IN THE SUPREME COURT OF ZAMBIA **APPEAL N0. 114/2013**

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

ISAAC LUNGU **APPELLANT**

AND

MBEWE KALIKEKA **RESPONDENT**

CORAM: CHIBESAKUNDA Ag CJ, WANKI JS AND KAOMA Ag. JS

On 14th June, 2013 and 02nd April, 2014

For the Appellant: Mr. C. Magubbwi - Messrs Magubbwi & Associates

For the Respondent: Mr. Q. K. Mumba - Messrs Quinton M. Kalonde & Company

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JUDGMENT

Kaoma, Ag JS delivered the Judgment of the Court.

Cases referred to:

1. **Ruth Kumbi v Robinson Kaleb Zulu S.C.Z Judgment No. 9 of 2009**
2. **Krige and Another v Christian Council of Zambia (1975) Z.R. 15**

3. **Lindsay Parkinson and Company Limited v Triplan Limited (1973) 2 All E.R. 273**
4. **Darlington v Mitchell Construction Company Limited (1966) Z.R. 10**
5. **Evan v Bartlam (1937) 2 All ER 646**
6. **Borniface K. Mwale v Zambia Airways Corporation Ltd (In Liquidation) 1998 Z.R. 71**
7. **Chikuta v Chipata Rural Council (1974) Z.R. 241**
8. **Keary Development v Tarmac Construction (1995) 3 ALL ER 534**

<u>Legislation referred to</u>:

1. **English Law (Extent of Application) (Amendment) Act No. 14 of 2002**
2. **English Law (Extent of Application) (Amendment) Act No. 6 of 2011**
3. **Rules of the Supreme Court, 1999 Edition**
4. **Supreme Court Rules, Cap 25**
5. **High Court Rules, Cap 27**

This is an appeal against a ruling of the High Court, dated 31st October, 2011 which upheld the order of the Deputy Registrar that the appellant should pay security for costs in the sum of K40,000,000.00 (now K40,000.00) to the respondent before his appeal to the judge at chambers could be prosecuted.

The background of this matter is that on 21st September, 2005 the appellant and the respondent signed a loan agreement in which the respondent advanced to the appellant a sum of K20.0 million and the appellant pledged title deeds of his house

No. 35909 Kabelenga/Dr. Damie Road also known as subdivision ‘R9’ of Farm no. 748 ‘NJO’ Ndola as security for the loan. The loan was to be repaid by 21st October, 2005 together with interest of K10.0 million. If the loan was repaid after that date there would be additional interest of K5.0 million raising the amount payable to K35.0 million. Then repayment of the loan and all interest accrued thereon was to be completed on 22nd November, 2005. If there was delay in completing the repayment after that date, the appellant would automatically forfeit the house given as security.

The appellant defaulted prompting the respondent to instruct his advocates to start the process of transferring ownership of the house into his name. On 6th July, 2007 the appellant commenced proceedings against the respondent in the Subordinate Court at Ndola seeking a number of reliefs, including a declaration that the interest rates of 300% to 600% per annum chargeable under the loan agreement were unconscionable, punitive, contrary to law and therefore illegal, and an order that the respondent’s intended sale of the house without obtaining an

order of possession and sale or a foreclosure order was irregular and illegal and if any sale had been perfected it was null and void.

In his defence the respondent had pleaded that the interest rates were agreed upon, and that he was entitled to sell the house in issue. He also counterclaimed, inter alia, payment of the loaned amount, damages for loss of business, and foreclosure and sale of the security pledged by the appellant.

On 9th December, 2008 the respondent commenced a fresh action against the appellant in the High Court for possession and vesting of title of the property in accordance with the loan agreement. On 6th February, 2009 the respondent obtained judgment in default of appearance and defense before the Deputy Registrar on 22nd June, 2009 the appellant applied before the Deputy Registrar to dismiss the action for duplicity or to set aside the default judgment on the ground that there was a similar case pending in the Subordinate Court. On 19th March, 2010 before the application was heard, the respondent moved the Subordinate Court to dismiss the appellant’s action for want of prosecution. The matter was dismissed on the ground that there had been

inordinate delay to prosecute it. On 2nd June, 2010 the appellant moved the Subordinate Court to stay and set aside the default order dismissing his action for want of prosecution.

