

IN THE HIGH COURT FOR ZAMBIA

2011/HP/957

AT THE PRINCIPAL REGISTRY

LUSAKA

**BETWEEN:**

MUSESHA CHITUNDU JOSEPH KANKUTA

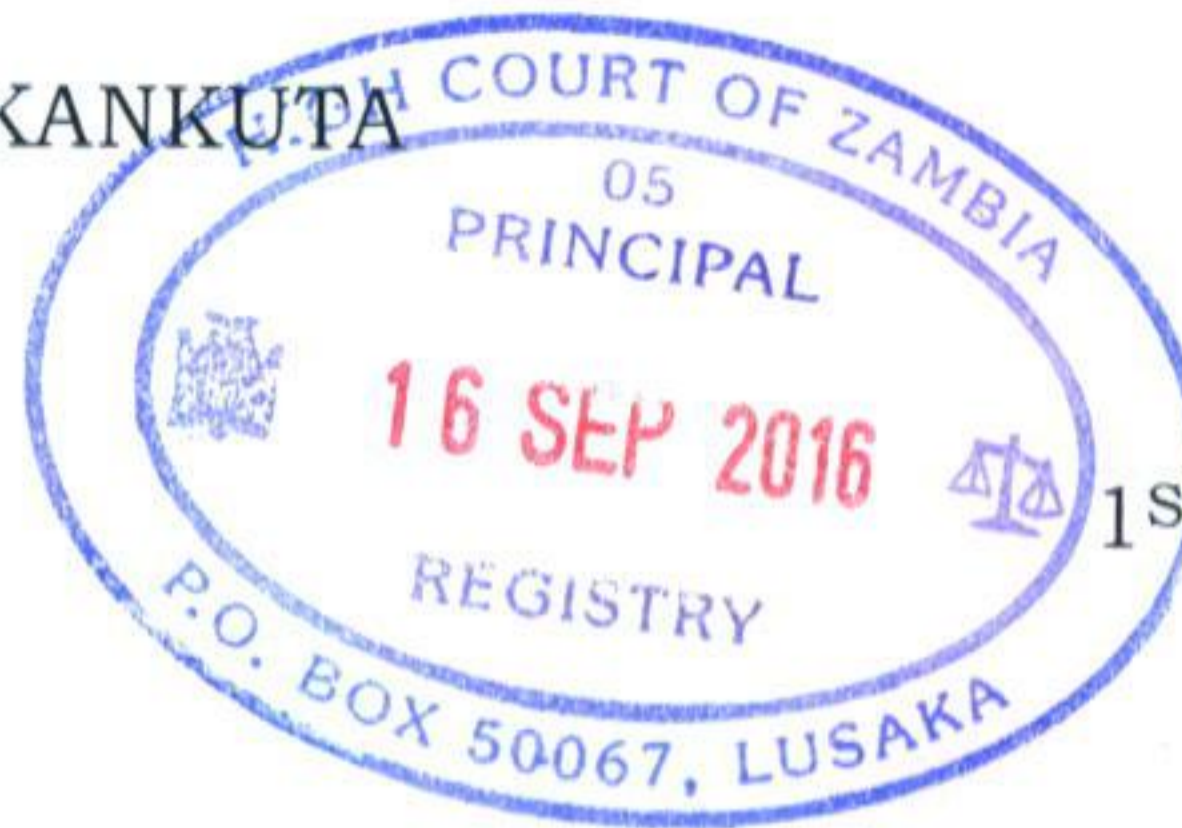
PLAINTIFF

**AND**

CHISAMBA MABLE MWANSA

1<sup>ST</sup> DEFENDANT**AND**

GARY DAVIES CHIBANGULA

2<sup>ND</sup> DEFENDANT

***Before The Honourable Mrs Justice P.C.M. Ngulube in Chambers.***

For the Plaintiff: Dr. J. Mulwila, SC, Messrs Ituna Partners.

