IN THE SUPREME COURT OF ZAMBIA **SCZ/8/09/2010**
HODEN AT KABWE
(Civil Jurisdiction)

B E T W E E N :

HAROON MUHOMED HUSSEIN **APPELLANT**

29 SEP 2020

AND

EBENEZER PREM CHELLEPPA **RESPONDENT**
(T/A KNIGHT HIGH SCHOOL)

Coram: **Phiri, Wood, and Malila JJS, on 12th August, 2015 and 29th September, 2020**

For the Appellant: Mr. A. D. Mwansa of Messrs AD Mwansa Mumba & Associates

For the Respondent: Messrs SLM Legal Practitioners (Notice of non-appearance)

J U D G M E N T

Phiri JS, delivered the judgment of the court.

Cases referred to:

1. *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Limited (1973) QB 609 at p. 626-627*
2. *Aquila Design (GRB) Products Ltd. v. Cornhill Insurance Plc (1988) BCLC 134 (CA)*
3. *Ebrard v. Gassier (1894) 28 Ch. D. 212*
4. *Kevorkian v. Burney (1957) 4 ALL ER 468*

5. *Keen Exchange Holding Company v. Ingrid Andrea Loiten & Investrust Bank Plc (2009) ZR 343*
6. *Jonathan Mwiinga v. The People (1981) ZR 243*
7. *General Nursing Council of Zambia v. Ing'utu Milambo Mbangweta (2008) ZR 105*

Legislation referred to:

1. *High Court (Amendment) Rules 1997 – Statutory Instrument No. 71 of 1997*
2. *Rules of the Supreme Court (1999 edition)*
3. *Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*

By Writ of Summons and Statement of Claim the appellant commenced proceedings in the High Court against the respondent. The claim was for a liquidated sum of K218,249,268.65 arising from a verbal tenancy arrangement relating to some property let by the appellant to the respondent. The trifling details of the claim are of no moment to the present appeal.

On the Writ issued against the respondent, the appellant (then as plaintiff) endorsed his address as House No. 30, Midway Road, Leicester, LE5 5TP, United Kingdom. The respondent (as defendant in the lower court) thereupon entered conditional appearance and took out an application for security for costs and for misjoinder under Order XL rule 7 and Order XIV rule 5(2) of the High Court Rules. The

basis for the application for security for costs was that as the appellant (plaintiff) is not a Zambian resident, it will be improbable for the respondent to recover its costs in the event that the appellant/plaintiffs did not succeed in his action. The application for misjoinder on the other hand was rooted in the fact that the lease agreement was concluded between the appellant and Knight High School Limited, a body corporate.

The application was opposed by the appellant on several fronts. First, that the respondent had filed a conditional memorandum of appearance which was never served on the appellant. Later the respondent's advocates served on the appellant summons for security for costs and for misjoinder. The respondent, however, failed to file his defence, thus rendering the pending application for security for costs improper and untenable.

Second, that although he is a British national resident in the United Kingdom, the appellant possesses real property in Zambia known a Stand No. 3049, Makishi Road, Fairview Lusaka, in respect of which the present dispute arose. He thus believed that even if he resides outside the jurisdiction of the court, the court would, in

determining the defendant's application consider his *bona fide* claims against the respondent as he had good prospects of success. Further, that the application was merely intended to stifle the prosecution of his genuine claims and was frivolous, oppressive and an abuse of court process.

Kajimanga J [as he then was] heard the application. He determined that Order 40 rule 7 of the High Court Rules does indeed allow a plaintiff in the position of the appellant to apply for security for costs. The judge stressed that he has discretion whether or not to grant an order for security of costs and that the exercise of such discretion is dependent upon the particular circumstance of the case.

The judge further held that as the appellant was resident outside jurisdiction, an order for security for costs was warranted.

He considered the appellant's averment that he had real property within the jurisdiction which could be resorted to in the event that his action was unsuccessful and an order for costs made against him. The judge, however, was of the view that merely owning property within the jurisdiction of the court was not sufficient as

such property could easily be disposed of before any possible costs order was satisfied.

The court believed that the appellant's property could only offer sufficient security if an attachment order is granted in respect of the property pending determination of the main cause. He thus proceeded to order attachment of the appellant's property as security for costs pending the final determination of the matter. He also allowed the respondent liberty to lodge a caveat on the property.

