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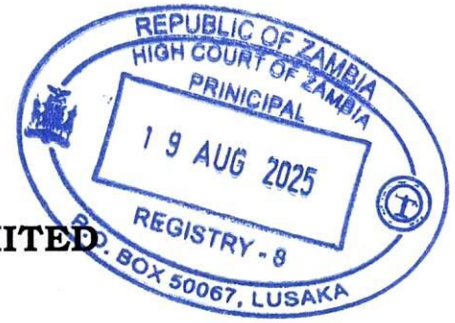
IN THE HIGH COURT FOR ZAMBIA **2024/HP/1359**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

ORYX OIL ZAMBIA LIMITED **PLAINTIFF**

AND

REFUEL PETROLEUM CORPORATION LIMITED **DEFENDANT**

Before: Honourable, Lady Justice G. C. Chawatama in chambers on the 19th August, 2025

For the Plaintiff : *No Appearance*
For the Defendant : *Miss. S. Banda from Messers ECB Legal Practitioners*

RULING

CASES REFERRED TO:

1. *Maheshkumar Somabhai Patel and Himanshu Patel v Freeze-o-Matic Patel and Ajoy j. Paul Selected Judgment No. 3 of 2017*
2. *Finsbury Investment Limited and Antonio Ventriglia and Others, Selected Judgment No.42 of 2016*
3. *Lukasu Properties Limited v African Banking Corporation Zambia Limited SCZ 08/10/2023*
4. *Nkwazi Chambers (Suing as a Firm) v Saturnia Regna pension Trust Limited and African Life Financial Services (Zambia) Limited Appeal No. 70 of 2021*
5. *Daniel Peyala v Zambia Consolidated Copper Mines Appeal 81 of 2012*
6. *Mususu Kalenga Building Limited and Another v Richman's Money Lenders Enterprise (1999) ZR 27*
7. *Coliett v Van Zyl Brothers Limited (1966) ZR 65*
8. *Matale James Kabwe v Mulungushi Limited SCZ Appeal No. 90 of 1996*
9. *Bellamano v Ligure Lombarda Limited (1976) ZR 267*
10. *Kansanshi Mine PLC v Joseph Maini Mudimina and Others appeal No. 149 of 2010*
11. *Savenda Management Services Limited v Stanbic Bank (2016) 3 ZR 128*

12. *African Banking Corporation Zambia Limited v Copper Harvest Foods Limited Appeal no. 216 of 2023*
13. *Jamia Masjid v Sri K Rudrappa Civil Appeal No. 10946 of 2014*
14. *Seshadri v Saroja C.R.P. No. 1302 of 2020*
15. *Lumwana Plant Hire Limited v Lumwana Mining Limited and Others appeal No. 101 of 2016*
16. *Bampi Aubrey Kapala and Joseph Busenga v Attorney General*[17] *2021/CCZ/0011*
17. *Kafamuyeke Mukelabai v Esther Nalwamba, Commissioner of Lands and Attorney General (2013) 2 ZR 312*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The High Court Rules Chapter 27 of the laws of Zambia*
2. *The Rules of the Supreme Court (Whitebook) 1999 edition.*

1.0 INTRODUCTION

1.1 The record reveals that on the 23rd September 2024, the Plaintiff commenced this action, seeking the following reliefs:

1. ***A declaration that the Defendant has no right, title, or interest in stand Liv/4061;***
2. ***A declaration that the Plaintiff, as registered proprietor holding a certificate of title, is entitled to possession of stand Liv 4061;***
3. ***An Order that the Defendant yield vacant possession of stand Liv 4061 to the Plaintiff and***
4. ***Any other relief the court will deem fit.***

1.2 On the 7th October, 2024, the Defendant filed a memorandum of appearance, defence, and counterclaim.

1.3 On the 21st October 2024, the Defendant filed a notice of motion to raise preliminary issues on points of law to determine the following questions:

"1. Whether the Plaintiff's action herein is irregular in that the Plaintiff did file a demand letter when commencing its action against the Defendant, and if this court finds that the Plaintiff's action herein is irregular, the Defendant prays that the Plaintiff's action be dismissed for irregularity.

