

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

2023/HP/625



BETWEEN:

**SUSAN ELIZABETH DAVIDSON**

**PLAINTIFF**

**AND**

**PEGGY MWACHILENGA**

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

**NGANDU YANDIKANI**

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

**Before the Honourable Mrs Justice Ruth Chibbabbuka on the 11<sup>th</sup> December, 2023**

For the Plaintiff:

In person

For the Defendants:

No appearance

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## **RULING**

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**Cases referred to:**

1. *Glocom Marketing Limited Vs Contract Haulage Limited HR (2011) Volume 1 ZR 482*
2. *Haroon Muhomed Hussein Vs Ebenezer Prem Chelleppa (T/A Knight High School) SCZ/8/9/2010.*
3. *Mwangelwa Mwanelwa & Another Vs Sibeson Likando (Appeal 230 of 2016)*
4. *Keen Exchange [Holding Company Vs Ingrid Andrea Loiten and Investrust Bank Plc (2009) ZR 343*

**Legislation referred to:**

*High Court Act, Chapter 27 of the Laws of Zambia*

**Other works referred to:**

*Zambian Civil Procedure Commentary and Cases, Volume 1, Patrick Matibini, LexisNexis, 2017*

## **1.0 Introduction**

1.1 This is the defendant's application by way of summons filed on the 7<sup>th</sup> September, 2023 for an Order for security for costs in the sum of K60,000.00. The application is made pursuant to *Order 40 Rule 7* of the *High Court Rules*, in the *High Court Act, Chapter 27* of the *Laws of Zambia* as read together with *Order 23 Rule 1a* of the *Rules of the Supreme Court of England (White Book) 1999 Edition*.

## **2.0 The defendant's affidavit**

- 2.1 The defendant filed an affidavit in support of their application on even date sworn and deposed to by Ngandu Yandikani the 1<sup>st</sup> defendant in this matter. According to the said affidavit he avers as follows:
- 2.2 He is the duly appointed attorney for the 2<sup>nd</sup> defendant who is currently resident outside the jurisdiction. The plaintiff is a Canadian national. There was a lease agreement between the plaintiff and the defendants for a period of one year from the 26<sup>th</sup> July 2022 at a standard rent of K5,500.00. After the termination of the lease the plaintiff has not been paying rent and has been occupying the premises without the consent of the landlord.
- 2.3 The plaintiff who is a foreign national has not been provided any security for costs and may vacate the country at any time leaving the defendants with no remedy and the plaintiff has no property on which the defendants can recover legal costs, rentals and or damages. The statement of claim was served on the defendants on the 5<sup>th</sup> June, 2023 and a Ruling was passed on the 24<sup>th</sup> July, 2023 where costs were granted in favour of the defendants. They requested for security in a letter dated 24<sup>th</sup> July, 2023 addressed to the plaintiff but the request has not been complied with.

### **3.0 The defendant's skeleton arguments and list of authorities**

3.1 In their skeleton arguments counsel argued that the plaintiff is a Canadian national and therefore must be ordered to give security for costs because she is a possible flight risk whose status is well known. Reference was made to *Order 40 Rule 7* of the *High Court Rules, Chapter 27* of the *Laws of Zambia* which provides:

*"The Court or a Judge may, on the application of any defendant, if it or he sees fit, require any plaintiff in any suit, either at the commencement or at any time during the progress thereof, to give security for costs to the satisfaction of the Court or a Judge, by deposit or otherwise, or to give further or better security, and may require any defendant to give security, or further or better security, for the costs of any proceeding undertaken in his interest."*

3.2 Counsel also referred to the case of **Glocom Marketing Limited Vs Contract Haulage Limited HR<sup>1</sup>** where it was held as follows:

*"...an order for security for costs seeks to protect the party in whose favour it is made against being unable to enforce any costs order he may later obtain. The order if complied with will provide the party in whose favour it is made with funds normally held in court available for the payment of any costs the court later awards."*

3.3 In making reference to the **Glocom** case it was counsel's argument that the said case highlights the conditions that must be fulfilled in order for one to be granted an order for security for costs, and one of the conditions being that of being resident outside jurisdiction. Counsel argued further that it was their understanding that the purpose of an

application for security for costs is to offer the defendant in legal proceedings a peace of mind by forcing the plaintiff to pay the court an amount that the court considers appropriate to secure the defendant's costs in the proceedings.

