

**IN THE HIGH COURT FOR ZAMBIA**

**2016/HPC/0463**

**AT THE COMMERCIAL REGISTRY**

**HOLDEN AT LUSAKA**

**(Civil Jurisdiction)**



**BETWEEN:**

ACCESS BANK (ZAMBIA) LIMITED

PLAINTIFF

**AND**

KITCHENWARE INDUSTRIES LIMITED

1<sup>ST</sup> DEFENDANT

ANDREW ELIAS KASHITA

2<sup>ND</sup> DEFENDANT

**Before Hon Lady Justice Irene Zeko Mbewe in Chambers**

*For the Plaintiff* : *Ms. Chimuka Mulomba of Theotis Mataka & Sampa Legal Practitioners*

*For the 1<sup>st</sup> Defendant* : *Mr. N. Ngandu of Messrs Shamuwana & Company*

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**RULING**

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**Cases Referred To:**

1. *New Plast Industries Limited v Commissioner of Lands and Another (2001) ZR 51*
2. *Chikuta v Chipata Rural Council (1974) ZR 241*

3. *NFC Africa Mining plc v Techno Zambia Limited (2009) ZR 236*
4. *Chansa Chipili, Powerflex (Z) Limited v Wellington Kanshimike, Wilson Kalumba (2012) ZR 483*
5. *Leopold Walford (Z) Limited v Unifreight (1985) ZR. 203 (S.C)*
6. *Barclays Bank (Z) ltd v Walisko and Company and Mohamed Ashrof Mansor (1980) ZR 7*
7. *Access Bank (Zambia) Limited v Group Five/Zcon Business Park Joint Venture (Suing as a firm)-SCZ/ 8/52/2014 (unreported)*
8. *Informatics Limited and Others V Stanbic Bank Zambia Limited (S.C.Z. judgment No. 2 of 2011)*
9. *Hotelier Limited v Ody's Works Limited and Finsbury Investments Limited (2011/HP/260)*
10. *Lily Drake v MBL Mahtani and Another*

**Legislation Referred To:**

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

This is the 1<sup>st</sup> Defendant's application for an Order for disposal of case on point of law pursuant to **Order 14A as read together with Order 33 (3) of the Rules of the Supreme Court 1999 Edition.**

The application is made by way of notice of motion dated 1<sup>st</sup> April 2016, in which the following questions were raised:

- 1. Whether a mortgage and/or legal charge can be enforced by commencing legal proceedings by way of writ of summons and statement of claim;**



**2. Whether a court has jurisdiction to pronounce itself on a matter erroneously commenced.**

A brief background leading to this application is that the Plaintiff herein commenced an action against the Defendants by way writ of Summons and Statement of Claim dated 27<sup>th</sup> October, 2016 seeking the following reliefs:

1. Payment of all sums of money which as at 17<sup>th</sup> September 2015 stood at ZMW 2, 424, 080=76, interest and other charges due and owing to the Plaintiff by the Defendants
2. Foreclosure
3. Possession of stand no.12631, Chinika Industrial Area, Lusaka and a TATA truck
4. Sale of the said stand no. 12631, Chinika Industrial Area, Lusaka and TATA truck
5. Interest on the above at current bank lending rate
6. Costs of and incidental to this action

The 1<sup>st</sup> Defendant filed a notice of motion to raise a preliminary issue, and in support of the notice of motion filed skeleton

arguments and submitted that the Court is vested with jurisdiction under **Orders 14A Rule 1 and 33 Rule of the White Book** to hear this application. It was submitted that it is a well settled principle of law that mode of commencement of any action is determined by the mode provided for by statute. In support of this proposition the case of **New Plast Industries Limited v Commissioner of Lands and Another** <sup>1</sup> was cited in which it was stated that:

**“The correct position is that the mode of commencement of any action is generally provided by the relevant statute. Thus where a statute provides for the procedure of commencing an action, a party has no option but to abide by that procedure.”**

The 1<sup>st</sup> Defendant's referred to **Order VI Rule 1 and 2 of the High Court Rules, Cap 27 of the Laws of Zambia** in furthering the argument that all actions in the High Court shall be commenced by Writ of Summons unless in exceptional cases where it is otherwise provided for by written law or Rules. **Order XXX Rule 14 of the High Court Rules, Cap 27 of the Laws of Zambia** was also cited which provides to the effect that:



**“Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, 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, and as the circumstances of the case may require; that is to say-**

**Payment of moneys secured by the mortgage or charge;**

**Sale;**

**Foreclosure;**

**Delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property;”**

The 1<sup>st</sup> Defendant contends that the thrust of the Plaintiff's claim against the Defendants is the payment of monies secured by a mortgage and charge, and based on this it was submitted that the mode of commencement of this action is irregular as an originating summons supported by an affidavit would be the appropriate mode of commencement given the circumstances. The case of **Chikuta v Chipata Rural Council** <sup>2</sup> was cited which states that:

**“where any matter is brought to the high court by means of an originating summons when it should have been commenced by writ, the court has no jurisdiction to make any declarations.”**

In respect to following court rules, reliance was placed on the case of **NFC Africa Mining Plc v Techno Zambia Limited** <sup>3</sup> in which the court held that:

**“Rules of court are intended to assist in the proper and orderly administration of justice and as such they must be strictly followed”**

It was the 1<sup>st</sup> Defendant's submission that Rules on the mode of commencement of actions are not regulatory but mandatory as they



go to jurisdiction and as such any breach thereof is fatal and incurable. The Court was urged to dismiss the matter with costs to the 1<sup>st</sup> Defendant.