2. Whether claims by the Plaintiff have not already been determined and therefore amount to an abuse of the Court process and res judicata, and if this Honourable Court finds that the Plaintiff's action herein has been determined and amounts to an abuse of court process, that the Plaintiff's action be dismissed for irregularity and an abuse of court process and being res judicata"

1.4 On the 8th November 2024, the Plaintiff filed summons to set aside the defence and counterclaim for irregularity, claiming that the defence and counterclaim does not comply with Order 18 rule 7 of the Rules of the Supreme Court of England, 1965 and further that the counter claim does not disclose any reasonable cause of action against the Plaintiff and that it therefore ought to be struck out.

1.5 Furthermore, the Plaintiff, on the 12th December 2024, filed a notice of motion to set aside the motion to raise preliminary issues on point of law on the ground that:

1. ***This Court has no jurisdiction to hear the said notice of motion as it is incompetent.***

2. ***The questions raised by the Defendant are not suitable for determination under Orders 14A and 33 of the Rules of the Supreme Court.***

1.6 This is therefore the Ruling on the applications stated above. I will start with the notice of motions filed by the Defendant.

2.0 THE DEFENDANT'S NOTICE OF MOTION

2.1 As stated above, the Defendant's notice of motion to raise preliminary issues was made pursuant to Order 14A rule 1 and 2 as read together with Order 33 rule 3 and rule 7 of the rules of the Supreme Court 1999 edition and section 13 of the High Court Act chapter 27 of the laws of Zambia which provides that:

Order 14A : ***"(1) 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 rule 3: ***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 the 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.***

rule 7: ***If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter***

substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.

Section 13: ***In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all***

multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.

2.0 AFFIDAVIT EVIDENCE

2.1 The affidavit in support of notice of motion for an order to dismiss the matter for being irregular, res judicata, and an abuse of court process was sworn by Daniel Malanda, a director in the Defendant.

2.2 He deposed that the Plaintiff commenced an action against the Defendant by way of writ of summons and statement of claim on the 23rd September 2024 and that the Defendant filed its defence and counter-claim on the 7th October 2024.

2.3 That prior to the Plaintiff commencing this matter, this court under Justice E Pengele at Kitwe determined who between the Plaintiff and the Defendant was the bona fide purchaser of the property in issue, being Liv/4061.

2.4 It was averred that the Plaintiff appealed the judgment and raised an issue with this Court's determination of who owns the property in question as according to them it was not pleaded

but the Court of Appeal upheld the route taken by this Court at J15 paragraphs 8.4 and 8.5 of the judgment and determined as a matter of fact that determining who is the rightful owner of the property between the Plaintiff and the Defendant was integral to the court determining whether the Defendant was entitled to specific performance.

2.5 That the deponent was advised by the Defendant's advocates, whose advice he verily believes to be true and correct, that the issue of ownership of the property was conclusively determined by this Court and upheld by the Court of Appeal. Exhibits marked "DM1 and DM2" decisions of this Court and the Court of Appeal were produced in evidence.

2.6 It was averred that the Plaintiff in contempt of this Court decided to change the certificate of title into its (sic) make while the matter was on going and there was an injunction issued by this Court, the matter was commenced on the 5th December 2019 and the ex parte order of injunction which was never vacated was issued on the 5th December 2019. Copies of the writ of summons and the ex parte order of interim injunction were exhibited and marked "DM3 and DM4".

2.7 That the deponent gave instructions to his advocates to register the order of injunction, but that this was not possible as there was a caveat on the property placed by one Wayne Micheal Wright which was only withdrawn on the 30th March 2021 when trial in the matter had concluded and thus was after the

directors in the Defendant had a meeting with him and confirmed his boundaries. A copy of the Lands printout showing the entry was exhibited and marked "DM5".

2.8 It was deposed that the Order of injunction was brought to the attention of the directors of the Plaintiff, who disobeyed it, and contempt proceedings were commenced but later withdrawn in order to progress the matter. That the Plaintiff quickly after getting wind of the removal of the caveat rushed to change title of the property when the matter was pending judgment and in view of an injunction as can be seen by the date of change of title being the 30th March 2021 the deponent commenced contempt proceedings and in the process reported the advocates who drafted the assignment and lodged the documents to the Law Association of Zambia for misconduct as they ought to have known that this matter was in court and there was an injunction.

