

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



B E T W E E N :

FRANCIS NGOMA

PLAINTIFF

AND

GURAS HOLDINGS LIMITED

DEFENDANT

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the
26th day of April, 2017**

For the Plaintiff : Mr. B. Mosha, Messrs Mosha & Co.
For the Defendant : Ms. R. Mwambi, Messrs OMM Banda & Co.

R U L I N G

Case Authorities Referred To:

1. *Kelvin Hang'andu and Company (A firm) v Webby Mulubisha* (2008) ZR. 82 (vol 2)
2. *Development and of Zambia and Another v Sunvest Limited & Another* (1995 – 1997) ZR 187
3. *Societe Nationale des Chemis de Pur du congo v Kakonde* SCZ Judgment No. 19 of 2013
4. *Mukumbuta Mukumbuta & 4 Others v Mongu Meat Corporation Limited & 3 Others* SCZ Judgment No. 8 of 2003

Legislation Referred To:

1. *Rules of the Supreme Court* (1999) Edition

On 21st February, 2017, the Plaintiff filed Writ of Summons and a Statement of Claim seeking damages and special damages in the sum of K43,237.00. The Defendant entered a Conditional Memorandum of Appearance on 22nd March, 2017, and on the same date, filed Summons to Dismiss the Plaintiff's Action for being an Abuse of Court Process. The Summons was accompanied by an Affidavit in Support and Skeleton Arguments.

Charles Gura, the Director of the Defendant Company swore an Affidavit where he deposes that the Plaintiff's claim had been adjudicated by the Local Court as shown in the exhibits marked "**CG1**" and "**GC2**", save for the claim of K16,300.00. He also deposes that on 12th February, 2014, the Plaintiff commenced Originating Summons in this Court under Cause No. 2014/HP/0208 claiming the sum of K16,300 and the goods listed in his Statement of Claim as shown in the exhibits marked "**CG3** and **CG4**." Altogether the claim was for the sum of K43,237.00

The deponent states that under Cause No. 2014/HP/0208, the Defendant applied to dismiss the Plaintiff's action for being an abuse of Court process and in a Ruling dated 2nd February, 2015,

the Deputy Registrar struck out the Plaintiff's claim on goods and allowed the Plaintiff to prosecute his claim of K16,300 as shown in the exhibit marked "**CG5.**"

The deponent further states that owing to the Plaintiff's failure to prosecute his claim of K16,300.00, the Court dismissed his action for want of prosecution on 12th December, 2016 as shown in the exhibit marked "**CG6.**"

The deponent also states that the Plaintiff never appealed the Local Court's decision on the goods and the Court's rulings dated 2nd February, 2015 and 12th December, 2016. The deponent avers that the effect of the Local Court's decision was that it settled the Plaintiff's claim on goods. The deponent contends that by this action, the Plaintiff is subjecting a decided claim for adjudication before this Court in a bid to obtain conflicting decisions over the same cause of action.

The deponent further avers that the Plaintiff's Advocates who were his Advocates in Cause No. 2014/HP/0208 are well aware of the decisions of the Local Court and High Court and have failed to

advise their client properly. Instead, they have encouraged him to abuse the process of Court. The deponent concludes with a prayer beseeching the Court to dismiss this action.

In opposing the application, **Francis Ngoma**, the Plaintiff swore an Affidavit in Opposition where he admits that he commenced an action on 12th February, 2014, under Cause No. 2014/HP/0208 claiming inter alia the sum of K16,300.00 and assorted goods worth K26,937.00.

The deponent also admits that the Defendant applied to dismiss the action for abuse of Court process and a Ruling was rendered wherein his claim on goods was struck out while the claim of K16,300.00 survived for determination.

The deponent avers that on 12th December, 2016, his action under Cause No. 2014/HP/0208 was dismissed for want of prosecution and not determined on its merits. He states that because the matter was never determined on the merits, his Advocates rightly advised him to recommence this action so as to enable him recover the claimed money. He concludes with a prayer

to the Court urging it to dismiss the Defendant's application and to allow him to prosecute his matter.

I have seriously considered this application, the Affidavits filed herein and the Skeleton Arguments. In my considered view, the issue to be determined is narrow and it is whether the Plaintiff's action amounts to abuse of Court process.

