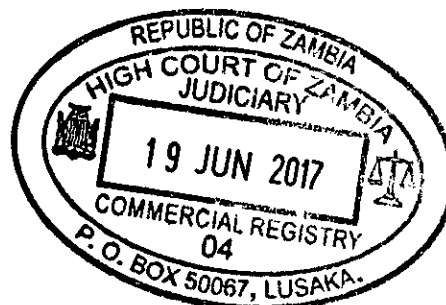


**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

2015/HPC/0348



BETWEEN:

ALLIANCE ONE ZAMBIA LIMITED

PLAINTIFF

AND

KABAYI FARMING LIMITED

DEFENDANT

**Before the Honourable Mr Justice W. S. Mweemba at Lusaka in
Chambers**

*For the Third Party: Mrs M. Kambobe – In House Counsel ZESCO
Limited*

*For the Defendant: Mrs I. M. Kunda – Messrs George Kunda &
Co.*

RULING

LEGISLATION REFERRED TO:

1. Order 16 of the Rules of the Supreme Court of England 1999 Edition (White Book).
2. Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia.
3. Atkins Court Forms, Second Edition, 37 1981 Issue.
4. Order 3 Rule 5 of the High Court Rules, Chapter 27 of the Laws of Zambia.

- 5. Order 4 Rule 9 of the Rules of the Supreme Court of England
(White Book) 1999 Edition.**

CASES REFERRED TO:

- 1. Development Bank of Zambia & Anr V Sunvest Ltd & Anr (1997) Z.
R 187.**
- 2. Finance Bank Ltd – V Monokandilos (2012) ZR Vol 1 484.**
- 3. BP Zambia Plc V Interland Motors Limited (2001) ZR 37.**
- 4. Kelvin Hang'andu and Company (A Firm) V Webby Mulubisha
(2008) Z.R 82 Vol 2.**
- 5. Bascom Enterprises Limited V Bharti Airtel Zambia Holdings B.V
& Ors 2011/ HPC/0201.**
- 6. Attorney General V Tall & Anr (1995) ZR 54.**
- 7. Tobacco Board of Zambia & Musonda Sampa Lishomwa & Ors V
Nkwilimba & Anr (SCZ) No.8 of 2003.**
- 8. Mukumbuta & Ors V Nkwilimba & Ors (SCZ Judgment No. 8 of
2003).**
- 9. Barclays Bank V Tom (1923) 1 KB 221.**

This is a Ruling on an application by the Third Party to set aside Third Party Proceedings. It is supported by an Affidavit sworn by Mweetwa Kambobe Counsel for the Third Party and Skeleton Arguments filed into Court on 15th August, 2016.

It is deposed by Mrs Kambobe that the Defendant on 27th June, 2016 served the Third Party with documentation relating to Third Party Proceedings which included the Affidavit in Support for Leave to issue Third Party Proceedings as well as Third Party Notice.

She further deposed that she had perused these documents and noted that the Defendant stated that there was already an

existing Court action between the Defendant and the Third Party under Cause No. 2015/HP/1554 where the Defendant had sued the Third Party for negligence arising out of a power outage which it claims led to the loss of tobacco.

That she was Counsel seized with conduct of the same matter and Trial had already commenced between the parties and the matter had made significant progress with the Plaintiff having already closed its case and the matter having been adjourned for the opening of the Defence case.

She also deposed that despite the fact that the Defendant did not serve the Third Party with its Skeleton Arguments and List of Authorities in support of its application for leave to issue Third Party Notice, she personally conducted a search on the Record on 3rd August, 2016 and established that the Defendant, apart from claiming a contribution or to be indemnified by the Third Party, had also joined the Third Party to the proceedings in order to prevent multiplicity of actions and to have the matter tried under one cause of action.

Further that since there already existed an action under Cause No. 2015/HP/1554 where trial had already commenced, joining the Third Party to these proceedings would in itself amount to multiplicity of actions.

It was also her position that there was a possibility of conflicting decisions between this action and the one under Cause No. 2015/HP/1554 and it was in the interest of justice that trial be concluded in the matter under Cause No. 2015/HP/1554 where the Court would decide if the Third Party was liable to the

Defendant and that would ultimately have an effect on the Third Party's Liability under this action.