The judge declined to consider the argument of the appellant that the application for security for costs was oppressive and an abuse of court process, stating that to do so would drag him into a premature consideration of the merits of the claims before him. He, however, stated that he saw no prejudice to the appellant prosecuting his claim.

Unhappy with that decision, the appellant lodged the current appeal on ten grounds structured as follows:

1. **The learned judge in the court below erred and misdirected himself both in law and fact by failing to consider and determine the appropriateness and reasonableness of the stage at which the respondent made an application of security for costs.**

2. **The learned judge in the lower court erred and misdirected himself both in law and fact by failing to consider all the circumstances of the case.**

3. **The learned judge in the court below erred and misdirected himself both in law and fact by ordering security when the appellant who resides out of this jurisdiction has a fixed and permanent property in Lusaka, Zambia.**

4. **The learned judge in the court below erred and misdirected himself both in law and fact by failing to find that the respondent's application for security for costs is irregular, frivolous or vexatious and an abuse of the court process.**

5. **The learned judge in the court below erred and misdirected himself both in law and fact by failing to exercise his judicial discretion judicially.**

6. **The learned judge in the lower court seriously erred and misdirected himself both in law and fact by making an unjust and oppressive order that the defendant is at liberty to lodge a caveat against any dealing in the said property which must be removed by the defendant immediately after the conclusion of this matter, in the event that the plaintiff's action against the defendant succeeds.**

7. **The learned judge in the court below erred and misdirected himself both in law and fact by ordering security in the absence of a defence on the record.**

8. **A finding and ruling on whether or not the judge had any discretion not to consider and take into account both the skeleton arguments and authorities relied upon with or without copies of such**

authorities filed by the parties pursuant to Order LIII rule 12 of the High Court (Amendment) Rules 1999.

9. **A finding and ruling on whether or not it is proper and lawful for a party to the proceedings without any interest in the other party's property, especially where such property is not in contention to lodge a caveat on such property or any other.**

10. **The learned judge in the court below gravely erred and misdirected himself in both law and fact by failing to consider the appellant's apparent business interests in his property and for failing to seek from and order the respondent to give an undertaking to compensate the appellant for loss that would arise from the respondent's lodgment of a caveat on the appellant's property.**

Our immediate observation is that all these grounds of appeal speak to but one grievance. Had a little more focused energy been invested in formulating them, several of these grounds could well have been condensed into one or two grounds. Furthermore, the structuring of grounds 8 and 9 are rather unconventional.

At the hearing, Mr. Mumba, learned counsel for the appellant relied on the heads of argument and list of authorities filed.

In support of ground one of the appeal, it was contended that the timing of the grant of the order for security for costs was wrong because the court should have satisfied itself that before making

such an order, the respondent had filed its defence or admitted the appellant's claim. The appellant complained that the ruling being impugned was delivered almost eight months after the action was commenced by which time the defence or admission had not been entered.

Counsel also argued at large about the law relating to the entry of judgment in default of defence. He cited and quoted Order XI rule 1(1) of the High Court (Amendment) Rules 1997 – Statutory Instrument No. 71 of 1997, dealing with entry of appearance to a writ of summons. He also reproduced Order XII rule (1) of the High Court Rules providing for entry of final judgment where a defendant fails to enter appearance to a specially endorsed writ of summons. He also referred to Order 19 rule 2(1) of the Rules of the Supreme Court (1999 edition) which is to the same effect.

The submission on ground one in a nutshell was that the application for security for costs would only have been appropriate and reasonable if the respondent had filed its defence showing that the appellant's claim was likely to fail. Because the court did not at

that time know whether the respondent was denying or admitting the appellant's claim, it was inappropriate to grant the order for security for costs at that stage.

As regards ground two of the appeal, it was the appellant's contention that the judge made the order complained of without taking into consideration all the circumstances of the case.

The appellant complained about the conduct of the respondent which was viewed as unusual and wondered why the court did not take the totality of the respondent's actions into account. Counsel submitted that in the process of resisting the appellant's claim in the lower court, the respondent made an application for misjoinder which it only withdrew after a challenge from the respondent. It was revealed in the process that some payment towards the liability being denied was made by the respondent through their advocates. Furthermore, the appellant also showed the lower court through an affidavit that the respondent could not be said to have been a wrong party to the proceedings as he had in fact at some point applied to court to determine the standard rent. All these are factors which,

according to the appellant, the court should have taken into account before making the order being challenged.

