

JOHN MUCHECHESI
versus
KELVIN MUSIMWA

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 26 October 4 November 2022

Mr *T Nyamucherera*, for plaintiff
Defendant in person

Civil Trial

MHURI J:

In May 2011 plaintiff issued summons against defendant claiming US \$52 000-00 damages for pain and suffering, loss of amenities of life, permanent disability and future medical expenses which damages he suffered as a result of a motor vehicle accident which he alleges was caused by defendant's negligence.

Defendant entered appearance to defend and filed his plea and a counterclaim. In the counterclaim defendant is claiming damages from plaintiff for the repairs he effected to his motor vehicle, the damages having arisen as a result of plaintiff's negligence.

The matter proceeded to pretrial conference stage and finally a date of trial was set on 25 and 26 October 2022. On 25 October the trial could not kick off as plaintiff's Counsel sought a post ponement to the next day as he was not feeling well.

On 26 October 2022 when the trial was set to begin, Defendant raised a preliminary point which he submitted, went to the root of the matter. He submitted that the issue was a point of law which can be raised at any time and it was only during the research he was doing the night before that he realised that there was a mis-citation of parties, hence his raising it at this stage. His issue was that his name was incorrectly spelt by plaintiff in all his pleadings, starting with the summons. He submitted that his name is KEVIN and not KELVIN. There is no L in his name. KEVIN and KELVIN are two different names, and he does not know how

many other people have a similar name KELVIN. He cannot continue to appear in court as KELVIN when he is not.

He submitted further that if the matter is to proceed to judgment, the judgment cannot be enforced nor executed. Therefore all the previous processes are affected, they are a nullity unless a proper amendment is sought. It was his submission that the court's discretion cannot be sought orally unless through an application and that there is need for plaintiff to take appropriate action as he does not want to attend court under this pretext.

To prove that he was improperly cited, Defendant produced his national identity card and passport which documents show that his first name KEVIN. His driver's licence shows KEVIN though the surname is spelt as MUSINWA and not MUSIMWA.

For being fatally defective, it was Defendant's prayer that the matter be struck off the roll with costs.

In response, it was plaintiff's submission that by raising this preliminary issue at this stage, defendant has ambushed him. As an officer of the court, he required time to research on this point and properly address the court citing cases on the point. In view of this, I granted the request and directed that defendant files and serves his heads of argument first and then plaintiff files his written submissions and on the basis of these I would then issue my ruling.

In his heads of argument, defendant maintained his position that the wrong defendant was cited. The defendant appearing on the pleadings is a different person altogether and this is the end of the matter as no amendment has been sought and even if it is sought, there can neither be an amendment or substitution of the defendant. Reliance was made on the cases;

1. *“Maxwell Matsvimbo Sibanda*
v
Gwasira & Ors SC 14-21
2. *Veritas v Zec* SC 103-20
3. *Sindikumbulawo Pacifique*
v
The Commissioner General Department
Of Customs & Excise HH 137/18
4. *Ct Bolts Private Limited*
v
Workers Committee SC 16-12
5. *Makondo & 32 Ors*
v

Freda Rebecca Mine HH 400-18

6. *Steward Scott Kennedy*

v

Mazongororo Syringes (Pvt) Ltd 1996 (2) ZLR 565

7. *Gariya Safaris (Pvt) Ltd*

v

Van Wyk 1996 (2) ZLR 246 (H)

Plaintiff's submissions were that since the dispute arose in 2008, ie when the accident arose, defendant has always identified himself as KELVIN MUSIMWA. He paid a fine for the accident, under that name, in matters under HC1999/22 and HC 626/22 he identified himself as KELVIN. In an urgent chamber application he filed, he used that name. If defendant answers to the name, that he claims, plaintiff shall proceed to seek to make an oral application for the amendment of the name that appears as his name. Defendant will suffer no prejudice as he has been appearing in this court on that basis. The misspelling is not fatal and does not change the cause of action in the main matter. The matter is to proceed in terms of Rule 7 of the High Court Rules. Plaintiff's prayer is that he be allowed to make an oral application amending the name of the Defendant.

It is a trite legal position that a point of law can be raised at any stage of the proceedings.

KORSAH JA in the case of *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 held;

"it is proper to raise a point of law, which went to the root of the matter, at any time, even for the first time on appeal, if its consideration involved no unfairness to the party against whom it was directed.

If the order was void ab initio, it was void at all times and for all purposes. And the question of its validity could be raised at any time."

ZIYAMBI JA reiterated the above position of the law in the case of

Interfresh Limited

v

Ryan Dzapata SC 58/05

citing with approval the case of *Muchakata v Netherburn Mine (supra)* she had this to say;

"It is indeed trite that a point of law which goes to the root of the matter may properly be raised at any time and even for the first time on appeal.....However, where the consideration of the point of law will result in unfairness to the party against which it was raised, the Court will not allow the point to be raised".

In casu, can it be said that the misspelling (even if it is a point of law) of the name KELVIN instead of KEVIN is so fatal that it goes to the root of the matter warranting that the

entire proceedings be declared a nullity? I agree with plaintiff's submission that it is a misspelling of the name which is not fatal and which does not change the identity of the defendant.

Defendant has been using this name right from the onset ie at the time of the accident. In the accident report by the police, his name was spelt as such, he paid an admission of guilt fine to the police using the same name spelt as such, hence plaintiff issued summons with the name spelt as such, defendant in two separate proceedings instituted proceedings as the applicant using the name spelt as such.

Defendant does not deny his description or identity, he only takes issue with the L in his first name. Plaintiff referred to the remarks by Peter Van Blerk, in *Legal Drafting , Civil Proceedings , Juta and Company Ltd, 2014* which I find very persuasive to the effect that,

“Generally speaking it is the practitioner representing the plaintiff whom is required to take the initiative in identifying parties to the action. This function must also receive the consideration of the defendant’s legal practitioner. It happens from time to time that to use the colloquial expression, the plaintiff has sued the “wrong party” or even, although less frequently that the wrong plaintiff has sued. A practitioner faced with one or the other of these situations must identify precisely what has occurred. In the case of the so-called “wrong defendant,” the first question to be asked is on whom the summons was served.

Further as follows, “Is it the party cited in the summons? If so, the second question is whether the cause of action relied upon by the plaintiff is one that lies against the defendant cited by the plaintiff.

If the party served with the summons is correctly described (ignoring spelling errors or minor immaterial mistakes) then one should admit the allegations concerning identity of the defendant and deny the appropriate allegations regarding the cause of action. If the description of the defendant clearly does not apply to the person on whom summons is served, the person served has, technically speaking no duty to oppose the proceedings”

In casu, defendant was, despite the misspelling sufficiently described. As alluded earlier, this misspelling does not go to the root of the matter and unlike the cases cited by defendant in which it was held that the citing of a non-legal entity went to the root of the matter as a result of which the proceedings were held to be void *ab initio* and a nullity which cannot be amended, the name can be amended.

In the premise therefore the point *in limine* is dismissed with costs. Plaintiff is granted leave to make an oral application for the amendment of the name on the date of next set down.

Lawman Law Chambers, plaintiff's legal practitioners
Musimwa and Associates, defendant's legal practitioners