

**IN THE HIGH COURT FOR ZAMBIA**  
**AT THE DISTRICT REGISTRY**  
**HOLDEN AT KITWE**  
**(CIVIL JURISDICTION)**

**2012/HK/530**

**BETWEEN:**

**WESTON PHIRI**

**AND**

**EXPORT TRADING COMPANY LTD**

**TOTAL ZAMBIA LIMITED**

**PLAINTIFF**

**1<sup>ST</sup> DEFENDANT**

**2<sup>ND</sup> DEFENDANT**

**Before; Hon. Madam Justice C. B. Maka-Phiri**

**For the Plaintiff: Mr. G. Kalandanya of Messrs GM Legal Practitioners.**

**For the 1<sup>st</sup> Defendant: Mr. C. Mukonka of Messrs Caristo Mukonka Legal  
Practitioners**

**For the 2<sup>nd</sup> Defendant: Mr. M. Ndalemeta of Messrs Musa Dudhia & Co. -  
Not present**

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**R U L I N G**

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**Legislation referred to:**

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

This is the 1<sup>st</sup> defendant's application for an order for leave to file supplementary list and bundle of documents made pursuant to Order 3 Rule 2 of the High Court Rules as read with Order 24 Rule 5 of the Rules of the Supreme Court. The application is supported

by an affidavit deposed to by one Alok Dikshit, the Local Director of the 1<sup>st</sup> defendant company.

According to the said affidavit, the deponent as DW1 testified on 30<sup>th</sup> September, 2016 that the 1<sup>st</sup> defendant purchased stand No. 5506, Buteko Avenue Ndola from Messrs Lantana Investments Limited whose director by the name of Dr. G. H. Mutale has been in possession, care and custody of numerous and various documents relating to the stand. It was deposed that the said Dr. G. H. Mutale has been largely indisposed as a result of which the deponent was not aware of the existence of the documents now produced and exhibited as 'AD1' in the affidavit in support. It was deposed further that the said documents are necessary to meet the ends of justice and to have a fair and final determination of all issues in dispute. That no serious prejudice will be occasioned to the plaintiff by the production of the aforesaid documents as the plaintiff will be at liberty to cross examine thereon as well as call further evidence to contradict their terms.

The plaintiff did not file an affidavit in opposition.

At the hearing of the application, counsel for the 1<sup>st</sup> defendant, informed the court that he was relying on the affidavit in support dated 23<sup>rd</sup> November, 2016. In addition, counsel submitted that this court has power to grant the order sought if it is of the view that making of the order will help resolve the issues before court.

Counsel submitted that the 1<sup>st</sup> defendant intend to produce documents which were in custody of the person who initially bought the property from Union Bank. This person was unwell at the time when the matter was being set down for trial and was out in India for treatment. That it was after he stabilized that he was able to produce the documents which the defendants are now seeking to produce. It was counsel's view that the documents are cardinal to the resolution of the dispute between the parties. Further that in the event that leave is granted, the 1<sup>st</sup> defendant will not object to the plaintiff being recalled.

On behalf of the plaintiff, Mr. Kalandanya opposed the application on grounds that it was too late in the day to make such an application. Counsel submitted that owing to the fact that the plaintiff has closed its case and the 1<sup>st</sup> defendant's principal witness has since testified, granting the application will amount to giving the 1<sup>st</sup> defendant a second bite at the cherry. Counsel argued that the issues in dispute have been known to the parties since 2012 when the action was commenced and that the 1<sup>st</sup> defendant only went to dig up the documents after DW1 was found wanting in cross examination. Counsel submitted that it would be unfair and not in the interest of justice for the 1<sup>st</sup> defendant to start producing documents which with a minimum diligence it should have in its possession. Counsel urged the court to dismiss the application but that should the court be inclined to grant the application, then the 1<sup>st</sup> defendant should be condemned in costs.



In reply, counsel for the 1<sup>st</sup> defendant insisted that the documents that the 1<sup>st</sup> defendant seeks to produce in court are cardinal for the determination of the matter. Counsel conceded to the costs that the plaintiff will be subjected to as a result of the introduction of these new documents.

I have considered this application and the submissions by both parties. The starting point in determining this application is to note that this court has discretionary power to grant leave to file supplementary bundle of documents following the close of pleadings. The applicant must however satisfy the court that he or she was aware of the existence of the document at the time of discovery but could not access it after due diligence.

The 1<sup>st</sup> defendant's evidence is that the documents that they seek to produce were in the possession of one Dr. Mutale who was indisposed on account of ill health. This evidence has not been challenged by the plaintiff and as such it is accepted as the truth. What this means is that the 1<sup>st</sup> defendant was not able to access the documents with due diligence because the person in custody was indisposed.

I have carefully looked at the documents that the 1<sup>st</sup> defendant is seeking to produce. I am of the view that these documents should be allowed to be filed so as to give a holistic picture or history as it relates to the property in dispute. The plaintiff will not suffer any

prejudice by the production of the said documents in that he could be recalled if he so wishes to react to the documents.

With the foregoing, I hereby grant leave to the 1<sup>st</sup> defendant to file supplementary list and bundle of documents as exhibited. This should be done within 14 days from date of ruling. All the costs that the plaintiff will incur as a result of this order will be borne by the 1<sup>st</sup> defendant.

Costs for this application are for the plaintiff in any case.

Leave to appeal is hereby granted.

Delivered at Kitwe; this 2<sup>nd</sup> day of August, 2017



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**C. B. MAKAPHIRI (MRS.)**  
**HIGH COURT JUDGE**