

IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 230/2016

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

MWANGELWA MWANGELWA

1ST APPELLANT

RUTH MWANGELWA

2ND APPELLANT

AND

SIBESO LIKANDO

RESPONDENT

CORAM: HAMAUNDU, WOOD and MUTUNA, JJS.

On 12th December, 2019 and 9th January, 2020

For the Appellant: Mr. K. Mwale – Messrs K. Mwale & Company

For the Respondent: No Appearance

JUDGMENT

Wood, JS, delivered the Judgment of the Court.

Cases Referred to:

- 1. Boniface K Mwale v Zambia Airways Corporation Limited (in liquidation) (1998) Z.R. 71*
- 2. Isaac Lungu v Mbewe Kalikela SCZ Appeal No. 114/2013*
- 3. Daka v Patel and Zambia State Insurance Corporation Limited (1995/1997) Z.R. 108.*

Legislation Referred to:

1. *Supreme Court Rules, Rule 56 Cap 25 of the Laws of Zambia*
2. *Order 40 rule 7 of the High Court Rules Cap 27 of the Laws of Zambia*

Other Works Referred to:

1. *Order 23 Rules of the Supreme Court*

This is an appeal against a decision of the High Court in Livingstone which held that the appellants could only appeal against a judgment of the High Court on condition that they paid K80, 000.00 as security for costs.

The facts leading to this appeal are fairly simply. On 23rd January, 2015 the respondent issued a writ against the appellants for the return of two trucks and damages in the sum of K120,000.00. The appellants denied the claim in their joint defence.

During trial, the respondent testified and also called witnesses who testified in her favour. The appellants cross-examined the various witnesses. When their turn came to testify, they opted to instruct counsel and applied for an adjournment to look for one. They were granted an adjournment to do so. They failed to instruct

counsel, so the court proceeded to deliver its judgment on 27th August, 2015 on the basis of the evidence before it and entered judgment in favour of the respondent for the sum of K120, 000.00 together with interest and costs.

On 23rd October, 2015, the appellants applied for leave to appeal out of time. The application was granted on condition that the appellants paid the sum of K80, 000.00 as security for costs "*as a prerequisite for their appealing.*" It should be noted that the order for security for costs was made pursuant to the respondent's application for security for costs under Order 47 rule 12 Cap 27 of the Laws of Zambia. Order 47 rule 12 deals with security for costs on appeals from the Subordinate Court to the High Court. It was not, therefore, the appropriate order under which to make such an application.

On 28th January, 2016, the appellants applied *ex parte* for leave to appeal out of time and also for an order to stay a writ of execution. The court heard the matter *inter-partes* on 2nd March, 2016 and dismissed it because the appellants did not appear for the hearing. The Court nevertheless granted them leave to restore their

application for leave upon payment of costs. The costs were paid and the application was restored on 15th April, 2016. In its ruling of 22nd April 2016 the court granted the stay of its judgment but held that the order for security for costs still stood.

The appellants have now appealed against this decision. The sole ground of appeal is that the court below misdirected itself in law when it ordered that security for costs be paid by the appellants pending the hearing and determination of the appeal by this court.

The appellants have argued that even though the High Court is empowered to order the payment of security for costs under Order 40 rule 7 of the High Court Rules Cap 27 of the Laws of Zambia, the application can only be made at the instance of a defendant in the proceedings before the High Court and the Order must be made against a plaintiff in a suit and must be granted either at commencement or during the currency of the suit. The appellants have also relied on the provisions of Order 23 rule 1 of the Rules of the Supreme Court which deals with security of costs and have in particular quoted rule 1 which states that the application for security for costs is usually made by a defendant

and may be granted by High Court if a plaintiff does not comply with Order 23 rule 1 RSC. Order 23 rule 1 lists four situations in which the court may exercise its discretion in favour of the defendant. These range from the plaintiff being resident out of jurisdiction to being unable to pay costs or not stating a residential address or changing an address with a view to evading the consequences of the litigation. It was argued by the appellants that none of the instances covered under Order 23 of the RSC applied in the present circumstances. It was further argued by the appellant that the grant of an order for security for costs pursuant to Order 40 rule 7 of the High Court Rules, as read with Order 23 of the RSC, is only available at the instance of the defendant as an interlocutory application in a suit.

The appellants also pointed out that if indeed the High Court relied on Order 40 rule 7 of the High Court Rules then it misdirected itself as the defendant did not move the court for the grant of the order for security for costs. An order for security for costs can only be granted to a defendant who has applied for such an order. The appellants relied on the cases of *Boniface K Mwale v*

*Zambia Airways Corporation Limited (in liquidation)*¹ which held that security for costs is generally provided by the plaintiff and the case of *Isaac Lungu v Mbewe Kalikela*² which held that a plaintiff can only apply for security for costs from a defendant in respect of a counterclaim, to support the argument that an order for security for costs can only be made against a defendant in proceedings taken in his interest such as a counter-claim. The appellants have in addition argued that the underlying reason for not granting a security for costs order is underpinned by the principle that a defendant should not be deterred from defending his rights because of an order for security for costs.

