

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2015/HP/2097



B E T W E E N :

GBZ EMERGENCY CALL CENTER

PLAINTIFF

AND

WILLIAM CHISHA KAPELA

DEFENDANT

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the
19th day of April, 2017**

For the Plaintiff : No Appearance
For the Defendant : Mr. A. Mbambara and Ms. D Mulondiwa, Mbambara
Legal Practitioners

R U L I N G

Case Authorities Referred To:

1. *Collett v Van Zyl Brothers* (1966) ZR 65
2. *Joseph Gereta Chikuta v Chipata Rural Council* (1983) Z.R 26 (S.C)

Legislation Referred To:

1. *High Court Act, Chapter 27*
2. *Rules of the Supreme Court, 1999 Edition*

The Defendant brings this interlocutory appeal against a Ruling delivered by the Learned Deputy Registrar which awarded the Plaintiff costs when the Defendant successfully set aside the default judgment of 15th April, 2015; and continued these proceedings by Writ of Summons instead of Originating Summons.

The Defendant fronted two grounds of appeal as follows:

- 1. That the Learned Deputy Registrar erred in fact and law when she condemned the Defendant to costs when the Defendant had succeeded in his application to set aside the default judgment obtained by the Plaintiff on 15th April, 2015.*
- 2. The Learned Deputy Registrar erred in fact and in law when she dismissed the application to set aside originating process for irregularity.*

Learned Counsel for the Defendant filed written submissions where she submitted that according to Order XL Rule 6 of the High Court Rules, costs are to be awarded to a successful party. Placing reliance on Order 62 Rule 2 Sub Rule 11 of the Rules of the Supreme Court, Counsel contended that a successful party should not be deprived of costs.

She then averted to the case of **Collett v Van Zyl Brothers**¹

where it was held that:

“The award of costs is discretionary in the trial judge but there are certain cannons to which the trial Judge must conform in exercising his discretion”

Counsel contended that by condemning the Defendant to costs, the Learned Deputy Registrar erred in law and fact. She also contended that there was no need for the Learned Deputy Registrar to condemn the Defendant to costs when there was no evidence of malafides on his part. Counsel submitted that the Defendant having succeeded in his application to set aside the default judgment should have been awarded costs instead.

In ground 2, Counsel submitted that these proceedings should have commenced by Originating Summons under Order XXX Rule 14 of the High Court Rules which provides that:

“Any mortgagee or Mortgagor, whether legal or equitable.. or any person having the right to foreclosure or redeem any mortgage, whether legal or equitable, may take out as of course an Originating Summons, returnable in the chambers of a Judge for such relief of the nature or kind following as may by the summons be specified....”

Counsel called in aid the case of **Joseph Gereta Chikuta v Chipata Rural Council**², where the Supreme Court stated that:

“It is clear therefore, that there is no case where there is a choice between commencing an action by a Writ of Summons or by an Originating Summons. The procedure by way of an Originating Summons only applies to those matters referred to in Order 6, Rule 2 and to those matters which may be disposed of in Chambers. Chamber matters are set out in Order 30 of the High Court Rules..”

Counsel went on to argue that the Learned Deputy Registrar misdirected herself when she held that Order XXX Rule 14 of the High Court Rules was discretionary, because the Plaintiff had no option but to commence a mortgage action against the Defendant by Originating Summons. Counsel also argued that the discretion to adjourn a matter from Chambers to Court or vice versa under Order XXX Rule 8 of the High Court Rules was preserved for a Judge. Thus, the Learned Deputy Registrar could not make that decision at an interlocutory stage. Counsel concluded with a prayer beseeching the Court to allow the appeal.

The Plaintiff did not file submissions.

I have anxiously considered the interlocutory appeal together with the arguments filed in support.

In ground 1 of appeal, the Defendant's main contention is that the Learned Deputy Registrar should not have condemned him to costs, when he succeeded in setting aside the default judgment. I have no quarrel with the preposition of law given that as a matter of right and course, the successful party (the Defendant at this stage) should have been awarded costs. Equally there was no evidence of malafides upon which the Defendant should have been condemned to costs. As a result, the Learned Deputy Registrar should not have departed from the general rule.

This being the position at law, I have no hesitation in holding that the Learned Deputy Registrar misdirected herself when she condemned the Defendant to costs. Accordingly, the order on costs is set aside.

The second issue raised in this interlocutory appeal relates to the originating process. It was spiritedly argued by Learned Counsel for the Defendant that the Learned Deputy Registrar erred in fact and law when she dismissed the application to set aside the

originating process for irregularity. It was also contended that the Learned Deputy Registrar misdirected herself when she held that Order XXX Rule 14 of the High Court Rules is discretionary.

It is hardly necessary for me to delay the finding that the Learned Deputy Registrar misapprehended the provision of Order XXX of the High Court Rules. The reason is rather straightforward given that the mode of commencement created by that Order is mandatory, in that, matters listed thereunder must be disposed of in Chambers. The decision to adjourn a matter from Chambers to open Court rests only with a Judge and can only be taken where the summons disclose contentious issues that require adjudication at trial. This being the case, it follows therefore that the lower Court had no jurisdiction to make that decision.

My examination of the Plaintiff's Writ of Summons and Statement of Claim reveals that they do not raise contentious issues. Infact, the reliefs sought may very well be disposed of in Chambers.

However, the Defendant's defence raises contentious issues which in my considered view, cannot be resolved on the basis of affidavit evidence. They naturally incline themselves to a trial. In consequence, it is in the interest of justice that these proceedings must continue by Writ of Summons.

Accordingly, I refuse to set aside the originating process for irregularity. The interlocutory appeal partially succeeds. I make no order as to costs.

Leave to appeal is granted.

Dated this 19th day of April, 2017.



M. Mapani-Kawimbe
HIGH COURT JUDGE