

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

2022/HP/0304

BETWEEN:

GIVEN LUBINDA FOUNDATION

AND

MAINDA SIMATAA



PLAINTIFF

DEFENDANT

Before the Honourable Ms. Justice S. Chocho, in Chambers.

For the Plaintiff:

No Appearance

For the Defendant:

Mr. F. Zulu Messrs MPM Legal Practitioners

R U L I N G

Cases referred to:

- i) Megha Engineering and Infrastructure Limited V Attorney General and Anor
(Appeal 270 of 2021)*
- ii) Society Nationale des Chemis De Pir Congo (SNCC) V Joseph Nonde Kakonde
(2013) 3 ZR 5*
- iii) Henderson V Henderson (1843-1860) ALL ER 378*
- iv) Amber Louise Guest Milan Trbonic V Beatrice Mulako and Attorney General
2010/HP/0344 (High Court)*

Legislation referred to:

- i) Order 18 Rule 19 of the Supreme court Rules of England 1999 edition (White Book)*

1. **INTRODUCTION**

- 1.1. This Ruling is in respect an application, in which the Defendant seeks an order to strike out statement of claim and to dismiss action. Grounds advanced are that the statement of claim does not disclose a cause of action, action amounts to an abuse of court process and that it is res judicata.
- 1.2. I must from the start place on record that this Ruling is past it's due date, the position is regretted. The record had been misplaced and could not found by the Registry.

2. **BACKGROUND**

- 2.1. The background to this matter as per pleadings and the Affidavit evidence presented before this Court is that the Plaintiff commenced action by Writ and Statement of claim on 28th February, 2022 claiming the following:-
- i. ***An order restraining the Defendant, his servants and agents from interfering with the Plaintiff's peaceful and quiet enjoyment of stand No. 14726/917/Rem in the Kamwala South of Lusaka District.***
 - ii. ***An order for interim Injunction***
 - iii. ***Damages for inconvenience***
 - iv. ***Punitive and exemplary damages.***
 - v. ***Interest on the said damages.***
 - vi. ***Further relief the Court deems fit.***
 - vii. ***Costs.***

- 2.2. The Plaintiff's application for interim injunction was denied by my sister Lady Justice Mrs. C. Lombe – Phiri on 14 April, 2022.
- 2.3. The Plaintiff filed an Amended statement of Claim on 21st April, 2022.
- 2.4. The Defendant's application was filed on 19th April, 2023.
- 2.5. The Plaintiff was granted interlocutory injunction on 20th June, 2022 which order restraining the Defendant from disturbing/interfering with the Plaintiff's peace enjoyment of stand 14726/917/Rem in the Kamwala South Lusaka.

3. **AFFIDAVIT EVIDENCE**

- 3.1. The Defendant relies on the averments in his Affidavit in Support of the Summons herein. The gist of the application as gleaned from the affidavit in support is that, the Plaintiff's originating process does not disclose a cause of action.
- 3.2. It is further averred that the Court in its Ruling of the 14th April, 2022 effectively pronounced itself on the de/merit of the Plaintiff's claims as pleaded, did not reveal a clear cause of action.
- 3.3. The Defendant further avers that the Plaintiff's attempt at showing cause of action by the Amended statement of claim did not change anything/reveal a clear cause of action.
- 3.4. The Defendant further avers that the matter is res judicata and an abuse of court process as the Court pronounced itself on the demerits of the claims.
- 3.5. The Defendant avers that the Writ of Summons and Statement of claim must be struck out for irregularity and action dismissed for being an abuse of court process and res judicata.

3.6. The Plaintiff did not file an Affidavit in opposition to the application.

4. **THE LAW/SUBMISSIONS**

4.1. I have had occasion to review and consider the application, having heard Counsel for the Defendant, the Defendant's affidavit in support, skeleton arguments and list of authorities cited herein, for which I am grateful.

4.2. This Court has jurisdiction to dismiss an action that fails /does not show cause of action, is res judicata and an abuse of the court process. This power is provided for under Order 18 Rule 19 of the Supreme Court Rules of England 1999 edition (White Book).

