

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



2016/HP/0880

BETWEEN

SKYLAND INVESTMENTS LIMITED

PLAINTIFF

AND

**TASHIR MARHMOOD CHOUDHRY
NOOR MOTORS LIMITED
LUSAKA CITY COUNCIL
ATTORNEY-GENERAL**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT**

BEFORE THE HONOURABLE MRS. JUSTICE M.C. KOMBE

For the Plaintiff : Mr. M. Chitundu- Messrs.
Barnaby, Chitundu, Khunga
Advocates.

For the 1st & 2nd Defendants : Mr. B.S. Sitali - Messrs. Butler
and Company and Mr. A.
Simunyola- Messrs. Eric
Silwamba, Jalasi and
Linyama Legal Practitioners

For the 3rd Defendant : No appearance

For the 4th Defendant : Mr. M. Mulonda- Principal
State Advocate - Attorney-
General's Chambers.

R U L I N G

Legislation referred to:

(1)The High Court Act, Chapter 27 of the Laws of Zambia.

This ruling relates to an application filed by the Plaintiff on 21st April, 2022, for leave to compel witnesses to appear before Court and Give Evidence on its behalf.

The application is made pursuant to Section 27 of the High Court Act, Chapter 27 of the Laws of Zambia and is supported by an affidavit deposed to by the **LIU TIAN SHUI**, the Director in the Plaintiff Company.

He deposed that the Plaintiff issued a Writ of Summons and Statement of Claim wherein it claimed possession of Stand No. S/1006348 Kafue to which the Defendants filed their respective Defences and Counter-claim, some even claiming ownership of the subject property on the strength of a purported Certificate of Title No. 177540 in respect of Stand No. 14131/B, Kafue.

The deponent further deposed that the 4th Defendant in its Defence averred that the Plaintiff's Certificate of Title was procured by fraud as it was alleged that the letter and signature of the then Permanent Secretary in the Ministry of Local Government and Housing

recommending the Plaintiff to be issued with a Certificate of Title was a forged one.

That in their Defence and Counter-claim, the 1st and 2nd Defendant had claimed ownership of the subject property and had gone to the extent of exhibiting documents leading to the issuance of the purported Certificate of Title. A perusal of the said documents from the Lusaka City Council, Ministry of Lands and Natural Resources as well as Ministry of Local Government and Housing revealed that all the said documents were obtained fraudulently and were not genuine.

He further deposed that the disputed land was situated in an area administered by the Ministry of Local Government and Housing in so far as the creation and recommendation of land for allocation was concerned. As such, it was crucial for the determination of this dispute that the said Ministry gave evidence in this matter. Thus, the Plaintiff desired that the current Permanent Secretary appeared before Court to give evidence on the status of the letter in question.

In addition, it was deposed that the disputed letter by the Permanent Secretary was examined by the Zambia Police Service through the Forensic and Handwriting Department and rendered a report.

It was for this reason that the Plaintiff desired that the three (3) Police Officers by the names of Senior Superintendent Mr. David Zulu, Deputy Chief Inspector Geoffrey Zyambo and Deputy Inspector P. Mwale appeared before Court to render the said report.

The deponent further deposed that since the Plaintiff's Certificate of Title had been disputed by the 4th Defendant despite it having been genuinely issued by the Ministry of Lands and Natural Resources, the Plaintiff believed that it would be in the interest of justice that the Commissioner of Lands and the Chief Registrar of Lands and Deeds also appeared with all the relevant documents to adduce evidence on the Plaintiff's disputed Certificate of Title.

Further, that as all the documents relating to the issuance of the 1st Defendant's title were all forged and were not genuine, there was need to have all persons alleged to have issued the documents appear before Court.

The Plaintiff sought the current Commissioner of Lands, the current Chief Registrar of Lands and Deeds, the former Registrar of Lands and Deeds Mr. Michael Chisengele, the current Surveyor General as well as

the former Assistant Surveyor General Mr. Tony Mwanalushi to be compelled to appear before Court.

That efforts to have all these witnesses appear on their own volition had been met with resistance from the 4th Defendant as they claimed that those witnesses were for the State. In this regard, it was extremely crucial to have the witnesses appear before this Court and that unless compelled, no witnesses would be released by the relevant Ministries.

The 4th Defendant opposed the application in an affidavit deposed to by **CHIBESA MULONDA**, the advocate seized with conduct of this matter.

He deposed that the witnesses the Plaintiff proposed to call were all relevant to the State's Defence and Counter-claim and were part of the witnesses to be called by the 4th Defendant.

Therefore, the Plaintiff would not be prejudiced if the said witnesses were called by the 4th Defendant.

