

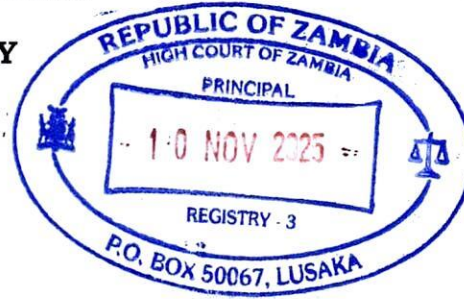
IN THE HIGH COURT FOR ZAMBIA

2024/HP/1013

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

CALISTO NHAMBOTEH

PLAINTIFF

AND

JOSEPHAT KAPIKA

DEFENDANT

BEFORE HON. JUSTICE E. P. MWIKISA

*For The Plaintiff: Mr. C. Nambeli of Messers C. Nambeli Legal Practitioners*

*For The Defendant: No Appearance*

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# RULING

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**Cases referred to;**

- 1) *Nykredit Mortgage Bank Plc vs. Edward Erdman Group Ltd (1998) 1 ALL ER 305*
- 2) *Mukelabai vs. Nalwamba and Others (2013)2 Z.R 312*

**Legislation referred to;**

1. *The Rules of the Supreme of England 1999 edition (whitebook)*
2. *The Limitation of Action Act, 1939*
3. *High Court Act, Chapter 27 of the Laws of Zambia*

## **1. Introduction.**

- 1.1 The Plaintiff herein commenced an action through Writ of Summons and Statement of Claim dated 17<sup>th</sup> July 2024. The Defendant entered appearance on 31<sup>st</sup> July 2024 and filed into Court an application to dispose of the case on point of law pursuant to Order 14A Rule 1 and 2 of the Rules of the Supreme Court, 1999 edition.
- 1.2 The summons to dispose of the case on point of law was accompanied by an affidavit in support and skeleton arguments of an even date.
- 1.3 The Plaintiff did not contest the application as no affidavit in opposition was filed into Court.

## **2. Background.**

- 2.1 The Plaintiff commenced an action against the Defendant on 17<sup>th</sup> July 2024 by way of a Writ of Summons and a Statement of Claim. The claims advanced against the Defendants are as follows;

- i) **Payment of ZMW5,000,000.00 plus contractual interest, costs and other charges owing to the Plaintiff by the Defendant under the Loan agreement dated 18<sup>th</sup> July 2017 and the vehicle sales agreement in respect of Toyota Landcruiser,**

**Registration Mark ABG 9304, grey in color owned by the Defendant.**

- ii) Damages for breach of the loan agreement.**
- iii) Interest thereon.**
- iv) Further or other relief the Honorable Court may deem appropriate.**
- v) Costs.**

**3. The Affidavit in support.**

- 3.1 It was deposed by the Defendant herein. He stated therein that in 2017, he got a simple loan from the Plaintiff and the said loan was payable on 18<sup>th</sup> August 2017.
- 3.2 That on 18<sup>th</sup> August 2017, the Plaintiff called for the debt to be paid back owing to the fact that the agreed date had elapsed. As at that time, the sum of ZMW11,500.00 was paid towards the debt, leaving the outstanding sum of ZMW3,500.00 which was not paid as the Plaintiff had travelled to Ghana and no instructions were given as to who should be given the outstanding balance.
- 3.3 Later in 2018, the Plaintiff commenced an action in the commercial Court claiming for an exorbitant amount as interest towards the debt. The said action was dismissed.

3.4 He stated that over six (6) years has elapsed from the time the loan agreement came to an end on the 17<sup>th</sup> August 2017.

**4. Skeleton Arguments in support of the affidavit.**

4.1 Order 14A Rule 1(1) and Rule 2 of the Rules of the Supreme Court of England was referenced to reinforce the position that this Court has the power to entertain the application herein.

4.2 It was argued that the cause of action begun in 2017, thus, it is statute barred as per Section 2(1) of the Limitation of Actions Act which provides as follows;

***“The following action shall not be brought after the expiration of six (6) years from the date on which the cause of action accrued that is to say;  
a) Action founded on simple contracts or tort.”***

4.3 The case of **Nykredit Mortgage Bank Plc vs. Edward Erdman Group Ltd<sup>1</sup>** was relied upon to reinforce the position that a cause of action for breach of contract and tort arise at different times. In case of breach of contract, the cause of action arises at the date of the breach of contract. Thus, in casu, the cause of action begun on the

17<sup>th</sup> August 2017 which was the date of repayment. Therefore, the six years has elapsed.

## **5. Hearing.**

5.1 The matter came up on the 23<sup>rd</sup> January 2025 for the Defendant's application. The Plaintiff was present and applied to dismiss the Defendant's application on grounds that firstly, service of the application was not done by the Defendant and lastly, the Defendant was deliberately been absent from Court. That those defaults have been intentional and contumelious, thus, causing serious prejudice to the Plaintiff.

## **6. Consideration and Determination.**

6.1 Before delving into the crux of the issue, I would like to state how amused I was at the Plaintiff's submissions on 23<sup>rd</sup> January 2025 in that, the Plaintiff should have contested the application herein rather than making another application. Having stated that, I will address my mind to the application herein as it is a clear indication that the Plaintiff has waived his right to contest the application.

6.2 This Court has been moved pursuant to **Order 14A Rule 1** and **Rule 2** of the Rules of the Supreme Court of England which provides as follows

**“(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) an application under rule 1 may be made by summons or motion or may be made orally in the course of any interlocutory application to the Court.”**

6.3 There are certain requirements that need to be met before one can use the invoke **Order 14A**. These have been clearly stipulated in **Order 14A/2/3** and reinforced in the case of **Mukelabai vs. Nalwamba and Others<sup>2</sup>** which provides as follows:

**“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**  
**c) such determination will be final as to the entire cause or matter or any claim or issue therein; 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”**

6.4 It is common cause that this case was commenced by way of Writ of Summons. The Defendant entered appearance and filed defence on 31<sup>st</sup> July 2024, thus, adhering to the procedural requirement as guided by the law above. Thus, the summons to dispose of the action on point of law is properly before this Court.

6.5 The record shows that the Defendant on two occasions has not come before this Court to prosecute the application herein. There is however, on record affidavit evidence which I shall rely upon. I find that the Statement of Claim under paragraph 4 shows that this matter is statute barred as the parties herein entered into an agreement on 18<sup>th</sup> July 2017, whereby the Defendant borrowed from the Plaintiff ZMW15,000.00 payable on 17<sup>th</sup> August 2017 at 30% interest totaling ZMW19,500.00 more than six (6) years has elapsed within which the Plaintiff should have commenced this action Pursuant to **Section 26** of the

Limitation of Actions Act, 1939. The application to raise a preliminary issue on point of law therefore succeeds.

**7. Conclusion.**

7.1 I therefore, dismiss this case on the basis that it is statute barred as six (6) years has elapsed from the date of the agreement of 17<sup>th</sup> July 2017, giving rise to these proceedings. Further the amount being claimed is not tallying with what is in the affidavit evidence as well as statement of claim.

7.2 I make no order as to costs.

Leave to appeal is granted.

Dated at Lusaka this.....10<sup>th</sup>.....day of .....November.....2025

  
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**ELITA PHIRI MWIKISA**  
**HIGH COURT JUDGE**