

R1

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



**2024/HP/0968**

BETWEEN:

(By Original Action)

**ERICK TEMBO**

**PLAINTIFF**

AND

**PETER KALENGA**  
(T/A Dieu Donnie Ndayisaba)  
**MUKWANU FOODS LIMITED**

**1<sup>st</sup> DEFENDANT**

**2<sup>nd</sup> DEFENDANT**

AND

(By Counterclaim)

**PETER KALENGA**  
(T/A Dieu Donnie Ndayisaba)

**PLAINTIFF**

AND

**ERICK TEMBO**  
**JACKSON MUSHILI**  
**OBEDI MUSIAFILI**

**1<sup>st</sup> DEFENDANT**

**2<sup>nd</sup> DEFENDANT**

**3<sup>rd</sup> DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 24<sup>th</sup>  
DAY OF APRIL, 2025**

*For the Plaintiff in the Original : Mr L. Lumamba, Messrs Lumamba action &  
action for the 1<sup>st</sup> & 3<sup>rd</sup> Defendants Legal Practitioners  
on the counterclaim*

*For the 1<sup>st</sup> & 2<sup>nd</sup> Defendants : Mr G. Musukwa and Mr. L. Sikalumbi, Messrs  
in the original action for & Ngosas & Associates  
the Plaintiff on the  
counterclaim*

*For the 2<sup>nd</sup> Defendant : No appearance  
on the counterclaim*

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**R U L I N G**

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CASES REFERRED TO:

1. ***Leopold Walford (Z) Limited v Unifreight 1985 ZR 203***
2. ***Standard Chartered Bank Zambia Plc v John M.C Banda SCZ Appeal No 94 of 2015***
3. ***Hakainde Hichilema & 5 others v The Government of the Republic of Zambia Appeal No 28 of 2017***
4. ***African Banking Corporation v Copper Harvest and others Appeal No 18 of 2021***
5. ***Copperbelt Energy Corporation v Patrick Mwila and ZESCO Limited and Zambia Daily Mail Limited Appeal No 190 of 2021***
6. ***Andrew Changala v Maheba Asset Holding Limited CAZ Appeal No 297 of 2021***

LEGISLATION REFERRED TO:

1. ***The High Court Rules, Chapter 27 of the Laws of Zambia***
2. ***The Rules of the Supreme Court of England, 1965, 1999 Edition***

OTHER WORKS REFERRED TO:

1. ***Odgers Principles of Pleading & Practice by D.B Carson, 22<sup>nd</sup> Edition, London Stevens & Sons 1981***
2. ***Zambian Civil Procedure: Commentary and Cases Vol 1 by Patrick Matibini, Lexis Nexis 2017***

**1. INTRODUCTION**

- 1.1 In an application which was filed on 10<sup>th</sup> January, 2025, pursuant to ***Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia***, as read with ***Order 2 Rule 2 of the Rules of the Supreme Court of England, 1965, 1999 Edition***, the 1<sup>st</sup> Defendant in the original action and Plaintiff on the counterclaim, Peter Kalenga, seeks an Order of this Court, to set aside the application to enter Judgment on admission, which was filed by Obed Musiafili, the 3<sup>rd</sup> Defendant on the counterclaim.
- 1.2 The application to enter Judgment on admission was made pursuant to ***Order 27 Rule 3 of the Rules of the Supreme***

***Court of England, 1965, 1999 Edition*** as read with ***Order 21 Rule 5 of the High Court Rules, Chapter 27 of the Laws of Zambia*** on 2<sup>nd</sup> October, 2024.

- 1.3 The application to set aside the application to enter Judgment on admission was supported by an affidavit and a List of Authorities and Skeleton Arguments in support.
- 1.4 Obed Musiafili filed an affidavit in opposition and a List of Authorities and Skeleton Arguments in opposition on 31<sup>st</sup> January, 2025.

