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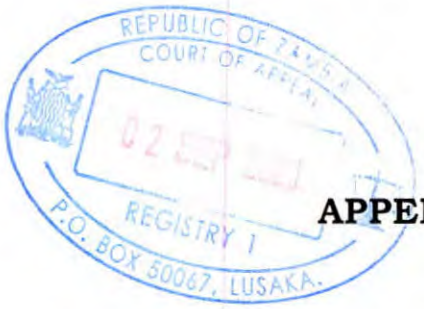
IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 132/2019**
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

KABINE KASONGO SIDIME **APPELLANT**

AND

DJANA SIDIME **1ST RESPONDENT**
RAMMY MOHAMMED KASONGO SIDIME **2ND RESPONDENT**
RAMA INVESTMENTS LIMITED
(In Liquidation) **3RD RESPONDENT**
WILLIAM NYIRENDA AND COMPANY (FIRM) **4TH RESPONDENT**

Coram: Chashi, Makungu and Lengalenga, JJA
On the 28th day of August, 2020 and on the 2nd day of September, 2020

For the Appellant : Mr. M. Chambaila of Messrs. Ituna Partners
For the 1st Respondent: Mr. K. Bota of Messrs William Nyirenda & Co.
For the 2nd and 4th Respondent : No appearance
For the 3rd Respondent : No appearance

JUDGMENT

MAKUNGU JA, delivered the Judgment of the Court.

Cases referred to:

1. *Phillip Mutantika and Another v. Chipungu (2014) 1 ZR 352.*
2. *Construction Sales and Services Limited and Another v. Standard Bank Zambia Limited – S.C.Z. Judgment No. 4 Of 1992.*
3. *S.F. Enterprises Limited v. Armco Security Limited (2013) 1 ZR, 132.*

Legislation referred to:

1. *Rules of the Supreme Court of England, White Book 1999 Edition.*

Other works referred to:

1. *Dr. Matibini, P. Zambian Civil Procedure; Commentary and Cases. Volume 1 (2017) Lexisnexis, South Africa.*
2. *Oxford Dictionary of Law. 6th Edition (2006) University Press, Oxford.*
3. *Breach Of Trust. (2002) P. Birks, A. Pretto, Editors Hart Publishing. Oxford and Portland, Oregon.*

1.0 INTRODUCTION

1.1 This appeal is against the ruling of the Hon. Mr. Justice I. Kamwendo dated 27th March, 2019 on a preliminary objection dismissing the Appellant's application to render an account for offending the provisions of Order 43 Rule 1 of the Rules of the Supreme Court, 1999 Edition (RSC).

2.0 BACKGROUND

2.1 On 4th August, 2016 the 1st Respondent commenced an action against the Appellant, as 1st defendant, the 2nd and 3rd Respondents as 2nd and 3rd defendants respectively by way of Writ of Summons. The writ was endorsed with the following claims:

1) An order that the corporate veil of Rama Investments Limited be pierced for the purpose of distributing to the beneficiaries of the estate of the late Ramazan Kasongo Sidime, which mainly comprises of the mining rights at Plot

10 Pit 3, which rights where transferred to the said Rama Investments Limited, mainly for the purposes of depriving the Plaintiff (1st Respondent herein) and other beneficiaries;

2) *An order setting aside the Consent Order dated 4th January, 2012 in Cause No. 2010/HN/234;*

3) *An order for damages for fraud;*

4) *Costs of and incidental to these proceedings; and*

5) *Any other relief the court may deem fit.*

2.2 Subsequently, on 11th May, 2017, the parties settled the action via Consent Order. The Order *inter alia*, directed that the mining rights held by the 3rd Respondent would be sold to Tubombeshe Mining Limited and that the proceeds of sale shall be paid to the 4th Respondent Messrs William Nyirenda and Company, advocates for the 2nd and 3rd defendants who should hold the monies in trust for all the parties until the specific disbursement due to each family member including the 1st and 2nd defendant was agreed.