Further that it was in the interest of justice that due to the reasons advanced in the preceding paragraphs the Third Party Proceedings under this action be set aside.

There is also an Affidavit in Opposition filed into Court on 8th September, 2016 sworn by Ireen Mwezi Kunda Counsel for the Defendant.

She stated that the Third Party had filed a Notice of Intention to defend Third Party Proceedings and an Affidavit in Support of Summons to set aside Third Party Proceedings.

It was further deposed that joining the Third Party to the Proceedings would not amount to multiplicity of actions as the two actions did not arise from the same transaction or a series of transactions as evidenced by the different parties in the two actions and that Third Party proceedings were commenced purely to ensure that the matters in the Cause may be effectively and completely determined and adjudicated upon to put an end to further litigation.

Further that the relief prayed for under Third Party Proceedings was for indemnity in that if the Court found that Kabayi Farming Limited had failed and neglected to repay the amount advanced it by the Plaintiff, then the Third Party must be ordered to indemnify the Defendant. Whereas in Cause No. 2015/HP/1554 Kabayi Farming Limited's claim against the Third Party was for damage caused to its tobacco due to power outages and to have

brought in Alliance One Zambia Limited as a party or claimant by Kabayi Farming Limited would have been improper.

It was also her deposition that the Third Party was of the firm belief that there were possibilities of conflicting decisions under the two Causes of action, however and as clearly stated above Third Party proceedings were commenced purely on account of avoiding multiplicity of actions hence having joined them through Third Party Proceedings so that matters may be effectively and completely determined and adjudicated upon to put an end to further litigation in a matter which was commenced by Alliance One Zambia Limited.

She went on to depose that in the interest of justice the Third Party contended that trial should be concluded in the matter under Cause No. 2015/HP/1554 where the Court would decide if the Third Party is liable to the Defendant and that will ultimately have an effect on the Third Party's Liability under this action. The Defendant's contention was that in the interest of justice, joining the Third Party to Cause No. 2015/HPC/0348 would ensure that all parties were heard at once thus effectively and completely determining all matters.

Counsel for the Third Party filed Skeleton Arguments in support of the application to set aside the Third Party Proceedings on 15th August, 2016. She submitted that their arguments were founded on Section 13 of the High Court Act, Cap 27 of the Laws of Zambia which provides that:

“In every civil cause or matter which shall come in dependence in the Court, law and equity shall be

administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail."

She also relied on Order 16/0/2 RSC 1999 Edition which set the tone for Third Party Proceedings right from the editorial introduction that:

"The objects of the rules of this Order are two-fold (1) to prevent multiplicity of actions and to enable the Court to determine disputes between all parties to them in one action, and (2) to prevent the same question from being tried twice with possibly different results."

According to Counsel it was unequivocally clear that Third Party proceedings were aimed at avoiding multiplicity of actions and

preventing different results stemming from two actions over the same subject matter and with the same parties.

It was therefore Counsel's contention that where a matter had already proceeded to trial on the same set of facts it was late in the day to endeavour to bring the parties under this action as the sole court to adjudicate over the issues.

Moreover that the prevention of multiplicity of actions was completely defeated as there now stood two matters on the same set of facts and the same subject matter under this Cause no. 2015/HPC/0348 and under Cause No. 2015/HP/1554.

Counsel also contended that the Defendant in its Skeleton Arguments supporting its application for leave to issue Third Party Proceedings stated that joining of the Third party to this action was to prevent multiplicity of actions owing to the fact that there was already an existing matter between the Defendant and the Third Party. This reasoning therefore flew in the teeth of reason and the Third Party Proceedings were of no consequence and could not stand.

Counsel went on to state that Order 16/0/2 further elucidated that:

“Generally speaking, where a defendant issues and serves a notice on another person who is already a party to the action (R.8) or who is not (R.1), the respective parties stand in relation one to another as if the defendant had brought a separate action against that other person

(McCheane v. Gyles [1902] 1 Ch. 287 at 301; Johnson v. Ribbins [1977] 1 W.L.R. 1458 at 1464, per Goff L.J., CA).

