IN THE COURT OF APPEAL FOR ZAMBIA **Appeal No. 158/2022**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER OF: **SECTION 81 AND 82 OF THE LANDS AND DEEDS Act CHAPTER 185 OF THE LAWS OF ZAMBIA**

AND

IN THE MATTER OF: **CAVEATS PLACED ON FARM 1872, 1873 AND 1088 KABWE**

BETWEEN:

MORGAN NAIK **APPELLANT**

AND

AMADEUS INTERNATIONAL LIMITED **RESPONDENT**

Coram: ***Chashi, Sichinga and Sharpe-Phiri, JJA***

on 27th March, 2024 and 10th April, 2024

For the Appellant: *In person*

For the Respondent: *Mr. M. Nkunika and Ms. N. Mwila of Messrs Simeza Sangwa and Associates*

JUDGMENT

Sichinga JA delivered the judgment of the Court.

Legislation referred to:

1. *The Court of Appeal Rules, Statutory Instrument No. 65 of 2016*

1.0 Introduction

1.1 This is an appeal against the ruling of the High Court per Mikalile J, delivered on 13th May, 2022, in which she found against the 1st respondent (the appellant now) on his application to vary the court's order of 8th November, 2021. In the said order, Mikalile J, declined to grant the appellant's application for an adjournment and ordered him to file further submissions on the originating summons for removal of caveats and the Judge set a date for delivery of judgment.

2.0 Background and plaintiff's claim

2.1 The brief background as deciphered from the record of appeal is that on 29th January, 2018, the respondent company, Amadeus International Limited (the applicant in the court below) commenced an action by way of originating summons for removal of caveats placed on Farms 872, 1873 and 1088 Kabwe, by Morgan Naik following his removal as a director of the respondent company. The matter was under cause no. 2018/HP/0179. The 2nd respondent in the action in the court below was the Registrar of Lands and Deeds.

2.2 On 16th February, 2018, the applicant applied to join the Attorney-General to the suit as the 3rd respondent.

2.3 On 16th April, 2018, the applicant (Amadeus) applied for an order to strike out the 1st respondent's affidavit in opposition. In a ruling dated 13th August, 2018, Mr. Justice Chitabo, SC granted the application and ordered the said affidavit to be struck out for irregularity. The learned Judge further scheduled the hearing of the main matter for the removal of the caveat to be heard on 4th October, 2018, at 09:15 hours.

2.4 Meanwhile, by summons dated 14th June, 2018 the 1st respondent (Morgan Naik) applied for leave to file a counterclaim and/or for leave to amend his affidavit in opposition, and to join a party to the proceedings, and to adjourn the matter into open court.

2.5 On 27th September, 2018, a couple of days before the main hearing, the 1st respondent (Morgan Naik) applied, *ex-parte* for an order to stay proceedings pending the outcome of an appeal against the decision of Chitabo, SC, J of 13th August , 2018. Chibabo, SC, J heard the application *inter-parte* and handed down his ruling on 9th November, 2018. He stayed the proceedings pending the determination of the appeal in the Court of Appeal.

2.6 On 9th January, 2020, the applicant (Amadeus) applied to have the order made on 9th November, 2018 discharged since the 1st respondent (Morgan Naik) had withdrawn his appeal to the Court of Appeal.

2.7 On 2nd September, 2020, the 1st respondent (Morgan Naik) filed his affidavit in opposition to the main application for the removal of the caveats.

2.8 On 14th September, 2020, the applicant (Amadeus) filed its affidavit in reply to the 1st respondent's affidavit in opposition dated 2nd September, 2020.

2.9 On 25th November, 2021, the 1st respondent (Morgan Naik) filed summons to vary the order made on 8th November, 2021 by Mikalile J. The applicant (Amadeus) opposed the application by way of affidavit dated 26th January, 2022. On 7th February, 2022, the 1st respondent (Morgan Naik) filed his affidavit in reply to the affidavit in opposition to the application to vary the order of 8th November, 2021.

2.10 On 30th May, 2022, the 1st respondent (Morgan Naik) applied for an order to stay proceedings pending determination of an appeal against the decision of Mikalile J dated 13th May, 2022, which is the subject of this appeal.

3.0 Decision of High Court

3.1 In her Ruling subject of this appeal, Mikalile J found that Mr. Naik's application of 14th June, 2018 for an order to file counterclaim, leave to amend affidavit in opposition, to join a party to the proceedings and to adjourn the matter into open court was still pending. She held that Mr. Naik was entitled to be heard. The learned Judge proceeded to deal with the

application on the record. She found that the amendments Mr. Naik had sought to include in his affidavit in opposition had been dealt with by her sister, Chibbabbuka J, under cause no. 2019/HP/0356. In the latter matter, Chibbabbuka J, held that Mr. Naik's claims were statute barred. Mikalile J held that those claims could not be raised again before her as they were *res judicata.*

3.2 The learned Judge accordingly dismissed the application.

4.0 The appeal

4.1 Aggrieved by the decision of the lower court, the respondent set in motion this appeal, invoking nine grounds of appeal as follows:

Ground one

1.1 The Court below erred in law and fact when she proceeded to deal with the Appellant's pending three-in-one interlocutory application of 14th June, 2018 without a proper and specific hearing scheduled for it, even when the Appellant's interlocutory application filed on 25th November, 2021 gave a clear intimation to the Court below of his wish to be heard on the said application and that it be determined on the merits before the main matter is determined.

