

**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**  
(Commercial Jurisdiction)

2019/HPC/0472



**BETWEEN:**

**OLIVE CLEARING AND FORWARDING LTD**

**PLAINTIFF**

**AND**

**KABILA KIBALEBOZZO**

**DEFENDANT**

**Before the Hon. Mr. Justice Bonaventure C. Mbewe in Chambers  
on Friday 8<sup>th</sup> November, 2019.**

*For the Plaintiff* : *Mr. H. Mulenga of Messrs. Philsong and Partners*

*For the Defendant* : *Mr. M. Sampa of Messrs. Frank Tembo and Partners*

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## **R U L I N G**

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**Cases referred to:**

1. *National Pension Scheme Authority v. Ndanji Fashions Limited*  
2019/HPC/0140

2. *Kufamuyeke Mukelebai v. Esther Nalwamba and 2 others* 2013 Vol. 2 ZLR at page 312
3. *National Airports Corporation Limited v. Mines Air Services Limited (T/A Zambian Airways)* (2011) 2 ZR 180
4. *Masauso Banda, Javeya Nyasolo Banda v. Gabriel Mathias Maiko & Reuben Shaury* (2012) 3 ZR 128
5. *Rules of the Supreme Court of England, (White Book) 1999 Edition*, Vol. 1
6. *High Court Rules, Chapter 27 of the Laws of Zambia*
7. *Zambian Civil Procedure, Commentary and Cases*, Hon. Justice Dr. Patrick Matibini, Vol. 1, Lexis Nexis, Durban 2017 at P. 469

This is a Ruling on an interlocutory application to raise preliminary issues under **Order 14A, Rule 1 of the Rules of the Supreme Court of England (White Book) 1999 Edition, Volume 1** filed by the Defendant.

The application which the Defendant brought by way of notice of motion raises three (3) questions for this Court to determine:

1. Whether or not this Court can admit into evidence an affidavit with a defective Jurat that is one not duly signed by the commissioner for oaths sworn by Beenwell Mtonga and filed on the 11<sup>th</sup> day of October, 2019.



2. Whether or not the affidavit sworn by Beenwell Mtonga and filed on the 11<sup>th</sup> of October, 2019 not duly signed by the commissioner can amount to sworn testimony of a witness
3. Whether or not the application for interim attachment of property is rightly before this Court minus a request for security from the Defendant and or his agent.

At the hearing, Counsel for the Defendant submitted that the application for interim attachment of property is improperly and prematurely before the Court. He contended that the Affidavit in support of interim attachment of property be expunged from the record due to the fact that it offends the provisions of **Order V Rule 20 (g) High Court Rules** which provides that;

*“The jurat shall be written without interlineation, alteration or erasure (unless the same be initialed by the commissioner), immediately at the foot of the affidavit, and towards the left side of the paper, and shall be signed by the commissioner.”*

Counsel argued that the Plaintiff's affidavit in paragraphs 5 & 6 contains issues of law and a prayer, which are prohibited by **Order V of the High Court Rules**. Further paragraph 14 of the said affidavit contains a prayer and for the said reasons the said affidavit be expunged from the record.



Counsel for the Plaintiff in opposing the Defendant's preliminary issue relied on the affidavit in opposition filed into Court on the 6<sup>th</sup> November, 2019 and the skeleton arguments filed on the 7<sup>th</sup> November, 2019. Counsel augmented as follows, that the irregularity on the Affidavit filed into Court on the 11<sup>th</sup> of October by one Beenwell Mtonga does not go to the root of the application and given the exhibit marked "HM1" which shows that the properly commissioned affidavit was presented to Court save for the mistake of returning the copy which was not signed although date stamped. Counsel contended that the Defendant's application or motion should fail as no injustice has been occasioned to the Defendant. Counsel prayed that this Court orders that the copy of the affidavit which has no signature by a commissioner of oaths, be substituted by the copy properly commissioned and was available when the evidence was led before Court at the time of granting the interim order.

