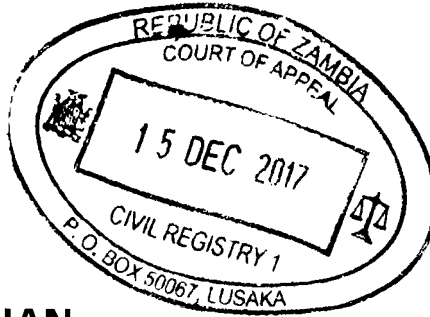


IN THE COURT OF APPEAL FOR ZAMBIA APPEAL No. 59/2017
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

MOHAMMED AYAZ KHAN

APPELLANT

(Suing as Attorney for and on behalf of Pakizah Khan)

AND

5 SQUATTERS

RESPONDENTS

Coram: Mchenga DJP, Mulongoti, Sichinga JJA

On 8th September, 2017 and 15th December, 2017

For the Appellant: Mr. B. Gondwe of Buta Gondwe & Associates

For the Respondents: Mr. J. Phiri of Legal Aid Board

J U D G M E N T

MULONGOTI, JA, delivered the judgment of the court

Cases referred to:

- 1. Chikuta v Chipata Rural Council (1974) ZR 241 (SC)**
- 2. Ngula v Administrator General and Official Receiver
 (Inonge Sitali) SCZ Appeal No. 132/2010**

3. **Robert Lawrence Roy v Chitakata Ranching Limited (1980) ZR 198**
4. **Hongling Xing Xing Building Company Limited v Zamcapital Enterprises Limited (ForNational Electronics Retail Limited) 2010/HP/439 (H.C)**
5. **Filemart Ltd v Avery [1989] E.G 921**
6. **Henderson v Law (1984) 17 H.L.R 237, C.A**
7. **In Eyles v Wells [1991]C.A transcript 376**
8. **Greater London Council v Jenkins (1995) 1 ALL E.R 354**
9. **Liamond Choka v Ivor Chilufya (2002) ZR 33 (SC)**
10. **Vangelatos v Metro Investments Limited (2013) Vol. 3 ZR 232 SC**

Legislation and works referred to:

1. **Rules of the Supreme Court, 1999 edition**
2. **Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia**
3. **Lands Act, Chapter 184 of the Laws of Zambia**

This is an appeal against the Judgment and Ruling of the High Court dated 29th July, 2016 and 27th December, 2016 respectively. The appellant sued the respondents in the High Court, seeking *inter alia*, an order that he was the rightful and legal owner of the property known as Farm No. F/11552 Mumbwa and that he be given vacant possession of the farm pursuant to Order 113/8/11 of the Rules of The Supreme Court (RSC) 1999 edition. The action was commenced by originating summons supported by an affidavit sworn by the appellant. He

deposed, *inter alia*, that in December, 2012 he and his wife Pakizah Khan were given land by Chief Shakumbila of Mumbwa after being recommended by headman Lupiya per exhibit 'MAK1' of the said affidavit.

Later, they applied to the Mumbwa District Council for conversion of the land from customary to statutory leasehold. Eventually, the land was offered to his wife and a certificate of title was issued in her name in respect of the property No. F/11552 situate in Mumbwa. That after he moved on site to commence works, he found squatters had trespassed and some had put up structures hence the decision to sue them.

The squatters, who were the respondents, filed an affidavit in opposition deposed by Cephas Mwembela. He stated that he was one of the respondents and was swearing the affidavit on his behalf and on behalf of the other respondents as occupiers of Mwembela village. He deposed that the property the appellant referred to as F/11552 is not in Mumbwa district but in Mwembela village in Chilanga district under Chieftainess Nkomeshya Mukamambo II, per exhibit 'CM1' a letter from the chieftainess to that effect. The Provincial Planner for Lusaka Province wrote to the Chilanga District Council by letter (exhibit CM3) dated 29th April, 2016 confirming that Farm 11552 was located in Chilanga with a small portion in Shibuyunji. He

further deposed that he conducted a search at Ministry of Lands (exhibit CM4) and obtained a map (exhibit CM5) which showed as marked in red that the Farm 11552 was in Chilanga. Therefore, as advised by their counsel, Chief Shakumbila had no authority to consent to the conversion of the land in question from customary tenure to leasehold since it is not situated in his area.

