

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

2314
2015/HP/2014

BETWEEN:

UMESHI PATEL

TIME TRUCKING LIMITED

AND

FLAME EGYPT COMPANY

FLAME WORKS AND SUPPLIERS LIMITED



1ST PLAINTIFF

2ND PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

Before:

The Hon. Mr. Justice Matthew Zulu.

For the Plaintiff:

Ms. N. Mbuyi, and Mr. N. Nkhata, of
Messrs Paul Norah Advocates.

For the Defendant:

Mr. J. Tembo of Messrs Linus E.
Eyaa & Partners.

RULING

Cases referred to:

Legislation & other materials referred to:

1.0. INTRODUCTION

1.1. This ruling is in respect of an application by the second Defendant for an order directing service on the first Defendant. the application was made pursuant to Order

III rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia.

2.1 BACKGROUND

2.1 A brief background to this application is that the Plaintiff, Time Trucking Limited, took out a writ of summons and statement of claim dated December 3, 2015 against the Defendants, Flame Works and Suppliers Limited, seeking the following reliefs:

- i. Damages for breach of contract;*
- ii. Damages for breach of statutory duty,*
- iii. Damages for negligence;*
- iv. Interest; and*
- v. Costs.*

1.2. The Defendant in his defence averred that the it was true the Plaintiff contracted it to build a house for him, but denied that the agreement included decorating the said house.

1.3. The Defendant denied the allegations that the contract included:

- i. Supply of ZESCO main electrical networks and external electrical works;
- ii. Landscape related civil works and finishing
- iii. External pool;
- iv. Pool electromechanical;
- v. Sauna; and
- vi. Salination Plant.

1.4 The Defendant counter –claimed as follows:

- (a) An order and declaration that the contract of sale dated 20th November, 2009 between the Plaintiff and Defendant was duly rescinded by the Plaintiff;*

- (b) An order that the Defendant pays the Plaintiff the equivalent rebased amount of K25,000.00 that was paid by the Plaintiff under the rescinded contract;*
- (c) An order that the caveat placed on the Defendant's property by the Plaintiff premised on the rescinded contract of sale be removed;*
- (d) An order for costs incidental to these proceedings;*
and
- (e) Any other relief that the court may deem fit.*

3.0 THE SECOND DEFENDANT'S AFFIDAVIT EVIDENCE

3.1 An affidavit in support was deposed to by Mutale Mukuka, the second Defendant's Advocate. It was deposed that this matter was initially commenced against the 2nd Defendant as sole Defendant and that the second Defendant subsequently applied to join the first Defendant, a Company incorporated in Cairo, Egypt to the proceedings. And that the order for joinder was granted by ruling dated April 14, 2017, but that the Plaintiffs have never served process on the first Defendant.

3.2 The Plaintiff did not file an affidavit in opposition instead, the application was opposed via skeleton arguments and viva voce submissions.

4.0 THE PARTIES' SKELETON ARGUMENTS

4.1 The second Defendant's Advocate, Mr. Sitali argued that the first Defendant ought to be served the originating process. That as the first Defendant was made a party to the present proceedings premised on representations made before court on affidavit, there was risk that judgment might be entered against the first

Defendant without it being accorded an opportunity to be heard.

- 4.2 to augment his arguments, Mr. Sitali adverted to the case of Bob Zinka v The Attorney General (1990-1992) Z.R. 73 wherein the Supreme Court held:

The principles of natural justice – an English law legacy – are implicit in the concept of fair adjudication. These principles are substantive principles and are two-fold, namely, that no man shall be a judge in his own cause, that is, an adjudicator shall be disinterested and unbiased (nemo iudex in causa sua); and that no man shall be condemned unheard, that is, parties shall be given adequate notice and opportunity to be heard (audi alteram partem). As quaintly stated by an eighteenth-century judge, Fortescue, J., in R v Chancellor of the University of Cambridge at p. 567:

Even God himself did not pass sentence on Adam before he was called upon to make his defence.

We are, of course, here concerned with the second principle.

The principles of natural justice must be observed by courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially, except where their application is excluded or by necessary implication.

- 4.3 It was further argued that by the court's own ruling granting joinder, it was clear that the first Defendant would be affected

by the decision of this court. An excerpt from the ruling of the court was referred to couched as follows:

I am satisfied that [2nd Defendant] has managed to satisfy the conditions prescribed in Order XIV relating to an application for non-joinder. I am of this view because the stated nexus is sufficient proof that [the 1st Defendant] has an interest in this legal suit and is likely to be affected by the result of the suit... FEC shall be joined to this suit as the 1st Defendant. This shall bring all parties to this dispute before the court and thereby avert the possibility of a multiplicity of actins arising from the same facts, a position that was emphasised by the Supreme Court in the case of Simbeye Enterprises Limited & Investrust Merchant Bank Limited v Ibrahim Yousuf SCZ Judgment No. 36 of 2000 in which it was held as follows:

It has been the practice of the Supreme Court to join any person to the appeal if the decision of the court would affect that person of interest.

