

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

2021/HP/0569

BETWEEN:

STEVEN KATUKA

AND

**GEORGE PHIRI
COMMISSIONER OF LANDS**

PLAINTIFF

**1st DEFENDANT
2nd DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 25th
DAY OF SEPTEMBER, 2024**

For the Plaintiff : Mr. K. Kawana, Messrs Muleza Mwiim bu & Company
For the 1st Defendant : Mr. M. Mukwasa, Messrs M. Mukwasa Legal Practitioners
For the 2nd Defendant : Mrs. B.M Kamuwanga, Senior State Advocate

RULING

LEGISLATION REFERRED TO:

1. ***The High Court Rules, Chapter 27 of the Laws of Zambia***
2. ***The Rules of the Supreme Court of England, 1965, 1999 Edition***
3. ***The State Proceedings Act, Chapter 71 of the Laws of Zambia***

1. INTRODUCTION

1.1 The Commissioner of Lands on 18th July, 2024, filed an application for an Order to enter appearance and to file the defence out of time, pursuant to ***Order 2 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia***, as read with ***Order 3 Rule 2 of the said Rules***.

1.2 The application was supported by an affidavit and a List of Authorities and Skeleton Arguments in support.

Order was granted on 1st September, 2023. The Orders for Directions were again varied following the joinder of the Attorney General to these proceedings, and the Writ of Summons and statement of claim were amended on 13th September, 2023 to reflect the joinder of the Commissioner of Lands as a party to the proceedings.

2.5 Trial commenced on 15th May, 2024, and on 18th July, 2024, as already seen, the Commissioner of Lands filed the application which is subject of this Ruling.

3. SUBMISSIONS AT THE HEARING

SUBMISSIONS BY COUNSEL FOR THE ATTORNEY GENERAL

3.1 At the hearing, Counsel stated that they relied on the affidavit which was filed in support of the application together with the List of Authorities and Skeleton Arguments.

RESPONSE BY COUNSEL FOR GEORGE PHIRI

3.2 Counsel had no objections to the application.

RESPONSE BY COUNSEL FOR STEVEN KATUKA

3.3 Counsel for Steven Katuka opposed the application on the basis that trial in the matter had already commenced, with one witness having testified. It was his submission that the application was not tenable at law, as the pleadings had already closed.

REPLY BY COUNSEL FOR THE COMMISSIONER OF LANDS

3.4 Counsel in reply, submitted that the Commissioner of Lands was only served the Court process on 9th December, 2023, and, therefore, they were not aware of the matter, and the notice of hearing which was issued for 15th May, 2023.

4. DECISION OF THIS COURT

4.1 I have considered the application. It was made pursuant to *Order 2 Rule 2* and *Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia*. *Order 2 Rule 2 of the said Rules* provides that:

"2. Parties may, by consent, enlarge or abridge any of the times fixed for taking any step, or filing any document, or giving any notice, in any suit. Where such consent cannot be obtained, either party may apply to the Court or a Judge for an order to effect the object sought to have been obtained with the consent of the other party, and such order may be made although the application for the order is not made until after the expiration of the time allowed or appointed."

4.2 *Order 3 Rule 2* on the other hand states as follows:

"2. 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."

- 4.3 In this matter, as can be gleaned from the affidavit which was filed in support of the application, the averment is that after Steven Katuka amended the Writ of Summons and statement of claim for the second time on 13th September, 2023, the Commissioner of Lands was joined as the 2nd Defendant in these proceedings.
- 4.4 Whilst stating that the Commissioner of Lands was served process, the date on which service was done was not stated in the affidavit. However, Counsel in deposing to the affidavit, averred that the Commissioner of Lands was to enter appearance and file the defence within Twenty-One (21) days of service. It was deposed that Counsel was only made aware of the hearing of 15th May, 2023, after the date had passed, and trial had commenced.
- 4.5 Counsel stated that instructions had since been obtained and the intended defence was exhibited as '13MK1'.
- 4.6 In the List of authorities and Skeleton Arguments, the law which was relied on in making the application was cited, as well as the provisions of *Section 13 of the State Proceedings Act, Chapter 71 of the laws of Zambia*.
- 4.7 The contention in this application, is that the Commissioner of Lands was not served the Writ of Summons and statement of claim on time, hence they could not comply with the Orders for Directions which were issued by this Court after being joined to the proceedings.

