

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

**2018/HP/0112**



**B E T W E E N :**

ARCADES DEVELOPMENT PLC

**PLAINTIFF**

**AND**

ALLIANCE MEDIA (Z) LIMITED

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

LUSAKA CITY COUNCIL

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

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the 5<sup>th</sup> day of April, 2018**

For the Plaintiff: Mr. M. Desai & Mr. S. Bwalya, Messrs Solly Patel,  
Hamir & Lawrence  
For the 2<sup>nd</sup> Defendant: Mrs. M.B. Mupeso, Legal Officer

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**R U L I N G**

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**Cases Referred To:**

1. *Stanley Mwambazi v Morester Farms Limited* (1977) ZLR 108
2. *Zambia Revenue Authority v Jayesh Shah* (2001) ZR 60

**Legislation Referred To:**

1. *Rules of the Supreme Court* 1999
2. *Urban and Regional Planning Act* No. 3 of 2015

By this application the 2<sup>nd</sup> Defendant seeks to dismiss this matter on point of law. It is filed pursuant to Order 14A and Order 33 of the Rules of the Supreme Court and is supported by an

Affidavit. The Affidavit is sworn by **Mulenga Sholomo**, Senior Legal Assistant who states that the 2<sup>nd</sup> Defendant granted the 1<sup>st</sup> Defendant planning permission to erect a billboard at Arcades Bus Station in accordance with the Urban and Regional Planning Act No. 3 of 2015. The deponent avers that if the Plaintiff had an objection with the 2<sup>nd</sup> Defendant's decision, it should have lodged a Notice of Objection within thirty (30) days of the decision.

It is averred that the Plaintiff did not lodge its objection and the 2<sup>nd</sup> Defendant was within its bounds when it granted the 1<sup>st</sup> Defendant planning permission. The deponent states that since the Plaintiff was aggrieved by the 2<sup>nd</sup> Defendant's decision, it should have lodged an appeal with the Planning Appeals Tribunal. The deponent contends that since the Plaintiff did not comply with the requirement, its matter is wrongly before Court.

The 2<sup>nd</sup> Defendant filed an Affidavit in Opposition sworn by **Sonny Mwila Mulenga**, Chief Operations Officer. He avows that paragraphs 5, 6, 7 and 8 of the 2<sup>nd</sup> Defendant's Affidavit contain legal arguments, conclusions and prayers, which should be

expunged. That paragraphs 5, 6, 7 and 8 also contain depositions on contentious facts, which ought not to have been deposed to by a Senior Legal Assistant.

The deponent avers that a notice of objection to an application for planning permission can only be made before it is granted and not after the fact. He contends that the Plaintiff did not object the 2<sup>nd</sup> Defendant's decision because it only gained knowledge of the 1<sup>st</sup> Defendant's application on 8<sup>th</sup> January, 2018 as shown in the exhibit marked "**SMM1.**"

The deponent states that the Plaintiff was not consulted by the 1<sup>st</sup> or 2<sup>nd</sup> Defendants and had no opportunity to raise an objection. That as at 30<sup>th</sup> January, 2018, no Provincial Tribunal had been established or constituted, capable of hearing an appeal under the Urban and Regional Planning Act. Further, that no regulations had been passed creating or constituting the Provincial Appeals Tribunals. The deponent states that the claims before Court are not limited to challenging planning permission but also include a



claim for nuisance. He prayed to Court to dismiss the 2<sup>nd</sup> Defendant's application with costs.

Learned Counsel for the Plaintiff filed Skeleton Arguments for which I am indebted. I shall not reproduce them suffice to state that I will refer to them in the Ruling. The issue raised by this application is whether the Plaintiff's action can be determined on a point of law. Order 14A of the Rules of the Supreme Court provides that:

**"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.**
- 2) Upon such determination the court may dismiss the cause or matter or make such order or judgment as it thinks just."**

Order 33 of the Rules of the Supreme Court is couched in a similar manner and says:

**"The Court may order any question or issue arising in a cause or matter whether of fact or law or partly of fact and partly of law, and whether raised by pleadings or otherwise to be tried before, at or after the trial of the cause or matter and may give directions as to the manner in which the question or issue shall be stated."**

Under the explanatory note to Order 14A/2/3, the requirements for employing the procedure are stated thus:

- a) **The Defendant must have given notice of intention to defend;**
- b) **The question of law or construction is suitable for determination without a full trial of the action;**
- c) **Such determination will be final as to the entire cause or matter or any claim or issue therein;**
- d) **The parties had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination."**

Although the Plaintiff has raised contention with the form of the 2<sup>nd</sup> Defendant's Affidavit and the capacity of the deponent, I firstly intend to deal with the question whether the motion is competently before me. Depending on the outcome, I will proceed to deal with the other issues that have been raised.