Counsel went on to argue that, Paragraphs 5 & 6 of the Plaintiffs affidavit in opposition filed on the 6<sup>th</sup> of November, 2019 do not contain law or argument as they are merely facts which state that the preliminary issue was not supported by an affidavit. The Court was invited to note that the affidavit was sworn by an advocate of the High Court of Zambia who is competent to speak to the law. It was also argued that Paragraph 14 of the said affidavit is not a prayer as it is a fact which the Plaintiff is presenting to the Court. Counsel submitted that the affidavit filed on 6<sup>th</sup> November by the Plaintiff and Paragraphs 5, 6 & 14 are not defective and the same should not be



expunged from the record of this Court. Counsel submitted that the notice to raise preliminary issue itself is defective for having not been supported by an affidavit.

Counsel for the Plaintiff, in responding to issue number 3 of the Notice to Raise Preliminary Issue argued that the Plaintiff's application for interim attachment of property was properly before this Court for the purpose of doing justice. He submitted that the Defendant has admitted that he is a foreign national and the property was about to leave the jurisdiction of this Court and the application for interim attachment cannot fail for the reason only that the Defendant was not given an opportunity to pay security for costs because the facts of this case will show that it was practically impossible to request firstly for security and thereafter seek for attachment because by then the property which is the subject of this matter would have left the jurisdiction.

It was Counsel's prayer that the Defendant's application be dismissed as given that the containers containing goods in question are in Chirundu and any minute the order is discharged, the property will be out of the jurisdiction of the Court and it will not be an easy thing for the Plaintiff to execute the judgment, in the likelihood of the Plaintiff succeeding, particularly that the person representing the Defendant is an agent who's agent relationship has not been backed with any documents at all and also that the Plaintiff cannot execute



on the agent now appearing for and on behalf of the Defendant which Defendant is a foreign national. Counsel prayed that the entire application to raise preliminary issues should collapse with costs to the Plaintiff.

Mr. Sampa, Counsel for the Defendant replied as follows, in relation to the affidavit filed on the 6<sup>th</sup> of November, 2019, that the High Court is a Court of record and procedure which must be followed religiously. The averment in the affidavit filed on 6<sup>th</sup> of November particularly in paragraph 5 that the preliminary issue is irregular. That in itself is legal argument. Further the same paragraph 5 contains an averment that the affidavit is irregular for not being supported by affidavit as required by law. That again is legal argument. **Order V of the High Court Rules** does not allow lawyers to depose to the law in affidavits merely because they are advocates, a lawyer deposing to an affidavit is a deponent who must follow the rules of **Order V** when in that capacity. Further, the averment in Paragraph 14 that the deponent craves the indulgence of this Court to dismiss the Defendants notice of motion to raise preliminary issue is in itself a prayer.

Counsel contended that in the Plaintiffs skeleton arguments as argues that the Defendant's notice of intention to raise preliminary issue should be supported by affidavit and failure to which is irregular, the Plaintiff has not cited any authority for that position



save for a fabricated precept from the learned author Hon. Justice Dr. Patrick Matibini's work on **Zambia Civil Procedure, Commentary and Cases**. Counsel submitted that the submission that a motion should be supported or accompanied by Affidavit evidence, is misleading this Court as a perusal of Page 469 of the said text by the learned author does not contain any requirement that a motion must be supported by affidavit evidence. He also submitted that there is no requirement in the White Book that the notice must be accompanied by affidavit and that the only time the affidavit is required is when the notice of intention to raise preliminary issue is made by summons, the main requirement for the Defendant to raise a preliminary issue is that he ought to file a notice of intention to defend in accordance with **Order 11, Rules 1 and 2** which the Defendant has done by entering appearance and a defence thereto as confirmed in the High Court decision in **National Pension Scheme Authority v. Ndanji Fashions Limited 2019/HPC/0140** and by Mr. Justice Chali in **Kufamuyeke Mukelebai v. Esther Nalwamba and 2 others 2013 Volume 2 ZLR** The Defendant submitted that the notice to raise preliminary issue is rightly and properly before this Court.

Counsel further argued, in relation to the premature application for interim attachment of property, that the two requirements under the order for interim attachment of property specifically in Rule 1 are married and cannot be divorced, failure to satisfy this Court under any of them renders the application premature depriving the Court



of Jurisdiction to hear it due to its defective form. The condition that there must be a request for provision of security before the application is made is mandatory and cannot be cured in any way not even by requesting for security *ex post facto*.