The proceedings which thereby arise have or may have, as it were, a life of their own, quite independent of the main action. They create a "lis" between the parties in question which will remain to be disposed of by the Court in the event of all the other issues falling away."

It was also Counsels submission that it was clear from the foregoing that the Defendant and the Third party would have to call their respective witnesses and argue the matter in exactly the same manner that they were already battling out under Cause No. 2015/HP/1554 which amounted to the same matter being tried before two courts.

Counsel also referred this Court to the case of **DEVELOPMENT BANK OF ZAMBIA AND KPMG PEAT MARWICK V SUNVEST LIMITED AND PHARMACEUTICALS LIMITED (1)** where Ngulube CJ stated that:

"... We disapprove of parties commencing a multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter... with the result that various Courts may end up making various conflicting and contradictory decisions..."

Counsel then argued that as elaborately detailed in the Third Party's Affidavit, the matters raised under this cause were emanating from the same set of facts as those under cause

number 2015/HP/1554, that is, the loss of tobacco due to power outage caused by the alleged negligence of the Third Party.

She also added that the outcome of both actions proceedings was that there would be re-litigation of the same issues as the causes of action were not separate and distinct and this would have the possibility of two Courts making conflicting and contradictory decisions.

Counsel went on to state that the Third Party would suffer substantial prejudice if the Third Party proceedings in this action were not set aside and that the existence of such prejudice was crucial and often a decisive factor as the Court put it in **FINANCE BANK LTD – V MONOKANDILOS (2)** that:

“...The existence of prejudice is a crucial and decisive factor in exercising the discretion whether or not to dismiss an action”

Moreover that it was a question of fact whether or not the Third Party had been prejudiced by the Defendant issuing Third Party proceedings on the same set of facts as an already existing cause of action.

Counsel went on to cite the case of **BP ZAMBIA PLC V INTERLAND MOTORS LIMITED (3)** where it was held that:

“In terms of the section (s13 of the High Court Act, Cap 27) and in conformity with the Court’s inherent power to prevent abuses of its processes, a party in dispute with another over a particular subject should not be allowed to deploy his grievances piecemeal in scattered

litigation and keep hauling the same opponent over the same matter before various courts.”

Counsel then argued that she was relying on this case to argue their position that the Defendant had grievances emanating from the power outage at his farm and it was clear that the Defendant was seeking to have them addressed in piecemeal through scattered litigation which was an abuse of court process and should not be condoned. Further that the Third Party would be out to great inconvenience to appear before different courts in respect of the same subject matter.

Moreover that the Supreme Court further held in the BP Matter that:

“The administration of justice would be brought into disrepute if a party managed to get conflicting decisions which undermine each other from two or more different judges over the same subject matter.”

Moreover that in the case of **KELVIN HANG'ANDU AND COMPANY (A FIRM) V WEBBY MULUBISHA (4)** the Court held that:

“once a matter is before court in whatever place, if that process is properly before it, the court should be the sole court to adjudicate all issues involved, all interested parties had an obligation to bring all issues in that matter before that particular court. Forum shopping is abuse of process which is unacceptable.”

It was also contended that the Defendant had an obligation to ensure that all his issues were brought before that one court and in this case the Defendant and the Third Party are already battling it out under cause number 2015/HP/1554 which should be the only case where the court would adjudicate all issues between the Defendant and the Third Party in relation to the power outage that is said to have led to the loss of tobacco.

According to learned Counsel it was clear that multiplicity of legal proceedings in civil cases was something that the Supreme Court had expressed displeasure upon and as such, the practice was to be avoided.

That it is also clear that a Plaintiff or any party in this case being the Defendant, should not be allowed to deploy grievances in a piecemeal manner through scattered litigation by moving a Defendant in this case the Third Party before different courts.

The Defendant also filed Skeleton Arguments in Support of the application for Third Party Proceedings. It was contended that in opposing the Affidavit in Support to this application, it would be important to point out circumstances giving rise to the action in the two causes that were different.

