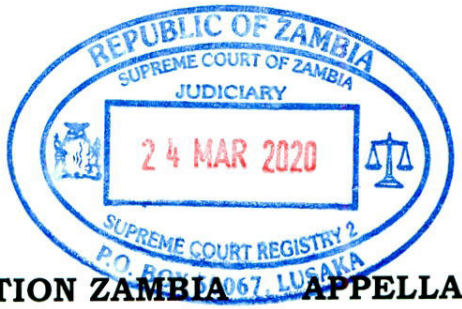
IN THE SUPREME COURT OF ZAMBIA **Appeal No.116/2016**
HOLDEN AT KABWE
(Civil Jurisdiction)



BETWEEN:

AFRICAN BANKING CORPORATION ZAMBIA **APPELLANT**

AND

MUBENDE COUNTRY LODGE LIMITED **RESPONDENT**

CORAM: **Musonda DCJ, Hamaundu and Kajimanga JJS**
On 2nd April 2019 and 24th March 2020

For the Appellant: **Mr. K. Wishimanga of Messrs A.M. Wood and Co**

For the Respondent: **Mr. J. Kabuka of Messrs J. Kabuka and Co**

J U D G M E N T

Kajimanga, JS delivered the judgment of the court.

Cases referred to:

1. **Saiki and Others v Esheveshe Nig. Limited (2013) LPELR-20739 CA**
2. **Henderson v Henderson [1843] 3 Hare 100**
3. **BP Zambia Plc v Interland Motors Limited (2001) Z.R. 37**
4. **Johnson V Gore Wood & Co [2002] 2 AC 1**
5. **Development Bank of Zambia and 2 Others v Sunvest Limited and Another (1995-1997) Z.R.187**
6. **Kelvin Hang'andu and Company (A firm) v Webby Mulubisha (2008) 2 Z.R. 82**

7. **The Republic of Botswana and 2 Others v Mitre Limited (1995-1997) Z.R. 113**
8. **Smith v Critchfield [1884 – 1885] 14 QBD 875**
9. **Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture (suing as a firm) – SCZ/8/52/2014**

Legislation and other works referred to:

1. **Rules of the Supreme Court of England 1999 Edition; O. 2 r, 1; O. 14A r. 1; & 2; O.17 r, 5; O.18 r. 11(1) & 19(18); and O.33**
2. **Rules of the High Court Chapter 27 of Laws of Zambia; O. 3 r. 2, O.11, r. 4 and O. 43 r. 8**
3. **The Constitution of Zambia (Amendment) No. 2 of 2016; Art. 118(2)(e)**
4. **P. Matibini, Zambia Civil Procedure: Commentary and Cases, Vol.2 (Lexis Nexis 2017), page 1418**
5. **B. A. Garner (ed.), Black's Law Dictionary, 8th Edition (Thomson West 2004), page 837**

Introduction

[1] This is an appeal from a ruling of the High Court (Chali, J) delivered on 6th April 2016 which declined to grant the appellant's application to dismiss the matter on a point of law.

[2] The appeal examines the question as to whether a claimant in interpleader proceedings can bring an action for wrongful execution against the judgment creditor prior to the determination of the said interpleader proceedings.

[3] The appeal also discusses the requirements for making an

application to dispose of a case on a point of law under Order 14A of the Rules of the Supreme Court 1999 Edition (RSC) and in particular, whether a conditional memorandum of appearance amounts to a notice of intention to defend an action.

Background to the appeal

[4] On 24th June 2015, the appellant issued a writ of possession under Cause No. 2009/HPC/0735 which was executed on Plot Nos. 9181/M, 9182/M and 9184/M Luanshya where the respondent conducted its business. Being a non-party to that matter, the respondent issued a notice of claim by way of interpleader in which it claimed ownership of all the goods and chattels seized in execution of the writ of possession. Whilst the interpleader proceedings were pending, the respondent took out an action against the appellant and the Sheriff of Zambia claiming:

4.1 Damages for wrongful execution and trespass on its business premises [at] Plot Nos. 9181/M and 9184/M Luanshya on or about 24th June 2015;

4.2 Damages for consequential loss of business;

4.3 Aggravated or exemplary damages;

4.4 Interest;

4.5 Mandatory injunction to restrain the [appellant] by [its] officers, servants, workmen or agents or whomsoever from

trespassing on the respondent's business premises and to release the seized/detained stock in trade, chattels and effects;

4.6 Costs of and incidental to the proceedings;

4.7 Such further or other relief as the Court may deem just and expedient.

[5] The respondent subsequently applied for and was granted an ex-parte mandatory injunction directing, among other things, that the appellant releases the seized goods to the respondent. Despite being served with the application, the appellant neither attended the hearing nor filed any opposing affidavit. As a consequence, the ex-parte injunction was confirmed by the lower court.