## **2. BACKGROUND**

- 2.1 On 8<sup>th</sup> July, 2024, Erick Tembo, as Plaintiff in the original action, commenced this action against Peter Kalenga (AKA Dieu Donnie Ndayisaba) and Mukwanu Foods Limited as Defendants, by Writ of Summons which was accompanied by a statement of claim and the other documents claiming:
  - i. The sum of K320, 000.00 being the outstanding balance owed by Peter Kalenga (AKA Dieu Donnie Ndayisaba) and Mukwanu Foods Limited to Erick Tembo for the provision of ginger;*
  - ii. The sum of K1, 400, 000.00 the same being damages for slander;*
  - iii. Damages for loss of business;*
  - iv. Further or other relief that this Court may deem just and equitable;*
  - v. Costs of and incidental to this action.*
- 2.2 Peter Kalenga (AKA Dieu Donnie Ndayisaba) and Mukwanu Foods Limited entered appearance and filed their defence

and counterclaim on 18<sup>th</sup> July, 2024. By the counterclaim Peter Kalenga as Plaintiff, sued Erick Tembo, Jackson Mushili and Obed Musiafili as the Defendants seeking:

- i. Immediate payment of K1, 526, 000.00 or the Kwacha equivalent being the balance for the sale of ginger in South Africa;*
- ii. An Order restraining Erick Tembo, Jackson Mushili and Obed Musiafili either by themselves, servants, agents or whomsoever and whatsoever from trespassing on Peter Kalenga's properties and from interfering with the quiet possession and quiet use of Peter Kalenga's vehicle;*
- iii. Damages for loss of business opportunities and chance;*
- iv. Costs;*
- v. Any other relief which the Court may deem fit.*

2.3 An application was made by Peter Kalenga to strike out the Writ of Summons and statement of claim on 18<sup>th</sup> July, 2024, and by an Order dated 14<sup>th</sup> August, 2024, I directed that the said Writ of Summons and statement of claim be amended. The amended Writ of Summons and statement of claim were filed on 23<sup>rd</sup> August, 2024.

2.4 Erick Tembo filed a defence to the counterclaim on 12<sup>th</sup> August, 2024, while Obed Musiafili filed a defence to the counterclaim, and he also counter claimed against Peter Kalenga on 28<sup>th</sup> August, 2024, seeking:

- i. The sum of USD46, 000.00 being the amount outstanding by Peter Kalenga in accordance with the Debt Agreement which was executed by the parties;*

- ii. *Specific performance of the terms of the undertaking of the Debt Agreement duly executed by the parties herein in the presence of Counsel;*
- iii. *Damages for loss of business;*
- iv. *Further or other relief that the Court may deem just and equitable;*
- v. *Costs of and incidental to this action.*

2.5 Obed Musiafili on 2<sup>nd</sup> October, 2024, filed summons to enter Judgment on Admission against Peter Kalenga. Thereafter, on 10<sup>th</sup> January, 2025, Peter Kalenga applied to set aside that application, which is the subject of this Ruling.

### **3. SUBMISSIONS AT THE HEARING**

#### **SUBMISSIONS BY COUNSEL FOR PETER KALENGA**

- 3.1 At the hearing, Counsel for Peter Kalenga submitted that they had applied to set aside the application to enter Judgment on admission on the counterclaim, as Judgment on admission is entered in the Court's discretion. He added that it is not entered as a matter of right. Counsel further stated that the application had been made as there is a counterclaim, which had to be responded to.
- 3.2 In that regard, he referred to ***Order 18 Rule 14 (3) of the Rules of the Supreme Court of England, 1965, 1999 Edition***, as providing that there is no joinder of issues on a statement of claim or a counterclaim. Counsel went on to state that this meant that there must be appearance to both and defences filed.

- 3.3 It was also his submission, that if there is a counterclaim, there must be a reply. Further submission was made, that if there was failure to respond to a statement of claim or a counterclaim, this could result in Judgment in default being entered for a statement of claim, and Judgment in default of pleading or defence for a counterclaim.
- 3.4 **Order 20 Rule 1 of the High Court Rules** was cited as authority in that regard.
- 3.5 Further reference was made to the learned author **Patrick Matibini** in the book **Zambian Civil Procedure: Commentary and Cases Vol 1 Lexis Nexis 2017 at page 609** stating that it states that, Judgment on admission cannot be entered where there is a counterclaim.
- 3.6 The case of **Andrew Changala v Maheba Asset Holding Limited** <sup>(6)</sup> was submitted as where the Court of Appeal guided that Judgment on Admission should not be entered where it is irregularly before the Court. On that basis, the prayer was that the application be granted.