2.9 That the deponent was informed by the Defendant's advocate which advice he verily believe to be true that the change in the title was meant to create a situation that would attempt to defeat the decision of this Court and true to their intentions the Plaintiff's attempted to raise their contemptuous deeds on appeal and the Court of Appeal refused to entertain their arguments. That the first claim by the Plaintiff has already been determined by this Court and the Court of Appeal.

2.10 It was averred that the second claim, possession was granted by this Court in its judgment dated the 21st December, 2021, and a writ of possession was issued, executed, and possession granted to the Defendant. The Plaintiff is attempting to re-litigate the issue of possession. A copy of the order granting leave to issue the writ of possession and the writ of possession and the sheriff's debit note was exhibited and marked "DM6".

2.11 That, as regards the third claim, the deponent stated that the vacant possession was granted to the Defendant after this court determined who purchased the subject property. That when the Defendant's advocates shared with the deponent the contemptuous process, they did mention that no demand for this action was made, the deponent instructed the advocates to conduct a search, which showed that no demand letter was filed with this action. A copy of the search was exhibited and marked "DM7".

2.12 It was averred that as directors in the Defendant's company, they reached out to the Plaintiff and pleaded with them not to take this route after they refused to change title in view of the Court's decision. The deponent was informed by the Defendant's advocates that a single judge of the Court of Appeal also echoed the same sentiments and observed the litigious approach that the Plaintiff took on obvious issue, they clearly expressed that businesses have no business in court over the same issues decided and ought to concentrate on doing

business which in this case has been substantially affected by the conduct of the Plaintiff and the lawyers who aided them in this conduct.

2.13 That they feel highly prejudiced as directors in the Defendant company and have a sense of sadness in that, where lawyers are involved, it has always been the expectation that they would obey court orders and conduct themselves in a manner befitting their profession, the Plaintiff should have been curtailed from this contemptuous conduct.

2.14 The Defendant's notice of motion was accompanied by a list of authorities and skeleton arguments in support. It was argued that learned authors of the Atkins Court Forms volume 29 explain the object of Order 14A of the Whitebook at pages 252 to 253 in paragraph 30 that:

> ***"Finality. The object of the order is that finality should be achieved at an interlocutory stage. It is therefore fundamental to the question of whether or not an application under Order 14A is appropriate that the determination of the question of law or matter of construction placed before the court should terminate the whole action or some claim or issue contained in the action. The finality of any order made is, of course, subject to appeal."***

2.15 Counsel then cited the Supreme Court case of **Maheshkumar Somabhai Patel and Himanshu Patel v Freeze-o-Matic Patel and Ajoy j. Paul**[1] wherein it was held that:

> ***"The editorial introduction to Order 14A RSC states that matters may be disposed on a point of law without a full trial of the action where it appears to the court that such a determination will finally determine the proceedings or an issue therein. The reason for Order 14A is essentially to save on time and costs as there is no point in prolonging proceedings when no matter what, a claim is bound to fail for want of cause of action. There are, of course, guidelines as to whether a case should be disposed of on a point of law and these are that the question must be suitable for determination without a full trial of the action and such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein"***

2.16 Counsel submitted that the application fulfills the conditions set out by Order 14A reproduced above. In that the Defendant intimated its intention to defend by entering an appearance and filing into Court a defence on the 7th October 2024, which constitutes sufficient notice of intention to defend. Secondly, the questions of law or construction that the Defendant seeks

determination are suitable for determination without the necessity of holding a full trial of the action. Thirdly, the determination of the subject questions of law in favour of the Defendant is likely to terminate the Plaintiff's entire cause.

