

IN THE HIGH COURT FOR ZAMBIA **2016/HPC/0193**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN

NEBETH HARDWARE LIMITED 1ST PLAINTIFF

SIMUCHIMBA ISAAC 2ND PLAINTIFF

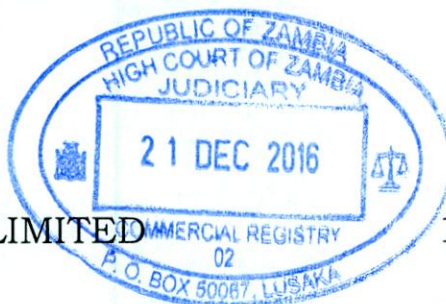
AND

COSMAS MBAO DEFENDANT

Before the Hon Lady Justice Irene Z Mbewe in Chambers

For the Plaintiff: Mr Mulenga of Messrs Philsong and Partners

For the Defendant: In Person



RULING

Cases referred to:

- 1. William David Carlisle Wise v EF Hervey Limited [1985] ZR 179*
- 2. Mubita Mbanga v the Attorney-General [1979] ZR 234*
- 3. Letung v Cooper [1965] 1Q.B 232*

Legislation referred to:

1. *High Court Rules, Cap 27 of the Laws of Zambia*
2. *Rules of the Supreme Court, 1999 Edition*

Other Works:

1. *Odgers Principles of Pleadings and Practice in Civil Actions in the High Court For Justice, 22nd Edition*

The Ruling has been delayed due to the Court's participation in the election petitions relating to the general elections of 2016.

This is a Ruling on the Plaintiff's application for striking out, setting aside or dismissing a counterclaim. The application is made by way of summons and supported by an affidavit deposed by Kennedy Katongo Mwenya a Director in the employ of the Plaintiff Company.

It is averred that the 1st and 2nd Plaintiff's filed a writ of summons and statement of claim on the 3rd May, 2016 (Exhibit "**MK1**") and on the 17th May, 2016, the Defendant filed a Defence and Counterclaim (Exhibit "**KKM-2**"). It is averred that the counterclaim does not disclose material facts on which the Defendant can ground the cause of action relied on in the counter claim namely malicious prosecution, damages for harassment and damages for inconvenience. It is averred that the counterclaim does therefore not meet the threshold set out in **Order LIII Rule 6 of the High Court Rules, Cap 27 of the Laws of Zambia.**

It is the 1st and 2nd Plaintiff's prayer that the Defendant's counterclaim be struck out, set aside or be dismissed for want of material facts in support of the cause of action relied on.

The Defendant did not file an affidavit in opposition to the 1st and 2nd Plaintiff's application.

The 1st and 2nd Plaintiff filed skeleton arguments into Court on 19th August, 2016. Counsel for the Plaintiff has argued that a perusal of the Defendant's counterclaim clearly demonstrates that it has no particular material facts on which the Defendant is relying on to claim for malicious prosecution, damages for harassment and damages for inconvenience. Counsel for the 1st and 2nd Plaintiff relied on the case of **William David Carlisle Wise v EF Hervey Limited (1)**. In the alternative, Counsel argued that for the allegation on malicious prosecution to be successful, fundamental elements have to be proven by the party calling on the Court to find in their favour. It was submitted that the burden of establishing malicious prosecution rests on the Defendant. In support of this proposition, Counsel cited the case of **Mubita Mbanga v the Attorney-General (2)** where it was established that the elements to be proved for a malicious prosecution are prosecution; favourable termination of the prosecution; lack of reasonable and probable cause ; and malice. It was Counsel's submission that the Court finds that there was no malicious prosecution on the Defendant and that the claim is void and is without merit.

I have carefully considered the affidavit evidence, skeleton arguments and viva voce submissions of Counsel for the 1st and 2nd Plaintiff.

The 1st and 2nd Plaintiff's application is predicated on **Order LIII Rule 6 of the High Court Rules** which states as follows:

"6. (1) A Statement of Claim or counter-claim, as the case may be, shall state in clear terms the material facts upon which a parties relies and shall show a clear cause of action, failing which the statement of claim or counter-claim may be struck out or set aside or the action dismissed by the Court, on its own motion or on application by the party."

The Court has the power under **Order LIII Rule 6 of the High Court Rules** to strike out or set aside or dismiss an action on the Court's own motion or on application by the party.

The issue for my determination is whether or not the Defendant's counterclaim meets the requirement of a pleading.

Counsel for the 1st and 2nd Plaintiff submitted that the Defendant's counterclaim does not clearly disclose the material facts upon which the cause of action is being claimed. I have considered the case of **Letung v Cooper (3)** where Lord Diplock assigned a meaning to the phrase "*cause of action*" in which he stated as follows-

"it is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person".

An instructive Order can be found under **Order 15 Rule 1/2A of the Rules of the Supreme Court** where a cause of action has been stated to refer **“to every fact which it will be necessary for a party to prove, if traversed, to support his right to the judgment of the Court.”**

Counsel cited the **William David Carlisle Wise v EF Hervey Limited** in which the Supreme Court held that pleadings are supposed to serve the useful purpose of defining the issues of fact and law to be decided; to give to each party distinct notice of the case intended to be set up by the other party; and to provide a brief summary of each party's case from which the nature of the claim and defence may be easily apprehended.

The above stated fundamental principle on pleadings enunciated in the case of **William David Carlisle Wise v EF Hervey Limited** have similarly been emphasised in **Odgers Principles of Pleadings and Practice in Civil Actions in the High Court For Justice, 22nd Edition** at page 113 which states as follows:

“the object of pleading is to ascertain definitely what is the question at issue between the parties, and this object can only be attained when each party states his case with precision.”

Arising from the purpose of pleadings, a litigant must therefore plead his cause of action or defence with at least clarity and precision as is reasonably necessary to alert his opponent to the case a litigant has to meet. A perusal of the Defendant's counterclaim in paragraph 12 states as follows -

"12. And the Defendant counterclaims -

- i. Damages for inconvenience and malicious prosecution;**
- ii. Damages for harassment by the Plaintiff;"**

A counterclaim should give each party distinct notice of the case intended to be set up by the other, and perhaps of greater relevance to provide a summary of each party's case from the which the nature of the claim can be easily apprehended. I find that the Defendant's counterclaim does not disclose a cause of action in respect of his claim for damages for malicious prosecution, in the sense that a factual situation is not alleged which contains facts upon which the Defendant can attach liability to the 1st and 2nd Plaintiff. The counterclaim is lacking in particularity thereby defeating the purpose of pleadings and did not comply with the procedural rules on pleadings. I find that it is not possible to get a precise hold of the substance of the Defendant's counterclaim against the 1st and 2nd Plaintiff herein due to its vagueness. I concur with Counsel for the 1st and 2nd Plaintiff that the counterclaim be struck off.

In light of the aforesaid, the net result is that the 1st and 2nd Plaintiff's application to strike off the counterclaim succeeds. The Defendant is at liberty to put in a proper pleading and amend the pleadings, with the leave of the Court as such amendment shall in no way prejudice the 1st and 2nd Plaintiff. This application shall be

done within fourteen (14) days from date of this Ruling failure to which the matter shall proceed to trial.

Costs to the Plaintiff and in default of agreement, to be taxed.

Leave to appeal granted.

Dated at Lusaka this 21st day of December, 2016

A handwritten signature in black ink, appearing to read 'Irene Z Mbeve', is written over a horizontal line. The signature is stylized and cursive.

HON LADY JUSTICE IRENE Z MBEWE
HIGH COURT JUDGE