Learned Counsel argued that in Cause No. 2015/HP/1554 the relief sought by the Plaintiff was in respect of the loss he suffered as a result of power outages caused by the Defendant who were negligent and therefore ought to compensate the Plaintiff.

Whilst in Cause No. 2015/HPC/0348 the relief sought by the Plaintiff was the repayment of a loan which the Defendant got from the Plaintiff with interest. That the two reliefs were radically different therefore there could not be multiplicity of actions as a result of that, further that the parties involved were different.

Counsel also contended that it was important to bring to the Court's attention that the causes of the two actions did not arise from the same transaction or series of transactions. That the transaction in Cause No. 2015/HP/1554 arose out of a service contract between the Plaintiff (the Defendant herein) and the Defendant (the Third Party herein) and the nature of the contract was that of the Defendant providing power to the Plaintiff's farm.

Moreover that the failure by the Defendant to meet its obligation of providing power consistently led to the loss of tobacco and the Plaintiff now wants to be compensated by the Defendant.

On the other hand, the action under Cause No. 2015/HPC/0348 arose through a loan which the Defendant obtained from the Plaintiff and had defaulted in his repayments and now the Plaintiff sought repayment with interest. According to Counsel, the two actions could not therefore be said to have the same facts and lead to a multiplicity of actions and further create two conflicting decisions from two different Courts.

Counsel for the Defendant also relied on the case of **BASCOM ENTERPRISES LIMITED V BHARTI AIRTEL ZAMBIA HOLDINGS B.V & ORS (5)** where the Defendants sought to

consolidate two actions on the grounds that, they arose out of the same or series of transactions and there were common questions of Law and fact to be determined in both. That the reason for the consolidation of actions was to avoid multiplicity of actions and in the interests of having the actions in dispute disposed off at once.

In that matter the Judge stated: *"I therefore find no merit in this application as it relates to the question whether or not the actions arise from common question of law and fact."* He further went on to say *"Their transactions cannot therefore be said to be one and the same transaction nor are there a series of transactions and for this reason the application fails on this ground as well."*

Moreover that in the case of the **ATTORNEY GENERAL V TALL & ANR (6)** the principle established was that joining of the Attorney General to those proceedings would be necessary to ensure that the matters in the cause may be effectively and completely determined and adjudicated upon to put an end to further litigation.

Counsel further contended that both our Order 14 and English Order 15 as well and Section 13 of the High Court Act, Cap 27 of the Laws of Zambia were intended to avoid a multiplicity of actions..... the Court still had an inherent jurisdiction to make this order in the interest of justice.

Counsel also cited the case of **TOBACCO BOARD OF ZAMBIA & MUSONDA SAMPA LISHOMWA (7)** wherein the Defendant's application for an order to dismiss the action for abuse of Court process pursuant to Order 18 Rule 19 (1) of the Rules of the

Supreme Court 1999 Edition, the Court went further to adopt the principle established in the English case of **Riches V DPP (8)** wherein it was decided that in order to be struck out, the litigation must be frivolous, vexatious and hopeless.

That paragraph 18/19/16 of the White Book, in addressing the question of a frivolous, vexatious and hopeless states that, **“these are cases that are so obviously unsustainable.”** In exercising this discretion the Court must be convinced that it is plainly desirable and only in obvious cases.

According to Counsel, Third Party Proceedings were commenced purely on account of Justice and the fact that the Plaintiff commenced proceedings against the Defendant did not amount to multiplicity of actions that will result in conflicting decisions. Therefore setting aside third party proceedings will deprive the defendant the opportunity and right of recovery of the claim from the third party by way of indemnity.

That under 18/19/1 of the White Book it was clearly stated that:

“An Applicant under this Rule must show that he is in some way prejudiced by the content of the proceedings.”

Further that the Third Party would not be prejudiced as alleged but instead her Affidavit in Support of Summons to set aside Third Party proceedings was in fact the prejudicial act whose ends would prejudice the Defendant's legitimate right.