The Plaintiff filed skeleton arguments in opposing this notice of motion in which it was submitted that **Order XXX Rule 14 High Court Rules, Cap 27 of the Laws of Zambia** is not couched in mandatory terms thus not making it mandatory for a litigant to take out a mortgage action by way of originating summons. **Order 88 Rule 1 Rules of the Supreme Court, 1999 Edition** was cited in support of the argument that a mortgage action can be commenced by way of Writ of Summons. The said Order provides as follows:

**“(1) This Order applies to any action (whether begun by writ or originating summons) by a mortgagee or mortgagor or by any person having the right to foreclose or redeem any mortgage, being an action in which there is a claim for any of the following reliefs, namely -**

- (a) Payment of moneys secured by the mortgage,**
- (b) Sale of the mortgaged property,**

- (c) **Foreclosure,**
- (d) **Delivery of possession (whether before or after foreclosure or without foreclosure) to the mortgagee by the mortgagor or by any other person who is or is alleged to be in possession of the property,**
- (e) **Redemption,**
- (f) **Reconveyance of the property or its release from the security,**
- (g) **Delivery of possession by the mortgagee.**

It was further submitted that the effect of a breach of procedure will not always be fatal if the Rule is merely regulatory or directory as confirmed by the Supreme Court in the case of **Chansa Chipili, Powerflex (Z) Limited v Wellington Kanshimike, Wilson Kalumba** <sup>4</sup> where it held that:

**“An irregularity on account of procedure would not be fatal because corrective action can be taken to allow the action to stand so that triable issues can be proceeded with, if that was all that was irregular.**



It was submitted that **Order 2 Rule 2 of the Rules of the Supreme Court, 1999 Edition** clearly provides that a second chance can be given to the party which has occasioned the irregularity, the party can be allowed to correct it.

Based on the foregoing it was submitted that this is not a case befitting the exercise of this court's jurisdiction in dismissing the action as corrective action can be taken by way of amendment. The Court was urged to exercise its jurisdiction in accordance with the constitutional imperative set out in **Article 118 (2) (e) of the Constitution of Zambia Act No 2 of 2016**. In conclusion it was submitted that this Court has jurisdiction to hear this matter as the breach is procedural and does not go to jurisdiction unlike matters of substance and the Court's attention was drawn to the case of **Leopold Walford (Z) Limited v Unifreight** <sup>5</sup>.

In reply, the 1<sup>st</sup> Defendant reiterated that the law is clear as to what mode of commencement should be used in a mortgage action. The case of **Barclays Bank (Z) Ltd v Walisko and Company** and **Mohamed Ashrof Mansor** <sup>6</sup> was cited in furtherance of its argument. In the said case it was held that:

**“Where an Act of Parliament has specifically laid down the method by which proceedings must begin, there is no option as to which procedure to adopt. The Plaintiff is bound to commence his action by the procedure laid down by the Act.”**

It was further submitted that **Order VI Rule 1 and 2** and **Order XXX Rule 14 of the High Court Rules, Cap 27 of the Laws of Zambia** must be read as whole and not in isolation, and that a reading of the two shows that originating summons is the only way to commence proceedings to enforce a mortgage and/or legal charge. In relation to **Article 118 of the Constitution of Zambia**, the 1<sup>st</sup> Defendant submitted that the Supreme Court in the case of **Access Bank (Zambia) Limited v Group Five/Zcon Business Park Joint Venture (Suing as a firm)** <sup>7</sup> gave guidance on the same when it stated that:

**“..... All that we can say is that the constitution never means to oust the obligations of litigants to comply with procedural imperative as they seek justice from the courts.”**



At the hearing of the matter, Counsel for the parties relied on their respective skeleton arguments filed herein. I have carefully considered the arguments advanced by both parties and I am indebted to both Counsel for the authorities cited.

The issue for determination in this application is whether the Plaintiff is justified in commencing a foreclosure action by way of Writ of Summons and whether this Court has jurisdiction to hear this matter wrongly commenced.

The starting point in resolving the issues before me is to ascertain the relevant Orders on the mode of commencement of an action.

