

IN THE HIGH COURT FOR ZAMBIA

2016/HP/0269

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

ELIZABETH MULENGA

AND

WEBSTER KALALUKA



APPLICANT

RESPONDENT

**BEFORE THE HONOURABLE MADAM JUSTICE P. K. YANGAILO
ON 13TH DAY OF SEPTEMBER, 2017**

For the Applicant: Ms. Elizabeth Mulenga (In person)

For the Respondent: Mr. G. Mhango - Nyangulu & Company

RULING

CASE AUTHORITIES REFERRED TO:

1. *Ellis vs. Allen* 1914 1 Ch. 904;
2. *Southern Cross Motors Limited vs. Nonc systems Technology Limited* (2012) ZR Volume 1
3. *Zambia Export and Import Bank Limited vs. Mkuyu Frams Limited* (1993 - 1994) Z.R 36;

LEGISLATION REFERRED TO:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia; and*
2. *The Rules of the Supreme Court (White Book) 1999 Edition.*

The delay in rendering this Ruling is deeply regretted. It is due to the amount of cases in backlog that were re-allocated to this Court.

By way of Originating Notice of Motion dated 10th February, 2016, the Applicant claims against the Respondent the following reliefs: -

- a) *Payment of K6,000.00 being rental arrears for the months of December 2015 and January 2016;*
- b) *An Order directing the Respondent to repair all the damages caused in the said house; and*
- c) *Any other relief the Court may deem fit;*

The Applicant filed herein an Affidavit in Support of the Originating Notice of Motion deposed by one **Elizabeth Mulenga**, who is the Applicant herein. The Applicant deposed, *inter alia*, as follows: -

1. *That sometime in 2010, the Applicant entered into a verbal tenancy agreement with the Respondent, in which it was agreed that the Respondent will pay rent of K3000.00 per month to the Applicant;*
2. *That the Respondent started giving problems in terms of paying rentals;*
3. *That after the Applicant experienced difficulties with the Respondent, she decided to evict him from her premises as it was her only source of income;*
4. *That the Respondent vacated the house leaving unpaid rental in the amount of K6,000.00 for the months for December, 2015 and January 2016;*
5. *That the Respondent later entered into an agreement with the Applicant for payment of the outstanding rental arrears in two instalments, which the Respondent failed to honour; and*
6. *That further the Respondent left the house in a dilapidated state.*

The Applicant, with leave of the Court, also filed herein a Notice to Produce on 28th July, 2016, where she exhibited pictures of damages occasioned to the house that she let out to the Respondent, quotations, invoices and cash sale receipts for funds

expended on the repair of the house that she alleged the Respondent left in a dilapidated state.

I scheduled this matter for hearing on 22nd July, 2016. The matter was adjourned on several occasions at the instance of the Respondent to afford him an opportunity to respond to the application. The Respondent eventually engaged the services of Messrs. Nyangulu and Company. The Respondent did not file any Affidavit in Opposition but his Advocates filed herein an Admission and Defence, where the Respondent admitted owing the Applicant rental arrears in the sum of K6,000.00 and the sum of K5,000.00 being the cost of repairs and fixtures to the premises that was leased to him. The Respondent denied owing the Applicant for other expenses, other than what he admitted owing. The Respondent also filed herein Summons to pay the admitted sum by instalments. The said Summons to pay the admitted sum by instalments was accompanied by an Affidavit in Support deposed to by the Respondent Webster Kalaluka, in which he averred, *inter alia*, as follows: -

1. *That he admits owing the Applicant the sum of K11,000.00 being K6,000.00 rental arrears and K5,000.00 cost of repairs to the rented premises;*
2. *That he is civil servant in the Ministry of Power Transport and Communications where he is the Principal Planner and his means, as of now, taking into account his other financial commitments, are such that he can afford to pay the Applicant a monthly sum of K800.00 until the total sum is paid; and*

3. *That in those times or months when he will have extra means, he will pay the Applicant more than K800.*

On the foregoing, he urged this Court to order that the amount admitted be paid in instalments as stated herein.