[6] A conditional memorandum of appearance was, however, filed on behalf of the appellant on 23rd October 2015, together with a notice of motion for an order to determine a point of law and to dismiss the action pursuant to orders 14A and 33, RSC. The appellant sought a determination by the court below as to whether or not the matter was properly before it in light of the pending interpleader proceedings under Cause No.2009/HPC/0735.

[7] For its part, the respondent contended that the notice of claim was issued in order to assert its proprietary rights over its goods that

had been wrongfully seized under a process to which the appellant was not a party. Further, that following the illegal entry on its business premises and consequential wrongful seizure of its goods, the respondent had a separate sustainable cause of action in trespass against the appellant.

Consideration of the matter by the High Court

[8] After considering the motion and arguments advanced by the parties, the learned trial judge found that the conditions favourable to invoking Order 14A and Order 33, RSC were not present in this matter. He reasoned that under Order 14A/2/3, a defendant is required to give a notice of intention to defend by entering appearance with a defence in terms of Order XI of the High Court Rules, Chapter 27 of the Laws of Zambia. He observed that in the present case, there was a conditional memorandum of appearance without a defence. He concluded that in terms of Order XI of the High Court Rules, appearance could not be said to have been entered to entitle the appellant to invoke Order 14A, RSC.

[9] The learned trial judge also noted that it was a requirement under

Order 14A, RSC that the question of law or construction sought to be determined ought to be suitable for determination without a full trial, entailing that it must be pleaded in the defence which is required to be filed with the memorandum of appearance pursuant to Order XI of the High Court Rules. Additionally, the defendant must show that the determination of that point of law will be final as to the entire cause of action. It was his finding that the appellant had not satisfied the requirement of filing the defence and pleading the question of law sought to be determined.

[10] He further found that Order 33 regulates the place and mode of trial which presupposes that the formal preparations to setting down the action for trial have been formalized whereupon, the court may be called to determine any preliminary point of law or issue. That, in the present case however, the preliminary proceedings were far from being concluded.

[11] The learned trial judge accordingly dismissed the application with costs to the respondent.

The grounds of appeal to this court

[12] Aggrieved by this decision, the appellant has now appealed to this

court on the following grounds:

12.1 The learned trial Judge misdirected himself in law and fact when he dismissed the appellant's motion to dismiss action for multiplicity of actions contrary to established principles of law.

12.2 The learned trial Judge misdirected himself in law and fact when he dismissed the appellant's motion to dismiss action for multiplicity of actions on the ground that the conditions favourable to invoking Order 14A and Order 33 of the Rules of the Supreme Court of England (1999) Edition were not present contrary to the law and evidence on the record.

The arguments presented by the parties

[13] In arguing ground one, the learned counsel for the appellant, Mr. Wishimanga, submitted that the proceedings in the court below amount to an abuse of court process in that (i) the subject matter in the earlier proceedings and the current action are the same; (ii) the claim could have been raised and determined in earlier proceedings; and (iii) there is a possibility of conflicting judicial decisions or the bringing of the administration of justice into disrepute. He argued that an abuse of court process generally occurs when a party improperly uses the judicial process. As authority for this proposition, he cited Order 18, rule 19(18), RSC and the case of *Saiki and Others v Esheveshe Nig. Limited.*[1]

[14] It was his contention that the law discourages re-litigation of the

same issues. He relied on the case of *Henderson v Henderson*[2] for the principle that a claimant is barred from litigating a claim that has already been adjudicated upon or which could and should have been brought before the court in earlier proceedings arising out of the same facts.

[15] On the question of the same subject matter, counsel submitted that the proceedings under Cause No. 2009/HPC/0735 relate to a mortgage action over property pledged by one Laurel Services Limited which said property included Plot Nos. 9181/M, 9182/M and 9184/M Luanshya; and that the respondent commenced proceedings in the court below seeking, inter alia, damages for wrongful execution and trespass upon the same property. It was therefore argued that the subject matter in both proceedings was the same. As such, this court should find that there was a multiplicity of actions. The case of *BP Zambia Plc v Interland Motors Limited*[3] was cited in support of this argument.

