

IN THE HIGH COURT FOR ZAMBIA 23 JAN 2024/HP/1355
 AT THE PRINCIPAL REGISTRY
 HOLDEN AT LUSAKA
 (Civil Jurisdiction)



IN THE MATTER OF: ORDER 30 RULE 14 OF THE HIGH COURT
 RULES CHAPTER 27 OF THE LAWS OF
 ZAMBIA

AND

IN THE MATTER OF: PROPERTY KNOWN AS STAND NO.
 14861/917 KAMWALA SOUTH LUSAKA

BETWEEN:

CONSTANCE MULENGA

APPLICANT

AND

AGROTECH LIMITED
 BMC PROPERTY MANAGERS AND REAL
 ESTATES LIMITED
 KENNEDY MALAMBO

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
 ON 22ND JANUARY, 2024 - IN CHAMBERS

For the Applicant : No Appearance
 For the Respondents : No Appearance

R U L I N G

CASES REFERRED TO:

1. *United Engineering Group v Mackson Mungalu and Others* (2007) 30 SC
2. *The Post Newspapers v Rupiah Bwezani Banda* SC No. 25 of 2009
3. *Finsbury Investments Limited v Antonio Ventriglia, Manuel Ventriglia and Ital Terrzo Limited* (in receivership)
4. *Indeni Petroleum Refinery Limited v Kafco Oil Limited and 3 others* Appeal No. 207/2014
5. *Lusaka Engineering Company Limited v Mathew Chaima and Others Philip M. Milimo and Others* (2006) Z.R 110
6. *Langley Constructions (Brixham) Limited v Wells* (1969) 1 W.L.R 503
7. *Chikuta v Chipata City Council* (1974) Z.R. 241
8. *Peter David Lloyd v J.R Textiles Limited*
9. *Newplast Industries v Commissioner for Lands and the Attorney General (SCZ) Judgement No. 8 of 2001*
10. *Zambia Revenue Authority v Jayesh Shah* (2001) Z.R 60
11. *African Banking Corporation Limited v Mubende Country Lodge Limited-SCZ Appeal No. 116 of 2016*
12. *Twampane Mining Co-operation Limited v A.M Storti Mining Limited* (2011) 3 ZR 67

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *High Court Act Chapter 27 of the Laws of Zambia*
2. *Rules of the Supreme Court 1999 edition*
3. *Limitation Act 1939 of the United Kingdom*

1.0 INTRODUCTION

1.1 By Notice of Motion to raise preliminary issues made pursuant to order 14A and *Order 33 rule 3 of the Rules of the Supreme Court (Whitebook) 1999 edition and section 4 (3) of the Limitation Act 1939 of the United Kingdom*, the 1st Respondent seek for the determination of the following questions, points of law:

1. ***The action brought by the Applicant is statute barred having been brought more than twelve years from which the cause of action arose.***
2. ***The relief sought by the Applicant under the originating summons do not fall within the purview of Order 30 Rule 14 of the High Court Rules, Chapter 27 of the Laws of Zambia.***
3. ***The matters raised in the Applicant's Originating process raise contentious issues that cannot be disposed of in chambers.***
4. ***The Applicant cannot commence an action against a company in liquidation without leave of court, and***
5. ***The 1st Respondent ought to have cited Milingo Lungu (in his capacity as liquidator of Agro-Tech Limited)***

1.2 The said Order upon which this application is premised provides that:

Order 14 *“The Court may upon the application of a party or 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

Such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.”

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.”*

Section 4 (3) : *“No action shall be brought by any other person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims to that person.”*

2.0 HISTORICAL BACKGROUND

2.1 The brief facts leading to the 1st Respondent’s application, is that on the 10th August 2023, the Applicant by way of Originating Summons commenced this action against the Respondent’s seeking determination of the following questions namely:

1. *Whether or not the Respondent's should not be made to render a full account to the Court of the proceeds received from the Applicant between September 2011 and June 2021 in respect of the loan agreement with the Applicant.*
2. *Whether or not the Respondents can have vacant possession of stand Number 14861/917 Kamwala South Lusaka in the absence of any valid court Order against the Applicant who was the known beneficial and registered owner of the property.*
3. *Whether or not the Applicant having paid the principal sum and interest under a loan agreement between the Applicant and the Respondent is not entitled to vacant possession of stand Number 14861/917 Kamwala South Lusaka.*
4. *Whether or not an Order of Interim injunction should not issue against the Respondents preventing them from interfering with the Applicant's quiet possession of Stand Number 14861/917 Kamwala South Lusaka.*
5. *Whether or not the Respondents should not be ordered to pay loss of mesne profits to the Applicant from June 2021 to date in respect of Stand Number 14861/917 Kamwala South Lusaka.*
6. *Whether or not the costs of these proceedings should not be borne by the Respondent.*