2.3 Tubombeshe Mining Limited paid an initial sum of US$200, 000.00 to the 4th Respondent who, pursuant to the terms of the Consent Order, dispensed the sum of US$160, 000.00 to settle the legal fees due to five law firms including the 4th Respondent

itself. The balance of about US$40, 000.00, less US$1, 000.00 applied to bank charges, was paid to the 1st Respondent (now appellant) through the 2nd Respondent.

2.4 A dispute arose with the Appellant contending that he was short-changed and he proceeded to report the 4th Respondent to the Legal Practitioners Committee. The Appellant, went on to file summons against the 4th Respondent, to render a full account of the purchase price of the said mining rights pursuant to Order 43 of the Rules of the Supreme Court, 1999.

2.5 In response, the 4th Respondent filed a notice of motion to raise a preliminary objection to the hearing of the Appellant's application pursuant to Order 3 Rule 1 of the High Court Rules Chapter 27 of the Laws of Zambia and Order 14A of the RSC. The motion was supported by an affidavit sworn by Kennedy Bota, counsel seized with conduct of the matter. The 4th paragraph of the affidavit which was the main paragraph read as follows:

> *4. That the intended application to render a full account under order 43 Rules of the Supreme Court, is objectionable and there being no endorsement on the Writ of Summons, for an Order to account or at all. Exhibits "KB1", "KB2" and*

"KB3" are respectively copies of Writ of Summons, Statement of Claim and Summons to Render a full account of the purchase price of mining rights of Rama Investments Limited to Tubombeshe Mining Company Limited pursuant to Order 43 Rules of the Supreme Court.

2.6 At the hearing of the preliminary objection, learned counsel for the 4th Respondent, Mr. Bota submitted that under Order 43 Rule 1, a party can only apply for an account if it has pleaded for an account. He submitted that this was not the case.

2.7 In response, Dr. Mulwila, SC learned counsel for the Appellant, took issue with the use of the word 'objectionable' in the affidavit deposed by Mr. Bota as this raised a legal argument in an affidavit, contrary to Order 5 Rule 15 and 16 of the High Court Rules. He further placed reliance on the case of **Phillip Mutantika and Another v. Chipungu.** [1]

3.0 DECISION OF THE HIGH COURT

3.1 Judge Kamwendo considered the affidavit and submissions before him. He found that paragraph 4 of the 4th Respondent's affidavit contained a legal argument through the use of the word

'objectionable' and that the said paragraph should be expunged from the affidavit.

3.2 He considered Order 14A Rule 2 of the Rules of the Supeme Court, 1999 which provides as follows:

> ***An application under rule 1 may be made by summons or motion or (notwithstanding Order 32, rule 1) may be made orally in the course of any interlocutory application to the Court.***

3.2 The learned Judge gleaned from the above provision that a preliminary issue may be brought orally and opined that even if paragraph 4 was expunged from the affidavit in support of the preliminary application, the point still remained that the application for an account was offensive to Order 43(1) of the RSC, 1999 in that there was no endorsement on the Writ of Summons and Statement of Claim for an account. Consequently, the preliminary issue raised by the 4th Respondent succeeded with costs and the application to render an account was dismissed.

4.0 GROUNDS OF APPEAL

4.1 The Appellant has raised three grounds of appeal as follows:

1. *The Judge below misdirected himself in law and in fact by upholding a preliminary objection which was raised by summons and supported by an affidavit which was unsustainable as its core paragraph number 4 was expunged;*
2. *The trial Judge further misdirected himself by allowing advocate for the 4th Respondent to raise the preliminary objection orally under Order 14A (1) of the Rules of the Supreme Court of England, 1999 Edition in total disregard of the fact that the application that was before the court was made by summons and supported by affidavit; and*
3. *That the Judge below erred in law and fact when he came to the conclusion that the Applicant (now Appellant) application to render an account was taken under Order 43 Rule 1 of the Rules of the Supreme Court of England 1999 Edition, when the Summons stated that the application was taken under Order 43 which provides for both Rule 1 and Rule 2 but the Judge held that an application under Order 43 can only be taken out when a relief for an account is specifically pleaded,*

relying on Order 43 Rule 1 and disregarding Order 43 Rule 2.

