

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2001/HP/ 0849

BETWEEN:

JOSEPHINE MONDE MUBITA CHIKWENDA

1ST PLAINTIFF

*(Suing in her own Capacity and as Administratrix
of the Estate of Levina Mubita)*

SARAH SAKALA



2ND PLAINTIFF

AND

JACOB STANLEY CHIKWENDA

1ST DEFENDANT

TOBACCO BOARD ZAMBIA

2ND DEFENDANT

EPHRAIM MULUBA MATEYO

3RD DEFENDANT

RACHEL CHISENGA

4TH DEFENDANT

**FRANCISCAN MISSIONERY SISTERS
OF SERVICE**

5TH DEFENDANT

Before:

The Hon. Mr. Justice C. Zulu

For the Plaintiff:

Ms. I.E. Suba, and Ms. S. K.
Chitoshi, Suba Tafeni and
Associates.

For the 2nd Defendant:

Mr. N.C. Dindi, Messrs Dindi &
Company.

For the 4th & 5th Defendants:

Mr. J. Chimankanta, Messrs Cholt
Legal Practitioners.

R U L I N G

Cases referred to:

- 1. William David Carlisle Wise v V.E.F Limited [1985] Z.R. 179.**
- 2. Hayat Communications Zambia Limited v Naprode Services Limited SCZ/8/149 of 2009).**

3. *Mazembe Tractor Company v. Meridien BIOA Bank (in liquidation)* (SCZ Judgment No. 11 of 2011).

Legislation & other Materials referred to:

1. *Rules of the Supreme Court of England and Wales 1965 (White Book 1999 Edition).*

2. *Lands and Deeds Registry Act Cap 185 of the Laws of Zambia.*

3. *High Court Rules Chapter 27 of the Laws of Zambia.*

1.0 INTRODUCTION

1.1 This ruling is in respect of two applications. The first is at the instance of the Fourth and Fifth Defendants dated February 19, 2024 to dismiss the action for non-disclosure of a reasonable cause of action against the Fourth and Fifth Defendants. The second application is at the instance of the Plaintiffs for “restoration” of the judgment dated March 11, 2022, which was set aside. However, the summons was titled: “summons for entry of judgment on admission and failure to file a defence”.

1.2 The first Application was made pursuant to Order 18 rule 19 and Order 33 rule 3 of the **Rules of the Supreme Court of England and Wales 1965 (White Book 1999 Edition)**, read together with sections 33, 34, and 35 of the **Lands and Deeds Registry Act Cap 185 of the Laws of Zambia.**

1.3 And the second application was made pursuant to Orders XX rule 1 and XXI rule 11 of the **High Court Rules (HCR) Chapter 27 of the Laws of Zambia.**

2.0 BACKGROUND

2.1 At the time judgment was delivered on March 11, 2022, in favour of the Plaintiffs, the Fourth and Fifth Defendants were not parties to this action. In that judgment, the Plaintiffs were *inter alia* granted an order for specific performance against the second Defendant, Tobacco Board of Zambia (TBZ). The Plaintiffs were also granted an order of vacant possession in respect of Plot No. 5745, Lusemfwa Road, Kalundu, Lusaka.

2.2 Following the said judgment, a writ of possession was issued for eviction of persons in occupation of the property. It then turned out that the Fourth and Fifth Defendants were in possession of the said property. Faced with the risk of eviction, the Fourth and Fifth Defendants filed an application dated April 4, 2022 to be joined to the matter post judgment. The application for joinder was granted. Subsequently, the writ of possession was set aside at the instance of the Fourth and Fifth Defendants.

2.3 And following an application to set aside the Court's judgment dated March 11, 2022, by ruling dated October 23, 2023 part of the judgment was aside. The setting aside was allowed, in order to allow a determination of whether, issues pertaining to the said property were *res judicata*, in the light of the fact that the Fifth Defendant earlier on obtained a vesting order over the same property having allegedly bought the property from TBZ. In that ruling, I said the following:

2.3.1 ***While I do not dispute that, the scope of res judicata extends to include matters for which parties had an opportunity to present their case***

in the earlier case, that scope is not fatal to the Plaintiffs. The Applicants did not demonstrate that the first Plaintiff, in particular had an opportunity to present or defend her case in the Kitwe matter. Parenthetically, it is apparent that the order in the Kitwe matter was obtained by default procedure.