4.3. The Defendant refers and relies on a number of authorities for this application. He cited: - **MEGHA ENGINEERING AND INFRASTRUCTURE LIMITED V ATTORNEY GENERAL AND ANOR (APPEAL 270 OF 2021)¹, SOCIETY NATIONALE DES CHEMIS DE PIR CONGO (SNCC) V JOSEPH NONDE KAKONDE (2013) 3 ZR 5², HENDERSON V HENDERSON (1843-1860) ALL ER 378³.**

5. **COURT'S ANALYSIS AND DECISION**

5.1. It is clear from the record that my sister Lady Justice Lombe-Phiri did comment on the demerit of the Plaintiff's originating process. In her Ruling dated 14th April, 2022 wherein she dismissed the Plaintiff's application for interim injunction. She stated: -

"While warning myself that at this point it is not for the Court to conduct a full inquiry, akin to a trial, the Court is called upon to consider the pleadings and see whether there is a right to relief. I have carefully done so. I find that the claims as set out and the case as pleaded do not reveal a clear cause of

action. On that front alone, this application lacks merit and is dismissed.”

- 5.2. The record further shows that the Plaintiff did file an Amended statement of claim on 21st April, 2022. The Plaintiff re-launched an application for interlocutory injunction which was granted by Lady Justice Lombe-Phiri on 20th June, 2022. She stated: -

“This is the Plaintiff’s application for an Order of interlocutory injunction restraining the Defendant from disturbing or interfering with the Plaintiff’s and Directors’ peaceful enjoyment of the property subject of these proceedings.

The application is supported by an Affidavit in support and skeleton arguments.

The Defendant has not filed anything in response. At the hearing of the application Counsel for the Defendant informed the Court that the Defendant would not be opposing the application.

A careful perusal of the affidavit in support of the Application shows that the Plaintiff has met the requisite threshold for the Order sought before the Court.

It is clear that the Plaintiff has sufficient interest in the property in dispute and is currently in occupation of the same under a lease between the Plaintiff and Lusaka City Council. The Plaintiff has also demonstrated that owing to the actions of the Defendant he is deserving of the protection of the law under an order of interlocutory injunction to restrain the Defendant either by himself, his servants or agents from interfering with his quiet enjoyment of the property until determination of this matter.

In that regard I will grant the order as prayed for by the Plaintiff. It is hereby ordered that the Defendant be and is hereby restrained from disturbing or interfering with the Plaintiff's and its directing peaceful enjoyment of Stand No.14726/917/Rem in Kamwala South, Lusaka.

Costs for this application are ordered for the Plaintiff."

- 5.3. In deciding whether or not the Plaintiff's originating process does not show cause of action, is res judicata or abuse of Court process. I have applied my mind to the facts surrounding this case and the Ruling that the Defendant heavily relies on in support of his application.
- 5.4. I have considered the authorities cited by the Defendant and I do not agree that this matter is estopped by res judicata. The claims and action as between the Plaintiff and Defendant have never been fully determined nor judgment delivered. I refer to the case of **AMBER LOUISE GUEST MILAN TRBONIC V BEATRICE MULAKO AND ATTORNEY GENERAL 2010/HP/0344 (HIGH COURT)**⁴, it was held inter alia;-

"In order for a plea of res judicata to succeed, it must be demonstrated that a judgment should have earlier on been pronounced between the parties."

In casu, the record is clear that the Court dismissed the Plaintiff's application for interim injunction (not the main action) for lack of merit. This shows that the substantial claims have not been heard nor determined.

- 5.5. The record also shows that the Court granted the Plaintiff's application for interlocutory injunction on 20th June, 2022 at which application the Defendant placed on record their no contest or objection.

- 5.6. It is clear to me that the Plaintiff does infact have a cause of action which must be heard at trial.
- 5.7. It is my considered opinion that the Defendant's application is berft of merit.

6. **CONCLUSION**

- 6.1. For the foregoing reasons, I hereby dismiss the Defendant's application.
- 6.2. I further order that the matter be heard on the 6th June, 2024 at 08:15 for Scheduling Conference.
- 6.3. I make no award as to costs.

Delivered at Lusaka on 13th May, 2024.



**S. CHOCHO
HIGH COURT JUDGE**

