

IN THE HIGH COURT FOR ZAMBIA  
 AT THE PRINCIPAL REGISTRY  
 HOLDEN AT LUSAKA  
 (CIVIL JURISDICTION)

2022/HP/0355

BETWEEN:

MULIFE MALAMBO



PLAINTIFF

AND

ALLISON PHIRI

1<sup>ST</sup> DEFENDANT

LAURENT ZULU

2<sup>ND</sup> DEFENDANT

BEFORE HON. JUSTICE E. P. MWIKISA

FOR THE PLAINTIFF: MR. L. NJUNGA OF MESSRS MUTEMWA CHAMBERS

FOR THE DEFENDANT: Mr D. BANDA OF MESSRS JMP ASSOCIATES

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## RULING

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### Cases Referred To:

1. *African Banking Corporation (Z) v Mulende Country Lodges Limited Appeal No. 116/2016*
2. *Leopold Welford v Unifreight 1985 ER 203*
3. *Mwambazi v Forester Farms Limited (1977) ZR 108*

### Legislation Referred To:

1. *Rules of the Supreme Court of England, 1999 Edition, White Book*

This is the Plaintiff's application to raise issues in limine pursuant to Orders 14A and 33 Rule 3 of the Rules of the Supreme Court of England, 1999 Edition, White Book. The Plaintiff raised the following issues for the Court's determination:

1. Whether the memorandum of appearance filed in this matter is not irregular for not disclosing an address which is within 10 kilometres from the Registry in which the cause or matter is pending.
2. Whether the said memorandum of appearance which did not disclose an address which is within 10 kilometres from the Registry in which the cause or matter is pending ought not to have been received.
3. On the totality of the above, whether this honourable court should dismiss or set aside the said memorandum of appearance and consequently the defence filed in this matter.

Should the memorandum of appearance and defence filed in this matter not be dismissed or set aside on the above issues, then we further raise the following issues in limine:

4. Whether the memorandum of appearance and defence which have been filed out of time without leave of this honourable Court should not be set aside, and

5. Whether the Defendants should not be condemned in cost for filing their memorandum of appearance and defence beyond the stipulated time and therefore in breach of set out procedure.

The application was supported by an affidavit both dated 30<sup>th</sup> May, 2022, deposed to by one Larry Njunga, Counsel seized with conduct of the matter on behalf of the Plaintiff herein. It was deposed therein that upon perusal of the memorandum of appearance and defence filed in this matter, it was discovered that the memorandum of appearance bears an address that is beyond 10 kilometres from the Registry in which this cause or matter is pending.

Further that the memorandum of appearance and defence were filed into Court way beyond the period stipulated for doing so. Counsel deposed that he was not aware of an application by the defendants seeking leave of court to file the said documents out of time. That it is on these premises that this Court has been moved by way of notice of motion to raise preliminary issues. It was deposed that the above pointed out shortcomings on the part of the defendants constitute issues that this Court should pronounce itself on before the main matter is heard.

On the other hand, the defendants filed an affidavit in opposition dated 8<sup>th</sup> July, 2022, deposed to by one David Banda, Counsel for

the defendants herein. He deposed that the writ of summons filed into Court on 9<sup>th</sup> March, 2022, commanded the defendants to enter appearance within 21 days from the date of service as the record of Court will show.

That on 25<sup>th</sup> March, 2022, the 2<sup>nd</sup> defendant took the Court process to the advocates chambers informing Counsel that he had just been served with the said process by one Nyuma Chirambo. It was deposed that in the circumstances, the last date within which to enter appearance according to the writ of summons was 22<sup>nd</sup> April, 2022.

It was deposed that the 2<sup>nd</sup> defendant is based in Chipata, Eastern Province, which is about 570KM from the Principal Registry in the Lusaka District from which the writ was issued. The deponent stated that the prescribed period within which to enter appearance to a writ of summons that is served to a defendant who resides more than 500KM is 30 days from the date of service. That in the circumstances, the memorandum of appearance was not out of time to the best of his knowledge. Counsel deposed that if it appears that the appearance was done out of time, such out of time was not inordinate in any event.

It was also deposed that the non-endorsement of an address that is within 10KM from the Principal Registry was due to administrative issues and that it was therefore not prudent, in the circumstances, to put the address of the agent law firm because doing so would be undermining the authority of the Law Association of Zambia. It was deposed further that negotiations are underway with the proposed alternative agent for JMP Associates within a 10KM radius to the Principal Registry.

It was deposed further that nonetheless, the non-endorsement of the address for service within a radius of 10KM from the Principal Registry does not invalidate the substance and merits of the defence filed herein. That if the memorandum of appearance and defence are struck out, the defendants herein would suffer irreparable damage as they would be prevented from being heard on the substance and merits of their defence and that if the said documents are preserved, no party would suffer prejudice and the matter would be disposed of in its merits.

In response, Counsel for the Plaintiff, filed an affidavit in reply dated 27<sup>th</sup> September, 2022, deposed to by Larry Njungu, Counsel seized with conduct of the matter on behalf of the Plaintiff. It was deposed therein that the 2<sup>nd</sup> defendant was served court process on 14<sup>th</sup>

March, 2022, as shown by the affidavit of service on the record deposed to by one Nyuma Chirambo. That arising from the facts above, the 2<sup>nd</sup> defendant was enjoined to enter appearance and defence on or before 3<sup>rd</sup> April, 2022, as he was duly served with court process on 14<sup>th</sup> March, 2022.

