

IN THE HIGH COURT FOR ZAMBIA

2019/HP/2008

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

MACHAYI KASAJI

1ST PLAINTIFF

SHIBA PHIRI

2ND PLAINTIFF

FAITH PHIRI

3RD PLAINTIFF

PAUL PHIRI

4TH PLAINTIFF

JERRIES PHIRI

5TH PLAINTIFF

AND

DAVY MALAMBO

1ST DEFENDANT

MAYABA MWEENE

2ND DEFENDANT

CHRISTIAN RESOURCES CENTRE

3RD DEFENDANT

BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN CHAMBERS, ON 25TH JUNE, 2020.

For the Plaintiffs: Mr. M. Kasaji - Messrs. C. L. Mundia and Company

For the Defendants: N/A

RULING

CASE AUTHORITIES REFERRED TO:

1. *Standard Bank Limited vs. Brocks (1972) Z.R. 306; and*

2. *National Airports Corporation Limited V Mines Air Services Limited (T/A Zambian Airways) (2009/HPC/0006).*

LEGISLATION AND OTHER WORKS:

1. *The High Court Act, Chapter 27, Volume 3 of the Laws of Zambia.*

1 INTRODUCTION

- 1.1 This is a Ruling on an application for an Order of interim attachment of property made pursuant to **Order XXVI, Rule 1** of **The High Court Rules**¹.

2 BACKGROUND

- 2.1 On 10th December, 2019, the Plaintiffs issued a Writ of Summons and Statement of Claim herein, in which they seek against the Defendants *inter alia*, Compensation for loss of Motor Vehicle BMW 525i Registration No. BBA 280ZM, in the sum of ZMW 140,000.00; Damages for personal injury; Damages for trauma, mental strain and anguish; and Special Damages in the sum of ZMW 17,000.00.
- 2.2 In the Statement of Claim accompanying the Writ of Summons, the Plaintiff contended, *inter alia*, that on 1st December, 2019, at around 04:20 AM, the Plaintiffs' motor vehicle and the Defendants' motor vehicle were involved in a Road Traffic Accident when the Plaintiffs' motor vehicle was negligently hit by the Defendants' motor vehicle, along the Ndola-Kabwe Road. That the Defendants' Driver failed to keep to his side of the road,

thereby causing the Plaintiffs' motor vehicle to lose control and go off the road.

- 2.3 Simultaneously, on 10th December, 2019, the Plaintiffs also filed, an *Ex-Parte* application for an interim attachment of property, which was granted by Justice G. C. Chawatama on 31st December, 2019 and the record was then allocated to this Court. Upon perusal of the record, I directed that the matter returns for *Inter Parte* hearing of the application on 28th January, 2020.
- 2.4 On the return date, the Plaintiffs' Learned Counsel Mrs. Munthali, intimated to the Court that they had not yet served the originating process on the Defendants and requested for an adjournment to enable them to serve the process. The application for an adjournment was granted and the matter adjourned to 19th March, 2020.
- 2.5 On 19th March, 2020, the matter was again adjourned to 15th April, 2020, as the Plaintiffs did not serve the process in good time.
- 2.6 Upon considering that Zambia is currently faced with Covid-19, a global pandemic, which demands social distancing and that this is an application that can be disposed of on Affidavit evidence whilst adhering to the social distancing guidelines given by the Judiciary and relevant government authorities, I issued an Order for Directions on 22nd May, 2020, directing the parties herein to file their respective Affidavits and skeleton

arguments within a specified time frame, upon which this Court would render its Ruling on the pending application.

2.7 At the time of writing this Ruling, only the Plaintiffs had filed their written submissions and I have now proceeded to render this Ruling based on the Affidavit and submissions on record.

3 AFFIDAVIT EVIDENCE

3.1 The application was supported by an Affidavit in Support sworn by one Machayi Kasaji, the 1st Plaintiff herein, where he reiterates the contents of the Statement of Claim. In addition, the Plaintiffs in the said Affidavit in Support *inter alia* aver that the 1st and 2nd Defendants who caused the accident cannot be located, but their motor vehicle Toyota Dyna Registration No. ACK 6189, is parked at Masala Police Station.

3.2 It is further averred that this action being for claims of monetary nature, in the event that the Plaintiffs succeed, they will be unable to enforce the Judgment and recover from the Defendants their awards, thereby making this matter an academic exercise. Therefore, they seek an Order of attachment of the Defendants' motor vehicle pending determination of this matter.

4 SUBMISSIONS

4.1 In their submissions, the Plaintiffs *inter alia* submit that the location of the Defendants is unknown to the Plaintiffs and that upon the 2nd Defendant's release from Police custody, he attempted to remove the Defendants' motor vehicle, which had been impounded and parked at Masala Police Station. For this submission, the Plaintiffs place reliance on the case of **Standard Bank Limited vs. Brocks**¹, in which the Court held as follows: -

"An interim attachment can only be issued where a Defendant is about to remove or dispose of property with intent to obstruct or delay execution of a decree that may be passed against him."