3.0 THE 1ST RESPONDENT'S APPLICATION

- 3.1 As stated in paragraph 1.1, the 1st Respondent's application is supported by an affidavit and skeleton arguments.
- 3.2 In the affidavit in support sworn by Milingo Lungu, the Liquidator of the 1st Respondent's company, deposed that the 1st Respondent was placed in liquidation on 31st January, 2020 and since the said date, he had been carrying out the affairs of the company. Exhibit marked "**ML1**" a copy of the Patents and Companies Registration Agency print out was produced in evidence. That in furtherance to the aforesaid, he was duly advised by his advocates Messrs. Lungu Simwanza and Company and verily believe the same to be true, that he ought to have been cited as the 1st Respondent in his capacity as Liquidator of the 1st Respondent's company.
- 3.3 It was averred that the Liquidator was duly advised by his advocates and verily believe the same to be true that an action cannot be commenced against a company in liquidation without leave of Court which said leave the Applicant has not obtained.
- 3.4 That the Applicant's claim primarily relates to the ownership of stand No. 14861/917 which was transferred to the 1st Respondent by way of a Deed of Assignment executed on 26th July, 2011 which translates to 12 years and 1 month from the time the cause of action arose. Further that, he has been reliably advised by his advocates and verily believe the same to

be true that the Applicant's action is barred by the law on limitation of actions for the recovery of land.

- 3.5 It was further averred that he was advised by his advocates which advice he verily believe to be true that the matters raised by the Applicant in this matter *inter alia* include persons that are not party to this suit such as Bruce Mukuwa, Reeves Malambo and Sanford Mwanza cannot be disposed of in chambers.
- 3.6 That matters relating to exorbitant interest and repayment of the loan amount are contentious issues that can only be determined at a full trial. Also, that the relief sought by the Applicant in this matter are not available under the provisions which this matter has been brought before the court.
- 3.7 It was then averred that he was duly advised by his advocates and verily believe the same to be true that the irregularities herein are incurable as they go to the root of the Applicant's case. That in the premises, he verily believes that this is a proper case for this court to set aside the originating process for irregularity and ensuring the court process is not abused.
- 3.8 In the skeleton argument filed, Learned Counsel began by referring this Court to the provisions of **Order 33 Rule 3 and 7 of the Rules of the Supreme Court, Order 14A Rule 1 and 2 of the Whitebook** and the case of ***United Engineering Group v Mackson Mungalu and***

*Others*¹ and *The Post Newspapers v Rupiah Bwezani Banda*² in which the Supreme Court held that:

“Preliminary issues are meant to save the Court’s time as they have the potential to affect the outcome of the main matter. Further that the Court is obliged to dispose of preliminary issues as a matter of priority”.

This Court was also referred to the cases of:

1. *Finsbury Investments Limited v Antonio Ventriglia, Manuel Ventriglia and Ital Terrazzo Limited*³ (in receivership) where the Supreme Court opined 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 him are stirred to their logical conclusion promptly. In doing so, the High Court has the 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 appellate courts, a system whereby, an obviously hopeless, frivolous or vexations matter may be dealt with at 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”.

2. *Indeni Petroleum Refinery Limited v Kafco Oil Limited and 3 others*⁴. The Supreme Court held that:

“This practice, in our considered view, is aimed at ensuring that there is proper case flow and case management of matters before the court below which eventually leads to the proper administration of justice. A robust Judge, such as the Learned High Court Judge, must ensure that he is alert and invokes the inherent jurisdiction vested in him of weeding out hopeless, frivolous and vexatious matters and those wrongly presented before him after giving the parties an opportunity to be heard”

3.9 As regards the contention that an action cannot be commenced against a company in liquidation without leave of court, it was argued that **section 66 of the Corporate Insolvency Act No. 9 of 2017**, an action cannot be commenced against a Company in liquidation without leave of the Court which may attach certain terms and conditions to the leave. The said section is couched as follows:

“Where a winding-up order is made or a provisional liquidator is appointed, an action or proceeding shall not be proceeded with or commenced against, a company except by leave of the Court and subject to such terms and conditions as the Court may impose”

To buttress the above provisions of the law, case of ***Lusaka Engineering Company Limited V Mathew Chaima and Others Philip M. Milimo and Others***⁵ was called in aid where it was pronounced that:

- “1. The purpose of section 281 of the Companies Act is not to weed out unmeritorious or pointless actions against a company in liquidation. Section 281 is intended to protect all creditors.***
- 2. The granting of leave is not automatic. It is within the discretion of the court.***

3. ***Section 281 preemptorily stops commencement or continuation of actions against a company in liquidation once a winding up order has been made by the court***”.