It was also argued in the alternative that if this Court found that the facts and subject matter in the two Causes were the same, it

was the inherent Jurisdiction of the Court to Order consolidation of matters pursuant to Order III Rule 5 of the High Court Act and Order 4 Rule 9 of the White Book and the authority she relied on for this was **MUKUMBUTA & ORS V NKWILIMBA & ORS (8)** where it was held that:

1. The principle governing consolidation of actions is that common questions of Law and facts and rights on relief arising out of the same transaction should be consolidated in one action.
2. The rationale for consolidation is to save costs and avoidance of multiplicity of actions.

In conclusion it was argued on behalf of the Defendant that the Third Party contended that these third party proceedings must be set aside as this was piecemeal litigation as was stated in the case of **BP ZAMBIA PLC V INTERLAND MOTORS AND DEVELOPMENT BANK OF ZAMBIA AND KPMG PEAT MARWICK V SUNVEST LIMITED AND PHARMACEUTICALS LIMITED (1)**, and that therefore her Affidavit in Support of Summons to set aside Third Party proceedings had merit as propounded in the said Affidavit. It was the Defendant's contention that merit to set aside Third Party Proceedings could only be determined by the Courts as it was only Courts that had inherent jurisdiction to determine whether forum shopping had indeed been detected and multiplicity of actions had taken place.

Finally it was submitted that in the case of **TOBACCO BOARD OF ZAMBIA AND MUSONDA LISHOMWA (7)** relating to the Defendant's application for an order to dismiss the action for

abuse of court process pursuant to Order 18 Rule 19 of the Rules of the Supreme Court 1999 Edition, the Court ruled that it was in the interest of justice to order that, that cause be consolidated with earlier cause number 2011/HP/728.

During the hearing on 15th September, 2016, both Counsel for the Third Party Mrs Kambobe and Counsel for the Defendant Mrs Kunda were before Court. Mrs Kambobe relied on Affidavit in Support and Skeleton Arguments filed into Court on 15th August, 2016.

According to her the Third Party Proceedings were an abuse of court process on account of multiplicity of actions as there was already an action by the Defendant against the 3rd Party under Cause No. 2015/HP/1554 premised on the same set of facts as the proceedings in this matter.

Mrs Kambobe augmented the Skeleton Arguments by stating that the two matters were not distinguishable as if they were then the Third Party would be wrongly joined as it was not privy to the Contract between the Plaintiff and the Defendant. Moreover that the Defendant would not be prejudiced in any way by setting aside the Third Party Proceedings as Cause No. 2015/HP/1554 would be determined sooner than later and as such the Defendant would be able to enforce its claim under that action.

Mrs Kunda relied on the Affidavit in Opposition and Skeleton Arguments filed into Court on 8th September, 2016. In addition to these she stated that they attempted to distinguish the two matters because of the Reliefs prayed for. That in this cause the Defendant was asking for indemnity whilst in Cause No.

2015/HP/1554 the Defendant who is Plaintiff in that matter was asking for damages and that if the Court found that there was duplicity it could order consolidation.

In reply Mrs Kamboke Counsel for the Third Party stated that the Third Party could not be called in to indemnify the entire claim by the Plaintiff in Cause No. 2015/HPC/0348. Moreover that the Third Party was being brought in to indemnify the component relating to the damaged tobacco which was the same one being tried in cause No. 2015/HP/1554.

I have considered the Affidavit evidence, the Skeleton and Oral Arguments, the authorities cited by both learned Counsel for the Third Party and the Defendant.

Mrs Kamboke premised this application on Section 13 of the High Court Act, Cap 27 of the Laws of Zambia which provides that law and equity should be concurrently administered. She also relied on Order 16/0/2 of the Rules of the Supreme Court, 1999 Edition which sets out the tone for Third Party Proceedings from its editorial introduction which states that:

“The objects of the rules of this Order are two-fold (1) to prevent multiplicity of actions and to enable the Court to determine disputes between all parties to them in one action, and (2) to prevent the same question from being tried twice with possibly different results.”

Based on this she stated that the object of Third Party proceedings was to avoid multiplicity of actions and prevent

different results stemming from two actions over the same subject matter and with the same parties.