5.0 APPELLANT'S CONTENTIONS

5.1 The appellant's counsel filed heads of argument on 6th August, 2017 which were relied upon entirely. Grounds one and two were argued together: When a party decides to make an application under Order 14A of the RSC, 1999 by summons or motion, it is trite that the said application is determined preliminarily as the essence of the application is for possible dismissal of a claim without the need to hear the main matter. It was further submitted that, for the application to be sustainable when made by summons or motion, an applicant needs to provide sufficient evidence by way of an affidavit. Reference was made to Dr. Matibini's book: **Zambian Civil Procedure; Commentary and Cases, Volume 1 (2017) Lexisnexis, South Africa** at page 469 on Order 14A which reads as follows:

> ***"An application by Rule 1 may be by summons or motion or may be made orally in the course of any interlocutory application to the court. The summons should state in clear and precise terms what the***

question of law or construction is, which the court is required to determine. The summons 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."

5.2 Thus, it was contended that paragraph 4 of the 4th Respondent's affidavit having been expunged for containing extraneous material, the application ought to have been dismissed as it was incompetent for being unsupported by material facts as required by law.

5.3 The argument was escalated: that the court below misdirected itself in law and fact by hearing the application as though it was made orally when it was made via summons which application was incompetent as it lacked material facts.

5.4 It was further contended that, the court below misdirected itself in its ruling at page R4 line 26 (page 15 of the record of appeal) by finding that the application for an account was taken out by the Plaintiff (1st Respondent herein) when in fact, the said application was made by the 1st Defendant (now Appellant).

5.5 It was contended that, it was a further misdirection in law and fact for the court below to expect the Appellant as 1st Defendant to have endorsed a claim for an account on a Writ of Summons or Statement of Claim which was issued by the Plaintiff (1st Respondent herein). Counsel submitted that the court below should have dismissed the preliminary application and then proceeded to hear the Appellant's application.

5.6 In arguing ground three, it was submitted that the Appellant did not state in his application that he was relying on Order 43(1) but that the application arose out of the Consent Judgment of 11th May, 2017. That a relationship of trustee was created between the Respondents' and the Appellant by which the equitable remedy for an account is implied. In support this, we were referred to the **Oxford Dictionary of Law, 6th Edition (2006) University Press, Oxford** Where 'account' is defined at page 7 as follows:

> ***"Account. A remedy at common law and (more importantly) in equity requiring one party to a relationship (e.g. a partner or trustee) to account to the other(s) for moneys received or due. It may be pursued in addition to a claim for another remedy,***

such as damages, or as a substantive remedy in its own right. An order to account can fulfill two functions: firstly, it can quantify the amount of the profit or loss being pursued; secondly, it can impose liability to make payment ..."

5.7 The appellant's counsel went on to refer to **Breach of Trust, (2002) P. Birks, A. Pretto, Hart Publishing, Oxford and Portland, Oregon** at page 3 under the heading **"WHY ARE TRUST DUTIES DIRECTLY ENFORCEABLE"** where it reads:

"In Target Holding Ltd vs Redferns (1996) 1 AC 421, 434, Lord Browne-Wilkinson said, "The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law." Generally speaking, the legal response to breach of trust are designed to fulfill this basic right. They do not bring the relationship between the parties to an end, but enable the trust to be carried out as the settlor intended. The trustees' duties can be enforced using

declaration, injunctions, and directions to perform, or orders to account."

5.7 Arising from the above, it was further submitted that under section 13 of the High Court Act, Chapter 27 of the Laws of Zambia, the High Court exercises and enforces both legal and equitable remedies.