4.8 Steven Katuka objected to the application for the Commissioner of Lands to be allowed to enter appearance and file the defence out of time, as pleadings have closed in the matter, and trial has commenced.

4.9 It will be noted that **Order 3 Rule 5 of the Rules of the Supreme Court of England** provides that:

"(1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules, or by any Judgment, order or direction, to do any act in any proceedings.

(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

(3) The period within which a person is required by these rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.

4.10 The explanatory notes under that Order, in **Order 3/5/1** state as follows:

"Where the time, sought to be enlarged, is not fixed "by these rules" but by the Masters' Practice Directions (which have no statutory force) or some other rule of practice, this rule does not apply, and in interlocutory proceedings the court has an

4.11 In terms of pleadings closing, **Order 18 Rule 20** of the **said Rules of the Supreme Court of England** provides that:

"(1) The pleadings in an action are deemed to be closed -

(a) at the expiration of 14 days after service of the reply or, if there is no reply but only a defence to counterclaim, after service of the defence to counterclaim, or

(b) if neither a reply nor a defence to counterclaim is served., at the expiration of 14 days after service of the defence.

(2) The pleadings in an action are deemed to be closed at the time provided by paragraph (1) notwithstanding that any request or order for particulars has been made but it has not been complied with at that time."

4.12 The explanatory notes in **Order 18/20/1** state that:

"Whenever the time for the service of a reply or defence to counterclaim or both has been extended whether by order of the Court or by written consent of the parties, the pleadings are not deemed to be closed until the expiry of such further time."

4.13 The effect of close of pleadings is that a party may not adduce further facts which have not been pleaded. This eliminates surprise in civil litigation. This is a fundamental principle as civil trials in the High Court are not by ambush.

- 4.14 In this matter, the contention is that the Commissioner of Lands was only served the Writ of Summons and statement of claim on 9th December, 2023, and they were not aware of the hearing date of 15th May, 2024.
- 4.15 The record shows that after the amended Writ of Summons and statement of claim were filed on 13th September, 2023, the Attorney General conducted a search on the record on 14th November, 2023. Therefore, as at that date, they were aware of the proceedings. There is also an affidavit of service dated 8th May, 2024, which shows that the Attorney General was on 13th November, 2023 served Steven Katuka's supplementary bundle of documents.
- 4.16 ***Section 13 of the State Proceedings Act, Chapter 71 of the Laws of Zambia*** was cited on service on the Attorney General. It provides that:
- "13. All documents required to be served on the State for the purpose of or in connection with any civil proceedings by or against the State shall be served on the officer of the Attorney-General's Chambers having the conduct of such proceedings, or, if a legal practitioner in private practice is acting for the State in such proceedings, on such legal practitioner."***
- 4.17 The exhibit to the affidavit of service dated 13th November, 2023 just has a date stamp for the Ministry of Justice acknowledging receipt. It does not show that the officer with conduct of the matter was served.

4.18 On that basis, it cannot be said that the service was properly effected, even though the next day, a search was done on the record. In view of that, and the fact that the pleadings could only have properly closed on there being proper service, I grant the Order allowing the Commissioner of Lands to enter appearance and file the defence and other documents out of time.

4.19 The Orders for directions are accordingly varied as follows:

1. The Commissioner of Lands shall enter appearance and file the defence and other documents, and George Phiri shall file an amended defence and an amended List of Documents and List of witnesses if any by 10th October, 2024.
2. Steven Katuka shall file replies and any amended List of Documents and List of Witnesses by 25th October, 2024.
3. There shall be inspection of documents by 8th November, 2024.
4. The Commissioner of Lands shall file bundles of pleadings and documents as well as witness statements, and Steven Katuka and George Phiri shall supplementary bundles of pleadings and documents and additional witness statements by 29th November, 2024.
5. The Commissioner of Lands shall file the scheduling conference brief, and Steven Katuka and George Phiri

shall file any amended scheduling conference briefs by 13th December, 2024.

6. The matter shall come up for a scheduling conference on 21st January, 2025 at 08:30 hours and for continued trial on 16th April, 2025 at 09:00 hours.

4.20 Costs shall be in cause and leave to appeal is granted.

DATED AT LUSAKA THE 25th DAY OF SEPTEMBER, 2024

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