1.2 *The Court below further erred when she took the view that what the Appellant was asking the Court to do in essence; through his aforesaid further interlocutory application filed on 25t November, 2021; to vary the Court's order made on 8th November, 2021; having set 14th January, 2022 as the date for delivery of the judgment on the main matter, was merely to stay the delivery of*

that judgment pending the hearing of the Appellant's aforesaid pending three-in-one interlocutory application filed on 14th June, 2018.

1.3 *The Court below further erred, when she proceeded, without a proper hearing, to deal with only one aspect of the Appellant's aforesaid three-in-one application, namely leave to file his intended counter-claims against the Respondent and its deponent, while opting to leave out the other two aspects of it, namely leave to join the Respondent's deponent to the proceedings and to adjourn the matter into open Court.*

Ground two

2.1 *The Court below erred in law and fact when she ruled against the Appellant to the effect that he had not conducted himself well in this matter on account that, his counsel, Mr. Levi C. Banda of Messrs Iven Mulenga and Company ought to have raised issue with the Court on 26th August, 2021 when this matter came up before her for the first time to the effect that the Appellant's interlocutory application of 14th June, 2018 for leave to file counter claim or for leave to amend affidavit in opposition, to join a party to the proceedings and to adjourn the matter into open Court, was still pending hearing and determination, and that he was not even in attendance, when the Court record clearly shows that the Appellant had not even engaged the said advocate as his co-advocate as at that date.*

2.2 *The Court further erred when she ruled that the Appellant's said co-advocate had another opportunity before the Court on 8th November, 2021, to raise an objection to that effect, but did not, when the Court record clearly shows that a search was only conducted on it by the Appellant's said Co-advocate on 22nd November, 2021 after the said hearing, which search revealed that the Appellant's aforesaid*

application of 14th June, 2018 was still pending hearing and determination.

Ground three

The court below erred in law and fact when she held that what the Appellant is asking the court to do in essence is to stay the delivery of judgment in the main matter pending hearing of his aforesaid hitherto pending three-in-one interlocutory application filed on 14th June, 2018, contrary to the evidence on record, which she failed to consider, to the effect that the court determines the Appellant's said application before it the main matter when in that application the Appellant has raised serious issues stemming from the same subject matter or transaction as herein, the basis upon which the Appellant's caveats herein were registered, that require to be settled by this Court.

Ground four

The Court below erred in law and fact when she held that having found that the claims under the proposed counter claims of the Appellant's aforesaid hitherto pending three-in-one interlocutory application filed on 14th June, 2018 and the claims made under the subsequent action commenced by the Appellant under Cause No. 2019/HP/0356 are the same, it becomes clear that staying delivery of judgment in order to hear and determine the Appellant's said application would be a futile exercise, when claims Nos. (v) and (ix) against the Respondent as well as claims Nos. (i)-(vii) against the Respondent's deponent under the Appellant's said pending application, wherein they are the only two parties, are not even among the said claims in the action under cause No. 2019/HP/0356, wherein there are four other different parties in addition to these two.

Ground five

The Court below erred in law and fact when she held that what the Appellant hopes to achieve through his aforesaid hitherto pending three-in-one interlocutory application filed on 14th June, 2018 has already been ruled upon by a Court of competent jurisdiction therefore res judicata, namely the ruling of Judge Chibbabbuka dated 27th September, 2019 having dismissed the claims made by him under the aforesaid cause No. 2019/HP/0356, on grounds that they were allegedly statute barred; therefore; the Appellant's proposed claims under the aforesaid pending three-in-one application of 14th June, 2018 are also allegedly statute barred, contrary to the evidence on record as well as the Supreme Court and Court of Appeal authorities cited by the Appellant in relation to the inapplicability of the limitation act to the aforesaid claims, which she failed to consider, to the effect that the Appellant's intended claims against the Respondent and its deponent in the Appellant's intended counter claims, in his said pending three-in-one interlocutory application of 14" June, 2018, arise from the preliminary findings of fraud made by the Patent and Companies Registration Agency (PACRA), which critical findings are central to the matter herein and that they were not in existence at the time when the Appellant commenced litigation under Cause No. 1999/HP/647, which action the respondent is relying on, and also that the said preliminary findings were communicated to the Appellant on 2nd March, 2017, when time started running, by which date, everything that happened in order for the Appellant to bring any particular claims had happened, and, that as such, neither the Appellant's said intended claims in the intended counter-claims nor his claims under Cause No. 2019/HP/0356, which were dismissed allegedly on account of being statute barred, are statute barred, as the date of accrual of the said claims is 2nd March, 2017 when the time started running, by which date, everything that happened in order for the appellant to bring any particular claims had happened, and that as such, neither the Appellant's said intended claims in the intended counter-claims nor his claims under Cause

No. 2019/HP/0356, which were dismissed allegedly on account of being statute barred, are statute barred, as the date of accrual of the said claims is 2nd March, 2017.