Counsel also cited the case of *Langley Constructions (Brixham) Limited v Wells*⁶ wherein it was pronouncement that:

“The purpose of section 231 is to ensure that when a company goes into liquidation, the assets of the company are administered in an orderly fashion for the benefit of all the creditors and that particular creditors should not be able to obtain an advantage by bringing proceedings against the company. What is contemplated is that the companies Court shall be seized of all these matters and should see that the affairs are wound up in a dignified and orderly manner”.

3.10 Furthermore, as regards the question whether the mode of commencement of the proceedings was appropriate and consequently, if this court has the jurisdiction to entertain this action, it was argued that the Applicant commenced this matter pursuant to ***Order 30 rule 14 of the High Court Rules***. The said order provides for the Originating Summons returnable in Chambers for specific reliefs set out therein. That as can be deduced from the Originating Summons, the Applicant seeks various reliefs from this court that are not applicable under ***Order 30 Rule 14 of the High Court Rules***. That additionally, the Applicant has raised potentially contentious matters that relate to collection of rentals as well as persons that are not parties to the suit as such matters raised in this action cannot be determined in

chambers and ought to be subjected to trial. The case of *Chikuta V Chipata City Council (1974)*⁷ wherein it was held that:

“Where any matter is brought to the High Court by means of an originating summons, when it should have been commenced by a writ, the court has no jurisdiction to make any declaration”

3.11 I was then urged to dismiss this matter for want of jurisdiction.

4.0 RESPONSE IN OPPOSITION

4.1 In opposing the application, the Applicant filed an affidavit in opposition to the notice of motion for the determination of preliminary questions and skeleton arguments.

4.2 The gist of the affidavit was that the 1st Respondent has not demonstrated that it is under liquidation as no winding up resolution or order had been exhibited by the 1st Respondent to enable the court confirm the assertion that the 1st Respondent is indeed under liquidation.

4.2 It was also averred that assuming it is proved that the 1st Respondent is proved to be under liquidation, the failure to cite the liquidator cannot render the entire action irregular as there are two other parties to the action and the court has authority to order an amendment as regards the parties which can easily cure the defect in citation of parties.

- 4.3 That there was an agreement between the Applicant and the late Reeves Malambo that the house be put on rent to offset the purported interest of K250,000 which agreement was only expected to have been performed by June, 2021 which is merely 2 years ago. It was then averred that it is not true that the Applicant's claims arose 12 years ago but 2 years ago when the Applicant did not receive possession of her property following completion of payment of interest.
- 4.4 Furthermore, that the Applicant's action is one that relates to an equitable mortgage and as such can be disposed of in chambers and further that the fact that matters raised are contentious does not of itself preclude the court from disposing off the same in chambers. That this court has authority to deem this matter as having been commenced by way of writ should it deem it fit.
- 4.2 On 06th October, 2023, the Applicant filed skeleton arguments, wherein it was argued that it is trite that every action brought before court must be within the time frame that is allowed within the Limitation Act of 1939. That the said Act applies to Zambia by reason of the British Acts Extension Act which makes provision in section 2 for matters relating to simple contracts to be commenced within a period of 6 years from the date that the cause of action accrued. It was then submitted that actions for recovery of land are to be commenced within a period of 12 years as provided for under **section 4 (3) of the Limitation Act 1939**. Counsel argued that reckoning of any period

under the Limitation Act 1939 has to begin from the date that the action accrued and not from a date when the parties contracted or when documents are simply signed.

4.3 In reinforcing the above argument, the Applicant referred this Court to the case of *Peter David Lloyd v J.R Textiles Limited*⁸ where the Supreme Court made the following observation regarding the triggering of *section 4 (3) of the Limitation Act 1939* that:

“First, we agree with Mr. Muchende that section 4 (3) of the Limitation Act 1939 lays down as a general rule that no action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him, however, by section 10 of the said Act, in order that a right of action should accrue, thereby triggering the commencement of the limitation period, the land concerned must be in the possession of some person in whose favour the period of limitation can run.”

