

**IN THE COURT OF APPEAL OF ZAMBIA**

**Appeal No. 295 of 2023**

**HOLDEN AT LUSAKA**

(Civil Jurisdiction)

**BETWEEN:**

**ETHEL BROME**

**1<sup>ST</sup> APPELLANT**

**CHARMAINE BROME**

**2<sup>ND</sup> APPELLANT**

**TIONENJI BROME**

**3<sup>RD</sup> APPELLANT**

**AND**

**TIMOTHY MULENGA & OTHER PERSONS UNKNOWN**

**RESPONDENTS**



**CORAM: SIAVWAPA JP, CHISHIMBA & PATEL, JJA**

**On 26<sup>th</sup> March & 11<sup>th</sup> April 2024**

For the Appellants:

Mrs. W.S. Kankondo with Mr. G.S. Kangwa

Mesdames Sil & Kay Advocates &

Messrs Station, Oliver & Kennedy Legal Practitioners

For the Respondent:

Mr. L. Njungu

Messrs. Mutemwa Chambers

(standing in for Mr. Tresford Chali from Messrs Tresford Chali

Legal Practitioners)

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## **JUDGMENT**

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**Patel, JA, delivered the Judgment of the Court.**

### **Cases Referred to:**

1. Robert Mulenga and Registrar of Lands and Deeds and The Attorney General- SCZ Appeal No. 31 of 1997.
2. Liamad Choka v Ivor Chilufya (2002) -SCZ No of 2002.
3. Turnkey Properties v Lusaka West Development Company Limited, BSK Chiti (sued as Receiver) and Zambia State Insurance Corporation Ltd (1984) ZR 85. (S.C.)
4. Oscar Chinyanta v Alasia Building and Tap Zambia Limited- SCZ Appeal No. 158/2015.
5. Mohammed Ayaz Khan v 5 Squatters -CAZ Appeal No. 59 /2019.
6. Bernard Mukupa Chisanga v Kabwe Municipal Council -CAZ Appeal No. 105/2018.

### **Rules Referred to:**

1. The Rules of the Supreme Court of England 1965 (White Book 1999 Edition)

### **Texts referred to:**

1. Patrick Matibini, Zambia Civil Procedure: Commentaries and Cases: Volume 1, Lexis Nexis (2017)
2. Bryan A. Garner, The Black's Law Dictionary, 9<sup>th</sup> Edition, 2009.

## **1.0 INTRODUCTION**

- 1.1 This is an appeal against the Ruling of **G. Milimo-Salasini J**, delivered on 19<sup>th</sup> June 2023, relating to a preliminary issue raised by the Respondent pursuant to Order 14A as read together with Order 33/7 of the Rules of the Supreme Court of England 1999 edition. It is noted that the Applicant and Respondent in the lower court are now the Appellants and the Respondents in this court.
- 1.2 A scrutiny of the Record reveals a deep-rooted dispute of ownership of land, known as Stand No. F196a/F/4, Mungwi Road Lusaka West, in Lusaka Province, the subject of this action. We have noted that the dispute has spilled over two generations in the Appellants' and Respondent's families.
- 1.3 We have also noted that although the Respondent, Timothy Mulenga, appears to have been sued together with other persons unknown, the Respondent appears to only be representing himself.
- 1.4 We have also noted reference to several matters in Court over the same piece of land. However, what is instructive to put issues in context, is the very short Judgment of the Supreme Court of Zambia of 22 July 1999, rendered in the case of **Robert Mulenga and Registrar of Lands and Deeds and The Attorney General**<sup>1</sup>. A copy of this Judgment is exhibited and marked 'ECT B4' and appears on **page 36/37** of the Record of Appeal.