[16] As to the opportunity to raise the issues in earlier proceedings, it was counsel's submission that the proceedings in Cause No. 2009/HPC/0735 were concluded by way of a consent order between the appellant and Laurel Services Limited after which

the latter defaulted in its payments. In accordance with the consent order, the appellant issued a writ of possession of the mortgaged property which included the subject matter in the present case. Subsequently, the respondent issued a notice of claim by way of sheriff's interpleader.

[17] It was argued that since a notice of claim was filed in Cause No. 2009/HPC/0735, the respondent could have been made a party in those proceedings as plaintiff with the appellant being deemed the defendant, for purposes of the respondent's claims. That in any event those proceedings would be the most suitable forum as the court was being called upon to determine ownership of the property in the interpleader proceedings. It would therefore be apt to further determine whether there has been a wrongful execution or a trespass by the appellant in that case and if the court found that the claimant's claim in the subject matter was valid, the appellant would have wrongfully executed against the respondent and would be liable in damages, if claimed.

[18] Relying on the cases of *Johnson v Gore Wood & Co*[4], *Development Bank of Zambia and Another v Sunvest Limited and Another*[5], *Kelvin Hang'andu and Company (A firm) v Webby Mulubisha*[6],

counsel contended that the respondent's claims in the court below should have been brought under Cause No. 2009/HPC/0735. That having been a party to Cause No. 2009/HPC/0735, the respondent assumed all rights and liabilities of a party to the action and was therefore, duty bound to raise all issues that affected it regarding the property.

[19] On the possibility of conflicting decisions, counsel submitted that the two actions were interrelated and the determination of the issues in both actions is likely to result in conflicting decisions. This is because the interpleader proceedings under Cause No. 2009/HPC/0735 seek to determine whether the respondent is the owner of the property in issue, which property will then not be liable for execution by the appellant as a judgment creditor. On the other hand, the present proceedings seek the determination of whether or not the appellant wrongfully executed as against the respondent; whether the appellant trespassed on the property in issue; and damages. This, he argued, assumed that the respondent is the lawful owner of the subject matter. Therefore, the issue of ownership is in contention in the present case as well.

[20] Counsel contended that the present case will require the re-litigation of the same issues as those in the interpleader proceedings and that there is a possibility that the court in either action may reach a different conclusion as to the ownership of the property and its effect. Such a possibility of conflicting judgments would bring the administration of justice into disrepute as the two judgments, Counsel contended, would undermine each other. That there was already an existing conflict in the court's decisions in that the appellant obtained possession of the subject matter following a mortgage action in Cause No. 2009/HPC/0735 and the respondent simultaneously obtained an interlocutory injunction in the court below, restraining the appellant from trespassing on the said premises. He accordingly urged us to find that there was a multiplicity of actions and that the proceedings in the court below were an abuse of court process.

[21] In advancing ground two, counsel submitted that the court below erred in dismissing the appellant's application merely on the basis of a procedural irregularity when the breach or default is curable. To buttress this argument, he cited Article 118(2)(e) of

the Constitution of Zambia (Amendment) Act No. 2 of 2016, Order 2 rule 1, RSC and the case of *The Republic of Botswana, Ministry of Works, Transport and Communications and Another v Mitre Limited*[7].

[22] It was also counsel's contention that the court below misinterpreted the requirement to give notice of intention to defend under Order 14A/2/3, RSC to mean that the appellant should have filed its defence before it could rely on the procedure under Order 14A, RSC. According to counsel, Order 1, RSC defines notice of intention to defend as:

> **"an acknowledgement of service containing a statement to the effect that the person by whom or on whose behalf it is signed intends to contest the proceedings to which the acknowledgment relates."**

[23] He argued that in relation to our High Court Rules, this is equivalent to filing an appearance. That while Order XI of the High Court Rules requires the filing of a memorandum of appearance together with a defence, it also provides for the entering of appearance conditionally. To this end, the appellant did enter appearance albeit conditionally, thereby indicating that it intended to defend itself in the matter but merely had a

preliminary issue on the regularity of the proceedings that needed to be determined first. It was his submission that a defendant who fails to enter appearance would generally have judgment in default entered against him. Thus, the fact that the respondent was not able to do so is a clear indication that the appellant gave notice of its intention to defend the matter. He contended that the requirement does not state that a defence should have in fact been filed into court, but simply that the defendant should have filed a notice of intention to defend.