5.8 With regard to Order 43 of the RSC, 1999, the submission was that Rule 1 provides for instances when an application for an account can be made when indorsed on a Writ of Summons, while Rule 2 provides that an application for an account can be taken out in any other matter. The said Order 43(2) is in the following terms:

2. - Court may direct taking of accounts, etc.

(1) The Court may, on an application made by summons at any stage of the proceedings in a cause or matter, direct any necessary accounts or inquiries to be taken or made.

(2) Every direction for the taking of an account or the making of an inquiry shall be numbered in the judgment or order so that, as far as may

be, each distinct account and inquiry may be designated by a number.

43/2/1 - Effect of rule

Whereas r.1 only applies in an action for an account, this rule applies in any action.

43/2/2 - Practice

An order may be made at any stage, e.g. after judgment, as in Barber v. Mackrell (1879) 12 Ch.D. 534; Taylor v. Mostyn (1886) 33 Ch.D. 226.

5.9 In this regard, it was submitted that the summons taken out by the Appellant appearing at page 26 – 27 of the record of appeal, clearly indicates that the application was made pursuant to Order 43 in its entirety, unlike Order 43(1) as held by the court below. Counsel submitted that the lower court ought to have taken Order 43(2) into account when considering the Appellant's application, which permits a party to take out summons for an account in any matter as supported by the Supreme Court decision in **Construction Sales and Services Limited and Another v. Standard Bank Zambia Limited** [2] where the Court stated as follows:

"... We agree with Mr. Chama that under order 43(2) an application for an account to be taken may be made in any cause or matter. ..."

5.10 In conclusion, counsel for the Appellant prayed that the appeal succeeds and that the Respondents be ordered to render an account on the premise of the Consent Judgment of 11th May, 2017.

6.0 2ND AND 4TH RESPONDENTS' CONTENTIONS

6.1 The 2nd and 4th Respondent's heads of argument were filed on 29th August, 2019. During the hearing of the appeal, reliance was placed on the same entirely.

6.2 With respect to ground one, counsel for the 2nd and 4th Respondents submitted that the court below cannot be faulted for relying on Order 14A Rule 1 of the RSC, 1999 as it empowers the court to make the determination even on its own motion and without any affidavit or viva voce evidence. It was argued that at the hearing of the application, an oral application was made on behalf of the 2nd and 4th Respondents.

6.3 With regard to ground two, it was submitted that the trial judge did not misdirect himself by allowing the 4th Respondent to raise

the preliminary objection orally under Order 14A Rule 1 notwithstanding that the application before him was made by summons supported by affidavit in that Order 14A Rule 1(5) does not limit the court in its exercise of its power to hear and determine questions of law.

6.4 In opposition to ground three, counsel insisted that Order 43 pursuant to which the Appellant made its application, clearly requires the originating process to include an endorsement of a claim for the taking of an account. Reliance was placed on the case of **S.F. Enterprises Limited v. Armco Security Limited,** [3] which is a High Court decision and thus not binding on this Court.

6.5 It was submitted further that the Appellant cannot be heard to argue that a party is at liberty to take out summons for an account in any matter because the enabling rule, Order 43 Rule 1 qualifies the entitlement and does not grant it carte blanche. Counsel prayed that the appeal be dismissed with costs.

7.0 OUR DECISION

7.1 Grounds one and two, are intertwined and will be dealt with as one. The main issue as we perceive it is whether a preliminary

objection raised by summons based on an incompetent affidavit can be entertained.

7.2 The 4th Respondent raised a preliminary objection based on Order 3 Rule 1 of the HCR, Chapter 27 and Order 14A of the RSC, 1999. Order 14A/1/1 reads as follows:

> ***(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.***

And Order 14A/2 provides:

> ***An application under rule 1 may be made by summons or motion or (notwithstanding Order 32, rule 1) may be made orally in the course of any interlocutory application to the Court.***

7.3 The appellant's counsel argued that paragraph 4 of the affidavit in support sworn by Kennedy Bota, having been expunged, the remainder of the affidavit disclosed no evidence to support the summons. That, the learned Judge should not have proceeded to treat the application as having been made orally, when it was brought by summons.