2.17 As regards section 13 of the High Court Act, the case of **Finsbury Investment Limited and Antonio Ventriglia and Others**[2] was cited wherein the Court held that:

> ***"The High Court Rules are couched in a manner that all actions before that court are judge-driven. Which entails that a judge of that court has the responsibility of ensuring that all actions before it are stirred to their logical conclusion promptly. In doing so, the High Court has a responsibility of ensuring that it adopts the quickest method of disposing of a matter before it, justly and having afforded the parties an opportunity to be heard. To achieve this, there is built in the practice and procedure of the High Court and indeed the appellate courts, a system whereby an obviously hopeless, frivolous or vexatious matter may be dealt with at the interlocutory stage without having to await a full hearing. This ensures that there is a saving on the already overstretched resources of the Court and indeed that matters are disposed of at least cost to the parties. In its unlimited jurisdiction, the High***

Court is also vested with the power to grant and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may be entitled."

2.18 It was submitted that the starting point is the unequivocal fact that a search was conducted by the Defendant on the 15th October 2024, and it was discovered that no demand letter was submitted and or filed together with the writ of summons and statement of claim. A copy of the search was exhibited and marked "DM7" in the affidavit in support. Counsel stated that the net effect of failure to file a demand letter has been settled by the Supreme Court in the case of **Lukasu Properties Limited v African Banking Corporation Zambia Limited**[3] wherein it was held that Rule 1(i) (d) of Order VI in paragraph 1 above leaves no doubt that the Plaintiff is required to serve a letter of demand on the defendant. This letter must set out the claim and the circumstances that surround it in detail. When commencing the action, the plaintiff is required to include the letter of demand, with the acknowledgment of its receipt by the defendant or an affidavit attesting to the service of the letter of demand. Thus, the writ of summons will be accompanied by a statement of claim, a list and description of documents to be relied upon at trial, a list of witnesses to be called by the plaintiff at trial, and the said letter of demand. Counsel also cited Order VI of the High Court Act Statutory Instrument No. 58 of 2020

and argued that the writ of summons, having been accepted by the registry, was improperly issued. This Court was urged to dismiss the Plaintiff's action for irregularity with costs to the Defendant.

2.19 With regard to the second question, whether the claims by the Plaintiff have not already been determined and amount to an abuse of the court process and res judicata. It was submitted that the terminology of res judicata has been defined by the learned authors of Black's Law Dictionary, 11th edition, at page 1567 as ***"res judicata, an issue that has been definitely settled by judicial decision (judgment). An affirmative defence barring the same parties from litigating a second lawsuit on the same claim or any other claim arising from the same transaction or series of transactions, and that could have been but was not raised in the first suit. The three essential elements are-***

1. ***An earlier decision on the issue.***
2. ***A final judgment on the issue.***
3. ***The involvement of the same parties or parties in privity with the original parties.***

2.20 The case of **Nhwazi Chambers (Suing as a Firm) v Saturnia Regna Pension Trust Limited and African Life Financial Services (Zambia) Limited**[4] where the Court of Appeal held that:

"We note that the Appellant commenced proceedings in the High Court by way of originating summons, seeking protection under the Act. Although this was not granted by the High Court, it was eventually granted by the Supreme Court in its judgment when it ruled that the notice to quit was ineffective, as it did not comply with the provisions of the Act. The Supreme Court found that the amount of rentals owing was not ascertained. They further did not accept the argument by the Respondent that the Appellant cannot seek protection of the Act because the lease agreement was not registered...from the afforested, it is clear that all the issues arising from the originating summons, in relation to the provisions of the Act, The Lands and Deeds Registry Act were fully determined by the Supreme Court. In our view, the Supreme Court did not leave out any issue subject to the claims in the High Court... The issue of the return of the goods which were seized under the warrant of distress was neither before the High Court nor the Supreme Court and could therefore not be the subject of determinations. The Judgment of the Supreme Court was final and binding on the parties. They

did not remit the matter back to the High Court for any issues as to entitle the Appellant to go back and resuscitate the originating summons. Therefore, the Appellant could not after the judgment of the Supreme Court, which was final, revert to the High Court and apply for amendment of the originating summons...in the view that we have taken, we agree with the learned judge that the action taken by the Appellant in seeking leave of the court to amend the originating summons by bringing fresh claims in a cause which was fully determined on the merits, was an abuse of the court process and res judicata. Therefore, the first ground equally fails."