In the affidavit in reply deposed to by **MWAMBA CHITUNDU**, the advocate representing the Plaintiff, he deposed that the intended witnesses to be compelled by the Plaintiff were to prove the Plaintiff's claim as pleaded in that the intended witness were authors of

documents issued to the Plaintiff by the Government officers which documents the 4th Defendant alleged were forged.

Contrary to what was deposed to that the Plaintiff would not be prejudiced, counsel deposed that should the 4th Defendant not call the witnesses, then the Plaintiff would be highly prejudiced.

The deponent added that should the Court be of the view that the said witnesses in issue be called at the instance of the 4th Defendant, the Court should further direct that should the 4th Defendant fail to call the said witnesses, then the Court would be called at the instance of the Court at the conclusion of the parties' witnesses as they were key to determining the issues before Court in all fairness and with all the relevant evidence before it.

At the hearing of the application on 19th May, 2022, learned counsel for the Plaintiff Mr. Mwamba Chitundu relied on the affidavit in support and skeleton arguments.

Learned counsel Mr. B. Sitali on behalf of the 1st and 2nd Defendant informed the Court that they were relying on the submissions made by the 4th Defendant.

On the part of the 4th Defendant, the learned Principal State Advocate relied on the affidavit in opposition and skeleton arguments. He prayed that the application be dismissed.

As I have mentioned, both parties filed skeleton arguments. I will not replicate what is contained in the skeleton arguments filed by the parties suffice to mention that I have considered the same and addressed my mind to the arguments that have been advanced.

When the Court asked counsel for the 4th Defendant whether the 4th Defendant's position was that they would call all the witnesses the Plaintiff sought to be compelled to appear and give evidence before Court, he answered in the affirmative. He stated that they were part of the witnesses the 4th Defendant intended to call.

In reply, Mr. Chitundu relied on the affidavit in reply he deposed to and submitted that if indeed the 4th Defendant was going to call all the witnesses, then in the event that they failed to call these witnesses, then an Order should be made that they would be called at the instance of the Court.

When asked to clarify if the Plaintiff intended to call the intended witnesses during its case, counsel submitted that ideally their intention

was to start with these witnesses but since the 4th Defendant had indicated that they would call them, then they didn't mind for as long they were before Court. If they were not called, they would make an appropriate application at that stage.

The application before this Court to Compel Witnesses to Appear Before Court and Give Evidence on Behalf of the Plaintiff is made pursuant to **Section 27 of the High Court Act, Chapter 27 of the Laws of Zambia.**

It provides as follows:

“27. (1) In any suit or matter, and at any stage thereof, the Court, either of its own motion or on the application of any party, may summon any person within the jurisdiction to give evidence, or to produce any document in his possession or power, and may examine such person as a witness and require him to produce any document in his possession or power, subject to just exceptions.

It is clear upon a fair reading of the above provision that this Court is clothed with the power either of its own motion or on application of any party to summon any person to give evidence or to produce any document in his possession or power subject to just exceptions. In

short, this Court has the power to subpoena witness to give evidence in court or produce documents.

The Plaintiff contends that the witnesses it seeks to be compelled to give evidence are extremely crucial to its case in view of the position taken by the 1st and 2nd Defendant as well as the 4th Defendant. However, there has been resistance from the 4th Defendant to release the witnesses hence the application.

The 4th Defendant on the other hand contends that the witnesses the Plaintiff proposes to call are all relevant to the State's Defence and Counter-Claim and are part of the witnesses that will be called. In the premise, the Plaintiff will not be prejudiced if the witnesses are called by the 4th Defendant.

It is very clear from the record that the 4th Defendant in this case has filed a Defence and Counter-claim. The Principal State Advocate has indicated to the Court that the witnesses that the Plaintiff proposes to call are all relevant to the 4th Defendant's case and are part of the witnesses that will be called.

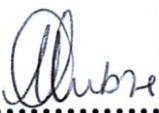
This position taken by the 4th Defendant in my view will give the Plaintiff an opportunity to elicit whatever evidence it requires to prove its case.

Therefore, it is not clear at this stage whether the Plaintiff will be prejudiced as trial has not even commenced and the 4th Defendant has not opened its case. And as counsel for the Plaintiff submitted at the hearing of the application, what the Plaintiff seeks is to have these witnesses appear before Court and the Plaintiff does not mind if the witnesses are called by the 4th Defendant although ideally the intention was for the Plaintiff to call these witnesses.

In view of the foregoing, I find that the application to compel the proposed witnesses to appear before Court is premature in the light of the position given by the 4th Defendant.

It is for this reason that I decline to grant the Order sought. If the 4th Defendant will not call the proposed witnesses at the close of its case, the Plaintiff will be liberty at that stage to make an appropriate application for the Court's consideration. Considering the circumstances of the case, I make no order as to costs.

DELIVERED AT LUSAKA THIS 9th DAY OF JUNE, 2022.


.....
M.C. KOMBE
JUDGE

