

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

2012/HP/0830

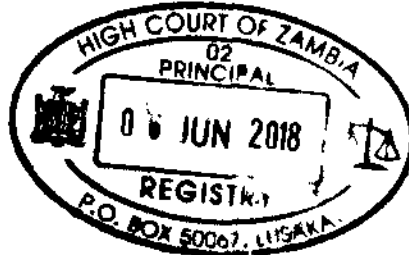
BETWEEN:

WINSTONE CHIBWE

VS

THE ATTORNEY GENERAL

CHARITY KATANGA *(Sued in her capacity
As Commissioner of Police)*



PETITIONER

1ST RESPONDENT

2ND RESPONDENT

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Petitioner: Ms. M. Mushipe of Mushipe and Co.

For the Respondent: Mr. F. K. Mwale Acting Principal State Advocate

RULING

Cases Referred to:

1. *Nkhuwa v Lusaka Tyre Services Limited (1977) ZR43*

Legislation Referred to:

1. *Constitution Amendment Act No. 2 of 2016*
2. *High Court Rules Chapter 27 of the Laws of Zambia*

This was an application by the 1st Respondent to expunge from the record paragraphs 9,10,11,12,13,14 and 15 of the Petitioner's affidavit in support of summons for an Order to set aside the Order of the Court Dismissing this matter pursuant to order of the Court dismissing this matter pursuant to Order V rules 15 and 16 of the High Court Rules. The Application was supported by an affidavit deposed to by Francis Kondwelani Mwale, the Acting Principal State Advocate employed under the 1st Respondent.

In the said affidavit the deponent swore that the Petitioner file into Court Summons for an Order to set aside the Order of the Court dismissing this matter on 26th July, 2017. The Petitioners summons was supported by an affidavit and the deponent believed that paragraphs 9,10,11,12,13,14 and 15 of the said affidavit were irregular.

To support this Counsel for the 1st Respondent filed in Skeleton arguments filed into Court on 4th October, 2017. He highlighted the relevant paragraphs which provide as follows:

"9. That I verily believe that this Honourable Court is a Court of Justice and accordingly it has inherent duty to determine the rights of each party to proceedings and not to punish them for mistakes and errors that may have occurred during proceedings.

10. That further to paragraph 9 above, rules of Court therefore exist that promote justice thereby entailing that parties to proceedings are accorded the right to be heard by the Court

despite any technical or procedural default by a party to the proceedings.

11. That with respect to paragraph 10 above, the Court by invoking these rules therefore ensures to address any inequality and thereby enabling matters and all issues in controversy between parties to proceedings are determined on their merits.

12. That therefore notwithstanding the prevailing factual circumstances in this case, the Petitioner herein is still desirous of prosecuting this matter hence this application before the Honourable Court for an Order to set aside the Order of the Court dismissing this matter and allow the matter proceed to trial.

13. That with respect to the foregoing, I therefore humbly seek the indulgence of the Honourable Court to grant this application as doing so will in essence promote justice in that the parties herein will be accorded the right to be heard by the Honourable Court.

14. That with respect to the foregoing, I verily believe that granting this application will not in any manner prejudice any party herein but will in the interest of justice have the rights of the parties herein determined on merit despite any procedural errors or procedural default (by) either party to the proceedings.

15. That in view of the above, I verily believe that in the interests of justice, this is a proper case in which the Court

should promote justice and exercise discretion and set aside the Order dismissing the matter and allow to proceed and be heard and determined on its merits."

It was Counsel's argument that Order 5 rules 15 and 16 provide that affidavits should not contain extraneous matters by way of objection or prayer or legal arguments of conclusion. That an affidavit shall only contain a statement of facts and circumstances of which a witness deposes. He stated that this position was also stated in the case of **Juliet Chabakale Tembo and Zephania Tembo v Steward Tembo and Elias Tembo 2010/HP/821**. He further cited the cases of **Sobek Lodges Limited V Zambia Wildlife Authority - 2008/HP/668** where citing Order 5 rules 15 and 16 refused to consider certain paragraphs in an affidavit.

He argued that the paragraphs already alluded to were nothing but legal arguments, conclusions, prayers and submissions and that the same should be expunged.

In response the Petitioner filed in an affidavit in opposition deposed to by one Stephen Katuka in his capacity as Secretary General for the United Party for National Development (UPND). He swore that the 1st Respondent's contention that the paragraphs 9,10,11,12,13,14 and 15 are irregular was misconceived. That the 1st Respondent's advocate had not stated in the affidavit in support how the said paragraph are irregular.

He stated that as a result of the 1st Respondent's failure to depose the material facts relating to the type of irregularity attached to the

said paragraph, the Respondent was inviting the Court to assume on their behalf, the type of irregularity before the Court. It was the deponent's contention that the Court had the inherent duty to determine the rights of parties to proceedings and matters are determined on their merit.

That with regard to paragraph 10, it was his contention that rules of Court exist for purposes of justice which accord a party the right to be heard. He further swore that by virtue of the Petitioner's application before this Court, they desired to prosecute this matter and dismissing the 1st Respondent's application will send the matter straight to trial. It was his contention that the Petitioner's affidavit was not irregular in any manner.

In the Petitioner's skeleton arguments it was argued that the 1st Respondent's Affidavit did not state how the relevant paragraphs in the affidavit in issue were irregular and therefore, there was no material before the Court for it to exercise its discretion and expunge the said paragraph. Failure to depose to material facts upon which the Court can exercise its discretion, the Court cannot exercise such discretion. It was argued that no reasons had been advanced in the 1st Respondent's affidavit in support as to why the paragraphs cited were irregular.