After analyzing the affidavit evidence and submissions by both counsel, the trial Judge opined that the dispute was not about who legally owned the piece of land but whether the land was properly given to the applicant by the traditional leadership.

The Judge found that documentary evidence exhibited by the respondents clearly placed a larger portion of the land in Chilanga. Thus, the Mumbwa District Council had no jurisdiction to deal with it. The Judge noted that if the allocation of land overlapping into two different chiefdoms was not done in ignorance by the traditional leaders, then it was a fraud for which a certificate of title could be cancelled under the Lands and Deeds Registry Act. He reasoned that since there was no evidence of fraud, he would discount it.

Accordingly, the Judge found that the only possibility was of mistake by the land administering authorities to which he ascribed three reasons. First, that it would appear the leadership in Chief Shakumbila's chiefdom are not conversant with the extent of their chiefdom. Second, that Mumbwa District Council acted erroneously in authorizing the conversion of tenure of the entire piece of land to presidential leasehold in the applicant's name without verifying the boundaries. Finally, the commissioner of lands also failed to verify the boundaries.

After considering the provisions of sections 33 (c) and 34(1) (d) of the Lands and Deeds Registry Act, the Judge reasoned that since the respondents had established a claim on the larger portion of the land, the traditional authority in Chief Shakumbila's area had no authority to grant the land to the applicant.

The Court below also considered section 8 (2) of the Lands Act which provides that the conversion of rights from customary tenure to a leasehold tenure shall have effect after approval of the chief and local authorities. The Court went on to hold that since Chieftainess Nkomeshya Mukamabo II did not approve the conversion and yet the larger part of the land was in her area, the conversion of the land in question; is void.

The Court then ordered for cancellation of the appellant's certificate of title.

Later, the appellant applied for review of the Judgment on the basis that he had subsequently come across communication from the Surveyor General including copies of the relevant map and a letter from the Office of the President, which showed that there was no common boundary between Chieftainess Nkomeshya Mukamambo II and Chief Shakumbila, as in between them there was trust land which is Government land. The documents were exhibited as MAK1, MAK2 and MAK3 of the said affidavit. The appellant disclosed that the information was given to him by Chief Shakumbila.

There was a further affidavit in support of the application for review, deposed by Charles Shamilimo, a headman in Chief Shakumbila's village. He deposed that he had been headman since 1958 and was conversant with the delineations of the land to various subjects. He did not know the respondents to be subjects of Chief Shakumbila although their claim as presented would make them his subjects. He further deposed that the respondents appeared to be claiming through Hopeless Mwembela who was a subject of Shamilimo village of Chief Shakumbila and was recorded as such in the record book. He exhibited an extract from the record book (CS1), in which the

subjects are entered and that the National Registration Cards (whose copies are in the book) were issued in Mumbwa district. Therefore, the respondents were not being truthful when they contended that they are subjects of Chieftainess Nkomeshya of Chilanga district.

The respondents opposed the application on the bases that it should have been made within 14 days of the Judgment which had elapsed. The appellant had not even advanced valid reason for the application which was in fact tantamount to requesting the court to litigate on a matter which had already been adjudicated upon.

The Court did not address the respondents' grounds for opposing the application for review. It considered the fresh evidence submitted by the appellant especially the letter from the Surveyor General to the Lusaka Province Permanent Secretary, to the effect that the two chiefdoms do not share a common boundary. He found that since it was apparent that there was no common boundary between the two chiefdoms, Chief Shakumbila did not possess authority to give out trust land which is not in his chiefdom.

He surmised that the new evidence, even if it had been presented at the hearing of the originating summons, would not have affected the outcome. He then dismissed the application with costs.