The setting aside of the judgment is basically to afford a complete adjudication of the matters in dispute. And the matters that remain unresolved are: whether, the first Plaintiff's husband, the first Defendants herein had the consent of his wife to sell her property, the subject property to a third party. Or whether the authority the TBZ relied on from the first Plaintiff's husband to bypass the Plaintiff and directly convey the property to a third party to the exclusion of the first Plaintiff was valid, or not. I, therefore, agree with Ms. Suba, that the pith and substance of the whole dispute relating to the subject property was never heard on its merit, and thus there is no judgment from the Kitwe matter determining the above issues. The said order under Cause No. 2016/HK/386, is but a vesting order and merely directing the Registrar of the High Court to execute conveyance documents in lieu of the alleged vendors. Again, this order does not resolve the above stated contentious issues. The issues remain unresolved, and can only be resolved in these proceedings.

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In the light of the foregoing, the application to set aside the judgment is granted, to the extent that part of the judgment granting specific performance, ownership and possession of the subject property to the Plaintiffs, and all adjunct reliefs arising thereof is set aside. This will afford the concerned Defendants, particularly the fourth and fifth Defendants an opportunity to be heard here. Having resolved that the matter

is not res judicata, the application to dismiss the action for alleged abuse of court process is dismissed.

3.0 THE FIRST APPLICATION THE PARTIES' ARGUMENTS

- 3.1 The parties filed their respective arguments. In summarizing the arguments, I will only focus on arguments relevant to the application and, not labour to focus on arguments pertaining to propriety or impropriety of the vesting order because, the same goes to the root and essence for which the matter was reopened for hearing of the Fifth Defendant's alleged interest in the property.
- 3.2 Counsel for the Fourth and Fifth Defendants, Mr. Chimankhata, submitted that a reading of the Plaintiffs' statement of claim did not advance any allegations against the Fifth Defendant's title deed obtained through a court process under cause number 2016/HK/385. He asserted that the allegations raised were only against the First and Third Defendants. I was thus urged to dismiss the Plaintiffs' action.
- 3.3 The Plaintiffs' Counsel in response focused thier arguments on challenging the propriety of the vesting order.

4.0 DETERMINATION OF THE FIRST APPLICATION

- 4.1 It is settled law that an action that does not disclose a reasonable cause of action is bound to be dismissed. In **William David Carlisle Wise v V.E.F Limited**¹ it was held:
- 4.1.1 ***Where a statement of claim discloses no cause of action, then the Plaintiff is not entitled to judgment even where the defendant does not apply to strike out***

the statement of claim or renders a defence... because there is nothing to try or to prove.

- 4.2. While the Plaintiffs' pleadings clearly show that there is no specific claim against the Fourth and Fifth Defendants, the want thereof is conceivably understood.
- 4.3 As rightfully observed by the first Plaintiff in her affidavit, the Fourth and Fifth Defendants were not parties to the suit, they only became parties after the judgment.
- 4.4 Therefore, the Fourth and Fifth Defendants were not contemplated to be parties to the suit. They came on board to challenge the judgment because, they allege that they ought to have been heard. And now having joined the action post judgment, they cannot seek to have the action dismissed on the technical ground that there is no reasonable cause of action against them, when at the time the action was taken out and at the time the judgment was delivered, they were not parties.

5.0 THE SECOND APPLICATION THE PARTIES' AFFIDAVT EVIDENCE & ARGUMENTS

- 5.1 An affidavit in support was deposed to by the First Plaintiff, Josephine Monde Mubita Chikwenda. She deposed that following the setting aside of part of the judgment, by ruling dated October 23, 2023 the Court by order dated January 31, 2024 gave directions to the Fourth and Fifth Defendants to file their defence by February 14, 2024.

