

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

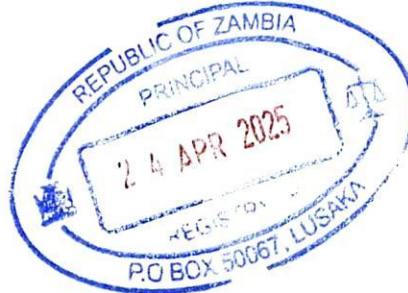
2025/HP/0114

BETWEEN:

ANDREW NDANGA KAMANGA

AND

AUGUSTINE MUKOKA



PLAINTIFF

DEFENDANT

**BEFORE: HONOURABLE, LADY JUSTICE G. C. CHAWATAMA
IN CHAMBERS ON THE 25TH MARCH, 2025.**

For the Plaintiff : Miss. J.L. Sipalo & Mr. C. Chibelo both of Messers Mosha
& Company
For the Defendant : Mr. B. Mulunda from Messers Mulunda and Company

RULING

CASES REFERRED TO:

1. *Guardall Security Group Limited v Reinford Kabwe Appeal 44 of 2029*
2. *Lukasu Properties Limited v African Banking Corporation Zambia Limited*
3. *Leopold Walford (Z) Limited v Unifreight 1985 ZR 203*
4. *George Balamoan v Aidan Gaffrey (1971) Z.R 29*
5. *Stanly Mwambazi v Morester Farms (1977) Z.R 108*
6. *Simeza, Sangwa & Associates v Hotellier Limited and Ody's Works Limited (SCZ) of 2012*
7. *Turnkey Properties Limited v Lusaka West Development Corporation (1984) Z.R 85*
8. *Henry Kapoko v the People*
9. *Access Bank Zambia Limited v Group Five/ZCON Business Park Joint Ventures (Suing as a firm)*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *The Rules of the Supreme Court (Whitebook) 1999 edition.*

1.0 INTRODUCTION

1.1 This is a Ruling on the application on the part of the Defendant to set aside writ of summons for irregularity on the ground that:

- 1. The Plaintiff did not serve a letter of demand on the Defendant.**
- 2. The Plaintiff did not seek leave of court prior to commencing the subject proceedings**
- 3. The date on the endorsement for writ shows 2024 and not 2025.**

2.0 BACKGROUND

2.1 The Plaintiff on the 29th January, 2025 commenced this action by filing a writ of summons, statement of claim and ex parte summons for an order of interim injunction.

2.2 On the 30th January, 2025 this Court granted the Plaintiff an ex parte order of interim injunction against the Defendant, compelling the Defendant by himself, his servants, agents or otherwise to immediately cease and desist from making and or publishing any statements on all matters subject of this suit until the Court determination of the matter.

3.0 THE DEFENDANT'S APPLICATION

- 3.1 The Defendant filed a memorandum of appearance and defence in this matter.
- 3.2 The affidavit in support of summons to set aside writ of summons for irregularity was sworn by Kennedy Gondwe, the Defendant's agent in this matter by virtue of the power of attorney which was exhibited and marked "KG1".
- 3.3 It was averred that the Plaintiff commenced the proceedings on the 29th January, 2025 and served the writ of summons on Messers Mulunda and Company before the advocates had been retained by the Defendant. A copy of the writ of summons was exhibited and marked "KG2". That Messers Mulunda and Company have since been retained by the Defendant as per notice of appointment filed before this Court.
- 3.4 It was averred that a perusal of the writ of summons on the endorsement, the date indicated thereon is 2024 and not 2025.
- 3.5 That the deponent has been advised by the Defendant advocates and verily concur with them that the irregularities pointed out render the subject proceedings improperly and incompetently before this court as the said irregularities not offends the rules of court but also prejudicial to the Defendant.

- 3.6 That on the 11th February, 2025 the Defendant's advocates conducted a search on the subject proceedings and the search revealed that the Plaintiff did not seek leave of this Court prior to instituting the subject proceedings as required by law.
- 3.7 That the deponent was advised by the Defendant's advocates and verily believe the same to be true that the failure to seek leave of this court by the Plaintiff prior to commencing the subject proceedings when the Plaintiff was fully aware of the fact that the Defendant is domiciled outside jurisdiction. Further renders the subject proceedings improperly, incompetently and irregularly before Court.
- 3.8 It was averred that the Plaintiff when serving the originating process on the Defendant's advocates did also serve an affidavit of service exhibiting a purported letter of demand dated 20th January, 2025. MA copy of the affidavit of service was exhibited and marked "KG3".
- 3.9 That a perusal of the letter of demand, which was also served on Messers Mulundu and Company before being retained by the Defendant reveals that the letter of demand was not only served on Messers Mulundu and Company but that the same was in fact addressed to Messers Mulundu and company and not to the Defendant.