#### **RESPONSE BY COUNSEL FOR OBED MUSIAFILI**

- 3.7 The submission in response, was that documents were filed in opposition to the application. Counsel further stated that with regard to the reliance on the case of **Andrew Changala v Maheba Asset Holding Limited** <sup>(6)</sup>, this Court should address its' mind to breach of a regulatory requirement.
- 3.8 Further submission was made, that in considering the submissions that had been made with regard to the learned author **Patrick Matibini**, that this should be understood in

context, more so that the same had not been referred to in the Skeleton Arguments.

- 3.9 Counsel still in submitting, stated that they had cited a case which was decided by the Court of Appeal in the Skeleton Arguments, which held that if the offending rule or the rule in question, in this case **Order 11 of the High Court Rules**, does not specify a penalty for the breach, and no prejudice would be occasioned to the offended party, once such passes through the hands of the Registry, it becomes a regulatory breach which is curable.
- 3.10 The continued submission was that Peter Kalenga had not demonstrated any prejudice that would be occasioned to him, and the prayer was that the application be dismissed with costs.

#### **REPLY BY COUNSEL FOR PETER KALENGA**

- 3.11 In reply, it was submitted that it was interesting to argue that failure to react to a statement of claim is a regulatory breach. Counsel stated that to the contrary, it is mandatory to react to a statement of claim, and he relied on **Order 18 Rule 14 (3) of the Rules of the Supreme Court of England**, stating that the said provision is clear that there is no joinder of issues on a statement of claim and a counterclaim.
- 3.12 Counsel asked the question what happens to the counterclaim if the Court enters Judgment on admission.
- 3.13 As to the submissions on prejudice which had been made, Counsel stated that while it had been stated that Peter

Kalenga had not demonstrated any prejudice, the question was whether entry of Judgment on admission was tenable. In conclusion, Counsel stated that the application lacked merit, as it had ignored the provisions of **Order 20 Rule 1 of the High Court Rules** and **Order 18 Rule 14 (3) of the Rules of the Supreme Court of England**.

3.14 Premised on that, the prayer was that the application be dismissed.

#### **4. DECISION OF THIS COURT**

4.1 I have considered the application. **Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia** provides that:

***“2. Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not.”***

4.2 **Order 2 Rule 2 of the Rules of the Supreme Court of England, 1965, 1999 Edition** on the other hand states that:

***“(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any***

***fresh step after becoming aware of the irregularity.”***

- 4.3 The gist of the application, as can be gleaned from the affidavit which was filed in support of the application, and which was deposed to by Gershom Musukwa, Counsel who is seized with conduct of the matter on behalf of Peter Kalenga, is that Erick Tembo as Plaintiff in the original action, on 8<sup>th</sup> July, 2024 filed a Writ of Summons together with the accompanying documents.
- 4.4 Counsel averred that on 18<sup>th</sup> July, 2024, Peter Kalenga as 1<sup>st</sup> Defendant, in the original action, entered appearance and filed the defence and the other documents, in response to the Writ of Summons. It was also deposed that by way of counterclaim, Jackson Mushili and Obed Musiafili were introduced as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
- 4.5 Then on 2<sup>nd</sup> October, 2024, Obed Musiafili filed and served Peter Kalenga summons to enter Judgment on admission, without entering appearance or delivering a defence thereof.
- 4.6 In the List of Authorities and Skeleton Arguments which were filed in support of the application, the law which had been relied on, in making the application was cited. Further reference was made to ***Order 11 of the High Court Rules*** which provides for the entry of appearance and filing a defence and counterclaim if any.
- 4.7 Argument was made, that ***Order 11 of the High Court Rules, as amended by Statutory Instrument No 58 of 2020*** had done away with conditional appearance

completely, and requires a Defendant to enter appearance and file a defence and counterclaim if any, together with the other required documents.

- 4.8 As authority, the case of **Andrew Changala v Maheba Asset Holding Limited** <sup>(6)</sup> was cited.
- 4.9 It was further argued that the application to enter Judgment on Admission was irregularly before Court, as a counterclaim creates a whole new action, and that the rules that govern a counter claim are similar to those that govern a fresh action.
- 4.10 In the affidavit in opposition, Lumamba Mudenda, Counsel seized with conduct of the matter on behalf of Obed Musiafili deposed that to the contrary, a defence and counterclaim was filed, and served on Peter Kalenga, as shown by the letter of service which was exhibited as 'LM1'.
- 4.11 In the List of Authorities and Skeleton Arguments in Opposition, Obed Musiafili with reference to the case of **Hakainde Hichilema & 5 others v The Government of the Republic of Zambia** <sup>(3)</sup> stated that **Order 3 Rule 2 of the High Court Rules** gives wide discretionary powers to the Court to make interlocutory orders, even if the same have not been expressly asked for, in Order to meet the ends of justice.
- 4.12 The case of **Copperbelt Energy Corporation v Patrick Mwila and ZESCO Limited and Zambia Daily Mail Limited** <sup>(5)</sup> was further relied on, as having held that there