Dissatisfied with Judgment and Ruling, the appellant has appealed on the following grounds:

- 1. The Court below misdirected itself by considering other matters and reliefs instead of restricting itself to answering the question whether the appellant had allowed the squatters to occupy his farm number F/11552, Mumbwa;**
- 2. The Court below also erred to cancel the appellant's certificate of title to the farm as it had no jurisdiction to do so under the order for summary possession;**
- 3. The Court below further erred as the initial application having been made pursuant to Order 113/8/11 of the White Book, the Court should have if it wanted to inquire into other matters first have made the necessary orders and proceeded to hear the matter in open court and not in chambers;**
- 4. The decisions of the Court below violated the appellant's rights under the Lands and Deeds Registry Act and**

- 5. Upon review of its own decision of 27th December, 2016, the Court below overlooked the Surveyor General's letter which was material and wrongly held that there was a common boundary between Chieftainess Nkomeshya and Chief Shakumbila of Mumbwa.**

The appellant's counsel also filed heads of argument to support the grounds of appeal. On the question of jurisdiction in grounds one and two it is argued that summary procedure under Order 113 is merely intended for disposal of the question whether an owner of land has allowed or given licence to persons occupying his land. It is contended that the learned authors of the White Book (RSC), make it clear in the commentary to Order 113 that it was introduced for removal of squatters by way of summary procedure. It was therefore, wrong for the Court below to have proceeded to hear the matter as it did and to order cancellation of the certificate of title.

It is the further submission of counsel that the Court also erred when it proceeded to consider the issue of boundaries between Chieftainess Nkomeshya and Chief Shakumbila and whether the portion of the land Farm F/11552 fell under Chief Shakumbila or Chieftainess Nkomeshya as these issues were concerned

with other claims other than possession of the farm the appellant had sued for.

According to counsel, the Court could have dealt with the other issues if it had opted to widen the scope of its enquiry pursuant to Order 28 of the White Book. Then it would have issued directions and put the parties on notice on the issues the Court would determine. And on which issues they would have addressed the Court.

However, the Court below did not do so and therefore lacked jurisdiction to deal with the other issues other than the issue of possession. Learned counsel relied on the Supreme Court decision in **Chikuta v Chipata Rural Council**¹ that:

“if a Court has no jurisdiction it cannot grant any orders even if it is inclined to do so and all such orders if granted will be a nullity.”

Thus, having proceeded without jurisdiction, the Court of Appeal should find that the Judgment and Ruling of the Court below were a nullity and should accordingly be set aside.

As to ground three, it is submitted that the Court below should have made the necessary order and proceeded to hear the case

in open court as it was not possible to determine it in chambers. The assertions made by the parties on boundaries needed a full enquiry which would have only been possible at trial. Relying on the case of **Ngula v Administrator General and Official Receiver (Inonge Sitali)**² where the Supreme Court held that:

“the mode of commencement for any action is provided for in the relevant statute and rules, it does not depend on the reliefs sought. It is clear that contentious issues require exhaustive evidence, evidence which can be examined and evaluated by the parties as well as the trial Court, such evidence would be the basis for findings of fact upon which the verdict may be based. Clearly, the claims enumerated by the respondent cannot be sufficiently dealt with by affidavit evidence alone. For general damages to be assessed, one requires proof by way of evidence, both oral and, where available, documentary. It was pointed out in the case of New Plast Industries that evidence can be written or oral but it has to be tested and evaluated, clearly, that is only possible in an open trial.”

Counsel maintained that the various assertions made by the parties needed to have been tested and specifically proved at a full enquiry, which could only have been possible at trial. Furthermore, there was need to establish the boundaries and whether the squatters were in Chief Shakumbila or Chieftainess Nkomeshya’s area. The evidence of the Surveyor General was

also key as he is the authority and custodian on boundaries in Zambia as provided in section 4 (2) (a) to (f) of the Lands Survey Act.

Quoting Order 28 Rules 4 and 8 of the White Book to the effect that the Court has a duty to ensure that there is just, expeditious and economic disposal of a matter and that it needs to determine, if there should be cross examination on matters in contention, counsel submits that the appellant's case was not justly disposed of. There should have been a trial and cross examination to determine the matters in dispute.