At the hearing of this matter, the Applicant relied on the Affidavit in Support of her application and orally submitted that in addition to the unpaid rentals that she was claiming, the Respondent vacated the house without painting the house and carrying out repairs to the damages occasioned during his occupation, thus leaving the Applicant with no other alternative but to carry out the repairs and painting of the house at her own cost in order make the house habitable as that is her only source of income. She further submitted that in addition to the unpaid rent of K6,000.00, the Applicant had spent money on painting and carrying out repairs of damages occasioned to the house by the Respondent and had suffered loss of income for February and March, 2016 when the house was undergoing repairs. She produced various pictures showing the damages occasioned to the house; invoices and receipts for costs of repairs carried out on the house. She also produced a summary of her claim, which is as follows: -

1.	<i>Unpaid rentals for December 2015 & January 2016</i>	<i>K5,500.00</i>
2.	<i>Expenditure on materials as per receipts produced</i>	<i>K6,104.00</i>
3.	<i>Labour costs for carpentry (fixing of doors & locks)</i>	<i>K 540.00</i>
4.	<i>Labour costs for plumbing</i>	<i>K 350.00</i>
5.	<i>Labour costs for Electricals</i>	<i>K 400.00</i>
6.	<i>Labour costs for painting</i>	<i>K1,200.00</i>

7.	<i>Labour costs for removing weeds around the house</i>	<i>K 300.00</i>
8.	<i>Collection of garbage</i>	<i>K 200.00</i>
9.	<i>Loss of income for February & March 2016 being the period the repairs were undertaken</i>	<i>K6,000.00</i>

Accordingly, the Applicant now seeks payment of the accrued rentals for December, 2015 and January, 2016; refund of funds expended on carrying out repairs of damages occasioned to the premises; loss of income for the months of February and March 2016, when the repairs were being effected; other relief that the Court may deem fit.

The matter having been commenced by Originating Notice of Motion, the Respondent was required to file herein an Affidavit in Opposition. The Respondent did not file any Affidavit in Opposition against the Applicant's claims herein, but at the scheduled hearing of the matter, Learned Counsel for the Respondent Mr. Mhango submitted *viva voce*. It was his oral submission that he had filed a Defence and Admission on behalf of the Respondent. He further submitted that the Respondent has applied herein by way of Summons to pay the admitted sum in instalments and an Affidavit in Support of the said Summons. That the Respondent will rely on the contents of the said Affidavit. It was also his submission that the Respondent has proposed to pay the admitted sum of K11,000.00 by monthly instalments of K800.00. On the foregoing, he urged the Court to enter judgment on the admitted figure and

that the admitted amount of K11,000.00 be paid in monthly instalments of K800.00.

In reply, the Applicant submitted that the Respondent vacated the premises without carrying out repairs to the house and left unpaid rentals of K6,000.00. She reiterated that the total claim inclusive of costs of repairs in order to make the house habitable and loss of income is K20,294.00. She further submitted that the Respondent was a Senior Principal Planner who previously managed to pay her K3,000.00 per month as rent and proposed that if the Court grants the application to pay by instalment, then the monthly instalment must be pegged at K1,000.00 or more. Therefore, the Applicant reiterated her prayer that she be granted the reliefs that she sought from this Court.

I have considered the claims by the Applicant in the Originating Notice of Motion and the averments deposed to in the Affidavit in Support filed herein. I have further considered the Respondent's application for payment of the admitted sum by instalments and the averments in the Affidavit in Support of application to pay by instalments. I have also considered the submissions orally advanced by both parties herein.

I wish to state from the outset that **Order XXI of The High Court Rules¹** and **Order 27 Rule 3 of The Rules of the Supreme Court²** empowers the Court to enter Judgment in favour of a party based on admissions of facts made by the other party on its claims.

Order XXI Rule 1 of The High Court Rules¹ states as follows: -

"Notice of admissions

Any party to a suit may give notice, by his own statement or otherwise, that he admits the truth of the whole or any part of the case stated or referred to in the writ of summons, statement of claim, defence or other statement of any other party."

Order XXI Rule 5 of the High Court Rules¹ states as follows: -

" Admission by defendants

If any defendant shall sign a statement admitting the amount claimed in the summons or any part of such amount, the Court or a Judge, on being satisfied as to the genuineness of the signature of the person before whom such statement was signed, and unless it or he sees good reason to the contrary, shall, in case the whole amount is admitted, or in case the plaintiff consents to a judgment for the part admitted, enter judgment for the plaintiff for the whole amount or the part admitted, as the case may be, and, in case the plaintiff shall not consent to judgment for the part admitted, shall receive such statement in evidence as an admission without further proof." (emphasis mine)

In my humble view, **Order XXI Rule 5 of the High Court Rules¹** empowers the Court to exercise its discretion to enter Judgment on Admission, upon being satisfied that there is a statement of admission by the Defendant, with the genuine signature of the Defendant appended to it.

