

IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

JULIUS MUYINGA

PLAINTIFF

AND

MATTHEWS SWETA

1ST DEFENDANT

(Senior Chief Kanongesha)

ATTORNEY GENERAL

2ND DEFENDANT

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

*For the Plaintiff: Mr. M. Lisimba of Messrs Mambwe Siwila
and Lisimba Advocates*

*For the 1st Defendant: Mr. A. Mbambara of Messrs Mbambara
Legal Practitioners*

For the 2nd Defendant: N/A

RULING

Cases referred to:

- 1. B.P. Zambia Plc and Interland Motors Limited SCZ No. 5 of 2001*
- 2. Kelvin Hang'andu and Company (a Firm) v Webby Mulubisha S.C.Z. Judgment No. 39 of 2008*
- 3. Zambia Breweries v Central and Provincial Agencies (1983) Z.R. 152 (H.C.)*

Legislation referred to:

1. The White Book

This is the 1st Defendant's application by a notice to raise a preliminary issue citing that this action amounts to an abuse of Court process and the injunction granted by this Court to the Plaintiff ought not to have been granted as the Plaintiff had not come to Court with clean hands as equity demands. The notice was supported by an affidavit in support deposed to by one **Anock Mbambara**, the advocate for the 1st Defendant.

He deposed that on 29th June, 2015 a matter was commenced in the High Court at Kabwe under cause number **2015/HP/56** by the Plaintiff's brother one **Gabriel Muyinda** as 1st Plaintiff and another relative **Jesphane Mukanda** as the 2nd Plaintiff on behalf of the Plaintiff against the 1st Defendant herein by way of Writ of Summons and Statement of Claim. The said Writ of Summons and Statement of Claim were exhibited and marked "**AM1**" and "**AM2**".

He averred that on 9th February, 2017 the said matter was dismissed by the honourable Court on ground that the Plaintiffs had no locus standi in the matter and a copy of the ruling was exhibited and marked "**AM3**". In the said Ruling the Court made an order for costs to the 1st Defendant which have not been paid to date. He stated that in the same Ruling the Court made reference to another Order for Costs to the 1st Defendant that had not been complied with. He asserted that by a Ruling dated 2nd June, 2017, the Plaintiffs in that matter were found guilty of

contempt of Court as they had written a letter to the Ministry of Chiefs to try and resolve the matter knowing full well that the matter was in Court and had not yet been determined. This ruling was exhibited and marked **"AM4"**.

It was further deposed that instead of the Plaintiff in the present case joining the matter in Kabwe, he on 22nd March, 2017 commenced this matter against the 1st Defendant by way of Writ of Summons and Statement of Claim which were marked **"AM5"** and **"AM6"**. He said that a perusal of the endorsement in this action and that in the Kabwe action is exactly the same. He added that the Plaintiff in the affidavit in support of the interim injunction admitted that the action in the Kabwe High Court was commenced by his brother on his behalf and this was evidenced by a copy of the said affidavit which was marked **"AM7"**.

It was the deponent's contention that the Plaintiff knew fully well that he should have been the one to commence that action in Kabwe or should have joined the action in Kabwe as opposed to instituting a fresh action in the Lusaka High Court with the exact same claim.

It was his further contention that the only possible explanation for commencing this matter was to try and evade the issue of costs in the Kabwe matter and possibly obtain a favourable decision in Lusaka before a different Judge.

The 1st Defendant filed in their skeleton argument and cited the case of ***B.P. Zambia Plc and Interland Motors Limited SCZ No. 5 of 2001*** where it was held, among other things, that in conformity with the Court's inherent power to prevent abuse of

process, a party in dispute with another over a particular subject should not be allowed to deploy his grievances in a scattered litigation and keep on hauling the same opponent over the same matter before various Courts.

The 1st Defendant argued that this matter was an abuse of Court process because the Plaintiff knowing very well that he was the correct party to commence the action before the Kabwe High Court did not do so but instead he had the matter commenced on his behalf by his brother who was the 1st Plaintiff in cause No 2015/HB/56.

It was the 1st Defendant's contention that at the time when the issue of locus standi was raised, the Plaintiff should have done the reasonable thing and joined those proceedings but instead opted to sit on his rights. The earlier action was dismissed by the Court for lack of locus standi by the plaintiffs and the Plaintiff in this present matter commenced a fresh action in the Lusaka High Court under cause number 2017/HP/0463.

It was further argued that in granting an injunction one of the considerations for the Court is that the party seeking the relief must come to equity with clean hands. According to the 1st Defendant, the Plaintiff did not disclose to the Court the full extent of what occurred in the earlier case commenced on 29th June, 2015 and was dismissed on 9th February 2017. The ruling dismissed the action and made an order for costs to the 1st Defendant and in that ruling the Court also made reference to an earlier order for costs which the Plaintiffs in that matter had not paid.

By a ruling dated 2nd June, 2017 the Plaintiff in the Kabwe matter were held in contempt on ground that the Plaintiffs had written to the Ministry of Chiefs to try and resolve that matter when the matter was yet to be determined by the Court. It was for these reasons that the 1st Defendant submitted that the Plaintiff did not obtain the injunction in this Court with clean hands as equity demands.

In his oral submission counsel for the 1st Defendant augmented that the application was in recognition of the Counsel's duty to this Court to preserve the integrity of the Court and prevent abuse of Court process. He argued that this fact had been upheld not only by this Court but also the Supreme Court in many cases. He added that the Plaintiff had an opportunity to prosecute the matter in the Kabwe case by joining the proceedings but did not.

Further, he argued that in the Kabwe matter, the Orders for costs had not been complied with and then chose to commence a fresh action against the Defendants in Lusaka. He averred that this amounted to abuse of Court process and prayed that the preliminary issue succeeds.