Following that the Deputy Registrar heard the application to dismiss the respondent's action for duplicity and/or to set aside the default judgment. The respondent argued that there was no duplicity as there was no longer any action pending in the Subordinate Court. On 4th October, 2010 the Deputy Registrar ruled that there was no similarity in the two actions and no proof that the subordinate court matter which was dismissed was still pending.

On 26th October, 2010 the appellant appealed to a judge in chambers. The appeal was never given a hearing date. On 24th March, 2011, the respondent moved the Deputy Registrar under Order 40(7) of the High Court Rules for an order that the appellant pays security for costs before hearing of his appeal. On 13th May the Deputy Registrar directed the appellant to pay K40,000,000,00 security, within 7 days, before his appeal could be heard.

Dissatisfied with that decision, on 8th of June, 2011, the appellant appealed to the Judge in chambers. He alleged that the Deputy Registrar failed to observe that there had been a multiplicity of processes by the respondent which eclipsed the appeal and made it impossible for the appeal to be heard before those processes. He also alleged that the Deputy Registrar erred when he held that there was failure by the appellant to present the appeal, as the appeal had never been allocated a date of hearing and had never come up prior to the ruling. He further alleged that the court in making its order for costs disregarded the very important aspect of considering the merits of his appeal and of the settled legal position that security for costs cannot be ordered against a person who is compelled to take proceedings which are merely defensive.

In her ruling the learned Judge observed that the security for costs related only to the appeal against the ruling of the Deputy Registrar of 4th October, 2010; that the respective actions commenced by the parties were diverse and there could be no claim for duplicity; and that the security for costs did not relate to

the main action where the appellant was taking a defensive action. She further stated that the appellant was not, by taking up the appeal against that ruling, trying to defend himself and was not even compelled to appeal against the ruling. Therefore, he was not taking a defensive action, but was just trying to unnecessarily delay the conclusion of the case. She concluded that the Deputy Registrar was on firm ground when he ordered security for costs; and that the appellant should pay the security for costs before the appeal could be prosecuted and bear the costs of the appeal.

Aggrieved by that decision, the appellant has now appealed to this Court raising two grounds of appeal namely:

1. **That the court below erred when it observed that the Deputy Registrar's order for security for costs does not relate to the main action wherein the defendant, now appellant is taking a defensive action when in fact and conversely the said order for all intents and purposes relates to the appellant's filed opposition/objection to the main or substantive action.**
2. **That the lower court erred in fact when it found and concluded that the defendant had an option of either appealing or not against the said order of the Deputy Registrar and that by taking the option of appealing**

there against was not acting defensively but was unnecessarily delaying the case.

At the hearing of the appeal both learned counsel relied on their written Heads of Argument. In his submissions on the first ground of appeal, Mr. Magubbwi, counsel for the appellant, argued that the Judge's ruling was borne out of misapprehension of the facts or processes on the record. He submitted that the Judge observed that the ruling of the Deputy Registrar was prompted by the appellant's application to set aside the default judgment and/or dismiss the action for duplicity. In counsel's view, however, the Judge erred when she stated that security for costs does not relate to the main action where the defendant is taking defensive action against the plaintiff'. That by so holding, she wrongly failed to appreciate the simple fact that the appellant's application was and is in fact an objection to set aside the default judgment or defensive process to the respondent's main action.

It is counsel's contention that by reason of misdirection at law and in fact, the lower court wrongly endorsed the Deputy Registrar's order for security for costs and placed itself outside

the provisions of Order 23 rule 3/3 of the Rules of the Supreme Court, 1999 Edition which states that security for costs cannot be required from a defendant who is exercising his right to defend himself against attack, nor from a person who is compelled to litigate or to take proceedings which are merely defensive. That the said provision by virtue of section 2 (e) of the **English Law (Extent of Application) (Amendment) Act No. 14 of 2002**[2] is of statutory effect and binding on our courts.