It was then submitted that the time only started running in June 2021 when the Respondents failed to handover possession of the property to the Applicant. That notwithstanding the fact that the Deed of Assignment dated 26th July 2011 was a running agreement between the Applicant and the late Reeves Malambo to the effect that the said documents would not be registered unless the Applicant failed to repay the principal and the interest. That following difficulties in repaying the interest it was further agreed that the house be put on rent to offset the interest. That the said interest was expected to have been offset

by June 2021 and that is when the Applicant expected the Respondents to handover possession of the property. Counsel reiterated that in accordance with the **Peter David LLCyd** case the Respondents only took possession of the property in 2021 when they refused or failed to handover possession of the property to the Applicant given that the interest was only presumed to have been offset in June 2021.

4.4 In converse to the above submission, Counsel submitted in the alternative if this court cannot be persuaded that this matter is still within time because the Deed of Transfer despite being dated 26th July 2011 was in fact only registered by the Respondent on the 7th February 2013. That the reckoning of time should only begin from February 2013 which is the date when the Respondent elected to register the Deed of Assignment.

4.5 As regards the second and third preliminary issues, it was submitted that the Applicant claims emanate from an equitable mortgage. That the Applicant surrendered her Land Record Card for stand 14861/917 Kamwala South as collateral for the loan. That this clearly created an equitable mortgage thereby bring the Applicant's claims within the purview of Order 30 rule 14 of the High Court Rules. It was then submitted that the reliefs that the Applicant seeks have no bearing on the mode of commencement but rather the mode of commencement is dictated by statute. Counsel referred the Court to the case of

*Newplast Industries v Commissioner for Lands and the Attorney General*⁹
(SCZ) *Judgement No. 8 of 2001* where the Supreme Court held that:

“It is not entirely correct that the mode of commencement of any action largely depended on the reliefs sought. The correct position is that the mode of commencement of any action is generally provided by the relevant statute”.

It was the Applicant’s contention that the High Court Rules clearly prescribed procedure for commencement of matters relating to mortgages.

4.6 As regards the fourth and fifth preliminary issues, the Applicant argued the same as one. The Applicant made concession as regards the position of the law with regards the need to seek leave before commencement of an action against a company in liquidation as well as citing the liquidator where one has been appointed. However, the Applicant contended that the 1st Respondent has not sufficiently demonstrated that the 1st Respondent is indeed under liquidation as there is no resolution or order that had been produced in order to confirm the 1st Respondent’s liquidation. That exhibit marked **“ML1”** does not show entries against the date the company was liquidated or indeed placed under receivership.

4.7 Counsel submitted that in the alternative that in the event this court finds that the 1st Respondent is indeed under liquidation; the Court should not set aside the entire action as the requirement to cite the liquidator and seek leave before

commencement only applies to the 1st Respondent and not the 2nd and 3rd Respondent.

4.8 The Applicant, further made concession that the Applicant should be given an opportunity to seek leave especially given the fact that there is no serious dispute that has been brought to court by the Applicant. This court was referred to the case of **Zambia Revenue Authority v Jayesh Shah**¹⁰ (2001) Z.R 60 in which it was held that:

“Cases should be decided on their substance and merit where there has been only very technical omission or oversight not affecting the validity of process”

5.0 CONSIDERATION AND DECISION BY THIS COURT

5.1 I have carefully considered the written and oral submissions by learned Counsel for the respective parties as well as the authorities cited.

5.2 At the hearing of this matter, both learned counsel for the parties were absent, this Court in exercise of its inherent jurisdiction vested in it under **Order 3 rule 2 of the High Court Rules** wanted to prod counsel for the parties on whether or not the notice of motion to raise preliminary issues is properly before me having regard to the requirement espoused under **Order 14A of the Whitebook**. The requirements are that:

The requirements for employing the procedure under this Order are the following:

- (a) the defendant must have given notice of intention to defend;***
- (b) the question of law or construction is suitable for determination without a full trial of the action (para. 1(i)(a));***
- (c) such determination will be final as to the entire cause or matter or any claim or issue therein (para. 1(i)(h)); and***
- (d) the parties had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination (para. 1(3)).***

14A/1-2/3 Notice of intention to defend

The wording of para. 1(3) makes it clear that the determination of any question of law or construction under this Order can only be made if the defendant has given notice of intention to defend. It precludes the Court from determining any such question unless the parties, i.e. both the plaintiff and the defendant, have had any opportunity of being heard on the question or have consented to an order or judgment being made on such determination. This requirement underscores the importance of the procedure under this Order in ensuring that both parties have participated or have had the opportunity to participate in the final disposal of the case on a point of law or construction. If the defendant fails to give notice of intention to defend, the plaintiff will be entitled to proceed to judgment in default under O.13.