For the 1<sup>st</sup> Defendant: No appearance

For the 2<sup>nd</sup> Defendant: Mr Chitundu, Messrs Banaby & Chitundu

## R U L I N G

***Cases referred to:***

1. *Daniel Mwale (Male) vs. Jolomile Mtonga Attorney General, SCZ Judgment Number 25 of 2015*
2. *William David Carlisle Wise vs. E.F. Henrvey Limited (1985) ZR 179 (S.C.)*

This is the 2<sup>nd</sup> Defendants' application to raise a preliminary issue against the 1<sup>st</sup> Defendant. The Notice is dated 22<sup>nd</sup> February 2016. At the hearing of the application, Mr Chitundu on behalf of the 2<sup>nd</sup> Defendant submitted that he would rely on the said Notice. He submitted that the 1<sup>st</sup> Defendant filed in an affidavit in which she made reference to the Plaintiff's evidence at

trial. Mr Chitundu submitted that the affidavit is improperly before the court and prayed that it be expunged from the record. He submitted that there is no law or rule of procedure of this court that provides for the filing of an affidavit in a triable matter. Mr Chitundu submitted that he filed skeleton arguments on the 22<sup>nd</sup> of February, 2016 in which several authorities were cited to the effect that the affidavit is wrongly before the court and should be expunged from the record.

Dr Mulwila, State Counsel declined to comment on the matter as the 1<sup>st</sup> Defendant has an Advocate on record. However, Mr Chitundu stated that the 1<sup>st</sup> Defendant has no legal representation and that she was served by way of substituted service on the 17<sup>th</sup> and 18<sup>th</sup> of August, 2016.

In the skeleton arguments, Mr Chitundu submitted that the 1<sup>st</sup> Defendant filed the affidavit on the 20<sup>th</sup> of August, 2015 without leave of the court and that this offends the rules of practice. Mr Chitundu submitted that the said affidavit is a departure from the case pleaded by the 1<sup>st</sup> Defendant at the close of pleadings. He submitted that this constitutes a separate and independent case. Mr Chitundu referred to the case of **Daniel Mwale (Male) vs. Njolomile Mtonga, Attorney General<sup>1</sup>**, where the court stated that –

***“pleadings are intended to prevent either party from springing up a surprise at that, or allowing an issue to creep up out of the woodwork. They serve the additional useful purpose of isolating the issue of law and fact that will fall to be determined by the trial court.”***

Mr Chitundu also referred to the cases of **William David Carlisle Wise vs. E.F. Hervey Limited<sup>2</sup>** and prayed that the affidavit be expunged from the court record with costs to the 2<sup>nd</sup> Defendant, to be taxed in default of agreement.

I have considered the 2<sup>nd</sup> Defendant's Counsel's submission and the 1<sup>st</sup> Defendant's affidavit of 20<sup>th</sup> August, 2015 on the Deed of Settlement dated 8<sup>th</sup> December, 2011. I do agree that this affidavit is at variance with the one that the 1<sup>st</sup> Defendant filed on the 11<sup>th</sup> of October, 2011, in which she stated that she purchased the property in issue from Presidential Housing Initiative (PHI). She stated that she was the landlord and registered owner of the property and that the Plaintiff only acted her as her Advocate.

It is in the interest of justice that I now order that the affidavit that was filed by the 1<sup>st</sup> Defendant after the close of pleadings be expunged from the court record for the reason that it does not conform to the rules of pleadings and is at total variance with the one that the 1<sup>st</sup> Defendant filed on 11<sup>th</sup> October, 2011.

I further award costs to the 2<sup>nd</sup> Defendant which shall be taxed in default of agreement. Leave to appeal is granted.

***Dated this 16<sup>th</sup> day of September, 2016.***



**HONOURABLE MRS JUSTICE P.C.M. NGULUBE  
HIGH COURT JUDGE**