To reinforce this argument, counsel also referred us to **Ruth Kumbi v Robinson Kaleb Zulu**[1] where we held that:

> **"Now by statute, the Zambian courts are bound to follow all the rules and procedure followed in England as stated in the 1999 edition of the white book. The entire provisions of the Rules of the Supreme Court as expounded in the white book, 1999 edition, including the decided cases, are now Zambian law by statute and as such binding on the Zambian Courts".**

He submitted that we should overturn the lower court's finding and reverse the order for the payment of security for costs.

On ground two, Mr. Magubbwi argued that the holding of the lower court that the appellant in appealing against the order of the Deputy Registrar was not acting in his defence as he had an option of either appealing or not, was wrong in fact and law. He said that the appeal relates to the appellant's challenge to the respondent's proceedings arising from the application to set aside default judgment and/or to dismiss the proceedings for duplicity, so the said holding is superfluous and wrong in fact and law and should be reversed. He contended further that the order for security for costs endorsed by the Judge puts a caveat upon the appellant from challenging the Deputy Registrar's decision that dismissed his defence/objection to the proceedings.

He submitted that the decision estops the appellant from benefiting from Order 23 rule 3/3 RSC which does not permit an order for security against a defendant. He said in line with the **Ruth Kumbi**[1] case the appellant is denied from enjoying a statutory provision. To buttress his argument, he cited **Krige and Another v Christian Council of Zambia**[2] where Baron DCJ in delivering the judgment of the Court referred to the principle that

one cannot set up an estoppel against a statute. He asked us to set aside the order for security for costs as the lower court acted contrary to the law by stopping the appellant from benefiting from the provisions of Order 23 rule 3/3 RSC. He prayed that the appeal be allowed with costs.

On behalf of the respondent, Mr. Mumba argued both grounds of appeal together. In brief he submitted that the learned Judge was on firm ground when she held that the appellant had an option whether or not to appeal the ruling of the Deputy Registrar, and he was not taking a defensive action, but was trying to unnecessarily delay the conclusion of the case. He said appealing against a Judge's ruling over an order of payment of security for costs cannot be said to be a defensive action as such action can only relate to the main action.

He argued further that Order 40(7) of the **High Court Rules** and Rule 56 of the **Supreme Court Rules, Cap 25** have similar provisions on payment of security for costs and that the latter rule further provides that 'the court may make compliance with any such order a condition precedent to the entertainment of any

appeal'. Mr. Mumba said that by Order 23/1–3/16 RSC, security cannot be required from a defendant who is exercising his right to defend himself against attack. But he said that the appellant is a debtor, who has evaded payment since September, 2005 and that the appeal is petty and frivolous.

He submitted further that since the writ and statement of claim were served on him on 4th January, 2009, the appellant has failed to file appearance and defence, but has preoccupied himself with countless applications and absenteeism from various dates of hearing given by the court. That he does not deny liability, but purports to argue on interest when he executed the loan agreement.

To fortify this argument counsel referred us to the English case of **Sir Lindsay Parkinson and Company Limited v Triplan Limited**[3] and contended that the respondent has a high degree of succeeding in his claim against the appellant. He submitted that in the affidavit in support of summons for an interim/interlocutory order of injunction at pages 3-4 of the Supplementary Record of Appeal, the appellant acknowledged his

indebtedness and is not putting up any defensive action. Therefore, the rulings of the Deputy Registrar and the Judge must be upheld.

In counsel's view, this is in fact a matter in which the High Court should have ordered the appellant to furnish or pay further security for costs. He referred us to **Darlington v Mitchell Construction Company Limited**[4] and **Evans v Batlam**[5].

In the Further Heads of Argument he stated that under Order 23 RSC, a defendant will not qualify for protection if in the opinion of the court there appears to be no merit or the matter is not likely to succeed. That the person seeking the protection afforded by Order 23, must show that he is able and ready to defend himself which the appellant has failed to do. That the appellant's appeal to the Judge in chambers cannot be said to be a challenge to the respondent's proceedings arising from a default judgment and to dismiss the action for duplicity; and that the two applications were interlocutory and did not relate to the main action.