2.21 Counsel submitted that what is essentially left is enforcement of the Judgment, which includes cancellation of the fraudulent and contemptuous certificate of title obtained by the Plaintiff. That the claims contemptuously orchestrated by the Plaintiff were to bring back a matter already litigated. That as regards the claim of a declaration that the defendant has no right, title or interest in stand LIV/4061, this Court before determining whether the Defendant was entitled to specific performance against Vuma Zambia Limited which was the 2nd Defendant in the case 2019/HKC/0058 had to determine who between the Plaintiff and the Defendant had rightfully purchased LIV/4061.

That at J43 at paragraph 118 of the judgment dated 21st December 2021, the Court stated that:

> ***"I hold the considered opinion that although, the 3rd Defendant (now Plaintiff in this case) asserted its entitlement to purchase the property, the fact remains that it was given actual notice that the Plaintiff (now defendant in this case) had already concluded a valid contract of sale with the 2nd Defendant (Vuma Zambia Limited which company was the vendor).... I am inclined to hold that the aforementioned slightly higher offer by the 3rd Defendant (now Plaintiff in this case) could not give the 3rd Defendant (now Plaintiff in this case) a good title to the property because the 2nd Defendant (Vuma Zambia Limited which was the vendor) had already executed a binding contract with the Plaintiff".***

It was argued that this Court therefore determined who rightly purchased the property in controversy, being Liv/4061 as such, the claim of a declaration that the Defendant has no right, title, or interest in stand Liv/4061 is an attempt at relitigating an issue and is res judicata and an abuse of the court process.

2.22 As regards the second claim, namely a declaration that the Plaintiff, as registered proprietor holding a certificate of title, is

entitled to possession of stand Liv 4061, has been determined and is an attempt after contemptuously obtaining title to relitigate the issue. Counsel submitted that vacant possession of LIV 4061 was given to the Defendant against the Plaintiff, who was in possession at the time. The Defendant has exhibited the order granting possession and evidence of the execution, and is also currently in possession of the property. This Court, at paragraph 131 at page J51 of the judgment dated 21st December 2021, stated that:

> ***"In addition to the foregoing, I order that the Plaintiff is entitled to vacant possession of the subject property and accordingly, that the 3rd Defendant (Plaintiff in this case) must yield up vacant possession of the property to the plaintiff (now Defendant in this case) by 31st January 2022 or such later period as the parties may choose to agree upon".***

That the Defendant in this case was the Plaintiff and the Plaintiff was the 3rd Defendant.

2.23 With regards to the third issue that the order that the Defendant yields vacant possession of stand LIV 4061 to the Plaintiff has been conclusively dealt with. What perhaps the Plaintiff does not understand is that their fraudulent act in the hope that they would waste the court's time or miraculously change the tide does not aid them but only exposes their contempt. It was

argued that the Plaintiff contemptuously changed title, the parties had already filed their written submissions, and the judgment of this court was soon thereafter delivered, the Plaintiff attempt to raise the issue of being a title holder on a contract of sale which was not enforced by the Court and the argument were rejected by the Court of Appeal. Counsel then cited the following cases: **Daniel Peyala v Zambia Consolidated Copper Mines**[5] and **Mususu Kalenga Building Limited and Another v Richman's Money Lenders Enterprise**[6]. Counsel prayed for the cost of this action, citing the cases of **Collett v Van Zyl Brothers Limited**[7] and **Matale James Kabwe v Mulungushi Limited**[8].

3.0 THE PLAINTIFF'S SKELETON ARGUMENTS IN SUPPORT TO SET ASIDE NOTICE OF MOTION TO RAISE PRELIMINARY ISSUES ON POINT OF LAW

3.1 The skeleton argument was filed on the 12th December 2024. Counsel cited the case of **Bellamano v Ligure Lombarda Limited**[9], wherein Gardner, J.S. stated that:

> ***"The application in this case was made by way of a summons applying for dismissal of the action and other relief. It is not indicated on the summons under what order and rule the application is made, and I would point out in passing that it is always necessary, on the making of an application, for the***

summons or notice of application to contain a reference to the order and rule number or other authority under which relief is sought."