**Order VI Rule 1 and 2 of the High Court Rules, Cap 27 of the Laws of Zambia** states as follows:

**" (1) Except as otherwise provided by any written law or these Rules, every action in the High Court shall be commenced by Writ of Summons endorsed and accompanied by a full statement of claim.**

**(2) Any matter which under any written law or these Rules may be disposed of in chambers shall be commenced by an Originating Summons.**

A reading of **Order VI Rule 2 High Court Rules, Cap 27 of the Laws of Zambia** shows that the law is clear as to which matters should be commenced by originating summons. Further **Order XXX Rule 14 High Court Rules, Cap 27 of the Laws of Zambia** particularly states that mortgage actions will be commenced by originating summons and this was re-affirmed by the Supreme Court in the case of **Informatics Limited and Others v Stanbic Bank Zambia Limited** <sup>8</sup>. It is clear that the law does not allow free reign when it comes to commencement of an action.

There is a plethora of authorities in respect to the mode of commencement of actions. The Supreme Court in the case of **New Plast Industries v Commissioner of Lands and Another** <sup>1</sup> held inter alia that:

"It is not entirely correct that the mode of commencement of any action largely depends on the relief sought, the correct position is that the mode of commencement of any action is generally provided by the relevant statute."



Further, in **BP Zambia Plc v Zambia Competition Commission, Total Aviation and Export Limited and Total Zambia Limited** <sup>9</sup> it was held that:

**"The mode of commencement of any action depends generally on the mode provided by the relevant statute."**

The mode of commencement of actions it is not a matter of choice but rather dependent on what the law provides as per guidance of the Supreme Court in the **New Plast Industries Limited v Commissioner of Lands and Another** <sup>1</sup>. I do not and cannot accept the Plaintiff's argument that the foregoing provisions are not couched in the mandatory term hence a party can commence a mortgage action either by Writ of Summons or Originating Summons. The law is very clear on the mode of commencement in mortgage actions. The Plaintiff argued that a mortgage action can be commenced by way of Writ of Summon and Statement of Claim pursuant to **Order 88 Rule 1 of the Rules of the Supreme Court, 1999 Edition**. My reaction to this argument is that resort to the **Rules of the Supreme Court, 1999 Edition** can only be had in instances where there is a lacuna in our laws. Justice N. K.

Mutuna in the case of **Hotelier Limited v Ody's Works Limited and Finsbury Investments Limited** <sup>10</sup> said that:

**“Resort to the White Book 1999 edition is only to be had, where our law is deficient in practice and procedure to be adopted. It is therefore available to fill any gaps that may exist in our law.”**

I therefore see no need for a litigant to resort to provisions of the **White Book, 1999 Edition** when our laws have clearly stipulated the mode of commencement. The Plaintiff's argument on this issue lacks merit.

The Supreme Court in the **Chikuta** case rightly said that:

**“(i) There is no case in the High Court 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, of the High Court Rules and to those matters which may be disposed of in chambers.”**



Based on the foregoing reasons I find that the first limb of the 1<sup>st</sup> Defendant's application herein succeeds in that the proper way of commencing a mortgage action is by Originating Summons as set out in **Order VI Rule 1 and 2** and **Order XXX Rule 14 of the High Court Rules, Cap 27 of the Laws of Zambia**.

On the question whether or not this Court has jurisdiction to hear this matter, I am alive to the fact that a matter which has been wrongly commenced goes to the jurisdiction of the Court. The Supreme Court in the case of **Chikuta** cited above gave guidance and stated as follows:

**" (ii) Where any matter is brought to the High Court by means of an originating summons when it should have been commenced by writ, the court has no jurisdiction to make any declarations."**

I am in agreement with the 1<sup>st</sup> Defendant's submission that mode commencement goes to jurisdiction. Notwithstanding, I am guided by the case of Lily **Drake v MBL Mahtani and Another** <sup>11</sup>, where the Court held that:

**"We appreciate that these technicalities may not always be clear and for that reason, it has always been the practice of this Court to allow amendment. "**

It is evident from the above cited case that the Supreme Court appreciates that technicalities may not always be clear and allows amendments to be made. In view of the fact that the matter has been wrongly commenced, should this Court proceed to dismiss the action as prayed by the 1<sup>st</sup> Defendant for being improperly before the Court? I invoke **Order 3 Rule 2 of the High Court Rules, Cap 27 of the Laws of Zambia** and allow the Plaintiff to make amendments to proceedings wrongly commenced. I find that it is good practice to allow amendments as long as no prejudice or injustices is done to the parties herein. In the present case, no injustice will be occasioned to the Defendants by allowing the Plaintiff to amend their form of action to an Originating Summons.

Accordingly, leave is granted to amend the originating process from a writ of summons to an originating summons. The originating process to be served on the Defendants within fourteen (14) days of

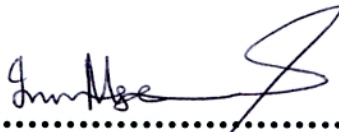


this Ruling, and the Defendants to respond within fourteen (14) days of receipt of the originating process.

I award costs to the 1<sup>st</sup> Defendant to be taxed in default of agreement.

Leave to appeal is hereby granted.

Dated at Lusaka this 31<sup>st</sup> day of May, 2017



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**IRENE ZEKO MBEWE**  
**HIGH COURT JUDGE**