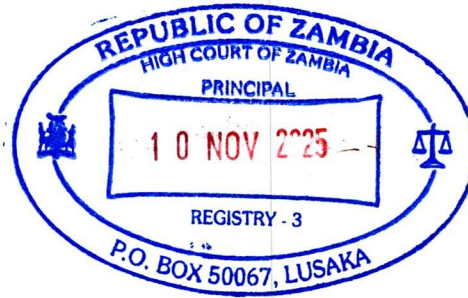


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2024/HP/1333

BETWEEN:



SAMUEL ZULU
JEREMIAH ZULU

1ST PLAINTIFF
2ND PLAINTIFF

AND

SEVERINO OGIK
MERYLITE COLLEGE OF HEALTH
SCIENCES LIMITED
NURSING AND MIDWIFERY COUNCIL OF ZAMBIA
ATTORNEY GENERAL

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

BEFORE HON. JUSTICE E. P. MWIKISA

FOR THE PLAINTIFF: MR. F. KAJOKOLO OF MESSRS CHISOWA CHAMBERS

✓ FOR THE 4TH DEFENDANT: MRS. E.W. MUSONDA- ATTORNEY GENERAL'S CHAMBERS

RULING

Cases Referred To:

1. *Lukasu Properties v African banking corporation Zambia limited*
SCZ/08/10/2023

Legislation Referred To:

1. *The High Court Act, Chapter 27 of the Laws of Zambia*
2. *The Rules of the Supreme Court of England, 1999, Edition, White Book*

This is the 3rd defendant's application to raise a preliminary issue on a point of law and to set aside proceedings pursuant to Order 14A Rule 1(a)(b) as read together with Order 33 Rule 3 and 7 of the Rules of the Supreme Court of England, 1965, 1999 Edition (White Book) as well as Order XI Rule 21 of the High Court Rules and Order VI Rule 1 (1) (d) and (2) of the High Court (Amendment) Rules 2020, of the High Court Act, Chapter 27 of the Laws of Zambia. The application is dated 6th December, 2024, and it raises the following issues:

- 1. Whether the proceedings before this Honourable Court have been properly commenced in line with Order VI 1 (1) (d) and (2) of the High Court Rules as amended by the High Court (Amendment) Rules, 2020;**
- 2. Whether the proceedings having been improperly commenced as outlined in (1) above, can be dismissed for irregularity or want of jurisdiction.**

The application is supported by an affidavit of even date deposed to by one Judith Kayanda Chipili, a Director in the 3rd Defendant Council. It was deposed therein that on 12th September, 2024, the plaintiffs commenced an action against the defendants alleging, inter alia; passing off, corporate fraud and copyright infringement. That in the documents accompanying the said originating process, the

plaintiffs alleged that they had served the 3rd defendant with a letter of demand pertaining to this cause of action but that the plaintiffs have only exhibited letters of demand issued to the 1st and 2nd defendants as shown by exhibit marked "JKC4." It was deposed that in fact, the 3rd defendant was only formally made aware of the court process when it was served with the 1st and 2nd defendants memorandum of appearance, defence and other accompanying documents on 26th November, 2024. Further that it was only upon contacting Counsel for the plaintiffs that the 3rd defendant was served with the originating process to this action on 28th November, 2024.

It was deposed that a perusal of the originating process does not exhibit any letter of demand personally served on the 3rd defendant with respect to this cause of action. Additionally, that the 3rd defendant has neither acknowledged receipt of any letter of demand prior to the commencement of this action nor has an affidavit of service been filed by the plaintiffs demonstrating proof of service of the demand letter. That prior to the commencement of any cause of action, a plaintiff must serve on and exhibit in its originating process,

a letter of demand issued to an impeding defendant, failing which, the process taken out would be irregular and therefore null and void.

It was also deposed that the 3rd defendant is a body corporate established by an Act of Parliament with perpetual succession who can sue and be sued in its own name and should therefore have been personally issued and served with a letter of demand by the plaintiffs. That this action has therefore been irregularly commenced as against the 3rd defendant for lack of compliance with the prescribed Rules of Court.

On the other hand, the 1st and 2nd plaintiffs filed a joint affidavit in opposition to the 3rd defendant's application dated 9th January, 2025, deposed to by Samuel Zulu and Jeremiah Zulu, the 1st and 2nd plaintiffs respectively. It was deposed therein that the plaintiffs herein did not serve both the demand letter and affidavit of service on the 3rd defendant prior to the commencement of this action. The plaintiffs acknowledged that the 3rd defendant is a body corporate with perpetual succession and should have been personally served with the court process. That however, service was issued on the other defendants who have in fact entered appearance to the plaintiffs'

action. It was deposed that this action should therefore not be rendered irregular in its entirety.

The plaintiffs deposed that in the interest of justice, this Honourable Court may proceed with the action in relation to the remaining defendants who had already entered appearance and filed their defences. That the 3rd defendant can therefore be struck-off the matter so that they can be properly joined to the proceedings through a joinder application as the 3rd defendant is an interested party to the proceedings.