1.5 What was in contention before the lower Court, in the **Robert Mulenga**<sup>1</sup> case, was the decision of the Commissioner of Lands to re-demarcate the remaining extent of **Subdivision F of Farm Number 196a, Lusaka** into three portions. Subsequently, and on appeal to the Supreme Court, the decision of the Commissioner of lands was upheld as follows:

20.357 acres for the appellant (Robert Mulenga)

25.797 acres for one B. Brome

23.035 acres for a Mr. J. E. Kariuki

1.6 The Appellants' have averred that they are the successors in title to the late Jessie B. Brome and they have produced a Certificate of Title in respect of **Farm 196a/F/4** situate at Lusaka in extent of 10.5434 hectares, which is approximately 25.7 acres. A copy of the Certificate of Title, death certificate and the grant of Probate is seen marked '**ECTB2**' and '**ECTB 3**' collectively at **pages 30 to 35** of the Record of Appeal.

1.7 The Appellants have now commenced the action in *casu*, for summary possession of a portion of **Farm No. 196a/F/4** Lusaka.

## **2.0 BACKGROUND**

2.1 For the purposes of this section, we will address the Parties as they were in the Court below.

2.2 On 9<sup>th</sup> August 2022, the Applicants commenced an action by way of an Originating Summons, brought under **Order 113**<sup>1</sup> of the Rules of The Supreme Court of England on an application for summary possession of the property known as Stand No. F/196A/F/4 Mungwi Road Lusaka West, Lusaka against the Respondents as cited of Stand /No. F/196a/F/4 off Mungwi Road Lusaka West, Lusaka, seeking the following reliefs:

1. An order for eviction of the Respondents occupying the said Stand No. F/196a/F/4 off Mungwi Road Lusaka West, Lusaka
2. An Order for possession of Stand No. F/196a/F/4 off Mungwi Road Lusaka West Lusaka
3. An injunction restraining the Respondents, their servants or Agents or whomsoever from developing the said Stand No. F/196a/F/4 off Mungwi road Lusaka West, Lusaka
4. Order to demolish all structures
5. Any other relief the Court may deem fit
6. Costs

2.3 The Originating Summons was accompanied by a supporting Affidavit deposed by the 3 Applicants jointly. The Originating Summons, supporting Affidavit and list of authorities and skeleton arguments are seen on **pages 22 to 44** of the Record of Appeal. The opposing affidavit dated 15<sup>th</sup> September 2022 and the Affidavit in Reply dated 6<sup>th</sup> October 2022 are seen on **pages 46 to 57** and **58 to 84** of the Record of Appeal respectively.

- 2.4 The Respondent in opposing the action, appears to challenge the effect of the decision of the Supreme Court referred to in **paragraph 1.4 and 1.5** above. He also appears to place reliance on an Agreement purportedly executed by the Parties and referred to as “**TM3**” on **page 56/7** of the Record of Appeal, by which agreement, he avers that the dispute had been resolved between the Parties.
- 2.5 The Respondent further deposed that several parcels of land were sold to named third parties and averred that he lives on **F196a/F3** and not **F196a/F/4**, Lusaka West, Lusaka.
- 2.6 Subsequently and on 31<sup>st</sup> October 2022, the Respondents filed a Notice of Motion to raise a preliminary issue on a point of law pursuant to **Order 14A rule 1** and **Order 33 rule 7** as read together with **Order 113** of the Rules of the Supreme Court of England<sup>1</sup>. This Notice was accompanied by the supporting affidavit and skeleton arguments. These are seen on **pages 85 to 107** of the Record of Appeal.
- 2.7 The Applicants opposed the Notice of Motion and their affidavit in opposition and skeleton arguments dated 15<sup>th</sup> November 2022 are seen on **pages 108 to 149** of the Record of Appeal.
- 2.8 The skeleton arguments in reply dated 16<sup>th</sup> November 2022 filed by the Respondent are seen on **pages 150 to 157** of the Record of Appeal.
- 2.9 The Preliminary Issue (*P.I.*) was subsequently heard on 13<sup>th</sup> December 2022 culminating in the now assailed Ruling of 19<sup>th</sup> June 2023. The Ruling the subject of this appeal is seen on **pages 8 to 21** of the Record of Appeal.

### 3.0 DECISION OF THE COURT BELOW

3.1 The learned trial Judge considered the P.I. and heard the arguments for and against the Respondent's application. The learned judge considered the Parties' affidavits, oral and written arguments and the authorities cited as noted above.