Ground six

The Court below erred in law and fact when she held that it is settled law as can be seen from the authorities" cited above that once an issue has been distinctly determined; it cannot be raised again in the same or subsequent proceedings and that it becomes res judicata and cannot be raised again before any court of law, contrary to the evidence on record, quoted in the above ground; as well as the position taken by the Supreme Court in respect of the issue of res judicata in the two cases cited by the Appellant; in terms of their applicability to his aforesaid intended claims in his intended counter-claims against the Respondent and its deponent of his pending three-in-one application of 14th June, 2018, on grounds that the said claims have hitherto never been adjudicated upon on the merits by any court of law: therefore; they are not res judicata, which the court below failed to consider altogether.

Ground seven

The Court below erred in law and fact when she held that if, for arguments sake, the Appellant is successful on appeal to the apex Court under the aforesaid cause No. 2019/HP/0356, she is of the view that that decision will have no bearing on the case in casu, contrary to the evidence on record, which she failed to consider, to the effect that the Appellant's claims thereunder also stem from the same subject matter or transaction as herein, the basis upon which his caveats herein were registered.

Ground eight

The Court erred in law and fact when she totally agreed with the Respondent that the Appellants attempt to revive his aforesaid hitherto pending three-in-one interlocutory application of 14th June, 2018 is a blatant

abuse of the process of Court, and that in fact the Appellant is very much aware of this fact and it comes as no surprise that the Appellant went ahead and filed his Affidavit in Opposition to the Originating Summons after the ruling of Judge Chibbabbuka as opposed to insisting on his aforesaid application of 14th June, 2018 being heard first, contrary to the evidence on record.

Ground nine

The Court below erred in law and fact when she failed to consider that there are highly contentious factual issues, of a fraudulent nature, raised in the Appellant's Affidavit in Opposition to the Originating summons filed on 2nd September, 2020 as well as in the Respondent's Affidavit in Reply to it filed on 14th September, 2020, attributable to the Respondent's deponent, in relation to the Appellant's beneficial interest in the caveated properties by virtue of his fully paid up 25% shareholding in the Respondent, which issues require evidence to be properly adduced and tested through a full trial.

4.0 Our decision on appeal

4.1 We have carefully considered the evidence on record, the impugned ruling and the submissions by the appellant which are on record. We will not regurgitate the heads of argument for reasons which shall soon become plain.

4.2 At the hearing of the appeal, Mr. Nkunika, learned counsel for the respondent, reminded us of the order of the single Judge (Sharpe-Phiri, JA), 14th March, 2024 by which she referred the appellant's application for consolidation of three appeals to the

full Court for consideration. Before doing so we shall consider the propriety of the appeal before us.

4.3 The memorandum of appeal states that the appellant has raised nine grounds of appeal. They are in fact twelve grounds of appeal which are repetitive, narrative and argumentative in nature. ***Order 10 rule 9 (2) of the Court of Appeal Rules (CAR)*** provides as follows:

> ***"A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of the objection to the judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively."***

4.4 We have carefully considered the grounds of appeal as presented. ***Order 10 Rule 9 (2) of the CAR*** has been breached by the appellant. It is a mandatory provision which ought to be strictly adhered to.

4.5 The grounds in the memorandum of appeal are none compliant with the rules of the Court. The appeal in its format is therefore incompetent and cannot be sustained. It is accordingly dismissed with costs to the respondent to be taxed in default of agreement.

4.6 Turning to the application for consolidation referred to the full Court by a single Judge, the same seeks consolidation of Appeal No. 142/2023 (CAZ/08/129/2023), Appeal No. 263/2023 (CAZ/08/309/2023) and Appeal No.158/2023 (CAZ/08/88/2022). The latter appeal having been dismissed cannot be consolidated to the other appeals.

4.7 Further, Appeal No. 142/2023 seeks to appeal against the ruling of the lower court refusing to order a stay of proceedings under Cause No. 2018/HP/0179. The proceedings under Cause No. 2018/HP/0179 have since come to an end and a final decision has since been handed down by the lower court dated 9th June, 2023. We are of the view that we have no jurisdiction to entertain the said application as there are no proceedings in the lower court to stay and a final decision has since been rendered.

4.8 Appeal No. 263/2023 (CAZ/08/309/2023) is an appeal against the final decision of the court below in this matter. We shall make no further comment on it as it shall be heard on its own merits by the Court in due course.

4.9 We have to caution the appellant that even though he chooses to act *pro se* (a person who represents oneself), he cannot escape the mandatory provisions of the rules of court which all litigants must adhere to for the orderly administration of justice.

5.0 Conclusion

5.1 In the net result, both the appeal and the application for consolidation have no merit. They are dismissed with costs to the respondent to be taxed in default of agreement.

J. Chashi
COURT OF APPEAL JUDGE

D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE

N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE