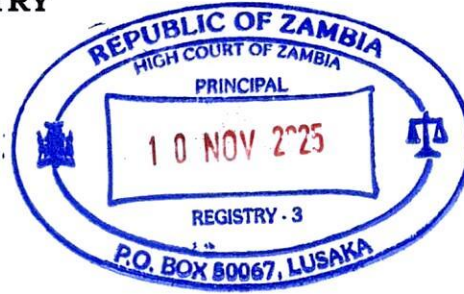


IN THE HIGH COURT FOR ZAMBIA  
 AT THE PRINCIPAL REGISTRY  
 HOLDEN AT LUSAKA  
 (Civil Jurisdiction)

2023/HP/2150



BETWEEN:

JOHN MIKAYA

PLAINTIFF

AND

AMBASSADORS FOR PEACE  
 MAMBO PHIRI

1<sup>ST</sup> DEFENDANT

2<sup>ND</sup> DEFENDANT

BEFORE HON. JUSTICE E. P. MWIKISA

FOR THE PLAINTIFF: NIL

FOR THE 2<sup>ND</sup> DEFENDANT: MR. M. MWEWA OF MESSRS G.M. LEGAL PRACTITIONERS

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## RULING

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### Cases Referred To:

1. Thomson Phiri v Toyota (Z) Ltd Appeal No. 31 of 2022
2. Brian Mundubile v Miles Sampa (2024) HP 0993
3. Lukasu Properties v African banking corporation Zambia limited SCZ/08/10/2023

### Legislation Referred To:

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

### Other Works Referred To:

1. Zambia Civil Procedure, Commentary and Cases, Volume 1

This is the 2<sup>nd</sup> defendant's application to set aside writ of summons for irregularity made pursuant to Order 2 Rule 2 of the Rules of the Supreme Court of England, 1999 Edition, White Book, as read together with Order 3 Rule 2 and Order 6 Rule 1 & 2 of the High Court Rules of the High Court Act, Chapter 27 of the Laws of Zambia. The application is supported by an affidavit and skeleton arguments all dated 7<sup>th</sup> December, 2023.

The affidavit in support of the application was deposed to by one Michael Beckhams Mwewa, Counsel seized with conduct of this matter on behalf of the Defendant. It was deposed that the Deponent herein had perused what purports to be a writ of summons filed by the Plaintiff on 29<sup>th</sup> November, 2023, and served on the 2<sup>nd</sup> defendant on 1<sup>st</sup> December, 2023. That upon perusal of the said purported writ of summons, it was noted that the Plaintiff suing had addressed the writ to the Defendants of Shimabala Central, Kafue District and not the purported defendants cited as Ambassadors for Peace and Mambo Phiri thereby contradicting itself on who is actually being sued in this matter.

It was further deposed that the Plaintiff has not filed anything relating to the demand letter addressed to Mr Mambo Phiri nor has

he filed in any affidavit of service of the letter of demand. A copy of the letter of acknowledgment of service of writ of summons endorsed by the Plaintiff, which was deposed that it was only served to the defendant by the Police Officers at Shimabala Police Post, was exhibited marked "MBM2." It was deposed that this was an appropriate case in which this Court should exercise its discretion by setting aside the writ of summons for irregularity.

In opposing the application, the Plaintiff filed an affidavit in opposition dated 29<sup>th</sup> October, 2024, deposed to by the Plaintiff himself. It was deposed therein that according to the Defendants' letter head on which the letter which is the subject matter of these proceedings is written, the Defendants' address is 'Shimabala Central.' That it follows that a reference to the Defendants as 'defendants of Shimabala Central' was a reference to them as shown by copy of the said letter exhibited and marked "JM1." That the Plaintiff duly identified the 1<sup>st</sup> and 2<sup>nd</sup> defendants as clearly shown in paragraphs 2 and 3 of the statement of claim.

Further that the record will clearly show that on 31<sup>st</sup> October, 2023, both the 1<sup>st</sup> and 2<sup>nd</sup> defendants were served with the letter of demand

at the address indicated on their letterhead and that an affidavit of service dated 29<sup>th</sup> November, 2023 was in fact filed before this Court.

It was deposed further that even in an event of a procedural lapse, this Court has the requisite authority to order for the lapse to be rectified rather than setting aside the action.