Counsel prayed that we uphold ground two of the appeal.

In arguing in support of ground three, counsel for the appellant contended that it was wrong for the lower court judge to have based his decision to grant the order merely on the basis that the appellant was a British national who resided in the United Kingdom. Referring us to Order 23 rule 3(3) of the Rules of the Supreme Court (1999 edition) at page 429 and 430, the learned counsel submitted that it is no longer an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. Security for costs cannot now be ordered as a matter of course, from a foreign plaintiff. The court must think it just to order such security in the circumstances of the case.

The learned counsel cited the case of *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Limited*[1] as itemizing the factors which a court should take into account when considering whether or not to exercise its discretion to consider granting an application for security for costs. As set out by Lord Denning, those factors are:

(a) the genuiness of the plaintiff's claim;

(b) the plaintiff's prospects of success;

(c) whether the defendant has made any payment into court;

(d) whether the plaintiff's impecuniosity has been brought about by the defendant's conduct;

(e) the stage at which the application has been made;

(f) whether the application is being made oppressively and therefore designed to stifle a claim which has reasonable prospects of success;

(g) the (improved) rights of enforcement either within or outside the jurisdiction.

Counsel submitted that of all these factors, the most relevant to the situation at hand, is the likelihood of the appellant succeeding in his claim. In his view, the facts as disclosed in the pleadings, made the appellant's prospects of succeeding bright. He itemised those facts which he regarded as tilting the case heavily in favour of the appellant.

He learned counsel also submitted that there was geneuiness in the appellant's claim; that the application for security for costs was made at a wrong stage – i.e. before the respondent submitted its defence and that the whole application by the respondent was being made oppressively to stifle a claim that had reasonably good

prospects of succeeding. Relying on the case of *Aquila Design (GRB) Products Ltd. v. Cornhill Insurance Plc*[2], counsel submitted that a court is entitled to refuse to make an order for security for costs where, as in the present case, the order was calculated to prompt the appellant to abandon a claim which otherwise has good prospects of success.

The appellant's learned counsel quoted Order 23 rule 3 sub-rule 7 of the Rules of the Supreme Court (1999 Edition) at p. 432 as follows:

> **Security will not be required from a person permanently residing out of the jurisdiction if he has substantial property whether real or personal within it...but, semble, the property must be of a fixed and permanent nature, which can certainly be available for costs or at any rate such as common sense would consider so.**

According to counsel, the appellant did in this case demonstrate in his affidavit in opposition that he owned real estate within Zambia, namely Stand No. 3049, Makishi Road, Fairview, Lusaka. It was thus unjust for the lower court to have granted the order for security for costs.

The case of *Ebrard v. Gassier*[3] was cited in aid of counsel's submission. There Bowen LJ stated as follows:

> **The plaintiffs being abroad were *prima facie* bound to give security for costs, and if they desired to escape from doing so they were bound to show that they had substantial property in this country, not of a floating but of a fixed and permanent nature, which would be available in the event of the defendant being entitled to costs of the action.**

The learned counsel also quoted a passage from the judgment of Geer LJ in *Kevorkian v. Burney*[4] which is substantially to the same effect. More pointedly perhaps, he referred us to a High Court of Zambia decision in *Keen Exchange Holding Company v. Ingrid Andrea Loiten & Investrust Bank Plc*[5] where the court held that a factor to take into account in exercising discretion to order security for costs is the plaintiff's prospects of success in the action. "If, the plaintiff has prospects of success, it is the plaintiff and not the defendant who would be entitled to costs."

Counsel for the appellant urged us to uphold the third ground of appeal.

Ground four of the appeal was generic in its criticism of the lower court. It merely posited that the court erred by not finding that the respondent's application for security for costs was irregular, frivolous or vexatious and an abuse of court process. More or less repeating the arguments that he had made under ground one of the

appeal, counsel submitted that the defendant had failed to file its defence or admission nearly eight months after the commencement of the action which can only lead to one conclusion, namely that the respondent had no defence.

Under ground five, the lower court judge's exercise of discretion was challenged. Counsel submitted that the judge did not exercise his judicial discretion judiciously. The reason for that submission, according to counsel, is that the court did not consider that there was a contract between the parties from which the claims arose; he failed to ensure that the full consequences of the respondent's failure to file the defence were brought to bear and that he did not take into account all the surrounding circumstances. In support of the submission, counsel referred to the case of *Jonathan Mwiinga v. The People*[6], where it was stated that the court's discretion must be exercised judicially and not capriciously. He also mentioned the case of *General Nursing Council of Zambia v. Ing'utu Milambo Mbangweta*[7] where we expressed similar sentiments.