In relation to grounds four and five, learned counsel contends that the appellant's rights have been violated in that section 34 of the Lands and Deeds Registry Act does not recognize adverse possession. In order to cancel title there has to be evidence of fraud in its acquisition, prior interest or misdescription. None of these factors existed to warrant cancellation of the appellant's certificate of title.

It is the further submission of counsel that the decision was made without consideration of relevant evidence. Counsel referred us to the case of **Robert Lawrence Roy v Chitakata Ranching Limited**³ which held that:

“setting aside a judgment on fresh evidence will lie on the ground of discovery of fresh evidence which would have had material effect upon the decision of the Court and has been discovered since the decision but could not with reasonable diligence have been discovered before.”

It is argued that having disregarded the evidence of the Surveyor General which was contrary to the position of the squatters, the decision of the Court below should be varied and the matter remitted back for trial to be undertaken and the certificate of title reinstated and abide the decision of the trial.

The respondent’s counsel filed heads of argument in response. In relation to grounds one and two, it is submitted that Order 113 of the White Book gives the Court latitude to look at other matters and not restricting itself to answering the question whether the appellant had allowed squatters to occupy his farm or not. Quoting part of Order 113 rule 8 that *“where the existence of a serious dispute is apparent to a plaintiff he should not use this procedure...if he does the action may be struck out”* and a High Court decision in **Hongling Xing Xing Building Company Limited v Zamcapital Enterprises Limited (For National Electronics Retail Limited)**⁴ that:

“...Order 113 relates to summary proceedings for possession of land. Typically, Order 113 is resorted to in circumstances where the land is occupied by persons who have entered into or

remained in possession...The summary procedure is discouraged where the plaintiff is aware of a real dispute with the occupier".

(Emphasis by counsel)

It is argued that paragraph 9 of the affidavit in support of the originating summons sworn by the appellant clearly shows that there has been a long standing dispute between Senior Chief Shakumbila and his subjects on the one hand and the respondents on the other. The appellant as stated in the affidavit, was informed that the respondents were not subjects of Chief Shakumbila and the chief's subjects had failed to evict them from the land. Thus, the appellant being aware of a dispute should not have commenced the action under Order 113.

Furthermore, it is submitted that it was unreasonable for the appellant to have proceeded to convert the land without verifying if it was encumbered and to convert it before he took possession. The failure to take possession shows that the appellant was aware of the respondent's presence and wishes to have them removed through the certificate of title.

It is counsel's further submission that the Court below was entitled to consider the disputes on boundaries as it was part of the real dispute between the parties. It is also submitted that

the Court should in fact have struck out the action because the appellant was aware of the real dispute between himself and the respondents before he commenced the action.

Learned counsel supports the order of cancellation of the title because according to him, the court was simply addressing one of the appellant's claims for an order that he is the rightful and legal owner of the property in question. This claim invited the court to determine ownership, which the court did and found against the appellant.

As to ground three, it is argued that there was no need for the Court below to make an order under Order 28 of the White Book to enquire into other issues. The appellant failed to file an affidavit in reply to challenge the facts in the respondents' affidavit in opposition. There was therefore, no need to conduct a full inquiry to test the assertions of the parties. Order 18 rule 13/3 of the White Book is relied upon that:

“under this rule there is an implied admission of every allegation of fact made in a pleading which is not traversed in the next succeeding pleading. Such an admission has the same value and effect as if it were an express admission.”

Thus, the Court below properly exercised its discretion when it proceeded to hear the matter on affidavit evidence.

Counsel repeated his arguments in ground three in relation to ground four and argues that there is clear unchallenged evidence of misdescription of the land over which the appellant obtained title. The respondents' unchallenged evidence that they occupied the land from way back in 1965 should be considered against the appellant's rights. Additionally, that no evidence was laid to suggest that the commissioner of lands took into account the interests of other persons before converting it from customary into state land.