The Writ of Summons filed by the Plaintiff under Cause No. 2014/HP/0208 reads as follows:

"The Plaintiff's claim is for K43,297.00.

- 1. Being cash lost from the shop and the value of the 45 assorted goods that were lost arising from unlawful eviction.***
- 2. Damages resulting from the Defendant's action;***
 - a. Costs of this action***
 - b. Interest thereon at such rate for such period the Court shall deem appropriate***
 - c. Such other relief the Court may deem fit.***

On 21st February, 2017, the Plaintiff took out Writ of summons endorsed with claims for:

- "a) Damages***
b) Special damages as claimed
c) Interest
d) Costs of and incidental to the proceedings."

The particulars of special damages are stated at paragraph 7 of the Statement of Claim filed on even date. The total sum of damages claimed is **K43,237.00**

From the foregoing, it is quite obvious to me that the claims under this cause are substantially the same as those raised under Cause No. 2014/HP/0208. Invariably, one would assume that the Plaintiff is raising new claims in this action, but a critical analysis of the claims reveals that they are mostly recycled. In fact, the Plaintiff seeks to recover more than the K43,237.00 which has already been adjudicated by the Local Court. The Ruling of the Learned Deputy Registrar dated 2nd February, 2015, at page 6 confirms this position when she held *inter alia* that:

“All in all as far as the claim relates to K16,300.00 there was no adjudication on it and the Plaintiff could not have recovered that amount in the Local Court, as the Local Court had no jurisdiction to deal with claims for that amount... The claim for the goods is dismissed as it was adjudicated upon by the Local Court..”
(underlining my own)

In the case of **Kelvin Hang’andu and Company (A firm) v Webby Mulubisha¹**, the Supreme Court held *inter alia* that:

“3. Once a matter is before Court in whatsoever place, if that process is properly before it, the Court should be the sole Court to adjudicate all issues involved, all interested parties have an

obligation to bring all issues in that matter before that particular Court. Forum shopping is abuse of process which is unacceptable."

Further, in the case of **Development Bank of Zambia and Another v Sunvest Limited & Another**², the Supreme Court held *inter alia* that:

"We also disapprove of parties commencing a multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter. We also disapprove of the multiplicity of actions between the same parties involving various issues proposed to be raised in the new action which as we said we disapproved of."

After carefully considering the facts of this case, I form the firm view that this action is frivolous, vexatious and an abuse of Court process. If at all the Plaintiff was dissatisfied with the decision of the Local Court, then he should have appealed that decision rather than raising a settled matter under a new cause of action. By not doing so, I find that the Plaintiff engaged in forum shopping, by commencing an action which is *res judicata*.

I am fortified by the case of **Societe Nationale des Chemis de Pur du Congo v Kakonde**³ where the Supreme Court stated that:

"...Res judicata is not only confined to similarity or otherwise of the claims in the 1st case and 2nd one. It extended to the

opportunity to claim matters which existed at the time of instituting the 1st action and giving the judgment.”

By her decision, the Learned Deputy Registrar demonstrated that the Plaintiff's claim only lay for the amount of K16,300.00. The Plaintiff being fully aware of this decision should therefore have sought redress in the Subordinate Court and not the High Court. By embarking on this expedition, the Plaintiff once again exposed and blighted himself to more forum shopping and abused the process of Court.

In the case of **Mukumbuta Mukumbuta & 4 Others v Mongu Meat Corporation Limited & 3 Others⁴**, the Supreme Court held *inter alia* that:

“In view of the fact that the Advocates for the Respondents deliberately and consciously went forum shopping resulting in the parties being before several High Court Judges, it is the Advocates of the Respondents and not the Respondents who should be punished in costs.”

I am convinced from the facts of this case that the Plaintiff's Advocates were fully aware of Cause No. 2014/HP/0208 and the Rulings delivered therein. By insisting on this Cause, I find the Plaintiff's Advocates guilty of the transgression of failing to give proper counsel. As such, they must suffer the consequences of

failing to manage the client-advocate relationship. I accordingly condemn them to costs.

In consequence, I dismiss the Plaintiff's action for being an abuse of Court process. I award costs to the Defendant to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 26th day of April, 2017.



M. Mapani-Kawimbe
HIGH COURT JUDGE