4.4 The Plaintiff's Advocate, Mr. Mwamba, contended that even though the court had discretion to grant interlocutory orders, the exercise of such discretion was subject to particular rules governing practice and procedure of Court on the Specific matter which is subject of the application. That the present application, required an examination of the provisions of Order X rule 14 of the HCR, which sets out the practice and procedure on service of process as follows:

Where the suit is against a defendant residing out of but carrying on business within the jurisdiction in his

own name, or under the name of a firm, through an authorised agent, and such suit is limited to a cause of action which arose within the jurisdiction, the writ or document may be served by giving it to such agent and such service shall be equivalent to personal service on the defendant.

4.5 According to Mr. Mwamba the above provision highlights some ***elements which had since been satisfied by the Plaintiff, thus;***

(i) the defendant resides out of jurisdiction but carries on business within Zambia;

(ii) An authorised agent carries on the defendant's business;

(iii) there is a suit against the Defendant limited to a cause of action which arose within Zambia;

(iv) there is service upon that authorised agent.

4.6 Mr. Mwamba argued that the second Defendant in its application dated December 16, 2016 had exhibited documents which indicate that the first Plaintiff is a Company that was domiciled in Egypt and that the Board of Directors of the first Defendant on June 1, 2011, by resolution authorised the second Defendant as a Zambian Associate of the Company to undertake the instruction of the first Plaintiff's residential property as an agent. And that upon that breach of contract dated June 11, 2011, a contract that was executed and performed in Zambia.

4.7 It was contended that the second Defendant having been duly served with the originating process, and the second Defendant

the ordinary and grammatical meaning of the words is that the person on whom service is effected must be one through whom the Defendant has continued to carry on business in the jurisdiction. It did not include one who was previously an agent, but no longer is. That as it were, the second Defendant was an agent for the first Defendant for a specific project which had since come to an end and the principal – agent relationship had since terminated.

4.11 that the project having been completed, it could not be said that the second Defendant was carrying on the business through the second Defendant as its authorised agent.

4.12 it was contended that the Plaintiffs could not abdicate the prosecution the prosecution of their case according to the requirements of a fair hearing and place the burden of service on the second Defendant.

4.13 I was urged to grant the application sought that is, to direct the Plaintiffs to effect service on the first Defendant with costs to the second Defendant.

5.0 **DETERMINATION**

5.1 I have carefully considered the affidavit evidence tendered by the second Defendant and the parties respective arguments tendered in by Counsel.

5.2

The legal regime for service of process is ably spelt out under Order X of the HCR. And the starting point is that service of process ought to be personal. Further, where service is to be effected out of jurisdiction such as is sought in the present action, the law to be relied on is as spelt out under Order X rule 15. And the relevant portions thereof are here- below excerpted:

15. Service out of the jurisdiction of a writ of summons, originating summons or originating notice of motion, or of a notice of such writ of summons, originating summons or notice of motion may be allowed by the Court or a Judge whenever-

(e) The action is one brought to enforce, rescind, dissolve, annul or otherwise affect a contract or to recover damages or other relief for or in respect of the breach of a contract-

(i) made within the jurisdiction; or

(ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction; or

(iii) by its terms or by implication to be governed by Zambian law;

or it is one brought in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to

his own name or under the name of a firm, through an authorised agent, and such suit is limited to a cause of action which arose within the jurisdiction. Under such a situation the writ or document may be served by furnishing it on such agent, and such service shall be equivalent to personal service on the defendant

5.6 However, as correctly observed by the second Defendant's Counsel, the first Defendant was not previously domiciled within the jurisdiction for service on the second Defendant to amount to sufficient service. Clearly, the premium placed on Order X rule 14 is misplaced. The correct provision that is applicable to the facts herein, is that postulated under Order X rule 15 (e)(i) and (ii), this is because the first Defendant has never been domiciled within jurisdiction and acted on the impugned contract through its authorised agent, the second Defendant. As such, the Plaintiff was duty bound to effect personal service on the first Defendant upon it being joined to the proceedings as a Defendant. As such, the second Defendant's application is tenable

6.0 CONCLUSION

6.1 In the light of the foregoing, the application is granted as prayed. And for the avoidance of doubt the Plaintiff is hereby ordered to effect personal service on the first Defendant in the light of Order X rule 15.

6.2 Considering the length of time that has elapsed in this matter, and in order to do complete and in order to perfect this order, I do hereby exercise my discretion under Order III rule 2 of the HCR and do hereby grant leave to the Plaintiff pursuant to Order X rule 16 HCR to effect service of Court process on the first Defendant at 28, Elshaheed Ahmed Wasfy-Almaza- Heliopolis, Cairo, Egypt.

6.3 Costs for the second Defendant in the cause.

Leave to appeal is granted.

DATED THE DAY OF MAY 2024



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THE HON. MR. JUSTICE M. ZULU