Counsel for the Defendant prayed to this Court that the ex-parte order for interim attachment of property granted on the 14<sup>th</sup> day of October 2019 should be discharged for being improperly and prematurely before this Court as required by law and that the costs of this application be borne by the Plaintiff.

I thank both Counsel for their spirited submissions before Court augmenting their written arguments filed into Court. I have taken due consideration of all arguments and submissions made to this Court.

The Defendant's application under **Order 14A, rule 1 Rules of the Supreme Court of England, 1999 Edition Volume 1** is properly before me, as the Defendant filed its defence and drafted the issues to be determined with sufficient clarity as provided in the Order it is brought under.

I shall address the first 2 preliminary issues first, namely;

1. Whether or not this Court can admit into evidence an affidavit with a defective Jurat that is one not duly signed by



the commissioner for oaths sworn by Beenwell Mtonga and filed on the 11<sup>th</sup> day of October, 2019.

2. Whether or not the affidavit sworn by Beenwell Mtonga and filed on the 11<sup>th</sup> of October, 2019 not duly signed by the commissioner can amount to sworn testimony of a witness

Firstly, let us get out of the way the submission by Counsel for the Plaintiff quoting **Zambian Civil Procedure, Commentary and Cases, Hon. Justice Dr. Patrick Matibini, Volume 1, Lexis Nexis, Durban 2017 at P. 469** as saying that “...*The summons or motion should be supported by affidavit evidence deposing to all material facts relating to the question(s) of law or construction to be determined by the Court.*” (My highlighting for emphasis only)

Counsel for the Defendant objected to the submission and “creative” quote that has words that are not in the actual text of the learned treatise. The words “**or motion**” do not appear anywhere in the actual text and have been inserted by Counsel for the Plaintiff. I believe that had the learned Hon. Justice Dr. Matibini intended to write in the words, he would have done so and the text as it stands clearly applies the requirement for a supporting affidavit in respect of summonses only. Motions are not included, meaning that a party may file a notice of motion under this rule without a supporting affidavit as the Defendant has done.



Sharp practices such as was done by Counsel for the Plaintiff are not welcome before the Courts as they are a deliberate attempt to mislead the Court which is unethical for Counsel to pursue. I accordingly dismiss the submission with the contempt it deserves.

The parties went to great lengths to argue on the admissibility of legal argument and prayers which were argued to be in the Plaintiff's affidavit in opposition to the preliminary issue in Paragraphs 5, 6 and 14 thereof.

The case of **Joseph Gereta Chikuta v. Chipata Rural Council (1974) 241** is a leading authority in which Doyle CJ warns against Counsel swearing affidavits. Counsel is not totally precluded from swearing affidavits but such contents must be on fact and cannot contain legal argument or prayer as per rules of Court.

Therefore, though Counsel for the Plaintiff is well versed in matters of law and can argue this, it is not competent for Counsel to argue this law or attest to it in an affidavit but leave this for his skeleton arguments. I therefore agree with Counsel for the Defendant that a lawyer deposing to an affidavit is a deponent who must follow **Order V** when acting in that capacity.

I therefore find that paragraphs 5, 6 and 14 of the affidavit in opposition to notice of intention to raise preliminary issue on point of law dated 6<sup>th</sup> November, 2019 and deposed to by Henry Mulenga



offend **Order 5 Rule 15 of the High Court Rules** and I accordingly expunge them.

On the matter of the affidavit of Beenwell Mtonga having a defective jurat which is not dully signed by a Commissioner for Oaths and whether as a result of this defect can be admitted into evidence and whether it can amount to sworn testimony of a witness.

I have duly noted the omission therein whereby the Commissioner for Oaths affixed his stamp bearing the date 11<sup>th</sup> October 2019 but did not affix his signature in the provided space.

Counsel for the Plaintiff showed the Court his copy of the same affidavit which bore the Commissioners signature and was duly commissioned as required under the **Order 5 Rule 20 (g) of the High Court Rules Chapter 270 of the Laws of Zambia**. I shall therefore admit the said Affidavit for use in these proceedings as I am convinced that the commissioner's mistake or omission is curable and is thereby deemed to be cured.

Regarding the 3<sup>rd</sup> preliminary issue raised namely,

3. *Whether or not the application for interim attachment of property is rightly before this Court minus a request for security from the Defendant and or his agent.*

**Order 26, Rule 1 of the High Court Act** reads as follows;



*"If the defendant, in any suit for an amount or value of five hundred 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 fulfill any decree that may be made against him in the suit, and, on his failing to give such security, to direct that any property, moveable or immoveable, belonging to the defendant, shall be attached until further order of the Court or a Judge."*

I have read the authority of **National Airports Corporation Limited v. Mines Air Services Limited (T/A Zambian Airways) (2011) 2 ZR 180** cited by the Defendant wherein Mutuna J. (as he then was) had occasion to interpret the import of **Order 26, Rule 1** when he held that;

*2. The two requirements to be met under **Order 26, Rule 1**, are that for such an order to be granted, there must first be a threat or intention on the part of the defendant to dispose of his assets in order to obstruct or delay execution of any judgment. Second, prior to making such an application, the plaintiff should call upon the defendants 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.*



The Plaintiff relied on the case of **Masauso Banda, Javeya Nyasolo Banda v. Gabriel Mathias Maiko & Reuben Shaury (2012) 3 ZR 128** in which the principle that before property is attached, the plaintiff must show that the defendant has failed to furnish such surety. In that case the interim attachment order appears to have also contained an order for the defendants therein to furnish security.

In the matter *in casu*, the first test or requirement for the grant of such an order, that there must first be a threat or intention on the part of the defendant to dispose of his assets or remove them from the jurisdiction in order to obstruct or delay execution of any judgment, has clearly been met as the said goods were in transit through Zambia and seemed to disappear somewhere enroute to Chirundu for a number of days and from the exhibits before Court, the Defendant does not appear to have been fully cooperative until an order of the Court was issued to deliver up the goods to the nearest Zambia Revenue Authority yard.

The second test or requirement is that, prior to making such an application, the plaintiff should call upon the defendants 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. The Plaintiff falls short on this requirement as it has not shown any evidence of calling for the defendant to provide security, which security the defendant failed to so provide.



From the evidence adduced in the affidavits and submissions made to this Court, it appears that the Plaintiff is under a real apprehension that the goods being in transit through Zambia and the Defendant being a non-Zambian for whom there has been no indication that he has any assets within the jurisdiction that recourse could be had to in the event a judgment was issued against him, further that the Defendant is currently defending this action through his local agent. The Plaintiff also submits that the urgency of the situation to stop the Defendant from taking the goods out of jurisdiction did not allow for it to call for security before making the application.

I do find that the Defendant is a party who is not ordinarily resident in Zambia and the goods in question are in transit and therefore will be removed outside the jurisdiction at any time meaning that there is a clear and present danger that the Defendant could easily avoid satisfaction of a Judgment, if given in favour of the Plaintiff.

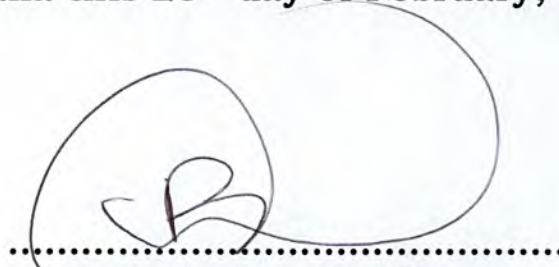
**Order 26, rule 1** does allow either at the time of institution of the suit or at any time thereafter until final Judgment to call upon the Defendant to furnish sufficient security and in the event a Defendant fails to give such security to attach any property belonging to him.

Upon considering all the circumstances of the case, I have formed the reasonable belief that, unless an interim attachment is granted, the Plaintiff may be denied of and not enjoy the fruits of a Court decision, the Court may eventually grant should such be granted in



its favour and find this an appropriate case for this Court to exercise the discretion vested upon it by **Order 26 rule 1** as read with **Order 3, rule 2 of the High Court Act, Chapter 27 of the Laws of Zambia** and order the Defendant to settle sufficient security in the sum of or equivalent to the sum of ZMW600,000.00 within the next Twenty (20) days to fulfill any decree that may be made against him in this suit, failing which, I hereby grant an interim Order attaching the containers pending final determination of the matter or until further order of this Court. Costs in the cause.

**Delivered at Lusaka this 25<sup>th</sup> day of February, 2020.**



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**Bonaventure C. Mbewe**  
**HIGH COURT JUDGE**