was erroneous reliance on **Order 3 Rule 2** in dismissing the matter for failure to enter appearance and filing a defence.

4.13 It was argued that the Court of Appeal in arriving at the decision, referred to the cases of **Leopold Walford (Z) Limited v Unifreight (1)** and **Standard Chartered Bank Zambia Plc v John M.C Banda (2)**.

4.14 The submission was that in the said case, the Court of Appeal with reference to the case of **African Banking Corporation v Copper Harvest and others (4)** stated that any default in a procedural requirement which has no prejudicial effect on the other party, may be cured. It was also stated that **Order VI Rule 1 (d) of the High Court Rules** does not provide for a penalty once the documents have passed through the Registry.

4.15 Therefore, the Court of Appeal found that the default was not fatal to the case.

### **DECISION**

4.16 The record shows that Erick Tembo, as Plaintiff in the original action, on 8<sup>th</sup> July, 2024 commenced proceedings by Writ of Summons which was accompanied by a statement of claim and the other requisite documents against Peter Kalenga and Mukwanu Foods Limited, as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively.

4.17 Then on 18<sup>th</sup> July, 2024, Peter Kalenga and Mukwanu Foods Limited entered appearance and filed their defence and counterclaim. By the counterclaim, Peter Kalenga sued Erick

Tembo, Jackson Mushili and Obed Musiafili as the Defendants.

4.18 Thereafter, on 12<sup>th</sup> August, 2024, Erick Tembo filed a defence to the counterclaim. Then on 28<sup>th</sup> August, 2024, Obed Musiafili filed a defence to the counterclaim, and he also filed a counterclaim against Peter Kalenga.

4.19 It will further be seen that on 23<sup>rd</sup> August, 2024, Erick Tembo as Plaintiff in the original action, filed an amended Writ of Summons, which basically particularised the claim for defamation.

4.20 Then on 2<sup>nd</sup> October, 2024, Obed Musiafili applied to enter Judgment on admission against Peter Kalenga.

4.21 It is that application which is sought to be set aside, premised on the provisions of **Order 18 Rule 14 (3) of the Rules of the Supreme Court of England.**

4.22 That Order states the following:

***“(3) There can be no joinder of issue, implied or express, on a statement of claim or counterclaim.”***

4.23 The explanatory notes in **Order 18/14/1 of the said Rules of the Supreme Court of England** state the effect of the rule as:

***“The effect of this rule is to ensure that the parties are ultimately, but definitely, brought to an issue, and that at the close of pleadings the issues between the parties are clearly and precisely defined. As to when pleadings are deemed to be closed, see r.20.***

*Thus, if no defence is served in answer to the statement of claim or no defence to counterclaim is served in answer to the counterclaim, there are no issues between the parties; the allegations of fact made in the statement of claim or counterclaim are deemed to be admitted, r.13 (1) and the plaintiff or defendant, as the case may be, may enter, or apply for, judgment in default of pleading under O.19.*

*On the other hand, if no reply is served in answer to a defence, the allegations of fact in the defence are deemed to be denied (para. (1)).*

*A joinder of issue operates as a series of denials of all the relevant facts alleged in the preceding pleading, except in respect of any allegation which is expressly admitted. After a joinder of issue takes effect, therefore, the pleadings will show which facts are admitted, expressly or impliedly, and which are in issue between the parties.*

*This rule does not apply in collision actions in Admiralty (O.75, r.20 (2)).”*

- 4.24 From the record, there is nothing to indicate that Peter Kalenga has entered appearance and filed a defence to Obed Musiafili's counterclaim. The application that has been made is for the entry of Judgment on Admission in line with **Order 27 Rule 3 of the Rules of the Supreme Court of England**

as read with **Order 21 Rule 5 of the High Court Rules, Chapter 27 of the Laws of Zambia.**

4.25 Judgment on admission is governed by those rules, which rules are not the same as those for entering appearance and filing a defence to a counterclaim or indeed entering Judgment in default of appearance and defence.