Counsel also deposed that Counsel for the defendants has not raised any issue of service of court process with respect to the 1<sup>st</sup> defendant a fact confirming that even the 1<sup>st</sup> defendant was duly served with court process on 11<sup>th</sup> March, 2022, as shown by the affidavit of service deposed to by one Larry Njunga on the record. That the 1<sup>st</sup> defendant was therefore equally enjoined to enter appearance and defence on or before 31<sup>st</sup> March, 2022.

It was also deposed that Counsel for the Defendant is making an admission that the memorandum of appearance did not disclose an address which is within 10 kilometres from the Registry in which the cause or matter is pending.

When the matter came up for hearing on 31<sup>st</sup> October, 2022, Counsel for the Plaintiff, Mr Njunga submitted that the Plaintiff raised a motion seeking this Court's determination on whether the memorandum of appearance that was filed into Court ought to have been received. It was Counsel's contention that firstly, the

memorandum of appearance was filed out of time and that to their knowledge, there has not been any leave sought from this Court allowing the Defendants to file out of time. Counsel stated that the said memorandum of appearance and defence do not therefore comply with the statutory provisions; namely Order 11 Rule 4(b) of the HCR which provides that if a Defendant is represented by an advocate, and that advocate is filing a memorandum of appearance it should bear an address 10KM from the Registry. It was Counsel's contention that in this case, the address bears an address of 510KM and that there are sanctions for such an occurrence in Order 11 Rule 6 of the HCR that such a memorandum of appearance shall not be received.

It was submitted that since there is no valid memorandum of appearance before this Court the defence equally falls off. Counsel stated that in our jurisdiction the memorandum of appearance is simply a notice to defend and that without a valid notice to defend, the Defendant cannot file any other document in respect of this cause. The case of **African Banking Corporation (Z) v Mulende Country Lodges Limited Appeal No. 116/2016<sup>1</sup>**. Counsel urged the Court to dismiss any subsequent documents that will arise from the Defendant.

Counsel added that the cited defects will remain if not cured. That the defendants have not addressed the defects but continue to raise issues that are outside the contentions that have been raised. Counsel concluded by stating that the Defendants are precluded from making any applications in respect of this matter without having on record a valid memorandum of appearance and defence.

In opposing the application, Counsel for the defendant, Mr Banda, submitted that he would rely on the affidavit in opposition and skeleton arguments filed. Counsel conceded to the memorandum of appearance not indicating an address within 10KM but stated that this irregularity does not go to the root of the defence and the defendants have a defence on the merits. Counsel relied on the case of **Leopold Welford v Unifreight 1985 ER 203<sup>2</sup>** as well as the case of **Mwambazi v Forester Farms Limited (1977) ZR 108<sup>3</sup>** to substantiate his point. Counsel contended that the defendants should not be denied the opportunity to be heard for failure to comply with the rules of Court if the defence has merit.

In relation to the issue of the Memorandum being filed out of time, Counsel submitted that the writ of summons on record quotes the defendants as residents of Chipata and that they were commanded

to enter appearance within 21 days. It was stated that Practice Direction No. 4 of 1997 prescribes times within which a defendant may enter appearance to the writ. That as rightly put by Counsel for the Plaintiff, Chipata is 577 KM from Lusaka and that according to Practice Direction No. 4 of 1997, a defendant who is more than 500KM away from the issuing registry must enter appearance within 30days. It was Counsel's submission that instructions from the 2<sup>nd</sup> defendant were that he had been served a writ of summons on 25<sup>th</sup> March, 2022. That Counsel filed a memorandum of appearance and defence on 25<sup>th</sup> April, 2022, and that according to the rules of computation of time, there were public holidays between 25<sup>th</sup> March, 2022, and 25<sup>th</sup> April, 2022, which should not count in the computation of time. Counsel submitted that notwithstanding the erroneous endorsements that required the defendants to enter appearance within 21 days, the Practice Direction hereinbefore mentioned required the defendants to enter memorandum of appearance and defence within 30 days.

In response, Mr Njunga stated, in relation to the submission that the defendants were required to file in the memorandum of appearance and defence within 30days, that the objection came in too late in the

day. That according to Order 2 Rule 2(1) of the RSC, any step taken must be taken within reasonable time.

I have taken note of the skeleton arguments from both sides.

I have carefully considered the affidavit evidence as well as the skeleton arguments on record. I have noted from the record that the writ of summons herein was filed on 9<sup>th</sup> March, 2022, and the memorandum of appearance and defence were filed on 25<sup>th</sup> April, 2022. I do not find that there was inordinate delay in the filing of the defence by the defendants and even if there was, this error is curable in that the defendants could still obtain leave to file out of time. Seeing that they did not, I am using my discretion to allow them to do so even if it is true that they entered appearance/defence outside the 30 days period required. The plaintiff's application is therefore dismissed with costs to the defendants to be taxed in default of agreement.

Dated at Lusaka the .....<sup>21<sup>st</sup></sup>..... day of *January*....., 2025

*Elita Phiri Mwikisa*  
.....  
**ELITA PHIRI MWIKISA**  
**JUDGE**