Counsel argued that this requirement of the law was reduced into Practice Direction No. 1 of 2002, which reads "All applications brought to Court should indicate the Act and section, or Order and Rule under which the application is brought, failure of which the application shall not be accepted for filing or be entertained."

3.2 It was submitted that the order or rule under which the application is brought must be in tandem with the jurisdiction of the Court sought to be exercised. It was contended that Order 14A and 33 (3) of the Rules of the Supreme Court cited by the Defendant as authority for the motion filed is not in tandem with the jurisdiction of the Court sought to be invoked. The case of **Kansanshi Mine PLC v Joseph Maini Mudimina and Others**[10] where the Supreme Court held that:-

"We accept the submissions by the learned counsel for the appellant that the absence of an indication of the correct provisions under which the motion was taken out, makes the application by the respondent ipso facto irregular".

Also, the case of **Savenda Management Services Limited v Stanbic Bank**[11] the Supreme Court held that :-

"Ideally, when a judge receives an incompetent application, he or she is not required to waste time hearing such an application. Rather, the judge should indicate that the application is incompetent on the papers. This is in accord with good case management."

3.3 Counsel submitted that this Court has no jurisdiction to hear the Defendant's application, which is incompetent having been brought under the wrong law. That the Defendant should have employed Order 6 rule 1 as per the decision of the Supreme Court in **Lukasu Properties Limited V African Banking Corporation Zambia Limited**[3]. It was argued that the Supreme Court guided on the need for a demand before commencing an action and that Order 6 is comprehensive and does not require one to resort to the Rules of the Supreme Court of England by virtue of section 10 of the High Court Act. It was held that

"It is equally true that Order 2 RSC, which is applicable to the High Court matters by virtual of section 10 of the High Court Act, describes the failure to comply with the rules as irregularities and reprieves the proceedings from nullification... however, two factors should be bourne in mind in considering whether the forgoing observations are applicable to the instant case. the first is that Order VI of the High Court Act has undergone a number of

amendments before Statutory Instrument No. 58 of 2020. These amendments have been addressed the effect of failure to comply with the requirements of the Order. It is only in Statutory Instrument No. 58 of 2020 that the Order now forbids the acceptance of a writ of summons when the documents that should accompany the writ are missing.... Order 6/1/3 RSC, which deals with writs of summons, states that non-compliance with form does not render the proceedings void, but is a non-compliance which can be dealt with under Order 2 RSC. In stark contrast to this position, a reading of Order VI of our High Court Rules clearly reveals that the intention behind sub-rule 2 of Order VI is that a writ of summons that is unaccompanied by the list of documents enumerated in the Order is incompetent. It is not to be accepted by the Court under any circumstances. This proscription demolishes the argument that a failure to serve a letter of demand on a defendant is but an irregularity that will be countenanced by the court... on this view, it is difficult to conceive the default that is contemplated by section 10 of the High Court Act, which enjoins the courts to refer to the whitebook in such an event. There being no default in the practice and procedure to be followed where a Plaintiff fails to file the writ of summons with the listed documents,

Order 2 RSC cannot be enlisted. This is because Order VI rule 2 stipulates the effect of non-compliance."

3.4 It was then submitted that based on the Supreme Court decision in **Lukasu Properties Limited v African Banking Corporation Zambia Limited**[3], the issue of whether this action could be sustained because of the Plaintiff's failure to file the demand letter ought to have been raised under Order 6 of the High Court Rules as opposed to resorting to Order 14A and Order 33 Rule 3 of the Rules of the Supreme Court.

3.5 That as regards the second question that the Defendant should have employed Order 18 rule 19(1) (d) of the RSC which provides for striking out of pleadings or anything in the pleadings on the grounds that it is an abuse of the process of the Court; Order 18 rule 19(1)(d) confers upon the court power where there is abuse of the process of the Court to strike out such action. Examples of what would constitute abuse include re litigation/res judicata. It was submitted that the Defendant has brought its application under Order 14A and or 33 (3) instead of Order 18 rule 19 (1)(d) and thus robbing this Court of the requisite jurisdiction to hear the application as it is improperly before this Court.