Counsel cited the case of ***Nkhuwa v Lusaka Tyre Services Limited (1977) ZR43*** where it was held that

“it must be emphasized that before this Court is able to exercise this discretion to grant such relief there must be material before it on which it can act.”

It was further argued that the paragraphs in issue were not contravening Order 5 rules 15 and 16 of the High Court Rules. According to Counsel, the said paragraphs did not contain any extraneous matters with respect to objections, prayers and or legal arguments. It was their arguments that the Court had the inherent duty to determine the rights of parties to proceedings and in the interest of justice to hear and determine matters on merit.

Counsel cited order 3 rule 2 of the High Court Rules which provided that:

“Subject to any particular rules, the Court or a Judge may, in all causes and matters, make any interlocutory order which it or he considers necessary for doing justice, whether such order has been expressly asked by the person entitled to the benefit of the order or not.”

She further cited the case of **Juliet Chikale Tembo, Zephania Tembo v Steward Tembo, Elias Tembo** and argued that that case did not deal with the provisions of Order 5 rule 15 and 16 but dealt with mode of commencement and the rules governing the same. Counsel also cited the case of **Sobek Lodge Limited v Zambia Wildlife Authority 2008/HP/668** where the Court made reference to Order 5 rules 15 and 16 and expunged some paragraphs from an

affidavit in opposition. She distinguished this case as the paragraphs in the Sobek case contained averments which were not the case in the paragraphs in issue. In addition to Order 5 Rule 15 and 16 she also cited Order 41 rule 5(2) of the Rules of the Supreme Court which provides that:

“save in the expected cases, an Affidavit must contain the evidence of the deponent as to such facts only as he is able to speak to of his own knowledge and to this extent, equating affidavit evidence to oral evidence given in Court.

It was Counsel’s argument that the 1st Respondent’s application is misconceived and should be dismissed.

The matter came up for hearing on 28th May, 2018 and the advocate for 1st Respondent reiterated his arguments in the skeleton arguments. The Petitioner’s Counsel submitted that there was no substance in the Respondent’s application and that the irregularity stated in paragraph 4 of the 1st Respondent’s affidavit did not disclose the nature of the irregularity. She prayed that the matter be heard on its merit and that the application be dismissed as it was intended to delay and avert the due process of the law.

In reply the 1st Respondent’s counsel submitted that the reason that they did not state the reasons of the irregularity was because they were avoiding to be in the same predicament that the Petitioner found himself in the affidavit in issue. He argued the reasons were well articulated in the skeleton arguments. On the

issue of substantial justice he cited the case of Chakaka Village Country House Ltd and 2 others v Africa Drilling Corporation Ltd. SJ No. 5 2018 which has adequately dealt with the issue.

I have considered the affidavit evidence and the arguments from both parties. The crux of the application is that the Petitioner made an application dated 26th July, 2017 to set aside this Court's Order to dismiss the matter pursuant to Order 3 Rule 2 of High Court Rules. The 1st Respondent made an application to expunge paragraphs from the affidavit in support of that application. The application was pursuant to Order 5 rules 15 and 16 of the High Court Rules.

The 1st Respondent argued that the law is clear that an affidavit according to Order 5 rules 15 and 16 should not contain extraneous matters by way of objection or prayer or legal arguments. The Petitioner on the other hand submitted that the application was baseless and the 1st Respondent's affidavit did not state the nature of irregularity it was alleging and as such there was no substance before the Court.

Having considered the arguments by both parties I must state that Order 5 rules 15 and 16 is very clear. It provides that:

"15. An affidavit shall not contain extraneous matter by way of objection or prayer or legal argument or conclusion.

16. Every affidavit shall contain only a statement of facts and circumstances to which the witness deposes, either of his

own personal knowledge or from information which he believes to be true."

This rule is very clear and unambiguous. An affidavit must only contain statements of fact and circumstances to which the witness deposes to. The Petitioner has argued that there is no substance before this Court because the affidavit in support of the application does not state what kind of irregularity as envisaged in this application.

In my view the summons which the 1st Respondent's affidavit supports clearly states that the application to expunge the named paragraphs from the record is pursuant to Order 5 rules 15 and 15 of the High Court rules. This to me is self-explanatory that if an affidavit is said to be irregular pursuant to this Order it means it contravenes the provisions of that Order.

The Petitioner's argument is a mere technicality that does not take away of the main issue at hand. In my view this is the nature of technicality envisaged by Article 118(2) (e) of the Constitution. The issue before me is that there is an application to expunge certain paragraphs from an affidavit pursuant to Order 5 rules 15 and 16 of the High Court Rules. I therefore do not agree with the Petitioner's arguments that there is no substance before me based solely on the fact that the affidavit does not state the nature of the irregularity. This is a mere technicality that cannot allow this Court to ignore the main application.

Having said this, I will now consider the issue at hand. From paragraphs 9,10,11,12,13,14 and 15 of the affidavit I do not find the averments there under to be statements of fact as they appear to be prayers, legal arguments and indeed conclusions. I agree with the 1st Respondent's arguments that they do not conform to what should be contained in an affidavit as provided by Order 5 rules 15 and 16.

I therefore find that the 1st Respondent's application has merit and I accordingly expunge paragraphs, 9,10,11,12,13,14 and 15 from the record.

I order that cost be for the Applicant.

Dated the 6th day of June, 2018



Mwila Chitabo, S.C
Judge