Ground six attacked the lower court's order that the appellant's property be caveated. Counsel quoted section 76 of the Lands and

Deeds Registry Act, Chapter 185 of the Laws of Zambia and section 77(1) of the same Act, and submitted that although those provisions give persons interested in land grand powers to place a caveat over land in respect of which they have an interest, the provisions do not go so far as to cover rights other than those recognised as being lawfully claimed or held. The respondent in the present case did not acquire any estate or interest in the appellant's property to entitle him to lodge a caveat estopping the appellant from having any dealings in the property.

The learned counsel cited a number of authorities dealing with the right to caveat property. The brief point he made was that it was wrong for the court below to have ordered entry of a caveat to secure costs to the detriment of substantial proprietary rights of the appellant.

Ground seven of the appeal, again confirms the concern we expressed earlier in this judgment that the grounds and the arguments are unduly repetitive. Like was argued under grounds 1, 3, 4 and 5 the argument of counsel under this ground was that it was

a misdirection on the part of the lower court judge to have ordered security for costs in the absence of a defence.

The learned counsel did not advance any arguments on grounds eight, nine and ten. We thus viewed them as abandoned.

Counsel ended by urging us to uphold the appeal on all grounds and order costs against the respondent.

There was no appearance by counsel for the respondent who filed a notice of non-appearance, but had filed brief heads of argument for our consideration.

Counsel for the respondent made a general argument opposing the whole appeal before zeroing in on specific grounds. Referring us to Order 59/1/142d of the Rules of the Supreme Court (1999 edition) counsel submitted that this authority, like many others, confirms the position that an appeal will not be entertained from an order arising from the exercise of discretion by a judge unless it can be demonstrated that such discretion was exercised under a mistake of law or in disregard of principle or under a misapprehension as to the facts or that the judge took into account irrelevant matters.

According to counsel, the power of the court to order security for costs being discretionary, it is not appealable unless the appellant demonstrates that it is a proper case in which that discretion can be interfered with. The appellant in the present case has not demonstrated that this is an appropriate case for such interference. The appeal should, according to counsel, thus be dismissed with costs.

In responding specifically to the grounds of appeal, counsel for the respondent replied to grounds 1, 4, 5 and 7 together and separately argued grounds 2, 3 and 6. They equally advanced no arguments on grounds eight, nine and ten of the appeal.

In respect of the first cluster of the grounds of appeal (i.e. 1, 4, 5 and 7) the learned counsel for the respondent submitted that these grounds centre on the absence of a defence and the impropriety or otherwise for the court to have entertained the application for security for costs in those circumstances. To address this issue, counsel posed the question: at what stage can a court order a party to furnish security for costs in an action? In response, Order 40 rule 7 of the High Court Rules was quoted. It provides as follows:

> **The court may, on application of any defendant, if it or he sees fit, require any plaintiff in any suit, either at the commencement or at any time during the progress thereof, to give security for costs.**

The learned counsel also quoted Order 23 rule 3(38) of the Rules of the Supreme Court (White Book) which states that:

> **Provided that the right to security is not waived by service of the defence, an order for security may be given at any stage of the proceedings.**

The submission of counsel was, therefore, that the application for security for costs can be made and granted at any time during the proceedings and the court was thus right to have entertained the application.

Turning to ground two of the appeal. Counsel's brief response was that the lower court judge considered all the relevant circumstances and addressed them before making his order. The relevant factors which the court took into account were that the appellant was resident abroad and had only one viable property upon which the respondent could rely to recover his costs in the event that costs were awarded against the appellant. In the view of the appellant there were no other factors to consider.

In responding to the appellant's submission that it was wrong for the lower court to have ordered security for costs against a non-resident plaintiff who had real property in Zambia, counsel for the respondent posed the question: under what circumstances will a court order security for costs against a plaintiff?

To answer that question, Order 23 rule 1 of the Rules of the Supreme Court (1999 edition) was reverted to. It provides the circumstances under which an order for security for costs can be made. One such circumstance is where the plaintiff is ordinarily resident out of jurisdiction. Counsel submitted quite simply that the court thus properly granted the order for security for costs.