[24] Counsel, therefore, submitted that the requirement for a notice of intention to defend does not amount to the requirement to file a defence as a party can raise a preliminary issue at any stage of the proceedings and the filing of a defence is not a condition precedent. That in any event, the appellant filed its notice of intention to defend the action through the conditional memorandum of appearance. If the court's position is that the appellant had not done so, the respondent would have been at liberty to enter judgment in default, but this was not the position. Thus, it was his contention that the court below erred in law and fact when it found that the appellant should have filed its defence

before invoking Order 14A, RSC.

[25] As to Order 33, RSC being inapplicable because it presupposes that the formal preparation to setting down the action for trial has been formalized, counsel submitted that this finding suggests that parties must first incur costs relating to setting the matter down for trial before they can actually consider applying to dismiss the matter for abuse of court process. It was his contention, however, that while Order 14A, RSC provides for the manner in which the place and mode of trial is to be set, parties can refer to Order 33, rule 3 and Order 14A, RSC if it becomes evident that trial need not take place as there is a point of law that will effectively determine the issues so as to save on costs.

[26] That this is confirmed in the editorial introduction of Order 33, RSC which states that "costs can be saved where this power is used to enable decisive issues to be tried first as preliminary issues". Further, Order 14A, rule 1, RSC provides that the court may, upon an application of a party or of its own motion, determine any question of law at any stage of the proceedings. He therefore argued that the parties need not wait to set the matter down for trial before an application to determine a

preliminary point of law can be raised as the law provides that this can be done at any stage of the proceedings.

[27] Counsel also submitted that it was inconceivable how the requirement that the question of law sought to be determined must be suitable for determination without a full trial can be interpreted as meaning that the question of law ought to be pleaded in the defence. He contended that the question of abuse of court process or multiplicity of action is one that need not be determined with a full trial whether or not it is pleaded. In any event, counsel contended, it is trite law that the court will allow a preliminary point of law even if it is not pleaded in one's pleadings. Our attention was drawn to Order 18, rule 11 and Order 33, rule 3, RSC as authority for this proposition.

[28] Counsel, therefore, submitted that the appellant's application was properly before the court below. He accordingly prayed that the ruling of the lower court be set aside and that the appellant's appeal be allowed.

[29] In response to ground one, Mr. Kabuka, the learned counsel for the respondent submitted that the material facts disclosed in the

appellant's affidavit in support of its application for dismissal of action which merely alleged that the respondent had filed a notice of claim of goods and property seized under Cause No. 2009/HPC/0735, in consequence whereof there was a pending interpleader application before that court, did not establish sufficient facts from which multiplicity of actions could properly be inferred. Counsel argued that multiplicity of actions as judicially defined by this court in the *Development Bank of Zambia*[5] case is understood to refer to a situation where parties to an action institute parallel proceedings over the same or substantially the same subject matter before different courts. He added that the courts have frowned upon such conduct because the administration of justice could be brought into disrepute if a party managed to get conflicting decisions or decisions which undermine each other from two or more different judges over the same subject matter as was held in the *B.P. Zambia*[3] case.

[30] It was his contention that in the instant case, the appellant's alleged facts did not disclose multiplicity of actions as judicially defined and attested to in the respondent's affidavit in opposition filed in the court below for several reasons. Firstly, the

respondent was not a party to Cause No. 2009/HPC/0735 but was merely a victim of wrongful execution of the judgment upon its assets whereupon, it filed a notice of claim to register its protest over the violation of its proprietary interests. Secondly, the respondent duly complied with the prescribed procedure for an injured third party to give a notice of claim to the sheriff who has wrongfully levied execution on the respondent's assets. He referred us to *Patrick Matibini, Zambia Civil Procedure: Commentary and Cases, Volume 2* who states at page 1418 that:

> **"An interpleader under execution arises because the enforcement officer or bailiff has levied execution on goods which he believes to be the property of the judgment debtor. However, a third person claims that the item in question belongs to him or her. If the judgment creditor accepts the claim, the enforcement officer will withdraw and the goods will be handed to the third party who reclaimed them. If however the claim is disputed, then interpleader will be necessary..."**

[31] Thirdly, the interpleader proceedings triggered by the respondent's notice of claim in Cause No. 2009/HPC/0735 have restricted relief under the provisions of Order 43 of the High Court Rules which is distinct and does not extend to the reliefs sought by the respondent in the independent and sustainable action for wrongful execution in Cause No. 2015/HN/151.