Order 21 Rule 1 of The Rules of the Supreme Court² states as follows: -

"Admissions

1. Admission of case of other party

Without prejudice to Order 18, rule 13, a party to a cause or matter may give notice, by his pleading or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party."

Order 27 Rule 3 of The Rules of the Supreme Court² states as follows: -

"Judgment on admissions

Where admissions of fact or of part of a case are made by a party to a cause or matter either by his pleadings or otherwise, any other party to the cause or matter may apply to the Court for such judgment or order as upon those admissions he may be entitled to, without waiting for the determination of any other question between the parties and the Court may give such judgment, or make such order, on the application as it thinks just.

An application for an order under this rule may be made by motion or summons." (emphasis mine)

My first consideration at this stage, is to determine whether this application properly sits under the above cited authorities. In view of that, I must be satisfied that the Respondent herein has made an admission of fact or an admission of part of the Applicant's case, either in their pleadings or otherwise. The use of the word "otherwise" which I emphasised above, clearly include other sources, other than pleadings. It is therefore my considered view that an admission contained in an affidavit falls within the category of "or otherwise" approved in the above cited authority. *In casu*, the

originating process is in the form of an Originating Notice of Motion. Accordingly, the admission that must be considered herein may be contained in an Affidavit as it is clear from the cited authorities that an admission may be made expressly in an Affidavit in Opposition or it may be an admission arising as a result of the rules, as has happened *in casu* where the Respondent failed to depose an Affidavit in Opposition to the Originating Notice of Motion, but filed herein Summons to pay admitted sum in instalments.

I refer to **Order 27 Rule 3 (2)** of **The Rules of the Supreme Court**, which states as follows: -

"Admissions of fact

Such admissions may be express or implied, but they must be clear..."

The above was also expounded in the case of **Ellis vs. Allen**¹. It follows therefore, that the admission that must be considered must evidently confirm the claim or part thereof that is admitted. *In casu*, a perusal of the record shows the Respondent deposed in paragraph 5 of the Affidavit in Support of Summons to pay admitted sum in instalments that the Respondent admit owing the Applicant the sum of eleven thousand Kwacha (K11,000.00) out of which six thousand Kwacha (K6,000.00) is rental arrears for two months and five thousand Kwacha (K5,000.00) being cost of repairs and fixtures to the premises. Further, in paragraph 6 of the said Affidavit, the Respondent proceeded to propose a plan for the liquidation of the admitted amount and averred that he required to

settle the debt in monthly instalments of K800.00 as he is a civil servant. Quite clearly, the said Affidavit contains an express admission of part of the debt. Since this fact has been admitted, in my considered view, it ceases to be an issue.

I refer to **Order 23 Rule 3 (7) of The Rules of the Supreme Court**², where it is stated as follows: -

"The Court may...as it thinks just

The jurisdiction of the Court is discretionary, but in the absence of reason to the contrary the order is made so as to save time and costs."

In casu, the admission is made in an Affidavit dated 29th November, 2016, which is a sworn testimony deposed by the Respondent, who has appended his signature in the presence of a Commissioner for Oaths. I am satisfied that there is a statement of admission by the Respondent, with the genuine signature of the Respondent appended to it. Accordingly, being satisfied that the Respondents issued a statement admitting part of the amount claimed by the Applicant, and being satisfied as to the genuineness of the signature of the deponent of the Affidavit in Support of Summons to pay admitted sum in instalments, which contains the admission, and further not seeing any good reason to the contrary, I hold that this is a proper case for me to exercise my discretion to enter Judgment on admissions in respect of the admitted sum. I accordingly, enter Judgment in favour of the Applicant, for the admitted amount, in the sum of K11,000.00 to be paid with interest

from the date of Originating Notice of Motion to date of hereof at the short term Bank of Zambia deposit rate. Thereafter at the current Commercial Banks lending rates.

I will now consider the balance of the claim that was not admitted. The Applicant had produced pictures, various invoices and receipts for the costs expended on damages occasioned to the house by the Respondent and bringing the house to a habitable state. I stated earlier that the Respondent did not file herein an Affidavit in Opposition to the Originating Notice of Motion, but instead filed herein an Admission and Defence where he denies owing the Applicant part of the claims. At the hearing of this matter, the Respondent's Counsel Mr. Mhango urged this Court to proceed to hold a trial for the disputed amount.

