rendered a nullity on appeal. Counsel referred to the case of **Citibank Zambia Limited v Suhayi Didhia CAZ Appeal No. 16/2020⁴** wherein the court held that:

“A jurisdictional question can be brought up at any stage of the proceedings either by formal application or viva voce, even on appeal, whether it was raised in the court below and even where it is not pleaded in the grounds of appeal or filed heads of argument... the nature of jurisdictional questions is that, once they are brought to the attention of the court, they must be dealt with immediately. This is because if a court decides to proceed without addressing the jurisdiction issue and it is later established that it had no jurisdiction, the court will have wasted both its own time and that of the litigants (sic) because the proceedings and everything that flows from them will be rendered a nullity and of no effect”.

I was then urged to dismiss the proceedings commenced on Christmas holiday without leave or direction of court and that the Plaintiff bears the cost.

6.0 ANALYSIS AND THE DECISION OF THIS COURT

6.1 I have examined the record and the evidence adduced in the affidavit filed herein. The question for determination is simply whether or not this court has jurisdiction to hear and determine

this matter in view of the provisions of Order 2 rule 4 of the High Court Rules.

6.2 I have noted from the record and agree with Counsel for the defendant, that the affidavit in opposition in this matter, indeed, consists of admissions and bare denial. It is therefore not in dispute that this matter as the record reflects commenced on the 15th December, 2017 during the Christmas vacation. The Defendant has vehemently argued that this matter was filed without leave of this court and therefore, the process filed is irregular and should be set aside.

6.3 The starting point in determining this matter is the examination of Order 2 rule 4 of the High Court Rules the application is anchored on. **Order 2 rule 4 of the High Court Rules** provide as follows:

“Summonses may be issued and pleadings may be amended, delivered or filed during the last eleven days of the Michaelmas and Christmas vacations respectively, but pleadings shall not be amended, delivered or filed during any other part of such vacations unless by the direction of the Court or a Judge.”

The reading of Order 2 rule 4 of the High Court Rules clearly reveals that before summonses and pleadings are filed, amended or delivered during any part of the Michaelmas and Christmas vacations excluding the last eleven days of such vacations, leave of the court should be obtained. Furthermore, the Order 2 rule 4 uses the words “shall not” which denote

mandatory. This entails that failure to comply with the same is fatal.

6.4 I am further guided by the provisions of **Order XLIX rule 3 (1)** which provides that:

“The vacations to be observed in the several courts and offices of the High court shall be four in every year, that is to say, the Easter vacation, the Whitsun vacations, the Michaelmas vacation and the Christmas vacation. The Easter vacation shall commence on Good Friday and terminate on Easter Tuesday; the Whitsun vacation shall commence on the Saturday before Whit Monday and shall terminate on the Tuesday after Whit Sunday; the Michaelmas vacation shall commence on the 8th August and shall terminate on the 6th September and the Christmas vacation shall commence on 11th December and terminate on the 9th January”

6.5 In the matter before me, it is a fact that the originating summons were filed on the 15th December, 2017 and no leave was obtained before the filing the originating summons. Clearly this was before the eleven days before the vacation ended. Consequently, this matter was not properly launched by the Plaintiff as no leave of court was obtained as provided for under Order 2 rule 4 of the High Court Rules.

6.6 This Court as a creature of the Constitution and the High Court Act can only exercise jurisdiction given to it by the High Court Rules. I reiterate that under Order 2 rule 4 of the High Court Rules, leave of the Court to file summons during Christmas

vacation goes with jurisdiction of the High Court to hear and determine a matter commenced during the Christmas vacation. I therefore agree with the observation of the Constitutional Court in the case of *Law Association of Zambia and Another v Attorney General*⁵ that:

“It is now settled that a Court cannot arrogate to itself jurisdiction through the craft of interpretation. The Court’s jurisdiction is donated by either the Constitution or Statute or both. And a Court’s jurisdiction is not a matter of procedural technicality but one that goes to the root of the court’s adjudication process. If a court lacks jurisdiction to entertain a matter, it downs its tools.”

- 6.7 Having established so that leave to file summons during Christmas vacation was not obtained, it is inevitable that any proceedings commenced without leave of the court where such leave is required, renders the same liable to be dismissed.
- 6.8 This matter is accordingly dismissed with costs to be taxed in default of agreement.

DELIVERED AT LUSAKA THIS 09TH DAY OF APRIL, 2024.



**G.C. CHAWATAMA
HIGH COURT JUDGE**