3.10 The deponent stated that he was advised by the Defendant's advocate and verily concur with them that in effect there was no letter of demand that was ever written, addressed and served on the Defendant as required by law.

3.11 That he was advised by the Defendant's advocates that failure to serve a letter of demand on the Defendant as prescribed by the law renders the subject proceedings a nullity. That this Court is clothed with the requisite jurisdiction to entertain the Defendant's application. That this is a proper case for this Court to judiciously discharge its powers to determine the Defendant's application.

4.0 AFFIDAVIT IN OPPOSITION

4.1 In opposing the application, the Defendant filed an affidavit in opposition on the 13th March, 2025. It was deposed that the assertion that the date on the writ is 2024 and not 2025 is a minor clerical error that does not substantially affect the validity of the claim. That the Plaintiff was advised by his advocates and verily believe the same to be true that a minor clerical error can be cured by a simple amendment.

4.2 That the Plaintiff was advised by his advocates and verily believe the same to be true that a minor clerical error in spelling does not render the proceedings improper or incompetent before this Court. That the Plaintiff believe that this Court has the

discretion to permit an amendment in the interest of justice, ensuring that triable issues are determined on their merits.

- 4.3 It was averred that the Defendant's advocates being the last known legal representatives of the Defendant in another matter between the Plaintiff and the Defendant under cause No. 2023/HP/478 remain the recognized advocates herein. That consequently, the Plaintiff have been advised by his advocate and verily believe the same to be true that there exists no requirement to obtain leave. A copy of the notice of change of advocates was exhibited and marked "JLS1".
- 4.4 It was the Plaintiff's further averment that while the Defendant is domiciled outside Zambia, all correspondence has been conducted through his duly appointed advocates, Messer Mulunda & company. That the Plaintiff duly effected service on the Defendant's advocates, who subsequently entered appearance on behalf of the Defendant. That the Plaintiff verily believe that if service had been ineffective, the Defendant would not have entered appearance through his advocates.
- 4.5 That the Defendant's advocates were the last known legal representatives of the Defendant. That the Plaintiff verily believe that Messers Mulunda & company remain the Defendant's last known advocates. Consequently, the Plaintiff firmly believe that the letter of demand was duly served and acknowledged by the

Defendant's advocates. A copy of the acknowledged letter of demand was exhibited and marked "JLS2".

4.6 It was averred that the Plaintiff has been advised by his advocate and verily believe the same to be true that this court is vested with the jurisdiction to decline entertaining the Defendant's application in the interest of justice as it is a mere attempt to exploit minor procedural irregularities capable of being cured by a simple amendment to frustrate the administration of justice.

5.0 AFFIDAVIT IN REPLY

5.1 In reply, it was averred that rules of the court are there to allow the orderly conduct of cases and must be strictly followed. That Messers. Mulunda and company was retained and had specific instructions to act for and on behalf of the Defendant in a different matter under cause No.2023/HP/478 which is completely different from the subject matter.

5.2 That the Plaintiff served the letter of demand on the firm and not the Defendant prior to the firm been retained and specifically instructed to act for and on behalf of the Defendant in this subject matter by the Defendant. That the firm in response to the Plaintiff's service of the letter of demand and court process wrote to the Plaintiff informing him that the firm had not been retained by the Plaintiff and that the firm could

not react nor respond to anything served by the Plaintiff in the absence of instruction from the Defendant. a copy of the email was exhibited and marked "BM1".

5.3 It was averred that even the alleged letter of demand that was served on the firm prior to being retained by the Defendant, the letter of demand was never addressed to the Defendant but the firm.

6.0 SKELETON ARGUMENTS

6.1 In support of the application to set aside writ of summons the Defendant filed skeleton arguments. They began their argument by referring to **Order VI of the High Court Rules Statutory Instrument No. 58 of 2020** which provides that:

- "1. (i) *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.*
 - e) *A writ of summons which is not accompanied by the documents under subrule 1 shall not be accepted"*

6.2 It was then argued that the Plaintiff when serving the originating process on the Defendant's advocates did also serve an affidavit of service exhibiting a purported letter of demand dated 20th January, 2025. That a perusal of the said letter of demand which was also served on Messers Mulundu & company before being retained by the Defendant reveals that the said letter of demand was not only served on Messers Mulundu & company but that the letter of demand addressed to Messers Mulundu & company and not the Defendant herein. Counsel submitted that Order VI rule 2 prohibits the court from accepting a writ of summons that is not accompanied by the list documents. That the writ of summons having been accepted in breach of the rule, the Court has no jurisdiction to adjudicate the matter. The case of ***Guardall Security Group Limited v Reinford Kabwe***¹ was cited in support of this proposition. That whatever was done in breach of the rule is unlawful, null and void ab initio.