5.2 The record shows that the purported defence by the Fourth and Fifth Defendants was only filed late on February 19, 2024 without the leave of Court.

5.3 An affidavit in opposition was deposed to by Kim Mu Yeoul, a Catholic Nun in Charge of the Fifth Defendant in Lusaka. She stated that the Fourth and Fifth Defendants failed to file their defence on time because, the Plaintiffs neglected to serve them with originating process. That a reminder was even sent to the Plaintiffs' Counsel by letter dated February 1, 2024 requesting service of court process. She added that despite the reminder, no service was effected on the Fourth and Fifth Defendants. As such, the only option the Fourth and Fifth Defendants were left with was to rely on the court record.

5.4 According to Sister Yeoul, the filing of the defence on February 19, 2024 did not prejudice the Plaintiffs in any way.

5.5 In an affidavit in reply, the first Plaintiff focused on challenging the Fifth Defendant's occupation of the house in issue, alleging that the vesting order was obtained by fraud.

5.6 In terms of written arguments, it was argued that the delay to enter a defence for five days was not unreasonable, or in bad faith or prejudicial to the Plaintiff. The case of **Hayat Communications Zambia Limited v Naprode Services Limited**² was cited wherein it was held:

5.5.1 ***We note that the defendant attempted to file a defence on 16th April, 2009, after it was served with the originating process on 30th March 2009. This in our view does not amount to unreasonable delay, we***

have also not seen any evidence of mala fides or improper conduct on the part of the defendant. For these reasons, all the three grounds of appeal succeed.

6.0 DETERMINATION

- 6.1 It is indisputable that the defence for the Fifth and Fourth Defendants was filed outside the deadline of February 14, 2024 and without the leave of the Court. Since time had elapsed, leave of court was required to extend time within which to file the defence. I desire to restate that no leave or application for extension of time was filed, but the Fourth and Fifth Defendant proceeded to file the same as if court process is ungovernable and driven by them. Such conduct is prejudicial to the administration of justice.
- 6.2 Notwithstanding the above facts, the application by the Plaintiffs in this regard is misconceived. This is because the Plaintiffs seek entry of judgment or restoration of the judgment without first seeking an application to set aside the defence that was filed. The Plaintiffs' application is untenable.
- 6.3 However, in the spirit of demonstrating that the Court is in charge of court process, and that a party cannot bulldoze its way and render redundant the Court orders, particularly those giving directions as to time 'lines', *suo moto*, the defence filed by the Fourth and Fifth Defendants is set aside for irregularity. In making this pronouncement, I am compelled to make reference to remarks made by the Supreme Court in **Mazembe Tractor Company v. Meridien BIOA Bank (in liquidation)**³ wherein the Court held:

6.3.1 ***These rules are often augmented by orders for directions including orders by a Judge in the exercise of the Court's inherent jurisdiction to control the proceedings before itself. The Judge's orders clearly stand on a higher footing than the rules and it is extremely naïve for litigants who think of disobeying and challenging the authority of the Judge in his own court without consequence.***

6.4 The Plaintiffs' failure to serve process on the Fourth and Fifth Defendants did not exempt them from the directive issued or vindicate their action to file their pleadings without the leave of court.

6.5 However, for the avoidance of doubt, the foregoing, does not deprive the Fourth and Fifth Defendants the liberty to apply for extension of time within which to file their defence.

7.0 CONCLUSION

7.1 In the light of the foregoing, the application to dismiss the action for non-disclose of a reasonable cause of action by the Fourth and Fifth Defendants is dismissed. And the application by the Plaintiffs for entry of judgment on admission and for failure to file a defence or restore the judgment is dismissed because, it is procedurally misconceived. However, as earlier stated, the setting aside is *suo moto*. Therefore, I make no order as to costs.

7.2 Leave to appeal is granted.

DATED THIS 9TH DAY OF DECEMBER 2024


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THE HON. MR. JUSTICE CHARLES ZULU