In opposing this application the Plaintiff's Counsel submitted that the issue raised fell short of what amounted to abuse of Court process. He argued that though the facts, issues and claims in the two matters were similar, the parties were not and the Honourable Justice Mwikisa dismissed the action on ground that the Plaintiffs had no locus standi. He argued that the Plaintiff in turn commenced a fresh action and the Plaintiffs in

the earlier matter were not a party to the current proceedings. There was further no evidence that the Plaintiff in this matter was represented by a Power of Attorney in the Kabwe matter.

The Plaintiff's Counsel submitted that the Defendants were estopped to argue on abuse of court process when they had taken further steps in defending the matter. He cited Order 2 of the Rules of the Supreme Court. He further cited Article 118(2)(e) of the Constitution to support his arguments.

It was Counsel's argument that the Supreme Court has guided that where a matter has not been dealt with on merit, a litigant is allowed to commence a fresh action on the same facts. According to him the Kabwe case was not dealt with on merit and further that a new litigant commenced this matter before this Court.

It was his submission that with regard to raising a preliminary issue at any stage, the Defendant having taken a further step in defending an injunction lost that right as the Plaintiff's position had been altered by the 1st Defendant's failure or omission to raise the preliminary issue at the right time.

He argued that dismissing the matter on a preliminary issue would have far reaching consequences and not only would it be unfair but unjust. He submitted that in the present case the Court should allow the matter to be heard on merit. He added that with respect to costs, the Plaintiffs in the Kabwe matter had paid off all the costs. He submitted that the fact of the Kabwe matter was disclosed to this Court and the Judgment was even exhibited.

In reply the learned Counsel for the 1st Defendant argued that while he agreed that matters must to a large extent be heard on their merit, it was also the law and procedure that the Court process should not be abused. He submitted that that was the very essence of legislation that provides for Court procedure.

With regard to estoppel, it was submitted that it did not apply because the law allowed for raising a preliminary issue at any point in the proceedings whether they had taken any steps to defend the matter or not. He added that a party that failed to raise such an issue when they had an opportunity did so at their own peril.

He argued that the 1st Defendant had not lost its right to raise a preliminary issue. He left it for the Court to read the proceedings from the Kabwe matter in order to get some clarity on the matter.

I have considered the evidence on record and the arguments by both parties. The starting point is Order 14A rule 1 of the White Book which provides 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.

From the onset I will address the submission by the Plaintiff's counsel that the Defendant by virtue of defending the application for injunction had taken steps that estopped them from making the present application. The law is very clear that a preliminary issue can be raised on a point of law at any point during the proceedings. I therefore do not agree with Counsel's argument and I hold the firm view that the 1st Defendant is on legitimate ground to raise a preliminary issue at any time in the proceedings.

With regard to the main issue of whether the Plaintiff's conduct amounted to abuse of Court process, the Supreme Court has given adequate guidance on this issue. In the case of ***Kelvin Hang'andu and Company (a Firm) v Webby Mulubisha S.C.Z. Judgment No. 39 of 2008*** it was 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 have an obligation to bring all issues in that matter before that particular court. Forum shopping is abuse of process which is unacceptable."

Further, in ***BP Zambia Ltd v Interland motors*** cited by the 1st Defendant the Supreme also held that

“as a general rule, it will be regarded as an abuse of the process if the same parties re-litigate the same subject matter from one action to another or from judge to judge”.

The High Court also in the case of ***Zambia Breweries v Central and Provincial Agencies (1983) Z.R. 152 (H.C.)*** found that *the plaintiff's action in instituting fresh proceedings while aware that the action was still pending implies an ulterior motive and was altogether an abuse of the process of court.*

The wealth of authorities are very clear that where a matter with the same set of facts and issues is before a court, it amounts to abuse of Court process if the same are brought before another Court to re-litigate.

In the present case the plaintiff instituted the initial proceedings through his brother before the Kabwe High Court. This matter was however dismissed citing that the Plaintiff in that matter had no locus standi.

The Plaintiff in the current proceedings later instituted these proceedings before me on the same fact with the same endorsement. The Defendants are of the firm view that there was an abuse of Court process where the Plaintiff was bringing this action of the same facts and claim before another Court when it was already decided on by another Court.

The Plaintiff on the other hand argued that the matter before the Kabwe High Court was not decided on its merits and therefore this application could not stand.

Having carefully analysed the evidence before me I have noted that the matter before the Kabwe High Court was in fact commenced on behalf of the Plaintiff by his brother and another relative. It has also not been disputed that the claim before that Court is exactly the same as the claim before this Court but that the Plaintiffs are different.

The matter was however dismissed by the Honourable Justice Mwikisa on ground that the parties who sued in the Kabwe matter had no locus standi in the matter.

From my analysis of the Ruling of the Court in Kabwe, the matter was not decided on its merits as she was determining a preliminary issue.

In the present case while the Plaintiff brought the action on the same facts as the Kabwe matter, the issues were not exhaustively dealt with on merit.

I therefore find that there was no abuse of process because this matter did not amount to re-litigation but is a fresh action for the determination of issues that have not been determined by another Court.

It must however be noted that this Court frowns upon the Plaintiff not having instituted the action before the same Judge who handled the initial matter because it is more desirable a matter before Court must be exhaustively dealt with the same Judge to easily avoid multiplicity of actions. What distinguishes this case is that the main matter was not dealt with on its merits.

I accordingly dismiss this action but the justice of the case demand that I award the costs to the 1st Defendant.

Leave to Appeal is granted.

Delivered under my hand and seal this ^{14/12} day of December, 2017



Mwila Chitabo, S.C.

Judge