6.3 The case of ***Lukasu Properties Limited v African Banking Corporation Zambia Limited***² was cited wherein the Court held that:

"It is not now possible for one to issue a writ of summons without strict adherence to the circumstances to the requirements stipulated in Order VI. If the documents outlined in Order VI do not accompany the writ of summons, but it is nonetheless issued as was done in this case, such a writ is improperly issued, it was further stated that, 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 intentions behind Order VI Rule 1, 2 and 4 as amended. The action was improperly before the Court and was bound to be set aside”.

That the Supreme Court accordingly set aside the writ of summons for incompetence.

6.4 According to counsel, a letter of demand offers the prospective defendant an opportunity to admit, negotiate or state his or her defence to the claims such that by the time a matter is commenced, issues in dispute are clear. That the failure to serve a letter of demand which would accompany the writ of summons is not a curable irregularity.

6.5 It was further submitted that ***Order 10 Rule 16 of the High Court Rules*** provides that:

“An application for leave to issue for service out of the jurisdiction a writ of summons, originating summons or originating notice of motion or on a concurrent writ of summons, originating summons or originating notice of motion may be made ex parte to the Court or Judge on deposit of the writ, summons or notice of motion with the Registrar together with an affidavit in support of such application”

6.6 The case of ***Leopold Walford (Z) Limited v Unifreight³*** was cited wherein it was held that:

“(iii) Before a writ can be issued out of the jurisdiction, leave of the Court must be obtained;

(iv) The steps to be taken when a writ is to be issued out of the jurisdiction are first the writ should be prepared, second an application to issue the writ out of the jurisdiction must be made to the Court, with the writ attached to the application. Only after the court's leave has been obtained should the writ be issued".

6.7 It was submitted that on the 10th February, 2025 the Defendant's advocates conducted a search in this matter. That the search revealed that the Plaintiff did not seek leave of this Court prior to instituting the proceedings as required by law, when the Plaintiff was fully aware of the fact that the Defendant is domiciled outside jurisdiction. The case of **George Balamoan v Aidan Gaffrey**⁴ was cited in support.

6.8 It was finally argued that in the present case, the originating process served on the Defendant reveal that writ of summons on the endorsement date indicated thereon is 2024 and not 2025. Counsel prayed that this Court discharge its powers to set aside the writ of summons for irregularity.

6.9 In opposing, the Plaintiff also filed skeleton arguments on the 13th March, 2025. Counsel cited **Order 18 of the High Court Rules, Order 2 rule 2 of the Supreme Court of England 1999 edition** and **Article 118(2)(e) of the Constitution of Zambia**. **Order 18 of the High Court Rules** provides that:

The Court or a Judge may, at any stage of the proceedings, order any proceedings to be amended, whether the defect or error be that

of the party applying to amend or not and all such amendments as may be necessary or proper for the purpose of eliminating all statements which may tend to prejudice, embarrass or delay the fair trial of the suit, and for the purpose of determining, in the existing suit, the real question or questions in controversy between the parties, shall be so made. Every such order shall be made upon such terms as to costs or otherwise as shall seem just.

Order 2 Rule 2 of the Supreme Court of England provides that:

“Subject to paragraph (3) the Court may on the ground that there has been such as failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgement or order therein or exercise its power under these rules to allow such amendments (if any) to be made and to such Order (if any) dealing with the proceedings generally as it thinks fit”.

Article 118(2) (e) of the Constitution provides that:

“Justice shall be administered without undue regard to procedural technicalities”

6.10 Counsel then cited the cases of *Stanly Mwambazi v Morester Farms*⁵, *Sangwa and Simeza, Sangwa & Associates v Hotellier Limited and Ody's Works Limited*⁶, *Mbazima v Tobacco association of Zambia*⁷.

7.0 HEARING

7.1 At the hearing of this matter counsel for the Defendant Mr. Mulunda informed the Court that he was relying on the affidavit

in support of the application to set aside writ of summons for irregularity. He stated that, it is the Defendant's prayer that the originating process before Court is incompetent and irregular, on the ground that first, no leave was sought by the Plaintiff before commencing the action. Secondly, that was no letter of demand addressed to the Defendant.

7.2 In response, Miss Sipalo, counsel for the Plaintiff, equally relied on the documents filed. She augmented in relation to the writ being dated 2024 and 2025 that it was a clerical error which does not go to the root of a matter.

