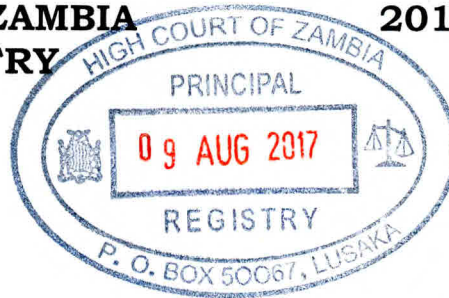


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2015/HP/0678



BETWEEN:

JULDAN MOTORS LIMITED
JULY DANOBO

**1st PLAINTIFF
2nd PLAINTIFF**

AND

NASSER IBRAHIM
OLYPA SIBONGILE DANOBO

**1st DEFENDANT
2nd DEFENDANT**

**Before Honourable Mrs. Justice M. Mapani-Kawimbe on the 9th day of
August, 2017**

For the Plaintiffs : *Mr. J. Zimba, Mr. N. Botha, Messrs Makebi Zulu & Advocates*
For the Defendants : *Mrs. N. Hadunka, Mrs. N. Chilufya, Messrs Keith Mweemba Advocates*

R U L I N G

Cases Referred To:

1. *D.E. Nkhuwa v Lusaka Tyre Services Limited (1977) Z.R 43*
2. *Access Bank (Z) Limited v Group Five Z/CON Business Park Joint Venture (suing as a firm) SCZ/8/52/2014*
3. *Kitwe City Council v William Nguni (2005) Z.R 57*

Legislation Referred To:

- 1 *High Court Act, Chapter 27*

This is the Plaintiffs' application to set aside the 1st and 2nd Defendants' final submissions for irregularity pursuant to Order 2 Rule 2 of the Supreme Court Rules. It is supported by an Affidavit.

The Affidavit in Support is sworn by July Danobo discloses that after the trial of this matter, on 29th May, 2017, the Court ordered the Plaintiffs to file their submissions by 16th June, 2017, while the Defendants were given 10th July, 2017, to settle their submissions. The deponent avers that the Court emphasized that late submissions would not be accepted.

The deponent states that in compliance with the Court's Order, the Plaintiffs filed their submissions on 16th July, 2017, while, the Defendants filed theirs on 18th July, 2017, and in defiance of the Order. The deponent prayed to the Court to set aside the Defendants' submission for irregularity.

On behalf of the Defendants, **Nasser Ibrahim** swore an Affidavit in Opposition. He concedes that the Plaintiffs filed their

submissions on 16th July, 2017, but only served the Defendants' Advocates, Messrs PNP Advocates and Messrs Keith Mweemba Advocates on the 19th June, 2017 as shown in the exhibit marked **"NI1."**

The deponent states that the late filing of the submissions by the Defendants was partly caused by the late service of the Plaintiffs. That given the bulky nature of the said submissions and vast evidence to explore, the delay was not deliberate and in defiance of the Court's Order.

The deponent states that at the time of adjourning this case for Judgment, the Court allowed the parties to file submissions on the dates of their preference. Further, that the Court never stated that late submissions would not be accepted. The deponent avers that upon advice received from his Advocates, submissions are meant to aid the Court in determining issues in controversy. That the Plaintiffs have not demonstrated the prejudice they may suffer by the late filing of Defendants' submissions.

The deponent states that the Defendants are not averse to the Plaintiffs being given more time to file a reply, if any, and if it is in the interest of justice. He prayed to the Court to dismiss this application for being misconceived and untenable at law.

At the hearing Learned Counsel for the Plaintiff placed reliance on the Affidavit in Support. He submitted that the Defendants disobeyed the Order of the Court when they filed their submissions late, and this exposed them to consequences. To support his submission, he cited the case of **D.E Nkhuwa v Lusaka Tyre Services Limited**¹, where the Supreme Court stated the need for strict adherence to the rules prescribed by Court. The Court also stated that advocates who failed to comply with the rules, did so at their own peril. Counsel submitted that the principles in the **D.E Nkhuwa** case were reiterated by the Supreme Court in the case of **Access Bank (Z) Limited v Group Five Z/CON Business Park Joint Venture (suing as a firm)**².