5.3 Although, the Applicant did not take issue, a careful scrutiny of the record reveals that the 1st Respondent in launching this application did not comply with the requirements of the law for employing the procedure under ***Order 14A of the Rules of the Supreme Court 1999 edition***, as they

did not give notice of his intention to defend this action by filing an affidavit in opposition to the Applicant's originating summons and affidavit in support. Instead, the 1st respondent proceeded to file an application for determination of preliminary questions or points of law and or construction on the 18th September 2023.

- 5.4 It is my firm view that civil procedure rules are enacted to govern the methods and practices used in civil litigation. To this effect, **section 44 (1) (a) of the High Court Act** states that Rules of the court may be made:

“For regulating and prescribing the procedure (including the method and pleading) and the practice to be followed in the court in all causes and matters”

To this effect, **section 10(1) of the High Court Act** provides that the jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act, or such written law, and in default thereof in substantial conformity with the **Supreme Court Practice, 1999 (White Book) of England** and subject to subsection (2), the law and practice applicable in England in the High Court of Justice up to 31st December, 1999.

- 5.5 In the current case, a perusal of the record indicate that this matter commenced on the 10th August, 2023 by way of originating summons supported by an affidavit in support. On the same date the Applicant filed ex parte

summons for an order of interim injunction, affidavit in support of an order of interim injunction, Ex parte Order and skeleton arguments in support. I accordingly granted the ex parte order of interim injunction on the 16th August, 2023 returned for inter parte hearing. On the return date for hearing for the injunction, the 1st Respondent filed a notice of motion to raise preliminary issues.

5.6 It is therefore my considered view that under Order 14A, Rule 2 of the Whitebook, the 1st Respondent ought to first have entered appearance and file a defence before satisfying the other requirements itemized under Order 14 Rule 2 of the Whitebook. The failure by the 1st Respondent to satisfy this jurisdictional threshold rendered this application incompetent before me. Faced with similar circumstances, the Supreme Court of Zambia in the case of *African banking Corporation Zambia v Mubende Country Lodge Limited*¹¹ in determining a question whether a conditional appearance amounts to an intention to defend for the purpose of invoking **Order 14A of the Whitebook**, the Court made the following pronouncements after examining **Order 14 A** that:

“It is plain from the preceding paragraph that there are certain requirements which must be satisfied before a matter can be disposed of on a point of law. One such requirement, according to order 14A/1-2/2, RSC is the giving of notice of intention to defend... the appellant did not file any defence. Instead, what was filed was a conditional memorandum of appearance. The answer to

the question whether a conditional memorandum of appearance amounts to a notice of intention to defend, in our view, seems to lie in reconciling the provisions of the RSC with our High Court Rules... Order 1, Rule 4, RSC defines a notice of intention to defend as “an acknowledgment of service containing a statement to the effect that the person by whom or on whose behalf it is signed intends to contest the proceedings to which the acknowledgment relates. The term ‘notice of intention to defend’ does not appear in our HIGH Court Rules.. in the view that we take what constitutes a notice of intention to defend, in the context of our rules, is the filing of a memorandum of appearance which is accompanied by a defence. It, therefore, follows that the filing of a memorandum of appearance with a defence is a pre-requisite to launching an application under Order 14A, RSC”.

5.7 However, in the current case, I note that the Applicant commenced this matter by way of an originating summons. The appropriate reaction to this application by the 1st Respondent ought to have been an affidavit in opposition.

5.8 I have no hesitation in my mind in holding that it will be a misdirection by this Court to consider the notice of motion to raise preliminary issues filed on the 18th September 2023 by the 1st Respondent, simply because the matter before me was commenced by way of an originating summons and the fact that no defence was lodged by the 1st Respondent in the form of an Affidavit in opposition by the time of filing his notice of motion to raise preliminary issues, this Court cannot consider the same and must invoke the power to dismiss the application contained in

Order 14A of the Whitebook. The Supreme Court has guided in plethora of cases including **Twampane Mining Co-operation Limited v A.M Storti Mining Limited**¹² that:

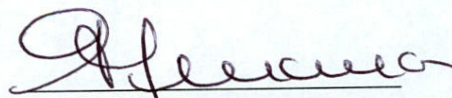
“It is important to adhere to the rules of the Court in order to ensure that matters are heard in an orderly and expeditious manner and those who choose to ignore rules of the court do so at their own peril”.

5.9 For the reasons given above, the net result is that this application to raise preliminary issues fails.

5.10 I make no orders as regards costs.

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

DELIVERED AT LUSAKA THIS 22ND DAY OF JANUARY, 2024.



**G.C. CHAWATAMA
HIGH COURT JUDGE**