7.4 It is noteworthy that, Order 14A/2 provides three ways in which an application to determine a point of law may be raised; By way of summons, motion or orally. Only where summons are used should an affidavit in support be filed.

7.5 As regards an oral application, the explanatory notes under Order 14A/2/9 are as follows:

> ***"Oral application***
>
> ***A helpful innovation has been made which enables a party to make an application under r.1 orally in the course of any interlocutory application to the court (r.2). Experience has shown that occasionally a question of law emerges during the hearing of an interlocutory application, e.g. relating to pleadings or discovery or evidence, the determination of which would finally dispose of the whole action or at any***

rate a claim or issue in it. In such event, instead of adjourning the proceedings to enable an application under r.1 to be made at a later date, the Court is enabled on the application of a party, and after having heard or after hearing the parties on that question, to proceed directly there and then to determine that question and finally to dispose of the whole action or the particular claim or issue in it. Indeed, in such event, the Court may act of its own motion, after hearing the parties, to determine the question of law and dispose of the action (see r.1 (1)).”

7.6 In light of the above explanation, although the key paragraph of the affidavit in support of the respondents summons for a preliminary objection was expunged, the learned Judge's power to entertain the application was not usurped and he rightly treated the application as having been made orally as he had heard the parties. We are of the view that under the circumstances neither party was prejudiced.

7.7 For the foregoing reasons, both grounds one and two lack merit and fail.

7.8 As rightly observed by the Appellant, the learned Judge misdirected himself by finding that the application for an account was taken out by the 1st Respondent as it is in fact the 1st defendant (Appellant) who made it.

7.9 In ground three, it is contended that, the court below erred in treating the application as falling entirely under Order 43/1 when the summons clearly indicated Order 43. The summons did not specify which rule under Order 43 was being relied on. Nonetheless, taking into account the fact that the said order has several rules under it, the learned Judge ought to have considered the provision in its entirety. To this end, Order 43(2) is in the following terms:

> ***2. - Court may direct taking of accounts, etc.***
>
> ***(1) The Court may, on an application made by summons at any stage of the proceedings in a cause or matter, direct any necessary accounts or inquiries to be taken or made.***
>
> ***(2) Every direction for the taking of an account or the making of an inquiry shall be numbered in the judgment or order so that, as far as may be,***

each distinct account and inquiry may be designated by a number.

43/2/1 - Effect of rule

<u>Whereas r.1 only applies in an action for an account,</u>

<u>this rule applies in any action.</u> (emphasis supplied)

43/2/2 - Practice

An order may be made at any stage, e.g. after judgment, as in Barber v. Mackrell (1879) 12 Ch.D. 534; Taylor v. Mostyn (1886) 33 Ch.D. 226.

7.10 From the above, it is evident that Order 43/2 applies in any cause or matter other than an action where the writ and/or counter-claim is endorsed with a claim for an account. We are further fortified by the case of **Construction Sales and Services Limited and Another v. Standard Chartered Bank Zambia** [(2)] which was cited by the Appellant's counsel

7.11 It is clear that the application for an account arose from the Consent Order of 11th May, 2017 and not from the pleadings. We hold that an order for an account can be made even after Judgment as explained under Order 43/2/2 of the White Book.

Therefore, the Appellant cannot be expected to commence a fresh case for an account so as to plead for an account.

8.0 CONCLUSION

8.1 All things being said, the first and second grounds of appeal are dismissed for lack of merit. We find merit in the third ground and uphold it. Under the circumstances, the decision of the lower court is hereby set aside and the lower court is directed to hear the application for an account. Costs are awarded to the Appellant; to be taxed in default of agreement.

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J. CHASHI
COURT OF APPEAL

.....

C.K. MAKUNGU
COURT OF APPEAL JUDGE

.....

F.M. LENGALENGA
COURT OF APPEAL JUDGE