4.2 The Plaintiffs contend that the Defendants not having entered Appearance and Defence, it cannot be ascertained if they are capable of furnishing security and that their failure to enter Defence is sufficient reason to impute that they have failed to show such cause why their motor vehicle must not be attached to these proceedings. For this contention, the Plaintiffs relied on **Order XXVI, Rule 4** of **The High Court Rules**¹, which provides that: -

"If the defendant fail to show such cause, or to furnish the required security within the time fixed by the Court or a Judge, the Court or a Judge may direct that the property specified in the application, if not already attached, or such portion thereof as shall be sufficient to fulfil the decree, shall be attached until further order. If the defendant show such cause, or furnish the

required security, and the property specified in the application, or any portion of it, shall have been attached, the Court or a Judge shall order the attachment to be withdrawn."

4.3 The Plaintiff further submitted that unless an Order of interim attachment is granted, the Plaintiffs may not enjoy the fruits of the Judgment that the Court may eventually grant in favour.

5 THE LAW

5.1 I have carefully considered the Affidavit evidence before me, the Plaintiffs' submissions and authorities cited, which have made my task considerably easier.

5.2 The application is made pursuant to **Order XXVI, Rule 1** of **The High Court Rules**¹, which provides as follows: -

"If the defendant, in any suit for an amount or value of fifty thousand kwacha or upwards, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of his property, or any part thereof, or to remove any such property from the jurisdiction, the plaintiff may apply to the Court or a Judge, either at the time of the institution of the suit, or at any time thereafter until final judgment, to call upon the defendant to furnish sufficient security to fulfil any decree that may be made against him in the suit, and, on his failing to give such security, to direct that any property, movable or immovable, belonging to the defendant, shall be

attached until the further order of the Court or a Judge." (Court's emphasis)

5.3 I have also addressed my mind to **Order XXVI, Rule (4)** of **The High Court Rules**¹, which reads as follows: -

"If the defendant fails to show cause, or to furnish the required security within the time fixed by the Court or a Judge, the Court or a Judge may direct that the property specified in the application, if not already attached, or such portion thereof as shall be sufficient to fulfil the decree, shall be attached until further order..."

6 ANALYSIS AND FINDINGS

6.1 In determining the application for interim attachment of property, I must, at the outset, bring to light that there is currently no application before this Court, made by the Plaintiffs, moving the Court to call upon the Defendants to furnish sufficient security to fulfil any decree that may be made against the Defendants in this matter. Accordingly, I am compelled to delve directly into the requirements of the cited **Order XXVI** of **The High Court Rules**¹, under which the Plaintiffs have brought their application.

6.2 It is the view of this Court that **Order XXVI** of **The High Court Rules**¹ prescribes the following mandatory sequential conditions precedent to the grant of an order for interim attachment of property: firstly, the Plaintiff must successfully move the Court to call upon the

Defendant to furnish sufficient security to fulfil any decree that may be made against the Defendant in the suit; secondly, the order requiring the Defendant to furnish security must fix the timeframe within which the Defendant must furnish the said security; and thirdly, there must be a failure by the Defendant to furnish the required security within the time fixed by the Court.

6.3 I am persuaded in taking this view by the case of ***National Airports Corporation Limited vs. Mines Air Services Limited (T/A Zambian Airways)***², where Justice N. Mutuna (then High Court Judge) held that: -

"prior to making such an application, the plaintiff should call upon the defendant to provide security and only where the defendant fails to provide such security is the plaintiff empowered to apply for an interim order of attachment."


6.4 As earlier indicated, this application has not been preceded by an application made by the Plaintiffs moving the Court to order the Defendants to furnish any security. Consequently, there is neither a Court Order directing the Defendants to furnish any security nor a failure by the Defendants to comply with any Court Order directing them to furnish security. I am not convinced by the Plaintiffs' argument that the failure to settle Defence by the Defendants is sufficient reason to impute that they have failed to show cause why their motor vehicle must not be attached, for the simple reason that it would be

unjust for this Court to make orders on assumptions. Accordingly, the application must fail at this stage for want of fulfilment of the mandatory conditions precedent to the grant of an order for interim attachment of property pursuant to **Order XXVI, Rule 1** of **The High Court Rules**¹.

7 **CONCLUSION**

- 7.1 On the foregoing, the application is dismissed and the *Ex Parte* Order of interim attachment of property granted on 31st December, 2019, is hereby discharged.
- 7.2 Costs remain in the cause.
- 7.3 Leave to Appeal is granted.

Dated this 25th day of June, 2020.

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P. K. YANGAILO
HIGH COURT JUDGE