When the matter came up for hearing on 30th January, 2025, Counsel for the plaintiffs, Mr Kajokolo, told the Court that the plaintiffs were opposing the 3rd defendant's application to raise a preliminary issue on a point of law made pursuant to Orders 14A and 33 of the RSC, White Book. Counsel submitted that the plaintiffs filed an affidavit in opposition and skeleton arguments in relation to the said application. Counsel requested the Court to render its Ruling based on the affidavit evidence on the record more so that the 3rd defendant, who are the owners of the application were not before court.

I have taken note of the skeleton arguments on the record.

I have carefully considered the affidavit evidence as well as the skeleton arguments on the record. The 1st and 2nd plaintiffs, in their joint affidavit in opposition of the 3rd defendants notice of motion to raise a preliminary issue on a point of law dated 9th January, 2025, acknowledged that they did not serve the letter of demand and an affidavit of service on the 3rd defendant prior to the commencement of this action. The plaintiffs also acknowledged that they should have personally served the 3rd defendant with the court process. The 1st and 2nd plaintiffs, however, argue that court process was served on the other defendants who have in fact entered appearance to the plaintiffs' action. That this action should therefore not be rendered irregular in its entirety. The Plaintiffs urged the court to proceed with the action in relation to the remaining defendants and to strike off the 3rd defendant to enable them be properly joined to the proceedings.

I wish to remind Counsel that affidavits should not contain any extraneous matter by way of objection or prayer or legal argument or conclusion as per Order 5 Rule 15 of the High Court Rules of the

High Court Act, Chapter 27 of the Laws of Zambia. I note that both the affidavit in support and the affidavit in opposition contained extraneous matter by way of prayer and legal arguments respectively. What is more disappointing is that both parties are represented by Counsel which means the affidavits referred to were prepared by Counsel. This practice is becoming prevalent amongst lawyers and I wish to condemn it and remind Counsel that they are officers of the court who are expected to be well acquainted with the Rules of Court. Be that as it may, I will proceed to consider the application herein. The 3rd defendant has raised the following issues for the Court's determination:

- 1. Whether the proceedings before this Honourable Court have been properly commenced in line with Order VI 1 (1) (d) and (2) of the High Court Rules as amended by the High Court (Amendment) Rules, 2020;**
- 2. Whether the proceedings having been improperly commenced as outlined in (1) above, can be dismissed for irregularity or want of jurisdiction.**

From what I can decipher, the main issue for determination herein, is whether or not failure to serve a letter of demand on all the defendants herein, is a fundamental and fatal breach of Order VI of

the High Court (Amendment) Rules, 2020. Order VI (1) (1) (d) and (2) of the High Court (Amendment) Rules, 2020 provides, as follows:

Order 6(1)(1) **“Except as otherwise provided by any written law or these Rules, an action in the High Court shall be commenced, in writing or electronically by writ of summons endorsed and accompanied by-**

(d) letter of demand whose receipt shall be acknowledged by the defendant or an affidavit of service attesting to the service of the letter of demand, which shall set out the claim and circumstances surrounding the claim in detail.

(2) A writ of summons which is not accompanied by the documents under sub-rule (1) shall not be accepted.”

As shown above, the 1st and 2nd plaintiffs acknowledged that they neither served the letter of demand nor an affidavit of service on the 3rd defendant prior to the commencement of this action which they should have done.

In the case **Lukasu Properties v African banking corporation Zambia limited SCZ/08/10/2023¹**, the Supreme Court had occasion to answer the question whether the failure to serve a letter of demand on the defendant before the writ of summons was issued was fatal. The Supreme Court stated that it is now not possible for one to issue a writ of summons without strict adherence to the requirements stipulated in Order VI of the High Court (Amendment)

Rules 2020. In the case **Lukasu Properties v African banking corporation Zambia limited supra**, the Supreme Court stated that:

“On this view, the argument that issuing a letter of demand to some of the defendants is sufficient compliance with the rule collapses. This is on account of the requirement to inform each and every defendant of the claim against them, thereby affording them an opportunity to decide to settle the matter, or litigate the claim... the appellant was entitled to be notified of the claim in its own right, as a prospective defendant, and decide whether or not to litigate the claim. Given the clear intention behind the rule as amended, constructive notice of the claim cannot be imputed to the appellant.”

The Supreme Court then held that:

“In sum, the respondent was required to serve a letter of demand on each and every defendant before commencing the action. The failure to serve a letter of demand on the appellant was a fundamental and fatal omission. It undermined the intention behind Order VI rules 1, 2 and 4 as amended. The action was improperly before the Court, and was bound to be set aside.”


In light of the authority cited above, I am of the considered view that the 1st and 2nd plaintiffs ought to have served the letters of demand on all the 4 defendants in this action, including the 3rd defendant herein. Failure by the 1st and 2nd plaintiffs to comply with Order VI Rule 1(1)(d) of the High Court (Amendment) Rules 2020, renders the action commenced by the 1st and 2nd plaintiffs irregular and improperly before this Court. I therefore find that the 1st and 2nd

plaintiffs' action is improperly before this Court for lack of strict adherence to Order VI (1) (1) (d) of the High Court (Amendment) Rules, 2020.

For the reasons stated, the 3rd defendant's application succeeds. The 1st and 2nd plaintiffs' action is accordingly dismissed in its entirety.

Leave to appeal is granted.

Dated at Lusaka the10th..... day ofNovember....., 2025


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ELITA PHIRI MWIKISA
JUDGE