

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

**2012/HP/0506**

BETWEEN:

**MICHAEL KANYINJI**



**PLAINTIFF**

AND

**BRENDA MATAFWALI**

**1<sup>st</sup> DEFENDANT**

**ANDREW SHABOLYO**

**2<sup>nd</sup> DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 23<sup>rd</sup> DAY OF  
OCTOBER, 2017**

*For the Plaintiff : Mr L. Mwamba, Simeza Sangwa and Associates*

*For the 1<sup>st</sup> Defendant : Mr M.C. Kanga, Makebi Zulu Advocates*

*For the 2<sup>nd</sup> Defendant : No appearance*

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## **R U L I N G**

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CASES REFERRED TO:

1. *William David Carlisle Wise V E.F. Hervey Limited 1985 ZR179*

LEGISLATION REFERRED TO:

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

This is a ruling on a notice to raise preliminary issues filed by the 1<sup>st</sup> Defendant on 15<sup>th</sup> August, 2017, pursuant to Order 14A and Order 33

Rule 7 of the Rules of the Supreme Court 1999 edition, as read with Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia, for the determination of the following question;

- 1. Whether or not the Plaintiff can commence and maintain these proceedings against the 1<sup>st</sup> Defendant herein without disclosing a cause of action in the writ of summons and statement of claim against the 1<sup>st</sup> Defendant.*

When the matter came up for the hearing of that application on 7<sup>th</sup> September, 2017, Counsel for the Plaintiff informed the court that they had filed a notice to set aside the 1<sup>st</sup> Defendant's application, and the matter was adjourned to 22<sup>nd</sup> September, 2017 to allow the 1<sup>st</sup> Defendant to respond to the notice. On 22<sup>nd</sup> September, 2017, Counsel for the Plaintiff was initially not before the court and I directed Counsel for the 1<sup>st</sup> Defendant to proceed to respond to the notice raised by the Plaintiff.

Counsel for the 1<sup>st</sup> Defendant stated that no affidavit had been filed in support of the notice, thereby rendering it difficult for them to respond to the said notice. I then directed that the 1<sup>st</sup> Defendant proceeds with her application. Counsel in submitting in support of the notice to raise preliminary issues, stated that they relied on the affidavit filed in support of the application on 15<sup>th</sup> August, 2017, as well as the list of authorities.

It was stated that the case of **WILLIAM DAVID CARLISLE WISE V E.F. HERVEY LIMITED 1985 ZR179** held that a cause of action is disclosed when a factual situation has been alleged, which contains facts upon which a party can attach liability to another party or where a Plaintiff can establish a right or entitlement to judgment against another party.

That a perusal of the originating process shows that both factors alluded to above are not present in the Plaintiff's writ of summons and statement of claim, and therefore no cause of action has been disclosed against the 1<sup>st</sup> Defendant. Counsel argued that on that basis, the 1<sup>st</sup> Defendant should be removed from these proceedings, as she is likely to face embarrassment, as she will not know what she is being called upon to meet at trial, thereby making it difficult for her to set up an appropriate defence. It was prayed that the 1<sup>st</sup> Defendant be removed from the proceedings.

Counsel for the Plaintiff who had at that point walked into the chambers, asked to be given time to file skeleton arguments in response to Counsel's submissions, and he was granted seven days within which to do so. Counsel for the 1<sup>st</sup> Defendant asked for seven days to reply to the same. To date the skeleton arguments have not been filed.

I have considered the application. Order 14A of the Rules of the Supreme Court states that;

***“(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that –***

***(a) such question is suitable for determination without a full trial of the action, and***

***(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.”***

Order 33 Rule 7 of the said Rules of the Supreme Court, 1999 edition on the other hand provides that;

***“If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.”***

Order 3 Rule 2 of the High Court Act, Chapter 27 of the Laws of Zambia states that;

***“Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not.”***

Going by the above provisions pursuant to which the application was brought, the issue is whether the question raised by the 1<sup>st</sup> Defendant is suitable for determination without a full trial? The affidavit filed in support of the notice states that the Plaintiff commenced this action claiming damages for personal injuries and loss caused by the negligent driving of the 2<sup>nd</sup> Defendant. That the same claim does not disclose any cause of action against the 1<sup>st</sup> Defendant.

A perusal of the statement of claim states that the vehicle driven by the 2<sup>nd</sup> Defendant was owned by the 1<sup>st</sup> Defendant, and that the 2<sup>nd</sup> Defendant was not a licenced driver. The 1<sup>st</sup> Defendant had filed an

application before the Learned Deputy Registrar for misjoinder on the basis that she had by an agreement dated 4<sup>th</sup> December, 2011, leased the vehicle to Brian Mulenga as shown on exhibit 'BM1', and that Brian was not an employee of hers. Further that upon payment of the contract sum, he would become the absolute owner of the vehicle. That Brian Mulenga gave the vehicle to the 2<sup>nd</sup> Defendant in circumstances the she was unaware of, and she could therefore not be liable under the circumstances.

In a ruling dated 20<sup>th</sup> May, 2015, the Learned Deputy Registrar opined that the application for misjoinder at that stage of the proceedings was not appropriate, taking into account that orders may be made at the end of the trial that would affect the status of the vehicle, and thereby affect the 1<sup>st</sup> Defendant ultimately. That on that basis, it was premature to misjoin the 1<sup>st</sup> Defendant from the proceedings, and the application was declined.

Without going into the merits of the matter, an assertion to the effect that the 1<sup>st</sup> Defendant owned the vehicle that was driven by the 2<sup>nd</sup> Defendant at the time of the accident, needs to be established. This can only be done after the matter is heard on its merits. When the Learned Deputy Registrar delivered the ruling, no appeal was lodged against the ruling. To now raise a preliminary issue on whether a cause of action is disclosed against the 1<sup>st</sup> Defendant is an indirect way of trying to review the ruling of the Learned Deputy Registrar, as the basis upon which the 1<sup>st</sup> Defendant has been sued is that she owned the vehicle at the time of the accident, and the Learned Deputy Registrar ruled that the truth or otherwise of this assertion, can only be determined at trial.

Therefore the question cannot be raised again, when the Learned Deputy Registrar's decision was not appealed against. The action shall proceed to be heard on its merits, and I find that the question raised by the 1<sup>st</sup> Defendant is not suitable for determination without a full trial, and the application will fail on that basis. This matter was set down for trial, and I accordingly direct that trial of the matter shall be held on 15<sup>th</sup> February, 2018 at 09:00 hours. Costs shall be in the cause, and leave to appeal is granted.

**DATED THE 23<sup>rd</sup> DAY OF OCTOBER, 2017**

*S. Kaunda*

**S. KAUNDA NEWA  
HIGH COURT JUDGE**