3.2 The learned judge started by considering the Respondent's challenge to the Originating process filed by the Applicants. The Notice of Motion to raise the P.I. was couched for the determination of a single question as follows:

*"whether the summary procedure under order 113 is suitable for a party with a genuine claim of right?"*

3.3 The Lower court started by considering Order 113 of the Rules of the Supreme Court (1999) Edition (White Book). The Court took note of the Respondent's argument that he is not a squatter on property known as F/196a/F/4 as he resides on property known as F/196a/F/3.

3.4 According to the Respondent, the Supreme Court judgment of 1999 SCZ Appeal No 31 of 1997 upheld the Ruling of the High Court of 3<sup>rd</sup> January 1995 which granted the Respondent's late father Robert Mulenga, a larger portion of the re-entered farm is not disputed by the Appellant and he did not challenge the re-entry. On re-entry the farm reverted to the state and the state was perfectly entitled to deal with the farm in the manner it did and that there was no *mala fides* in the way the state subdivided the farm.

3.5 The learned judge took the view that it is clear that the Respondent in his affidavit in support of the preliminary issue, misapprehended the decision which upheld the High Court Ruling. The lower court also noted that the 1<sup>st</sup> Appellant demonstrated lack of comprehension of the Supreme Court judgment when she entered into an agreement with the Respondent in 2011.

3.6 The learned judge stated that it is trite that litigation must have finality and placed reliance on learned author **Matibini P, SC** in his book titled **Zambian Civil Procedure Commentary and Cases Volume 1<sup>1</sup>**, at page 1135 states;

*“As a matter of general principle, once a judgment order has been made, the court is functus officio and no longer had jurisdiction over the matter in controversy.”*

3.7 The Lower court noted that the Respondent raised the preliminary issue that the summary procedure by the applicant is incompetent before the learned judge as the court had no jurisdiction and the case of **Liamad Choka v Ivor Chilufya<sup>2</sup>** was cited.

3.8 The lower court took the view that it is not in dispute that the Respondent is a title holder of Farm F/196a/3. What was in dispute for determination was whether the Applicants application for summary possession is competent before the court.

3.9 The lower court proceeded to invoke the doctrine of stare decisis and referred to **Black’s Law Dictionary<sup>2</sup>** which defined it at page 1443 as:

*“The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.”*

- 3.10 In arriving at its conclusion, the lower court took the view that the matter before the court was previously litigated upon with the same issues by the Supreme Court and held that the court is not competent to hear the matter again.
- 3.11 Ultimately, the lower court found that the application by the Respondent has merit and the Applicant’s action for summary possession was dismissed with costs to the Respondent. Leave to appeal was granted.

#### **4.0 THE APPEAL**

- 4.1 Being dissatisfied with the Ruling of the lower Court, the Appellants filed a Notice of Appeal and Memorandum of Appeal on 17<sup>th</sup> July 2023 advancing four (4) grounds of appeal:
- 1. That the Lower Court misdirected itself in law and fact when it ruled that it had no jurisdiction to determine the matter on the basis that the Supreme Court had previously litigated upon the issues relating to this matter.*
  - 2. That the Lower Court misdirected itself in law and fact in holding that the application for summary possession was incompetent on the basis of stare decisis.*

3. *The Lower Court erred in law and fact when it failed to determine the preliminary issue raised instead it delved into the merits of the main matter.*
4. *That the Lower Court misdirected itself in law and fact when it dismissed the matter and awarded the defendant costs.*

## **5.0 APPELLANTS' ARGUMENTS IN SUPPORT OF THE APPEAL**

- 5.1 We have duly considered and appreciated the Appellant's Heads of Argument filed on 14<sup>th</sup> September 2023 which we will not recast here, save for emphasis as necessary.
- 5.2 We however bemoan the lack of pagination of the said Heads of Argument and note that this is becoming a disturbing trend and advise Counsel to take note of our sentiments.