He submitted also that if the appellant had over the years filed appearance and defence he could call this a defensive action. That the Judge cannot be faulted, and she did not put a caveat or stop the appellant from exercising his right. He said that **Kriges v Christian Council of Zambia**[2] has no bearing on this case. Finally he urged us to dismiss the appeal with costs and to order the appellant to bear the costs of the proceedings in the court below and to bar or prevent the appellant from taking any further step or action until he pays security for costs as ordered.

We have considered the record of appeal and the submissions of learned counsel. We have identified two issues arising from the grounds of appeal. The first is whether the order for security for costs related only to the appeal and not the main action. The second is whether the order for security prevented the appellant from pursuing a genuine claim. We will deal with the two issues together as they are interrelated. We shall also look at the factors that may be taken into account on an application for security.

In **Darlington v Mitchell Construction Company Limited**[4] cited by Mr. Mumba, Evans Ag, J, applying **Evans v Batlam**[5], stated that a Judge who hears an appeal from a Registrar must exercise his judgment and discretion anew and independently as though the matter came before him for the first time though he must give the weight it deserves to the registrar's decision. This is the correct position even today.

Before we consider the two issues raised for decision we want to deal with the submission by Mr. Magubbwi that by virtue of section 2(e) of the **English Law (Extent of Application) (Amendment) Act No. 14 of 2002**[2], and **Ruth Kumbi v Robinson Kaleb Zulu**[1] the provisions of Order 23 Rule 3/3 of the RSC, 1965 Edition and of the RSC or White Book 1999 Edition are of statutory effect and binding on our courts**.** We wish to state that the position as put by counsel for the appellant is no longer the same with the passing of the **English Law (Extent of Application) (Amendment) Act No. 6 of 2011**[8].

By this amendment, and of course subject to the provisions of the Constitution and to any other written law, (a) the common

law; (b) the doctrines of equity; (c) the statutes which were in force in England on 17th August, 1911.....; and (d) any statute of a later date than that mentioned in (c) in force in England, now applied to Zambia, or which shall apply by an Act of Parliament, or otherwise, shall be in force in Zambia.

However, English practice and procedure rules only apply in so far as there is a lacuna in our rules or practice and procedure. We do not resort to English practice and procedure when our own rules and procedures are clear and comprehensive. In **Chikuta v Chipata Rural Council**[7] we stated at page 243 that the practice and procedure in the High Court is laid down in the High Court Rules, and that where the same are silent or not comprehensive, recourse should be had to the English White Book**.**

To this effect we have noted that Order 40(7) of the High Court Rules, Cap 27 and Rule 56 of the Supreme Court Rules, Cap 25 provide for the issue of security for costs. However, as the learned Judge was referred to Order 23 rule 3 RSC and she actually referred to it, we shall determine this appeal in terms of both the High Court Rules and the White Book 1999 edition.

We turn now to the merits of the appeal. It is trite that a successful party in litigation is usually entitled to have a substantial part of his costs paid by the losing party. However, the costs of every suit or matter and of each particular proceeding therein are in the discretion of the Court (See Order 40(1) and (6) of the High Court Rules).

With regard to security for costs, Order 40 rule 7 of the High Court Rules provides as follows:

> **“The Court or a Judge may, on the application of any defendant, if it or he thinks fit, require any plaintiff in any suit, either at the commencement or any time during the progress thereof, to give security for costs to the satisfaction of the Court or a Judge, by deposit or otherwise, or to give further or better security, and may require any defendant to give security, or further or better security for the costs of any particular proceeding undertaken in his interest”.**

We had the opportunity in **Borniface K. Mwale v Zambia Airways Corporation Ltd (In Liquidation)** [6] to discuss the issue of security for costs. We held as follows:

> **“According to Rule 1 of Order 40 of the High Court Rules, costs are monies incurred in defending oneself or in proving one's case. Therefore, costs do**

not include the actual amount claimed. Security for costs is generally provided by the plaintiff. However, the proceedings in which the defendant can be ordered to provide security for costs are only those proceedings taken in his own interest. To hold otherwise would be a paradox since the defendant is forced to appear before court to defend his rights".