I refer to **Order 28 Rule 8 (1)** of **The Rules of the Supreme Court**², which provides that: -

"Continuation of proceedings as if cause or matter begun by writ

- (1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof."***

In casu, the Respondent has denied owing the Applicant part of the claim. Since the issue is contentious, it cannot be determined on Affidavit evidence. The issue can only be best resolved by way of trial, where the parties will be given an opportunity to argue their claims. Accordingly, I invoke the provisions of the above cited provision and order that part of the Applicant's claim that was not admitted by the Respondent will proceed to trial. The matter began by Originating Notice of Motion shall proceed as if it had been began by Writ of Summons and Statement of Claim. The Affidavits filed herein shall stand as pleadings.

I will now consider the application by the Respondent to pay the admitted claim in instalments. In his Affidavit in Support of application to pay the admitted claim in instalments, the Respondent averred in paragraph 6 that he is a civil servant in the Ministry of Power, Transport and Communications where he is a Principal Planner and his means taking into account his other financial commitments are such that he can afford to pay the Applicant monthly the sum of eight hundred Kwacha (K800.00). He further averred in paragraph 7 that in those times or months when, as some time happens, he will be of extra means, he will pay the Applicant more than K800.00 and depending upon how good his means would be, a good fraction of the balance outstanding or the whole amount outstanding would be paid at once.

In response, the Applicant submitted that the Respondent is a Senior Principal Planner who previously managed to pay her rent of

K3,000.00 per month and on that basis, she proposed that the Respondent pays monthly instalments of K1,000.00 or more.

I refer to **Order XXXVI Rule 9** of **The High Court Rules**¹, which states as follows: -

"Payment by instalments and stay of execution

Where any judgment or order directs the payment of money, the Court or a Judge may, for any sufficient reason, order that the amount shall be paid by instalments, with or without interest. The order may be made at the time of giving judgment, or at any time afterwards, and may be rescinded or varied upon sufficient cause, at any time. The order shall state that, upon the failure of any instalment, the whole amount remaining unpaid shall forthwith become due:

Provided that where there is a default in paying any one instalment, there shall be no order for stay of execution on the balance." (emphasis mine)

In the case of **Southern Cross Motors Limited vs. Nonc systems Technology Limited**², the Court held that: -

"the kind of evidence to be adduced in order for the Court to ascertain whether there is sufficient case of special circumstances includes, a look at the applicant's income, nature and value of property owned, details of the applicant's indebtedness to other persons apart from the Judgment creditors."

I further refer to the case of **Zambia Export and Import Bank Limited vs. Mkuyu Frams Limited**³, where the Supreme Court held that: -

"It is quite clear from Order 36 Rule 9 that a Court may order that a Judgment debt be satisfied by instalments upon sufficient cause being shown by the Judgment Debtor."

Looking at the above authorities, it is clear that there is a pre-condition for the granting of an order to pay the Judgment debt in instalment, which is "sufficient reason" being shown. Although the above cited Order does not list the considerations that would amount to "sufficient reason", these considerations are outlined elsewhere, particularly in **Order 47 Rule 1 (3) of The Rules of the Supreme Court²**. The said **Order 47 Rule 1 (3) of The Rules of the Supreme Court²** states as follows: -

"An application made by summons must be supported by an affidavit made by or on behalf of the applicant stating the grounds of the application and the evidence necessary to substantiate them and, in particular, where such application is made on the grounds of the applicant's inability to pay, disclosing his income, the nature and value of any property of his and the amount of any other liabilities of his." (emphasis mine)

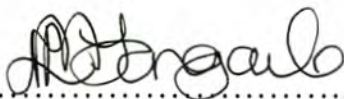
It is clear from the foregoing that the pre-condition to the issuance of an order for payment of a Judgment debt in instalment is evidence of the Applicant's income, the nature and value of his property and the amount of his other liabilities.

In casu, the Respondent has not disclosed his income, the nature and value of his property and the amount of his other liabilities. He has not demonstrated sufficient cause or any special circumstances to entitle him to liquidate the admitted sum in

instalments. Accordingly, I find no justification for me to order payment of the admitted debt in instalments. The admitted debt shall be paid in a lump sum of K11,000.00.

Costs are awarded to the Applicant to be taxed in default of agreement. Leave to appeal is granted.

Delivered at Lusaka on the 13th day of September, 2017



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P. K. YANGAILO
HIGH COURT JUDGE