- 3.4 The court's attention was also drawn to *23 Rule 1a* of the *Rules of the Supreme Court* which provides that:

*"[1] Where, on the application of the defendant to an action or other proceeding in the High Court, it appears to the court;*

*a. That the plaintiff is ordinarily resident out of the jurisdiction, or that the plaintiff [not being a plaintiff suing in a representative capacity] is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so, or...."*

- 3.5 Counsel in arguing that since the plaintiff is a foreign national, this made her a possible flight risk and were she to get up and go home to her country, it would be near to impossible for the defendants to find her and enforce the costs that were granted by this Court. To buttress this argument the Court was referred to the case of **Haroon Muhomed Hussein Vs Ebenezer Prem Chelleppa (T/A Knight High School)**.<sup>2</sup>
- 3.6 It was counsel's further argument that as the plaintiff has no real property of fixed nature in Zambia the defendants will lose out if there is no security for costs. For this argument the Court was referred to the cases of **Mwangelwa Mwanelwa & Another Vs Sibeson Likando**<sup>3</sup> and **Keen Exchange [Holding Company Vs Ingrid Andrea Loiten and Investrust Bank Plc]**.<sup>4</sup>

#### **4.0 The plaintiff's affidavit in opposition**

4.1 The plaintiff did not file an affidavit in opposition but instead filed her own application to set aside the defendant's defence which issue this court addressed at the hearing.

#### **5.0 The plaintiff's skeleton arguments and list of authorities**

5.1 The plaintiff did not file any skeleton arguments and list of authorities either.

#### **6.0 The hearing**

6.1 At the hearing only the plaintiff was in attendance. The Court advised the plaintiff that as it had already determined that the matter should go for trial the application to set aside the defence and counterclaim would not be heard as there were triable issues. This Court advised the plaintiff to proceed to respond to the substantive application that was before Court being that for security for costs.

6.2 The plaintiff in opposing the application for security for costs argued that she was also applying for security for costs due to the behaviour of the defendants of not even bothering to show up to the hearing. The plaintiff argued that she had been placed in a predicament where she was incurring financial costs as she has three children in need of accommodation. That she is currently in debt for temporary accommodation where she is residing in the sum of K12,000.00 and that she is unable to find accommodation.

6.2 The plaintiff argued further that she has to pay more for accommodation because of her accent. That she is in a bad financial situation and needs the costs in this matter more so that she has to save money for her immigration issues apart from paying rent.

## 7.0 The decision of the Court

7.1 The rationale for security for costs is succinctly stated by the learned author of **Zambian Civil Procedure Commentary and Cases, Volume 1**, at **page 517** where Patrick Matibini explains that:

*“Applications for security for costs are usually made by a defendant to a claim which is regarded as being speculative or having limited prospects of success and where the defendant is not confident that any order for costs against the plaintiff will be satisfied. In deciding what, if any, order to make, the court will keep in mind the primary purpose for costs which is to protect a party who is forced to respond to litigation at the election of someone else. Thus a counterclaiming defendant who would not himself have commenced litigation against the claimant should neither be ordered to give security nor deprived of an order for security in respect of the claimant’s claim.”*

7.2 From the aforementioned quoted text it can be gleaned that a defendant who is not confident that any order for costs against the plaintiff will be satisfied has the right to apply for security for costs. Counsel for the defendants has argued that the defendants were already awarded costs by this Court in its Ruling dated 24<sup>th</sup> July, 2023 which costs the plaintiff in spite of being written to by the defendant’s lawyers is yet to pay. This Court has however taken note that the said costs were to be taxed in default of agreement, which process the defendants have not adhered to. While the defendant’s do have a right to apply for security for costs, the amount of K60,000.00 claimed for is arising out of this Court’s Ruling which is yet to be taxed. The defendants having opted not to follow this

court's directive cannot now use the provision for security for costs to circumvent the process that should be followed.

7.3 On the other hand the plaintiff through a *viva voce* has also applied for security for costs. On an inspection of the arguments presented it is clear that the same do not meet the standard requirements for an order for security for costs as outlined above in the arguments by counsel for the defendant. Additionally, the quoted text above makes it evident that a counterclaiming defendant who would not himself have commenced litigation against the claimant should not be ordered to give security.

7.4 The upshot of the matter is that the defendant's application for security for costs is denied and the defendants are instead directed to have the same taxed as was indicated in this Court's Ruling of the 24<sup>th</sup> July, 2023. The *viva voce* application by the plaintiff for security for costs equally fails.

75. Each party will bear their own costs for this particular application.

Leave to appeal is hereby granted.

Dated the 11<sup>th</sup> day of December 2023

REPUBLIC OF ZAMBIA  
HIGH COURT OF ZAMBIA  
11 DEC 2023  
R. CHIBBABBUKA  
P.O. BOX 10000, LUSAKA  
HIGH COURT JUDGE