When the matter came up for hearing on 28<sup>th</sup> October, 2024, Counsel for the 2<sup>nd</sup> defendant submitted that the matter was coming up for the hearing of the 2<sup>nd</sup> defendant's application to set aside writ of summons for irregularity made pursuant to Order 2 Rule 2 of the RSC, White Book as read together with Order 3 Rule 2 and Order 6 Rule 1 & 2 of the HCR. That the application is supported by an affidavit and skeleton arguments. Counsel submitted that Order 6 (2) of the HCR is clear and drafted in mandatory terms that a writ of summons not accompanied by documents, which include a letter of demand, shall not be accepted by the Court. That the said Order 6 (2) of HCR brings out the need to bring out a letter of demand or an affidavit attesting to the letter of demand. Counsel referred the Court to the cases of **Thomson Phiri v Toyota (Z) Ltd Appeal No. 31 of 2022<sup>1</sup>** and **Brian Mundubile v Miles Sampa (2024) HP 0993<sup>2</sup>** to

substantiate his argument that failure to file a letter of demand together with the court process is more than a breach that would simply warrant a cure of a defect as the breach goes to the root of the entire proceedings. Counsel prayed for the matter to be dismissed for irregularity.

I have taken note of the skeleton arguments from both sides.

I have carefully considered the affidavit evidence as well as the list of authorities and skeleton arguments on the record. It is clear from the perusal of the 2<sup>nd</sup> defendant's application that two issues arise. Firstly, that the Plaintiff addressed the writ of summons to wrong defendants and not the ones cited in the process and secondly that there was no letter of demand addressed to the 2<sup>nd</sup> defendant herein or indeed an affidavit of service attesting to the service of the letter of demand as required by law.

I will first deal with the second issue raised. In relation to the question that there was no letter of demand addressed to the 2<sup>nd</sup> defendant herein or indeed an affidavit of service attesting to the service of the letter of demand as required by law, a perusal of the record shows an affidavit of service dated 29<sup>th</sup> November, 2023. In

the said affidavit of service, the Plaintiff deposed that he served the 1<sup>st</sup> and 2<sup>nd</sup> defendants a letter of demand dated 31<sup>st</sup> October, 2023, and exhibited two copies of the said letters of service. A further perusal of the said exhibits revealed that both documents were received by one person; namely one Marama Kelvin on 31<sup>st</sup> October, 2023.

Order 6 Rule 1(1) (d) and (2) of the High Court (Amendment) Rules, 2020 provides that:

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

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

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

The question I must therefore answer is whether or not the letter of demand was received and acknowledged by the 2<sup>nd</sup> defendant or whether there is an affidavit of service attesting to the service of the letter of demand. As shown above, upon perusal of the affidavit of service, both letters of demand were acknowledged by Marama Kelvin who is not the 2<sup>nd</sup> defendant nor is there any indication that

he is an agent of the 2<sup>nd</sup> defendant. Furthermore, the document exhibited by the 2<sup>nd</sup> defendant, in their affidavit in support of this application, and marked “MBM2,” dated 30<sup>th</sup> November, 2023, showing a list of documents served on the defendants by the Plaintiff herein, does not refer to the letter of demand being served on either defendant herein.

In the case **Lukasu Properties v African banking corporation Zambia limited SCZ/08/10/2023<sup>3</sup>**, the Supreme Court had occasion to answer the question whether the failure to serve a letter of demand on the defendant before the writ of summons was issued is fatal. The Supreme Court comprehensively interpreted Order VI of the High Court (Amendment) Rules, 2020, and gave guidance on how to deal with circumstances such as the one in casu.

The Supreme Court stated at paragraph 59 of **Lukasu Properties v African Banking Corporation Zambia Limited** supra that:

***“...a reading of Order VI of our High Court Rules clearly reveals that the intention behind subrule 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.”***

In Paragraph 62-64 the Supreme Court stated:

**“The proscription against acceptance of process that omits some of the documents that should accompany the writ of summons implicates the court’s jurisdiction to entertain an action commenced without conformity with the form now prescribed by Order VI... It matters not that the registry staff have accepted the process. Subsection 4 of Order VI reveals that all the listed documents, including the letters of demand are to be stamped.**

**It is true that a letter of demand serves the purpose of bringing the claim to the notice of the intended defendant...it is our considered view that this is intended to drive home to the prospective defendant the claim they will have to meet should an action be brought against them. They may decide to settle the claim even before the Plaintiff issues process against them.**

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

The Supreme Court in the **Lukasu Properties v African Banking Corporation Zambia Limited** supra opined that it is now not possible for one to issue a writ of summons without strict adherence to the requirements stipulated in Order VI of the High Court (Amendment) Rules 2020. The Supreme Court held that:

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

In light of the guidance of the Supreme Court above and for the reasons stated earlier, I am of the considered view that the letter of demand herein and the affidavit of service in this matter fall short of Order 6 rule 1(d) of the High Court (Amendment) Rules, 2020, in relation to the 2<sup>nd</sup> defendant herein. The whole action must therefore suffer the same fate. I accordingly set aside the action herein for the reasons stated.

The second issue raised has been rendered otiose in the circumstances.

Leave to appeal is granted.

**Dated at Lusaka the ..... 10<sup>th</sup> day of November, 2025**

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**ELITA PHIRI MWIKISA**  
**JUDGE**