4.26 **Order 20 Rule 1 of the High Court Rules** states the following with regard to the entry of default Judgment on a counterclaim:

***“1. If the plaintiff fails to deliver a defence to the counter claim within the time allowed for that purpose by the order for directions, the defendant may, at the expiration of such time, enter final judgment or interlocutory judgment, as the case may be.”***

4.27 The learned author **Patrick Matibini** in the book **Zambian Civil Procedure: Commentary and Cases Vol 1 Lexis Nexis 2017 at page 609** in relation to entry of Judgment on Admission states that:

***“Judgment on admission is not a matter of right for the party in whose favour the admission has been made. It is a matter within the discretion of the Court. Thus, the Court has power to pronounce the Judgment on the basis of admissions only if the Court is satisfied that the admissions are certain and clear and do not require further investigation. Therefore, the Court may refuse an***

***application for Judgment on admission if it appears to it that the question in the action is such as that it ought not do so. For instance, it has been held that where there is a counterclaim, judgment on admission ought not to be given, unless it is clear that the counterclaim is frivolous and insubstantial.***

- 4.28 From the above, it can be seen that Judgment on admission may be entered where there is a counterclaim, depending on whether the counterclaim is frivolous and insubstantial.
- 4.29 In this case, there are claims against the defendants in the original action, being Peter Kalenga and Mukwanu Foods Limited. Then Peter Kalenga as plaintiff on the counterclaim, also claims against the defendants Erick Tembo, Jackson Mushili and Obed Musiafili.
- 4.30 Then Obed Musiafili in defence denied the claims that Peter Kalenga has made on the counterclaim, stating that they do not relate to him. He has also counterclaimed against Peter Kalenga stating that he owes him USD46, 000.00.
- 4.31 ***Odgers Principles of Pleading & Practice by D.B Carson, 22<sup>nd</sup> Edition, London Stevens & Sons 1981 at page 203*** states that a counterclaim need not relate to or be in any way connected with the Plaintiff's claim, or arise out of the same action. The learned author further states that every cross claim of whatever kind can now be pleaded as a counterclaim, and that it may exceed or be less than the Plaintiff's claim.

4.32 It is also stated that if the amount found due to the Plaintiff on his claim exceeds the amount established by the Defendant on his counterclaim, the Plaintiff will recover the difference. Further that if the balance is in favour of the Defendant on the other hand, Judgment may be given in favour of the Defendant for such balance.

4.33 Also stated, is that the Defendant may be granted such other relief as he may be entitled on the merits of the case, and that it is more usual nowadays to give separate Judgments upon the claim and counterclaim, with the appropriate costs of each instead of one Judgment for the balance, but this is entirely a matter of discretion.

## 5. CONCLUSION

5.1 Going by the provisions of **Order XX Rule 1 of the High Court Rules**, after Obed Musiafili filed his defence and counterclaim, I am to issue Orders for Directions directing Peter Kalenga to file a defence to Obed Musiafili's counterclaim within a specified time. If after that, no defence is filed, Obed Musiafili will be at liberty to enter Judgment in default of appearance and defence against Peter Kalenga on his counterclaim, it being a liquidated claim.

5.2 What would remain after then, is the question of Peter Kalenga's counterclaim against Erick Tembo, Jackson Mushili and Obed Musiafili.

5.3 In deciding that, regard would have to be had, as to whether Peter Kalenga if successful in his claims against Obed Musiafili would be paid any difference found due from the

amount entered as Judgment in default, as Obed Musiafili has denied owing Peter Kalenga, on Peter Kalenga's counterclaim against him.

- 5.4 I have highlighted that applications to enter Judgment on admission are not governed by the same rules as those that govern the entry of Judgment in default.
- 5.5 Therefore, the application to enter Judgment on admission is not irregularly before me, and the application to dismiss it, is accordingly dismissed for want of merit. The application to enter Judgment on Admission shall come up on 23<sup>rd</sup> May, 2025 at 10:00 hours. Costs shall be in the cause. Leave to appeal is granted.

**DATED AT LUSAKA THE 24<sup>TH</sup> DAY OF APRIL, 2025**

*S. Kaunda*  
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**