It was also her contention that where a matter had already proceeded to trial on the same set of facts it was late in the day to endeavour to bring the parties under this action as the sole court to adjudicate over the issues.

Mrs Kambobe also cited the case of **DEVELOPMENT BANK OF ZAMBIA AND KPMG PEAT MARWICK V SUNVEST LIMITED AND SUN PHARMACEUTICALS LIMITED (1)** where the Supreme Court disapproved of parties commencing a multiplicity of actions over the same subject matter....as this would result in various Courts making various conflicting and contradictory decisions.

She also relied on the case of **KELVIN HANG'ANDU AND COMPANY (A FIRM) V WEBBY MULUBISHA (4)** cited above.

Mrs Kunda in opposing the application to set aside the Third Party Proceedings contended in sum that the two actions were different therefore there could not be a multiplicity of actions and further they could not create two conflicting decisions from two different courts.

She relied on the cases of **BASCOM ENTERPRISES LIMITED & ORS V BHARTI AIRTEL ZAMBIA HOLDINGS B.V & ORS (5)**, **ATTORNEY GENERAL V TALL & ANR (6)** AND **TOBACCO BOARD OF ZAMBIA & MUSONDA SAMPA LISHOMWA (7)**.

It was also her position that merit to set aside Third Party Proceedings could only be determined by the Courts as it was only the Courts that had inherent discretion to determine whether forum shopping had indeed been detected and multiplicity of actions had taken place.

She also argued that Third Party Proceedings were commenced purely on account of justice and setting them aside would deprive the Defendant of the opportunity and right of recovery of the claim from the Third Party by way of Indemnity.

I note from the record that the Defendant issued Third Party Notice against the Third Party on the 24th of June, 2016 in order to be indemnified by the Third Party if they were found liable after being brought before Court by the Plaintiff in this matter.

The Third Party in applying to set aside these Third Party Proceedings has contended that there is already a matter under Cause No. 2015/HP/1554 in Court and that adding the Third Party to these proceedings would amount to multiplicity of court actions and abuse of court process.

Counsel for the Third Party relied *inter alia* on the Supreme Court decision of **KELVIN HANG'ANDU AND COMPANY (A FIRM) V WEBBY MULUBISHA (4)** cited above.

Based on the **KELVIN HANG'ANDU AND COMPANY** case I have found that since there is already a matter between the Defendant and the Third Party in Cause No. 2015/HP/1554, that should be the sole court to adjudicate all issues involved between them.

Counsel for the Defendant also stated that the circumstances which gave rise to the action in Cause No. 2015/HP/1554 and this action were different and that the causes of the two actions did not arise from the same transaction or series of transactions.

Whilst according to Counsel for the Third Party, the two matters were the same and that the Defendant and the Third party would have to call their respective witnesses and argue the matter in exactly the same manner that they were already battling out under Cause No. 2015/HP/1554 which would amount to the same matter being tried before two courts. I agree with Counsel for the third Party on this point.

Moreover it is the duty of this Court to prevent a situation where Courts of the same jurisdiction make conflicting and contradictory decisions as was stated in the case of **DEVELOPMENT BANK OF ZAMBIA AND KPMG PEAT MARWICK V SUNVEST LIMITED AND SUN PHARMACEUTICALS LIMITED (1)** cited above.

It is trite that third party proceedings are quite separate and independent proceedings from the main action. Further third party proceedings do not afford a defendant a defence as against the plaintiff, who has nothing to do with the question whether the defendant has a remedy against somebody else. I refer to Atkin's Court Forms, Second Edition, 37 1981 Issue at page 301 where it is stated that:

"It should be emphasized that third party procedure affords the means of enabling a defendant, as it were, to *"claim over"* against a third party, but does not afford him a defence as against the plaintiff, who has nothing to do with the question whether the defendant has a remedy against somebody else. The fact that the defendant claims indemnity against a third party does not enable him to defend or prevent the plaintiff from obtaining summary judgment under Order 14.

