

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**

**2023/HP/1716**

*(Civil Jurisdiction)*

*Public*

**BETWEEN:**

*Civil*

**NORMAN KOKE**

*4*

**PLAINTIFF**

**AND**

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**ALFRED TEMBO**

**DEFENDANT**

**BEFORE THE HONOURABLE MRS. JUSTICE M. C. KOMBE**

*For the Plaintiff*

*In person.*

*For the Defendant:*

*No appearance*

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## **RULING**

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**Cases referred to:**

- 1. Leopald Walford (Z) Limited v. Unifreight (1985) Z.R. 203.**

**Legislation and other material referred to:**

- 1. The High Court Rules, Chapter 27 of the Laws of Zambia.**

**1. INTRODUCTION**

- 1.1 On 28th September, 2023, the Plaintiff commenced this action against the Defendant by way of writ of summons and statement of claim seeking the following reliefs:

**(i) Immediate payment of K361,500.00 being and in respect of misappropriated monies meant for the purchase of the motor vehicle.**

**(ii) Costs and interest be in the cause**

**(iii) Any other relief the Court may deem fit.**

1.2 On 8th November, 2023, the Plaintiff filed an application to enter judgment in default of appearance and Defence against the Defendant.

1.3 By order of this Court dated 5th January, 2024, I declined to enter judgment in default on the ground that the Plaintiff had not complied with Order 10 rule 22 of the High Court Rules on service of documents.

1.4 Orders for Directions were issued on 30th April, 2024 and 13th August, 2024 was set as the date for the scheduling conference.

## **2. SCHEDULING CONFERENCE HEARING**

2.1 At the scheduling conference hearing, the Plaintiff was in attendance but the Defendant was not. He informed the Court that Defendant had been served but he had refused to accept process. When asked by the Court whether he had effected personal service, he clarified that he used to

serve on the Defendant's employees but the same used to refuse to accept process as the Defendant was based in Botswana. He told the Court that the Defendant was out of jurisdiction and that at the time of issuing court process, he knew that the Defendant was out of jurisdiction.

2.2 When he was asked further by the Court whether he had obtained leave of Court to issue court process against the Defendant who was outside the jurisdiction, he stated that he had not obtained leave as he followed what he was told to do.

2.3 The Plaintiff, was informed that an appropriate Order would be made in view of what he had disclosed hence this ruling.

### 3. **DECISION OF THE COURT**

3.1 In view of the information that the Plaintiff availed to the Court, I have to determine whether this matter is properly before this Court.

3.2 Order 10 rule 16 of the High Court Rules provides for issuing of court process outside jurisdiction. It reads as follows:

**"16 An application for leave to issue for service out of the jurisdiction a writ of summons, originating summons, or originating notice of motion or a concurrent writ of summons, originating summons or originating notice of motion may be made *ex parte* to the Court or a Judge on deposit of the writ, summons or notice with the Registrar together with an affidavit in support of such application. The affidavit shall state-**

**The grounds upon which the application is made and the facts which bring the plaintiffs case within the class in respect of which service out of the jurisdiction may be allowed;**

**(a)That the deponent is advised and believes that the plaintiff has a good cause of action or right to relief;**

**(b)In what place or country the defendant resides or probably may be found;**

**(c)Whether the defendant is a citizen of Zambia or not."**

3.3 The procedural steps to be taken when making an application to serve out of the jurisdiction were considered by the Supreme Court in the **Leopald Walford (Z) Limited v. Unifreight<sup>(1)</sup>** where it was held that:

**"The steps to be taken before a writ can be issued out of the jurisdiction are: first the writ should be prepared, second an application to issue the writ out of the jurisdiction must be made to the court; with the writ attached to the application. Only after the court's leave has been obtained showed the writ be issued."**

3.4 What is abundantly clear from the above case is that leave of court should be sought before a writ is issued for service out of the jurisdiction and not after the writ has been issued. And the applicant should comply with the provisions of Order 10 rule 16 as to the contents of the affidavit.

3.5 This is because the applicant must disclose the grounds upon which the application is made and the facts which bring the plaintiff's case within the class in respect of which service out of jurisdiction may be allowed.

3.6 Furthermore, the deponent must state that he believes that the plaintiff has a good cause of action or right to relief.

3.7 In the present case, the Plaintiff did not comply with the procedural steps when he knew that the Defendant was

based in Botswana outside the jurisdiction of Zambia. These steps I have highlighted are important as they would assist the court ascertain *inter alia* whether the plaintiff's case is within the class in respect of which service out of the jurisdiction may be allowed.

3.8 In the absence of leave of court which is supposed to be obtained before the originating process is issued for service, I find that the originating process issued against the Defendant who was outside jurisdiction was irregular. It is therefore improperly before this Court.

3.9 In my view the only way this irregularity can be cured is by setting aside the originating process so that the Plaintiff can comply with Order 10 rule 16.

3.10 In view of the foregoing, I set aside the originating process for irregularity but I make no order as to costs.

**DELIVERED AT LUSAKA THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2024**

  
REPUBLIC OF ZAMBIA:4  
HIGH COURT OF ZAMBIA:31.4  
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**M.C. KOMBE**

**JUDGE**

M.C.  
F.O. eOX 60067, LUSAKA