3.6 As regards the question whether the questions are suitable for determination under Order 14A and 33. It was submitted that the questions sought to be determined by the Defendant pursuant to Order 14A and Order 33 rule 3 are not suitable for

determination under the said provisions. That the issue for determination under Order 14A should be suitable for determination without a full trial, and the determination of such an issue should settle the entire cause or matter, subject only to any possible appeal. That the application before this Court does not seek to determine the substantive matter, as the questions/issues raised are procedural issues. Counsel cited the learned authors of Atkin's Court Forms volume 29 at pages 252-253 with regard to Order 14A of the Rules of the Supreme Court which states that:

> ***"The object of the order is that finality should be achieved at an interlocutory stage. It is therefore fundamental to the question of whether or not an application under Order 14A is appropriate is that the determination of the question of law or matter of construction placed before the court should terminate the whole action or some claim or issue contained in the action".***

Counsel referred to the explanatory note at paragraph 14A 12/10 of the Rules of the Supreme Court, which explains a determination of a question of law or construction as follows:

> ***"Upon making its determination of the question of law or construction, the court may dismiss the action or make such order or judgment as to thinks just. In this way, the action will be finally disposed of***

without a full trial, and the judgment or order will have the same force and effect as a judgment or order after a full trial of the action."

3.7 This Court was referred to the case of **African Banking Corporation Zambia Limited v Copper Harvest Foods Limited**[12]. It was then argued that the procedure under Order 14A virtually replaces the trial process and the determination by the Court under Order 14A goes to the merits of the substantive action and should dispose of a matter without the need for trial. That the first question raised whether the action is irregular because the Plaintiff did not file a demand letter when commencing the action as required by the High Court Rules is therefore not suitable question for determination under Order 14A Rules of the Supreme Court as the effect of a successful application under Order 14A would not dispose of the main matter on the merit.

3.8 As regards the question whether a plea of res judicata can be determined under Order 14A, it was submitted that res judicata is equally not a suitable question for determination under Order 14A or indeed Order 33 Rule 3, as a plea of res judicata implicates both law and facts raised in a matter. That Order 14A is suitable for the determination of any question of law or construction of any document arising in any cause or matter, and not to settle issues of fact. That the Defendants' motion specifically reads "Notice of Motion to raise preliminary issues

on point of law," suggesting that the questions of law which have arisen in the matter, which they intend the court to settle. That the plea of res judicata is, however, a question of mixed law and fact. Counsel argued that Order 14A cannot be employed to settle factual disputes. That for a plea of res judicata to succeed, one has to show not only that the parties are the same in both actions but equally that the issues in both actions are the same. Whether the issues in both actions are the same is a factual question and not a matter of law. The cases of **Jamia Masjid v Sri K Rudrappa**[13] and the **Seshadri v Saroja**[14], **Lumwana Plant Hire Limited v Lumwana Mining Limited and Others**[15] and **Bampi Aubrey Kapala and Joseph Busenga v Attorney General**[16] were cited.

3.9 As regards the procedure under Order 33 rule 3 of the Rules of the Supreme Court, the case of **Kafamuyeke Mukelabai v Esther Nalwamba, Commissioner of Lands and Attorney General**[17]. The Court held that

> ***"Order 33, rule 3 of the Supreme Court Rules envisages a trial or inquiry into the issue so as to establish it as a matter of fact in the determination of the whole cause or matter, it is not suited to the disposing of the cause or matter on a point of law as envisaged under Order 14A".***

4.0 ANALYSIS AND DECISION OF THIS COURT

4.1 I have carefully considered the application for preliminary issues before me and the submissions made by the parties through their legal counsel. In this application, I am being asked to consider the questions, first, whether the application to raise preliminary issues by the Defendant is properly before me on the ground that the Defendant has cited the wrong provision of the law. The second question is whether, in the event the application is properly before me, are the Defendant's questions of law posed for determination in the application attenable under Order 14A of the Rules of the Supreme Court.