It should further be emphasized that third party proceedings are quite separate and independent proceedings from the main action. Thus, if the main action is settled, third party proceedings already begun, including proceedings for contribution between co-defendants, can still proceed, and conversely, third party proceedings may be dismissed for want of prosecution, even though the main action is still proceeding. Indeed, however the main action is disposed of, whether by settlement, compromise, acceptance of money in Court, discontinuance, withdrawal or otherwise, the matters in controversy in the third party proceedings will continue to survive for separate disposal if necessary by determination by the Court, and equally the disposal of the third party proceedings will still allow the main action to continue to survive for separate disposal."

As third party proceedings are separate and independent proceedings from the main action, the contention by the Defendant that the circumstances giving rise to the action in Cause No. 2015/HP/1554 and Cause No. 2015/HPC/0348 are different is a misconception. The misconception arises because the Defendant is looking at the causes of action of the Plaintiff in the 2 causes of action as well as the reliefs sought. In determining whether or not there can be multiplicity of actions herein, the causes of action and the reliefs sought which are relevant are those of the Plaintiff in Cause No. 2015/HP/1554 and those of the Defendant as against the Third Party in Cause No. 2015/HPC/0348.

A perusal of the Defence in this Cause, Affidavit in Support of Summons for Leave to Issue Third Party Proceedings and Skeleton Arguments in Support of the application for Third Party Proceedings make it clear that the reliefs sought by Kabayi Farming Limited (the Plaintiff) in Cause No. 2015/HP/1554 and Defendant in Cause No. 2015/HPC/0348 is the same, namely damages for loss suffered by it as a result of power outages caused by the alleged negligence of ZESCO Limited. The claims of the Plaintiff in Cause No. 2015/HP/1554 and the Defendant's claim against the Third Party in Cause No. 2015/HPC/0348 arise from the same transaction or series of transactions namely, the Service Contract between the said ZESCO Limited and Kabayi Farming Limited. The 2 actions therefore arise from the same

facts and can lead to a multiplicity of actions which would result in 2 conflicting decisions by 2 different Courts.

As stated above I am of the considered view that the question which is the subject of litigation in Cause No. 2015/HP/1554 is the same question that the Defendant wishes this Court to answer under the Third Party Proceedings herein. I therefore find and hold that the Third Party Proceedings could well result in different answers being given in Cause No. 2015/HP/1554 and in this Cause. It is clear that the Third Party Proceedings herein amount to a multiplicity of actions.

As one of the objects of third party procedure is to prevent multiplicity of actions, the Third Party Proceedings commenced by the Defendant are not tenable and cannot be sustained for being a multiplicity of actions and an abuse of Court process.

Another object of third party procedure is to have the question between the defendant and the third party decided as soon as possible after the decision between the plaintiff and the defendant, so that the defendant may not have to wait to establish his claim against the third party while the plaintiff is enforcing his judgment against the defendant (**BARCLAYS BANK V TOM (9)**).

It is to be noted that as trial in Cause No. 2015/HP/1554 has already commenced the Defendant is likely to establish its claim against the Third Party before the question between the Plaintiff and Defendant herein is decided.

Lastly, learned Counsel for the Defendant advanced an alternative argument that if this Court found that the facts and subject matter in the two Causes were the same, it should Order Consolidation of matters pursuant to Order III Rule 5 of the High Court Act and Order 4 Rule 9 of the White Book.

I find that such an argument is misconceived. Order 4 Rule 9 of the Rules of the Supreme Court of England 1999 Edition (White Book) states that:

(1)Where two or more causes or matters are pending in the same Division and it appears to the Court -

(a)that some common question of law or fact arises in both or all of them, or

(b)that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or

...

the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

This law clearly states that the cases that can be suitable for consolidation should be from the same Division. In this case

Counsel is asking that this Court should consolidate a matter from the Commercial Division of the High Court with another one from the General Division of the High Court which is improper in my view.

In the circumstances I find merit in this application to set aside Third Party Proceedings and it is hereby granted. I accordingly set aside the Third Party Proceedings with costs to the Third Party.

Leave to appeal is granted.

Delivered in Chambers at Lusaka this 16th day of June, 2017.



.....
WILLIAM S. MWEEMBA
HIGH COURT JUDGE