7.3 As regards the issue that leave of court was not sought, Miss Sipalo, argued that she found it problematic as the Defendant's advocates, Mulunda and Company, have been the known advocates for the Defendant even in known cases and that the letter of demand was served on the Defendant's advocates. That the Defendant's advocates should have immediately written back to inform the Plaintiff's advocates that they had no conduct of the matter but they however, proceeded to enter appearance and filed a notice of appointment. That counsel, remain at pains to fully comprehend the reasons of the Preliminary Issues as the law firm has already put itself on record. She cited the case of *Stanly Mwambazi v Morester*⁵ that if there are triable issues and there happens to be a default, the Court can order for payments of costs. That, it is not in the interest of justice to deny a person that his case should be

made. She stated that procedural technicality should not overshadow real technical issues in dispute, especially where no prejudice has been demonstrated. That where a party has accepted service and taken steps cannot later dispute that the service is irregular.

7.4 In reply, Mr. Mulunda stated that the Plaintiff did not issue a letter of demand. Counsel cited exhibit "KGK" to show that the letter in question was addressed to the firm and not the Defendant in his personal capacity. As regards the argument that the firm is the known advocate in other matters does not in any way act as a substitute to the mandatory requirement of the law that a letter of demand must be issued or served on the intended Defendant. The case of ***Lukasu Properties v African Banking Property Limited***².

7.5 Mr. Mulunda argued that exhibit marked "BM1" shows that communication was made to the Plaintiff that the Defendant advocates has not be retained by the Defendant. That in any case counsel for the Plaintiff by way of courtesy should have reached out to Messers. Mulunda and Company to find out whether the firm had instructions to receive a letter of demand as opposed to merely assume that Messers. Mulundu and Company had instructions to receive service of the demand letter. Counsel concluded by stating that the Court can only exercise the Power to order for amendment of error or omission if a matter is properly before it. That the current proceedings

are a nullity and that the court should set it aside with costs to the Defendant.

8.0 ANALYSIS AND THE DECISION OF THIS COURT

8.1 I have carefully considered the preliminary application before me to set aside the writ for irregularity, the affidavit, skeleton and oral arguments in support of the parties' respective positions filed in this matter. I will deal with the question whether or not the Plaintiff's originating process should be set aside for irregularity on the ground that the Plaintiff did not serve a letter of demand on the Defendant and the question whether or not the Defendant ought to have sought leave of this Court to issue proceedings as the Defendant is based outside jurisdiction. I am compelled to consider the two questions because they go to the root of this matter.

8.2 I have scrutinized the Defendant's arguments which attacks the defect that first the Plaintiff did not serve the letter of demand on the Defendant and that no leave of Court was sought before commencing this matter. I will start by addressing the requirement on the part of the Plaintiff to serve a demand notice. **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 therefor 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.

8.3 Counsel for the Plaintiff, spirited argued that the Plaintiff served the letter of demand on the Defendants advocates. I draw Miss Sipalo's attention to the provision of **Order VI Rule 1 (d)** reproduced above. It is clear from the provision that the letter of demand receipt must be acknowledged by the Defendant. The wording used in **Order VI Rules 1 (d)** is "shall" emphasising the mandatory importance of serving the Defendant. I do not agree with the submission by the Plaintiff's advocates that the letter of demand served on the Defendant's advocate constituted effective service of the letter of demand on the defendant. 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.

8.4 As regards the Plaintiff's Counsel argument that this Court is mandated by the Constitution to dispense justice without due regard to procedural technicalities, my brief response is that a party that disobeys the mandatory requirements of Rules cannot cry foul citing **Article 118 (2) (e) of the Constitution** and expect to escape the consequences of the non-compliance. The Plaintiff had an opportunity to serve the demand letter on the defendant before commencing this action. They however, did not do so but served on the Defendant's advocate, consequently did not compliance with **Order VI Rule (1) (d)**. Moreover, the Constitutional Court in **Henry Kapoko v The People**⁸ pronounced itself that:

“Article 118 (2) (e) is not intended to do away with existing principles, laws and procedures even when the same constitute technicalities, it is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality... rules are enacted with a purpose in mind, which purpose the rules must actually serve”.

8.5 The Plaintiff's advocates have exhibited a lackluster approach to litigation in this matter. In **Access Bank Zambia Limited v Group Five/ZCON Business Park Joint Ventures (Suing as a firm)**⁹ the Supreme Court pronounced that the Courts cannot aid in bending or circumventing the rules under the guise of doing justice through hearing matters on their merits.

8.6 In view of the above forgoing, the first preliminary question succeeds, therefore, the second preliminary issue of the requirement of obtaining leave of court has become otise.

8.7 The net result is that the ex parte order of injunction granted to the Plaintiff is hereby vacated or discharged. This matter is hereby dismissed with costs awarded to the Defendant to be taxed in default of agreement.

8.8 Leave to appeal to the Court of Appeal is hereby granted.

DELIVERED AT LUSAKA THIS 24TH DAY OF APRIL, 2025.


G.C. CHAWATAMA
HIGH COURT JUDGE