It is useful to indicate from the outset that the 2<sup>nd</sup> Defendant did not file a notice of motion but approached the Court by Summons supported by an Affidavit. I am satisfied from the record that the 2<sup>nd</sup> Defendant gave notice of its intention to defend this action when it filed a conditional memorandum of appearance on 27<sup>th</sup> February, 2018. The Summons for this application was initially addressed to the Learned Deputy Registrar. However, I directed the

2<sup>nd</sup> Defendant at the status conference of 27<sup>th</sup> February, 2018 to lodge the application before me for the sake of expediency.

The body of the Summons to dismiss matter on a point of law and fact filed by the 2<sup>nd</sup> Defendant reads thus:

*“Let the parties concerned attend before Hon. Mrs Justice M. Kawimbe on..... day of ..... 2018 at ..... hours in the ..... noon or soon thereafter on the hearing of an application on the part of the 2<sup>nd</sup> Defendant to dismiss matter on a point of law and fact on the grounds set out in the Affidavit in Support sworn by one Mulenga Sholomo thereof.”*

What I immediately distill is that the Summons does not disclose the grounds or basis upon which the Defendant seeks to rely on in this summary procedure. Order 14A and Order 33 of the Rules of the Supreme Court require a party to state by notice the question of law, or construction of any document or issue arising in a cause or matter, whether of fact or law, that a Court is required to determine.

In the present case, the 2<sup>nd</sup> Defendant's grounds of dismissal are stated in the Affidavit in Support. It is trite that an Affidavit is a



source of evidence and cannot therefore supply the question or issue to be determined.

Order 14A of the Rules of the Supreme Court only invites the determination of matters that are capable of being disposed of without a full trial. Once a determination is made, it is final as to the entire cause or matter or any claim therein. A perfunctory perusal of the Plaintiff's Writ of Summons discloses that there are a number of declaratory reliefs that the Plaintiff seeks against the 1<sup>st</sup> Defendant. Further, the Plaintiff alleges impropriety in the manner that the 2<sup>nd</sup> Defendant granted the 1<sup>st</sup> Defendant planning permission. Additionally, there is a claim of nuisance against the 1<sup>st</sup> Defendant.

In my view, these wide ranged claims are a source of contention and cannot be determined without resorting to a full trial. In other words, the issues raised by the Plaintiff need to be tested at trial as guided by the Supreme Court in a plethora of

authorities. For instance, in the case of **Stanley Mwambazi v Morester Farms Limited**<sup>1</sup>, the Supreme Court held inter alia that:

**"...At this stage it is the practice in dealing with bona fide interlocutory applications for courts to allow triable issues to come to trial despite the default of the parties..."**

Further, in the case of **Zambia Revenue Authority v Jayesh Shah**<sup>2</sup> the Supreme Court stated thus:

**"Cases should be decided on the basis of their merit or demerit as the case may be and at the same time rules of Court must be followed..."**

I wish to reiterate that from my findings, there are triable issues between the parties that should not be extinguished at this interlocutory stage. I also find that the 2<sup>nd</sup> Defendant's application to raise issue *in limine* does not comply with the requirements of Order 14A and Order 33A of the Rules of the Supreme Court as no grounds are revealed upon which the Court can summarily dispose of this case.

I therefore, find no merit in the 2<sup>nd</sup> Defendant's application and accordingly dismiss it. I further find it otiose to deal with the question on the form of the Affidavit and the capacity of the



deponent for the reasons given above. Costs are for the Plaintiff to be taxed in default of agreement.

Dated this 5<sup>th</sup> day of April, 2018

*M. Mapani*  
M. Mapani-Kawimbe  
**HIGH COURT JUDGE**