Counsel further submitted that the rules of the Court provided an avenue to correct a lapse or default, however, the Defendants

had not taken advantage of the rules. Counsel contended that paragraphs 11, 12, 13, 14, 15 and 16 of the Affidavit in Opposition offended Order 5 Rules 15 and 17 of the High Court Rules. He argued that paragraphs 11, 12, 13 and 14 constituted legal arguments, while paragraph 15 amounted to a prayer. He stated that paragraph 16 did not state a ground of belief. He prayed to the Court to expunge the paragraphs from the Affidavit in Opposition and reiterated his prayer to set aside the Defendant's submissions.

In response, Learned Counsel for the Defendant placed reliance on the Affidavit in Opposition. She contended that submissions were meant to aid the Court in shaping its judgment as stated in the case of **Kitwe City Council v William Nguni**³. Counsel submitted that the Court never ordered that late submissions would not be accepted but merely emphasized that submissions were to be filed on the dates that the parties committed themselves to.

In rejoinder, Counsel for the Plaintiff stated that the Court's emphasis on submissions constituted an order, which the parties

were required to comply with. Counsel stated that since the Defendants did not comply with the Order, the Court could set aside the Defendants' submissions with costs to the Plaintiffs.

I have earnestly considered the application before me and the Affidavits filed herein. The application raises the question whether this Court should set aside the Defendants' submissions filed on 18th July, 2017, for being out time?

Order 2 of the Rules of the Supreme Court Rules provides that:

- "1. An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity."**
- "2. An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion."**

According to Order 2 Rule 1 of the Supreme Court, an Order to set aside any proceedings for irregularity must be made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

The Affidavit in Support discloses that the Defendants filed their submissions on 18th July, 2017. The Plaintiffs issue by way of these summons on 20th July, 2017. It was not necessary for the Plaintiffs to take any further steps after becoming aware of the irregularity because the trial of this matter had concluded. The order I made at the conclusion of the trial was as follows:

“The Plaintiffs must file submissions by 16th June, 2017. The Defendants should settle their submissions by 10th July, 2017. I shall thereafter adjourn to deliver judgment to a date to be communicated to the parties.”

I also emphasized to the parties after reading out that order that there was need for them to file their submissions on time. At no point did I order that late submissions from either party would not be accepted. The emphasis I placed after reading out my order was to ensure the timely filing of submissions so as to ensure the rendering of a timely Judgment. The Defendants' submissions were filed six days after their date of choice. The Plaintiffs served their submissions on the Defendants on 19th June, 2017, four days after they had been filed.

I am empowered under Order 3 Rule 2 of the High Court Rules, to make any interlocutory order, which I consider necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not. Thus, I find that it is necessary to envoke my jurisdiction under Order 3 Rule 2 and accept the Defendants submissions as they will assist me in gaining the utmost clarity of their position.

I am fortified by the case of **Kitwe City Council v William Nguni**³, where the Supreme Court held *inter alia* that:

“1. The Court is not bound to consider Counsel’s submissions because submissions are only meant to assist the Court in arriving at a judgment.”

It is trite law that submissions are only meant to assist the Court in shaping a judgment and not to substitute the opinion of the Court. The Court can only make a decision after independently reviewing and analyzing the evidence presented in a case. Therefore, I see no need to set aside the Defendants’ submissions.

In view of my finding, I find it otiose to consider the arguments on the affidavit in opposition.

This application is frivolous, vexatious and misconceived. It is dismissed with costs to the Defendants to be taxed in default of agreement.

Dated this 9th day of August, 2017.

M. Mapani

M. Mapani-Kawimbe
HIGH COURT JUDGE