## **6.0 RESPONDENT'S HEAD OF ARGUMENTS**

- 6.1 At the hearing, Counsel Njungu, standing in for Counsel Tresford Chali, applied for leave to file the Respondent's heads of argument out of time. The viva voce application was met with great opposition from the Appellant who argued that no reasons had been advanced for the Respondent's failure to file its heads of argument coupled with the fact that service of the Appellant's Record of Appeal and Heads of Argument had been effected on 3<sup>rd</sup> October 2023. Counsel also referred us to several decisions of the

Supreme Court on the need to follow rules of court for the proper administration of justice.

6.2 We dismissed the ill-fated application and reminded counsel that we will not take lightly conduct of counsel, who approach the court on flimsy ground and without adherence to established rules of procedure.

## **7.0 THE HEARING**

7.1 At the hearing, both Counsel Kankondo and Kangwa, placed reliance on their filed arguments which they augmented with brief oral submissions.

## **8.0 OUR DECISION**

8.1 We have carefully considered the grounds of appeal reproduced in *paragraph 4* above, the impugned Ruling, and the arguments and submissions of the Parties. We have narrated in significant detail the background in this matter as it has a historical basis which needs to be appreciated before one can jump into the grounds of appeal as noted in paragraph 4.

8.2 For reasons that will become clear, we have started our analysis with **ground 3** of the appeal. The Appellants have submitted that the lower court erred in law and fact, when it failed to determine the preliminary issue raised by the Respondent and by delving instead into the merits of the main matter.

8.3 The Notice of Motion at **page 85** of the Record of Appeal identifies one preliminary issue for determination of the following question:

*“1. Whether the summary procedure under Order 113 is suitable for a party with a genuine claim of right?”*

8.4 In the affidavit supporting the notice of motion, the Respondent makes several averments, not least of which he states that he is not a squatter on the Appellants’ land and that he resides on **F196a/F/3** and not on **F196a/F/4**. He proceeds to make averments of his interpretation of the Judgment of the Supreme Court and the Agreement that was purported to have been entered into with the Appellants. He also deposes to parcels of land that were sold to third parties and prays for the Court to make a determination on the preliminary issue raised; namely, whether the summary procedure under Order 113<sup>1</sup> is suitable for a party with a genuine claim of right.

8.5 The Respondent also exhibited several exhibits in support of his Notice of Motion which essentially was a challenge to the summary procedure under Order 113<sup>1</sup> invoked by the Appellants.

8.6 In our considered opinion, a detailed discourse on the provisions of **Order 113** of the Rules of the Supreme Court of England<sup>1</sup> is not necessary to determine the issue raised in this ground of the appeal. In its skeleton arguments in support, tendered before the lower court, the Respondent has on **page 107** has submitted as follows:

*“My Lady, the summary procedure under Order 113 can only be suitable for squatters and others without any genuine claim of right or who have since transformed into squatters.*

*My Lady, as the Affidavit in support clearly shows, that there is a real dispute between the Applicants and the Respondent. The parties have a long history from as far back as 1987. The applicant can not therefore use summary possession as a mode of commencement.*

*We submit that as the Supreme Court held above, the matter is misconceived, incompetent and a nullity.”*

- 8.7 What transpired in the lower court, was akin to the lower court attempting to pronounce itself on the reliefs claimed in the main action in *casu*, as opposed to restricting itself to the issue of whether the dispute was appropriate by way of Order 113 summary proceedings, in the face of deep historical dispute between the Parties. The lower Court, in analyzing the preliminary issue on mode of commencement, went into depths of analyzing facts and issues, based on contested affidavit evidence alone. By way of example, we refer to the findings of the lower court made at **page 18** of the Record of Appeal, where the lower court stated as follows:

*“It is clear to me that the Respondent in his affidavit in support of the preliminary issue, misapprehended the decision which upheld the High Court Ruling. Regrettably the 1<sup>st</sup> Applicant also demonstrated lack of comprehension of the Supreme Court Judgment when she entered into an agreement with the Respondent in 2011”.*