Turning to ground 6 of the appeal, the respondent's counsel contend that the lower court judge was on firm ground to have made the order for a caveat to be placed on the property in view of the nature of the security. Moreover, the court in exercise of its discretion, has wide powers to order attachment of property in the form of a caveat. Under Order XXVI of the High Court Rules the court has power to order interim attachment of property, real or personal.

We were thus urged to dismiss the appeal with costs for lacking merit.

We are grateful to counsel for their efforts. Although we have taken the liberty to set out the full arguments of counsel relative to all the grounds of appeal argued, we are in no doubt that the real issue for determination is fairly narrow: All circumstances considered, was the lower court judge empowered by the law to make an order for security for costs in the manner he did?

We believe that the general response given by the learned counsel for the respondent calls for our measured consideration. Counsel argued that there should generally be no appeal against the exercise by a court of its discretionary power unless it is shown that the power was not exercised judicially. This brings in the question of the propriety of the whole appeal against a decision of the court relating to costs.

Our view is that the exercise of a discretionary power by a court is indeed appealable. The onus lies on the appellant to show that the

exercise of such discretion by the lower court was injudicious or otherwise improper.

The learned counsel for the appellant has strenuously argued that it was wrong for the lower court judge to grant the order for security for costs against the appellant merely because he was resident out of jurisdiction. It was worse still to have granted the order for security for costs given that he had real property located within jurisdiction.

We appreciate the authorities cited by the learned counsel to support his submission. We well appreciate that orders for security for costs could easily be used as a device to torpedo legitimate court actions and in the process, discourage or frustrate litigation that is otherwise genuine. We think there is public interest in allowing aggrieved persons access to justice so that they have an opportunity to vindicate their rights regardless of what other people, whether interested or not, may think about the merits or otherwise of their claim.

There is also another public interest issue to be considered. People should not be dragged into litigation at huge expense if it is

unlikely at the end of the day that the person at whose instance the litigation was undertaken, will pay the costs associated with litigation. The logic of it is easy. A person who seeks judicial intervention against another and in the process, leads that other to incur costs which were both unintended and unplanned, and it then transpires at the end of it all, that the person who sought court intervention did not after all have legitimate reason to do so, it should follow that such person must bear the costs of the innocent person dragged into litigation.

For plaintiffs who reside out of jurisdiction, the prospect of recovering any costs, should they be unsuccessful in their suit, are on balance remote, and hence the rules that were quoted by the respondent's learned counsel directing that such plaintiff pays security for costs.

Our view is that the learned judge was perfectly within the law to order security for cost. His exercise of discretion for the reasons that he gave is, to us, unimpeachable.

The court was also in order to grant security for costs by way of a temporary encumbrance on the appellant's property as opposed to

a deposit of funds into court. We do not think that the security for costs order thus made was oppressive, nor could it stifle the litigation that the appellant had instituted.

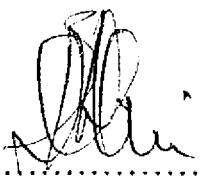
As regards the appellant's complaint that the lower court judge did not take into account all the circumstances, especially the conduct of the respondent before granting the order, we must state that we agree with counsel for the respondent that the lower court judge did in fact take into account the circumstances relevant for the grant of the order. Those circumstances were simply that the appellant resided outside jurisdiction. He had real property in Zambia which could easily be liquidated by way of sale at any time before the conclusion of ligation, thus leaving the respondent exposed in the event that an adverse order of costs is made against the appellant at the end of the litigation. It was not about weighing the relative merit of the case for either party that was paramount; it was about what the law says to secure the financial interests of a party who is unwillingly brought into costly litigation.

As to the granting of an order for costs before a defence was filed, counsel for the respondent asked a pertinent question as to the

stage at which an application for security for costs may be made. He quoted Order 40 rule 7 of the High Court Rules which makes it plain that such application can be made at any time, either at commencement or at any time during the progress of the litigation.

We need not say more than that the argument of the appellant premised on the absence of a defence in this regard is misplaced.

The upshot of our decision is that all the grounds of appeal are without merit. We dismiss them accordingly with costs to the respondent here and below.



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G. S. Phiri

SUPREME COURT JUDGE

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A. M. Wood

SUPREME COURT JUDGE

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M. Malila

SUPREME COURT JUDGE