The appellants pointed out that an application for security for costs can only be made during the progress of the proceedings in the High Court as it is an interlocutory application and as such any proceedings subsequent to the trial and judgment in a cause cannot be deemed to have been an interlocutory application or an application made during the progress of the suit as defined in Atkins Court Forms, Volume 22, at page 307. Atkins Court forms defines interlocutory proceedings as follows:

“...interlocutory proceedings encompass the whole range and the enormous variety of applications and procedures which are required by Rules of Court to be made or taken, or which may be made or taken by the parties during the period between the commencement of an action and the plenary trial.

....There is an inevitable time lag between the commencement of an action and its trial, and during this intermediate, intervening period while the action is pending and possibly progressing towards the trial, interlocutory proceedings become necessary to bridge the gap between the start of an action and the trial, in order to deal with the rights of the parties during the pendency of the action.”

In this case the order for security costs was made subsequent to the issue of the judgment dated 25th August, 2015 and was not, therefore, applied for and granted either at the commencement or at any time during the progress of the proceedings in the trial court. Since there was no application by the appellants during the currency of the proceedings, the court should not have made an order for payment of security for costs subsequent to the judgment. Therefore, the exercise of the jurisdiction under Order 40 rule 7 of the High Court Rules leading to the grant of the order for security for costs against the appellants was a misdirection and an improper exercise of the authority to grant orders for security for costs. In addition, the appellants argued that rule 56 of the Supreme Court

Rules Cap 25 of the Laws of Zambia empowers the Supreme Court or a Judge of the Supreme Court in any case where it or he thinks fit upon application or of its or his own motion, order security or further security for costs to be given and may make compliance with any such order a condition precedent to the entertainment of an appeal. This rule does not extend such powers to a High Court Judge as was held in the case of *Daka v Patel and Zambia State Insurance Corporation Limited*³. It was therefore a misdirection for the High Court to order the payment of security for costs.

We have not seen any heads of argument from the respondent.

It is quite clear to us that this appeal hinges on the single issue of whether or not a Judge of the High Court had jurisdiction to make an order for security for costs after judgment had been delivered.

To begin with, the proceedings show that counsel made an application for security for costs pursuant to Order 47 rule 12 of the High Court Rules Cap 27 which deals with additional security for costs on appeal from the Subordinate Court to the High Court. The learned Judge should, therefore, not have allowed an

incompetent application. Be that as it may, we shall address that lone ground of appeal which has been raised by the appellant.

It seems to us from the record of appeal that there is a misunderstanding of what amounts to a payment into court and security for costs. In his submission in the court below in connection with the appellant's application relating to security for costs, counsel for the respondent submitted that *"....To claim that the amount is substantial cannot be sustained for the amount ordered is below the judgment sum."* He then submitted that *"If the appeal does not succeed it is clear from the arguments on behalf of the defendant that it will be the plaintiff to suffer prejudice for the defendant will not be able to pay the sum due."* These submissions go to show that what counsel for the respondent had in mind and wanted to secure was the judgment debt and he was not concerned with the costs arising out of the suit which the respondent was entitled to. These costs were at the material time untaxed and unknown.

There is a fundamental difference between a payment into court and security for costs. Payment into court, as was correctly


submitted by counsel for the appellants in the court below, is a sum paid into court usually by a defendant or a plaintiff in the event of a counterclaim pending litigation or as a settlement or indeed as a condition precedent before filing an appeal. Payment into court can be made with an admission or denial of liability. Payment into court refers to the actual or part of the sum in dispute whereas security of costs does not. A more detailed reading on payment into and out of court and tender can be found in Order 29 of the High Court Rules Cap 27 of the Laws of Zambia. Security for costs on the other hand must at the very least comply with Order 40 Rule 7 of the High Court Rules as read with Order 23 rule 1 of the Rules of the Supreme Court, before a Judge can exercise his discretion to grant the order.

Order 40 Rule 7 states as follows:

"The Court or a Judge may, on the application of any defendant, if he sees fit, require any plaintiff in any suit, either at the commencement or at any time during the progress thereof, to give security for costs to the satisfaction of the Court or a Judge, by deposit or otherwise, or to give further or better security, and may require any defendant to give security, or further better security, for the costs of any particular proceeding undertaken in his interest."

In the case at hand, the learned Judge made the order for security for costs after judgment had been delivered and as has been correctly argued by the appellants, this was a misdirection on the part of the learned Judge and was not in compliance with Order 40 rule 7 of the High Court Rules. We reaffirm our decision in *Boniface K. Mwale v Zambia Airways Corporation Limited (In Liquidation)*¹ that costs do not include the actual amount claimed. We also reaffirm our decision in *Daka v Patel and Zambia State Insurance Corporation Limited*³ in which we held that in terms of Rule 56 the reference to the Court or a Judge means the Supreme Court or a Judge thereof, and, consequently, no other Court or Judge can order security for costs in excess of the sum laid down in Rule 54 as amended. We accordingly allow the appeal and set aside the order for security for costs with costs to the appellants to be agreed or taxed in default of agreement.



E.M. HAMAUNDU
SUPREME COURT JUDGE

A.M. WOOD
SUPREME COURT JUDGE

N.K. MUTUNA
SUPREME COURT JUDGE