- 8.8 It is settled, and authorities abound on the principle that a court should not make comments which may have the effect of pre-empting the decision on issues which are best resolved and decided on the merits at the trial. A case in point is the decision in the case of **Turnkey Properties v Lusaka West Development Company Limited, BSK Chiti (sued as Receiver) and Zambia State Insurance Corporation Ltd<sup>3</sup>**.
- 8.9 Having noted the deep rooted and historical dispute between the Parties, the lower court should have restricted itself to answering the question as phrased, namely whether summary proceedings under **Order 113** of the **Rules of the Supreme Court<sup>1</sup>** was appropriate in the circumstances. To the contrary, the lower court went into all the issues between the parties and made findings and determinations, not asked of it. It went into issues of *res judicata* by which it determined that the matter had already been determined by the Supreme Court when parties had not had a chance to make any representations on that finding.
- 8.10 It is also noted that the lower court made findings on the Respondent being a title holder of Farm 196a/F/3 based purely on averments in the affidavits. We will leave this issue here, the only emphasis being made, is the point that all these determinations were not appropriate in determining the preliminary issue before it.
- 8.11 In our considered opinion, the lower court had the option of ordering the matter be deemed to have been commenced by Writ, due to the vast differences and contentious facts that were noted from the Affidavits filed

by the Parties. **Order 28 rule 8** of the **Rules of the Supreme Court**<sup>1</sup>, provides as follows:

*“Where in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.”*

8.12 We concur with the submission of the Appellants’ in placing reliance on the decision of the Supreme Court of Zambia in the case of **Oscar Chinyanta v Alasia Building and Tap Zambia Limited**<sup>4</sup> in discussing the powers of the court under Order 113, when the Supreme Court stated as follows:

*“The court has no discretion to prevent the procedure being used in cases that fell within the Order 113.....if the court finds there is some issue or question that requires to be tried or that for some reason there ought to be trial it may give directions as to further conduct of the proceedings or may order the proceedings to continue as if begun by writ.”*

8.13 We were also referred to two decisions rendered by this Court, one in the case of **Mohammed Ayaz Khan v 5 Squatters**<sup>5</sup> where we stated as follows:

*“the court below having found that there were contentious issues should have ordered that the matter be deemed to have begun by writ of summons in line with Order 28 of the Rules of the Supreme Court of England.”*

- 8.14 The second case was **Bernard Mukupa Chisanga v Kabwe Municipal Council**<sup>6</sup> where we held that the learned judge ought not to have delved into issues of ownership based on affidavit evidence alone and at that stage of the proceedings before trial, as any evidence before him could only be tested by cross examination of witnesses that were likely to be called at trial.
- 8.15 We are therefore of the considered view that the lower court misdirected itself and fell into grave error by proceeding to make findings in the manner it did and for extraneous considerations on heavily contested issues to do with res judicata, stare decisis and ultimately dismissing the matter. These, were not even within the confines of the question placed before the lower court as a preliminary issue. Simply put, the lower court proceeded in error and got tangled in its own error leading to determinations and findings that cannot be sustained.
- 8.16 As stated earlier, we will not pronounce ourselves on the other grounds of appeal, as those grounds necessarily involve us making determinations on issues that have not yet been tested at trial.

**9.0 CONCLUSION**

- 9.1 The net effect of our determination is that we find favour in the appeal for the afore-stated reasons. We set aside the Ruling of the lower court in its entirety, including the order for costs.
- 9.2 In its place, we order that the matter be remitted back to the High Court for determination before a different Judge of the General List.
- 9.3 We also order that the matter be deemed to have been commenced by Writ of Summons and for the lower court to give directions as appropriate.
- 9.4 Costs of the appeal shall abide the outcome in the court below.



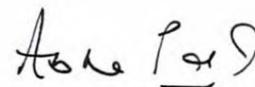
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**M. J. SIAVWAPA  
JUDGE PRESIDENT**



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**F.M. CHISHIMBA  
COURT OF APPEAL JUDGE**



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**A.N. PATEL S.C.  
COURT OF APPEAL JUDGE**