[32] Additionally, the right of an injured third party arising from a wrongfully executed process to maintain an independent action for damages in trespass has long been recognized at common law. As authority for this argument, he cited the case of *Smith v Critchfield*[8] where it was stated that:

> **"If indeed the Sheriff in execution of the Writ has committed any real grievance (of trespass) the court will allow the injured party to bring an action."**

[33] Lastly, there was no risk of relitigating the issues in Cause No. 2009/HPC/0735 and those in the wrongfully executed proceedings pending in the court below. Counsel, therefore, submitted that the learned trial judge was on firm ground by refusing to dismiss the respondent's action as it did not constitute a multiplicity of the earlier action.

[34] In response to ground two, counsel began by referring us to the editorial introduction to Order 14A, RSC where it is observed as follows with regard to the procedural requirements for disposal of cases on points of law:

> **"This order was introduced in 1990. Rule 1 provides that the Court may determine any question of law or construction of any document arising "without a full trial of the action" where it appears to the Court that such determination will finally**

determine the proceedings or an issue therein...The order should be read with O.14 (summary judgment), as well as with O.18, r.19 (striking out pleadings) and O.33, r.7 (dismissal of action after decision of preliminary issues)."

[35] He contended that the first necessary inference from this introductory note is that Order 14A, RSC is an extension of the old Order 14, RSC which provides for summary judgment. Under Order 14, RSC summary judgment may only be invoked after entry of appearance by the defendant. Within the context of Zambian civil procedure, it is a mandatory requirement under Order 11, rule 1 of the High Court Rules for every appearance to be accompanied with a defence and it follows that a plaintiff may only apply for summary judgment after a defendant has entered appearance and filed its defence. Similarly, since Order 14A, RSC is an extension of Order 14, RSC the second necessary inference is that the same prerequisites for summary judgment apply. Thus, for a defendant to properly launch an application under Order 14A, rule 2, RSC he must have first entered appearance and filed a defence before satisfying the other requirements itemized under that rule. He argued that the failure by the appellant to satisfy this jurisdictional threshold to properly

invoke Order 14A, RSC rendered the application incompetent and not a mere irregularity. As such, counsel contended, the learned trial judge was on firm ground to find as he did, that the appellant had improper recourse to Order 14A, RSC.

[36] As to the contention by the appellant that entry of conditional appearance procedurally precluded it from filing a defence and entitled it to make the application under Order 14A, RSC it was submitted that entry of conditional appearance is regulated by Order 11, rule 21 of the High Court Rules whereby a defendant with a bonafide objection to the validity of the proceedings may enter conditional appearance without filing a defence and apply to the court to set aside the writ of summons. That the manner of making such application to set aside the writ is amplified under Order 12, RSC and is a stand-alone procedure which does not extend to applications under Order 14A or Order 33, RSC contrary to the appellant's contention.

[37] Counsel argued that it is mandatory for a defendant, except where he intends to contest the validity of the proceedings under the provisions of Order 11, rule 21 of the High Court Rules to file a defence when entering appearance. That while it is not

mandatory to plead points of law, Order 18, rule 11, RSC guides that it is good practice and convenient to do so, especially where a party intends to raise a point of law on the facts as pleaded; the determination of such a point of law may then appropriately be disposed of as a preliminary issue before trial under Order 33, RSC if it is suitable for determination without a full trial. He contended that in the instant case, the appellant elected against filing the mandatory defence or to plead the point of law it intended to raise for determination as a preliminary issue, and the learned trial judge was therefore on firm ground in finding that the appellant had not met favourable conditions for a proper application under Order 33, RSC. Counsel accordingly submitted that the appeal lacked merit and he urged us to dismiss it with costs.

Consideration of the matter by this court and decision

[38] We have considered the record of appeal, the ruling appealed against, the parties' heads of argument and authorities relied upon. We have also considered the brief oral arguments made by both counsel at the hearing.

[39] The appellant's grievance in ground one is that it was a

misdirection by the court below to refuse to grant its motion to dismiss action for multiplicity of actions contrary to established principles of law.

[40] The contention of the appellant is that the subject matter in the court below and that in the interpleader proceedings was the same and that the determination of the issues in both actions was likely to result in conflicting decisions. That consequently, this court should find that there was a multiplicity of actions and the proceedings in the court below were an abuse of court process.

[41] On the other hand, the respondent's position is that the lower court could not be faulted for refusing to dismiss its action on the basis that it did not constitute a multiplicity of the earlier action. The argument being that the respondent was not a party to Cause No. 2009/HPC/0735; the respondent duly complied with the procedure by an injured third party to give a notice of claim to the Sheriff who wrongfully levied execution on its assets; the interpleader proceedings have restricted reliefs under Order 43 of the High Court Rules which do not extend to those it seeks in Cause No. 2015/HN/151; and the right of an injured third

party arising from a wrongful execution to maintain an independent action for damages in trespass has long been recognized at common law.

[42] In determining ground one, we consider that a discourse on the essence of interpleader proceedings is imperative. The starting point is Order 43 of the High Court Rules which enacts as follows:

> **"If the claimants appear at the hearing of the application, the Court or a Judge may order either that any claimant be made a defendant in any action already commenced in respect of the subject matter in dispute in lieu of or in addition to the applicant, or that an issue between the claimants be stated and tried, and in the latter case may direct which of the claimants is to be the plaintiff and which the defendant."** [Emphasis added]

And Order 17(5), RSC similarly states that:

> **"(1) Where on the hearing of a summons under this order all the persons by whom adverse claims to the subject matter in dispute (hereafter in this Order referred to as "claimants") appear, the Court may order-**
>
> **(a) That any claimant be made a defendant in any action pending with respect to the subject matter in dispute in substitution for or in addition to the applicant for the relief under this Order, or**
>
> **(b) That an issue between the claimants be stated and tried and may direct which of the claimants is to be the plaintiff and which the defendant..."** [Emphasis added]

Furthermore, Black's Law Dictionary, 8th Edition defines 'interpleader' as:

> **"A suit to determine a right to property held by a ... disinterested third party (called a *stakeholder*) who is in doubt about ownership and who therefore deposits the property with the court to permit interested parties to litigate ownership. Typically a stakeholder initiates an interpleader both to determine who should receive the property and to avoid multiple liability."** [Emphasis added]

[43] We hasten to state that the 'subject matter in dispute' envisaged in Order 43 of the High Court Rules and Order 17 (5), RSC is the property seized in execution of a judgment. From the quotations in the preceding paragraphs, there can be no doubt that interpleader proceedings are a mechanism employed by a disinterested stakeholder (the Sheriff of Zambia to be specific) to facilitate litigation of ownership of property seized by the Sheriff in execution of a judgment when an interested party lays a claim to such property. Therefore, the essence of interpleader proceedings is precisely that and no more.

[44] In buttressing its overarching ground that the respondent's action is an abuse of the court process, the appellant has contended, firstly, that the subject matter in the earlier proceedings and this action is the same. In paragraph 4 of this

judgment, we have set out the endorsement in the writ of summons taken out by the respondent in this action (Cause No. 2015/HN/151). For emphasis, we repeat them below as follows:

> **44.1 Damages for wrongful execution and trespass on its business premises [at] Plot Nos. 9181/M and 9184/M Luanshya on or about 24th June 2015;**
>
> **44.2 Damages for consequential loss of business;**
>
> **44.3 Aggravated or exemplary damages;**
>
> **44.4 Interest;**
>
> **44.5 Mandatory injunction to restrain the [appellant] by [its] officers, servants, workmen or agents or whomsoever from trespassing on the respondent's business premises and to release the seized/detained stock in trade, chattels and effects;**
>
> **44.6 Costs of and incidental to the proceedings;**
>
> **44.7 Such further or other relief as the Court may deem just and expedient.**

[45] We have had occasion to look at the case record in Cause No. 2009/HPC/0735. The originating summons is endorsed with the following claim:

> **"1. Payment of all monies which as at 9th October 2009 stood at US1,523,160.34, interest, costs and other charges due and owing to the Plaintiff Bank by the 1st Defendant by virtue of banking facilities granted to the said 1st Defendant and secured by a Third Party Mortgage over Subdivision 'V' of Stand No. 10445 Lusaka, Mortgage over Farm No. 10419 Luanshya and Third Party Mortgage over Subdivision "E19" of Farm No. 748 'Njo' Ndola.**

2. **Foreclosure**
3. **Delivery up by the Defendants to the Plaintiff of the Mortgaged Properties**
4. **Sale of the Mortgaged Properties**
5. **An order that the 3rd, 4th and 5th Defendants do honour the Guarantees signed by them as security for the borrowing of the 1st Defendant**
6. **Any other relief the Court may deem fit."**

[46] It is clear from the endorsements on the originating process in the two actions that the subject matter is not the same, contrary to the appellant's assertion. To be specific, the properties in Cause No. 2015/HN/151 which are subject of interpleader proceedings are different from the mortgaged properties in Cause No. 2009/HPC/0735. And we may add, the parties in the two actions are also not exactly the same.

[47] The second limb under this ground is that the respondent's claim in this action could have been raised and determined in Cause No. 2009/HPC/0735. Earlier in this judgment under paragraph 43, we made the point that the essence of interpleader proceedings is to facilitate litigation of ownership of property seized by the Sheriff in execution of a judgment if there is an interested party who has laid a claim to the property by way of a

notice of claim. This is the only purpose of interpleader proceedings. They are restricted to only facilitating an interested party to prove his claim of ownership of the property seized in execution of a judgment. For this reason, the respondent could not have competently launched the claim sought in this action (Cause No. 2015/HN/151) under Cause No. 2009/HPC/0735 as his *locus standi* in the latter cause was restricted to filing a notice of claim for the sole purpose of triggering interpleader proceedings.

[48] The third and last limb of this ground is that there is a possibility of conflicting judicial decisions or bringing the administration of justice into disrepute. Given what we have stated in the preceding paragraphs, we find that this argument is legally flawed and the issue needs no further interrogation. For these reasons, we have no difficulty in concluding that ground one lacks merit. It is dismissed.

[49] The appellant's complaint in ground two is that the trial judge fell into error by dismissing its motion to dismiss action for multiplicity of actions on the basis that the conditions favourable to invoking Order 14A and Order 33, RSC were not present. The

main argument here is that the trial judge misinterpreted the requirement to give notice of intention to defend under Order14A/2/3, RSC to mean that the appellant should have filed its defence before it could rely on the procedure under the said order. It is also contended that while Order 11 of the High Court Rules requires the filing of a memorandum of appearance together with a defence it also provides for the entering of conditional appearance. Furthermore, that the appellant filed its notice of intention to defend the action through a conditional memorandum of appearance.

[50] The respondent's position however, is that for a defendant to properly launch an application under Order 14A, rule 2, RSC he must have first entered appearance and filed a defence before satisfying the other requirements itemized under that order. That failure by the appellant to satisfy this jurisdictional threshold rendered the application incompetent and not a mere irregularity.

[51] The respondent also contends that while it is not mandatory to plead points of law, Order 18, rule 11, RSC guides that it is good practice and convenient to do so, especially where a party intends

to raise a point of law on the pleaded facts. The determination of such a point of law may then be appropriately disposed of as a preliminary issue before trial under Order 33, RSC if it is suitable for determination without a full trial. According to the respondent, the appellant elected not to file the mandatory defence or to plead the point of law it intended to raise for determination as a preliminary issue and the trial judge could not be faulted in finding that the appellant had not met favourable conditions for a proper application under Order 33, RSC.

[52] The appellant begins its attack of the trial judge's ruling by seeking solace in Article 118(2)(e) of the Constitution of Zambia (Amendment) Act No. 2 of 2016 and argues that the dismissal of the appellant's application was based on a procedural irregularity which was curable. We find the appellant's argument to be devoid of any merit. Time without number, we have stated in various case authorities that Article 118(2)(e) of the Constitution was not enacted to shield litigants from complying with procedural rules which are intended to provide an orderly administration of justice. One such case is *Access Bank (Zambia)*

Limited v Group Five/ZCON Business Park Joint Venture (suing as a firm)[9] where we stated as follows:

> **"In conclusion, we are mindful that the issue regarding Article 118(2)(e) of the Constitution of Zambia was raised in passing by Mr. Silwamba, SC, and was not part of his written arguments before us. We do not intend to engage in anything resembling interpretation of the Constitution in this judgment. All we can say is that the Constitution never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from courts."**

[53] The germane question for our determination in this ground is whether a conditional appearance amounts to an intention to defend for the purpose of invoking Order 14A, RSC. This order provides:

> **"(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) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.**
>
> **(3) The Court shall not determine any question under this Order**

unless the parties have either -

(a) had an opportunity of being heard on the question, or

(b) consented to an order or judgment on such determination..."

[54] And most relevant to this appeal, Order 14A/2/3, RSC goes on to state as follows:

> **"The requirements for employing the procedure under this Order are the following:**
>
> **(a) <u>The defendant must have given notice of intention to defend.</u>**
>
> **(b) The question of law or construction is suitable for determination without a full trial of the action.** [Emphasis added]

[55] It is plain from the preceding paragraph that there are certain requirements which must be satisfied before a matter can be disposed of on a point of law. One such requirement, according to Order 14A/1-2/2, RSC is the giving of notice of intention to defend.