Clearly Order 40 rule 7 places discretion on the Court or the Judge in deciding whether or not to grant security for costs. It is also clear from the foregoing rule and authority that security for costs can be ordered against a plaintiff or a defendant in a matter. Suffice to add that for a defendant it is only in proceedings taken in his interest, such as a counterclaim, that a plaintiff can apply for security in respect of the costs of that counterclaim.

Order 23 rule 1 RSC 1999, also deals with the circumstances in which the Court may, on an application made by a defendant, order security for costs 'if having regard to all the circumstances of the case, it thinks it just to do so. The circumstances are (a) the plaintiff is ordinarily out of the jurisdiction, or (b) the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person

and there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or (c) the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated, or (d) the plaintiff has changed his address during the proceedings with a view to evading consequences of the litigation.

We ought to add that the circumstances listed above have been widely used in our jurisdiction to apply for security for costs under Order 40 rule 7 of the High Court Rules, Cap 27. Again it is clear that the Court has a complete or real discretion whether to order security, and it will act in light of all the relevant circumstances of the case. In other words, the court must carefully consider the effect of making such an order, and in the light thereof to determine to what extent or for what amount a plaintiff (or the defendant as the case may be), may be ordered to provide security for costs (see paragraph 23/3/3 RSC 1999).

In **Sir Lindsay Parkinson & Co Ltd v Triplan Ltd**[3], Lord Denning MR highlighted the circumstances that the Court might take into account on an application for security as follows:

1. **Is the claim bona fide and not a sham?**
2. **Does the claimant have a reasonably good prospect of success?**
3. **Is there an admission by the defendant on the pleadings or elsewhere that money was due?**
4. **Is there a substantial payment into court, or an 'open offer' of payment?**
5. **Is the application for security being used oppressively so as to try to stifle a genuine claim?**
6. **Is the claimant's want of means brought about by any conduct by the defendant, such as delay in payment or doing their part of the work?**
7. **Is the application for security made at a late stage of the proceedings?**

We have considered the circumstances that led to the order for security in this case. We note firstly that the respondent's affidavits at pages 138 and 170 of the Record of Appeal did not disclose circumstances that would warrant security against a defendant. We repeat what we said in **Borniface K. Mwale**[6] that ordering security for costs against a defendant who is a party that is forced to appear before a court by a party commencing the proceedings is a paradox.

Secondly, while the Judge admitted that the appellant's appeal to a Judge in chambers dated 26th October, 2010 had never been given a hearing date, and that the appellant could not be blamed for the delay in prosecuting the appeal, she still acknowledged that the main matter had taken long and thus placed the blame on the appellant when he had no control over the setting of a hearing date. This came out clearly when the Judge said the appellant was not, by taking up the appeal against the order for costs, trying to defend himself and that he had an option to appeal or not to appeal.

We accept as submitted by counsel for the respondent that the court faced with an application for security will look into the prospects of success. But the court will not be enthusiastic about considering the merits of the claim unless it is possible to clearly demonstrate, one way or another, that there is a high degree of probability of success or failure. In this case it does not seem that the learned Judge considered the prospects of success of the claim or of the appeal when she confirmed security of K40,000,000.00.

Further, the possibility or probability that the appellant will be deterred from pursuing his appeal by an order for security for costs is a sufficient reason for not ordering security. We are aware that the burden to show that a security for costs order would probably have the effect of stifling litigation is on the claimant and that the Court ought to weigh the injustice to a claimant if prevented from pursuing a proper claim by an order for security with the possible injustice to the defendant if they could not recover their costs (See **Keary Development v Tarmac Construction**[8]). In this case it is clear that the appellant's appeal will not be heard if the security is not paid.