4.2 In considering the question whether the application to raise preliminary issues by the Defendant is properly before me on the ground that the Defendant has cited the wrong provision of the law. I must, from the onset, state that citing a wrong provision of the law in raising a preliminary issue does not automatically invalidate the application for preliminary issues, but it can affect its success depending on the specific circumstances and the nature of the error. It is my firm view that this Court in this application must focus on the substance of the issue raised rather than the procedural error in citing the law. This is more so because the error does not, in my opinion, prejudice the Plaintiff, as the procedural error raised by the Defendant does relate to jurisdiction, which is fatal to the proceedings of this matter.

4.3 Therefore, the irregularity prompted by the Defendant in this matter and the statutory foundation which forms the basis of the preliminary issues, being Order 6 rule 1 of the High Court Rules, cannot simply be ignored. This Court, on its own motion in exercise of its inherent jurisdiction, can decide on want of jurisdiction because of the irregularity founded under Order 6 rule 1 of the High Court Rules. Thus, the irregularity observed by the Defendant cannot be simply ignored, as it is founded on jurisdiction under Order 6 rule 1 and must be decided in this matter. It is a fact that the Plaintiff has not taken issues with the fact that a demand notice was not served on the Defendant, rather, the kernel of the Plaintiff's objection is that although the Plaintiff did not file and serve a letter of demand the Preliminary issue raised by the Defendant is defective as it cites the wrong law and thus ineffectual. Therefore, it is a fact that the commencement of this matter was done in complete violation of the mandatory requirement of the law as prescribed in Order 6 rule 1 of the High Court Rules.

4.4 With great respect, I do not accept learned counsel's argument for the Plaintiff's reasoning advanced in support of their client's position. The question that I should ask myself and answer is whether, having regard to the fact that the Plaintiff did not file or serve a demand letter as mandatory required under Order 6 rule 1 of the High Court Rules, can the originating process filed by the Plaintiff in this matter possibly stand. The inescapable answer is that the originating process, however counsel for the

Plaintiff would choose to advocate, cannot stand as it is legally flawed under Order 6 rule 1.

4.5 It is my firm view that citing the wrong law does not defect or cure the irregularity envisaged under Order 6 Rule 1 of the High Court Rules. The position of the law which this Court is bound to interpret and enforce dictates that under Order VI rule (1) (d) of the High Court Amendment Rules of 2020 provides that:

> ***Order VI of the principal Rules is amended by the deletion of rule 1 and the substitution therefore of the following:***
>
> ***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—***
>
> ***(a) a statement of claim; (***
>
> ***b) list and description of documents to be relied on at trial;***
>
> ***(c) list of witnesses to be called by the plaintiff at trial; and***
>
> ***(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.

The Court of Appeal guided on the effect of non-compliance of Order VI Rule (1) (d) of the High Court Rules in the case **Africa Banking Corporation Zambia Ltd v Copper Harvest Foods Limited & 3 Others** that failure to comply with Order VI Rule 1 (d) entitles the Court to dismiss the matter. It is therefore my firm view that the originating process filed by the Plaintiff by disregarding the mandatory provision of Order VI rule (1) (d) makes the originating process filed by the Plaintiff incompetent.

4.6 It is my considered view that the Defendant is in order to invoke Order 14A and 33 of the Rules of the Supreme Court to prevent and thwart the further progression of this matter as the preliminary issues go to the basis of this matter. I must, however, stress that a preliminary objection founded or attaching to the originating process, it is imperative to cite the relevant statutes formulation intended to target, as in this case being Order 6 rule 1. This serves a useful purpose of saving limited judicial resources, or in circumstances such as the present preliminary issue it found itself in.

4.7 The meaning and ramification of the above preceding are that the Defendant's preliminary issue succeeds to the extent elaborated in this Ruling.

4.8 Having regard to the position taken above, this Court will refrain from delving into the second question as it becomes otiose. The net effect is that this matter is hereby dismissed. Since the Defendant was put to expense in reacting to this matter, it is only fair that I award costs to the Defendant, which costs must be taxed in default of agreement.

Delivered at Lusaka, this 19th day of August, 2025

G.C. CHAWATAMA
HIGH COURT JUDGE