[56] In the present case, the appellant did not file any defence. Instead, what was filed was a conditional memorandum of appearance. The answer to the question whether a conditional memorandum of appearance amounts to a notice of intention to defend, in our view, seems to lie in reconciling the provisions of

the RSC with our High Court Rules. As pointed out by counsel for the appellant, Order 1, rule 4, RSC defines a notice of intention to defend as **"an acknowledgment of service containing a statement to the effect that the person by whom or on whose behalf it is signed intends to contest the proceedings to which the acknowledgment relates."**

[57] The term 'notice of intention to defend' does not appear in our High Court Rules. However, Order 11 rule 1 of these rules which generally provides for the mode of entering appearance to a writ by a defendant states as follows:

> **"(1) A defendant shall enter appearance to a writ of summons by delivering to the proper officer sufficient copies of memorandum of appearance in writing dated on the day of their delivery, and containing the name of the defendant's advocate, or stating that the defendant is defending in person. The defendant shall at the same time deliver to the proper officer sufficient copies of the defence and counter claim if any:**
>
> **Provided that before delivering the memorandum and defence, the defendant shall be at liberty to apply for further and better particulars of the statement of claim within the period specified for delivery of the memorandum and defence.**
>
> **(2) A memorandum of appearance not accompanied by a defence shall not be accepted.**

(3) The proper officer shall seal the memorandum of appearance and defence and shall return the copies to the person filing them for service upon the plaintiff.

(4) Any person served with a writ under Order VI of these rules may enter conditional appearance and apply by Summons to the Court to set aside the writ on grounds that the writ is irregular or that the court has no jurisdiction." [Emphasis added]

[58] In the view that we take what constitutes a notice of intention to defend, in the context of our rules, is the filing of a memorandum of appearance which is accompanied by a defence. It, therefore, follows that the filing of a memorandum of appearance with a defence is a pre-requisite to launching an application under Order 14A, RSC. The record shows, as we alluded to earlier, that contrary to the mandatory requirements of Order 11, rule 1 of the High Court rules, the appellant did not file a memorandum of appearance and a defence before invoking Order 14A, RSC. Consequently, we cannot fault the trial judge in finding that the conditions favourable to invoking Order 14A, RSC were not present.

[59] The appellant has argued, through its counsel, that it filed its notice of intention to defend by way of a conditional

memorandum of appearance. As will soon become clear in our analysis below, the appellant's argument is flawed.

[60] The filing of a conditional memorandum of appearance without a defence is only applicable in circumstances where a defendant wishes to contest the validity of proceedings with a view to applying to set aside the writ. This is governed by Order 11, rule 4 of the rules of the High Court which states as follows:

> **"Any person served with a writ under Order VI of these rules may enter conditional appearance and apply by summons to the Court to set aside the writ on grounds that the writ is irregular or that the court has no jurisdiction."** [Emphasis added]

[61] It is very clear from Order 11, rule 4 that other than what is envisaged therein, a conditional appearance can never be extended or over stretched to constitute a notice of intention to defend in the context of an application under Order 14A, RSC which is intended to finally determine a matter without a full trial of the action.

[62] Regarding Order 33, RSC the trial judge stated as follows at page R7 of his ruling:

> **"As for Order 33, it was Mr. Kabuka's submission that it regulates**

the place and mode of trial. This presupposes that the formal preparation to setting down the action for trial have been formalised whereupon the court may be called upon to determine any preliminary point of law or issue. In the instant case the preliminary proceedings are far from being concluded."

[63] Order 33, RSC is titled 'PLACE AND MODE OF TRIAL'. As its title suggests, the purpose of this order is generally to regulate the place and mode of trial of actions. However, Order 33, rule 3 provides that:

> **"The court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."** [Emphasis added]

[64] And Order 33, rule 7 provides that:

> **"If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just."**

[65] The import of Order 33, rule 3, RSC is that a preliminary point of law can be raised at any stage of the proceedings, including the period before trial. To that extent, we agree with the appellant

that the parties need not wait for setting down the matter for trial before an application to determine a preliminary point of law can be raised. We should quickly make the point however, that Order 33, rule 3 cannot be invoked independently or to the exclusion of the mandatory requirements of Order 14A, RSC which require the filing of a notice of intention to defend as a pre-requisite to raising a preliminary point of law. We stated earlier in this judgment that in the context of our rules, a notice of intention to defend is the filing of a memorandum of appearance with a defence. consequently, this ground equally suffers the same fate as ground one. It is also dismissed.

[66] For these reasons, the net result is that this appeal has no merit, both grounds having failed. It is accordingly dismissed with costs to be taxed in default of agreement.

M. MUSONDA
DEPUTY CHIEF JUSTICE

E. M. HAMAUNDU
SUPREME COURT JUDGE

C. KAJIMANGA
SUPREME COURT JUDGE