Furthermore, both parties' conduct in the proceedings ought to be taken into account. We accept that the appellant's failure to file a defence resulted in the default judgment and that there was an acknowledgement on the record that the amount loaned was owed. However, the appellant had the right to challenge the high interest rates on the loaned amount and he was granted leave to appeal out of time to the Judge in chambers against the Deputy Registrar's order for security for costs.

The respondent is not without blame. He commenced fresh proceedings in the High Court when similar proceedings over the same facts and subject matter were pending in the subordinate court. We are alive to the fact that the learned Judge below held that the two actions were diverse, but it is clear from the pleadings that there was duplicity. There was also an unexplained delay by the court itself to hear the appeal. As we have said the appeal was never given a hearing date up to the time of the order for security.

In addition, the respondent moved the subordinate court to dismiss the appellant's action challenging the high interest rates on the loaned amount before the application to set aside default judgment and/or to dismiss the High Court action for duplicity could be heard by the Deputy Registrar. Furthermore, he applied for security for costs five months after the appeal against the order for security was filed (though security can be granted at any stage of the proceedings). This conduct on the part of the respondent ought to have been looked at seriously.

We have since established from the case record at the Ndola Subordinate Court that the matter that was dismissed for want of prosecution was in fact restored on 14th June, 2011 by Magistrate Yvonne Nalomba and on 20th May, 2013 the matter was re-allocated to Magistrate Chongo Chitundu for trial on the merits. As late as 12th December, 2013 there was an application by the appellant's advocates to pay a sum of K10,000.00 out of court. In other words the appellant's action at the subordinate court is still subsisting.

The learned Judge below seemed to accept that under Order 23/3/3 RSC 1965 (Order 23/3/23 RSC 1999), security for costs cannot be required from a defendant who is exercising his right to defend himself against attack nor from a person who is compelled to litigate or to take proceedings which are merely defensive, but she observed that the order for security for costs does not relate to the main action where the defendant is taking a defensive action.

It is not clear to us from the order for security for costs that the order related only to the appeal against the dismissal of the

application to dismiss action for duplicity and/or to set aside default judgment. We agree with the argument by Mr. Magubbwi that the appellant's aforesaid application and the subsequent appeal which was never given a date of hearing, was a defensive action and that the order for security affected not only the appeal, but the main action as well.

Even if we were to agree with the learned Judge that the security for costs order related only to the appeal, we still find the amount of K40,000,000.00 to be excessive, and unjustified. We cannot fathom out what expenses the respondent would incur in defending the appeal before the Judge in chambers. We are not even sure how the security for costs of K40,000,000.00 was arrived at. The respondent's affidavits in support of the application for security did not even indicate the amount of costs incurred so far or the estimated costs of the appeal or indeed the estimated future costs.

We want to make it very clear that the court must award only such sum of money as will provide a 'sufficient security', which must be reasonable, in all the circumstances of the case. In

fact such a high amount of security undermines access to justice and the appellant's ability to seek and obtain a remedy through the court. We emphasise that there is no access to justice where the justice system is financially inaccessible to litigants. We again encore our decision in the **Borniface K. Mwale**[6] case that costs do not include the actual amount claimed. In the present case it seems to us that the amount of security included the loaned amount.

In conclusion we agree with Mr. Magubbwi that the order for security barred the appellant from seeking redress and that it was being used oppressively to stifle him from prosecuting a genuine appeal. We disagree with Mr. Mumba that this is a matter in which the learned Judge should have ordered further security for costs.

We are satisfied that the learned Judge in exercising her discretion in this case misdirected herself in law and in principle when she confirmed the order for security of costs in the sum of K40,000,000.00 against the appellant who was the defendant in the matter as he did not choose to embark on the litigation and

he had the right to defend himself and to appeal to the Judge in chambers.

For the reasons stated above, we allow the appeal. We set aside the order for security and direct that the appellant's appeal be heard immediately before a different Judge at Ndola. However, we order each party to bear own costs.

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L. P. CHIBESAKUNDA

ACTING CHIEF JUSTICE

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M. E. WANKI

SUPREME COURT JUDGE

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R. M. C. KAOMA

ACTING SUPREME COURT JUDGE