It is submitted that ground five equally lacks merit as the Court gave due attention to the relevant information contained in the Surveyor General's letter. The letter did not reveal that Senior Chief Shakumbila had authority to recommend change of tenure nor did it state that the land in dispute was in his area.

It is the respondents' prayer that the appeal be dismissed in its entirety, with costs.

At the hearing of the appeal both counsel relied on the respective heads of argument. Mr Gondwe, submitted orally in response to the respondent's arguments, that both parties acknowledge that there is a real dispute as to whose subjects the respondents are whether Chief Shakumbila's or

Chieftainess Nkomeshya's. It is for this reason that the matter be remitted back to the High Court for a full inquiry as there are contentious issues to be resolved at trial.

In response to questions from the Court as to why he did not apply before the lower court for trial to be conducted on the grounds argued before us, counsel stated that he was not in charge of the matter at that stage. However, when he assumed conduct he applied for review of the judgment but was unsuccessful.

Mr. Phiri, who appeared for the respondent, confirmed that he agrees with arguments by the appellant's counsel that trial should have been conducted as there was a dispute between the parties which could not be resolved summarily. Furthermore, that the action should have been commenced by writ of summons and statement of claim. When asked if he was agreeing with the appellant's counsel that the appeal has merit, contrary to his heads of argument, counsel answered in the affirmative.

We have considered the arguments by counsel.

We will first consider grounds one to four of the appeal simultaneously as they are interlinked. The cardinal issue the appeal raises is whether the orders and findings made by the trial Judge such as cancellation of the certificate of title and finding that a larger portion of the land in question was in Chieftainess Nkomeshya's area, could be made on affidavit evidence in chambers under summary procedure in Order 113 of the RSC.

From the outset, we must state that the starting point is for us to consider the scope of Order 113 of the RSC, to put matters in proper context. The explanatory note under Order 113/9/2 reads as follows:

"..In proceedings under this Order, the only claim that can be made in the originating summons is for the recovery of possession of land; notwithstanding O.15 r 1, no other cause of action can be joined with such a claim in proceedings under this Order, and no other relief or remedy can be claimed in such proceedings, whether for payment of money such as rent, mesne profits, damages for use and occupation or other claim for damages or for an injunction or declaration or otherwise. The Order is narrowly confined to the particular remedy described in r.1.

On the other hand, like the default and summary procedures under O.13 and O.14, this Order would normally apply only in virtually uncontested cases or in clear cases where there is no

issue or question to try, i.e where there is no reasonable doubt as to the claim of the plaintiff to recover possession of the land or as to wrongful occupation of the land without licence or consent and without any right, title or interest thereto.

Where the existence of serious dispute is apparent to the plaintiff, he should not use this procedure (Filemart Ltd v Avery [1989] E.G 921⁵). If he does the action may be struck out (Henderson v Law (1984) 17 H.L.R 237, C.A⁶). In Eyles v Wells [1991]⁷C.A transcript 376, the Court of Appeal following Greater London Council v Jenkins⁸ held that the Court had no discretion to prevent the procedure being used in cases that fell within the rule...”

It is clear to us that Order 113 RSC is restricted to non contentious cases or cases where there is no issue or question to try as explained by the learned authors of the RSC. Authorities abound in which the Supreme Court in this country has pronounced itself on the scope of Order 113. In **Liamond Choka v Ivor Chilufya**⁹ the Supreme Court stated thus:

“The point here is that the proceedings under Order 113 were misconceived, incompetent and therefore nullity...the circumstances in which the procedure can be used are restricted to cases where the land is occupied by persons who have entered into or remain in possession of the land without the licence or consent of the person claiming possession...The learned authors go on to observe that the use of this procedure is discouraged where the plaintiff is aware of a real dispute with the occupier

defendant. We respectfully concur. It cannot be doubted in this case, that there was a real dispute and a possible claim involving the employers and their holding company such that it is not possible to say that at some point in time, at any rate, by the launch of the proceedings, the defendant had already become a trespasser or a squatter..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; see Greater London Council v Jenkins. It was for the foregoing reasons that we allowed the appeal with costs, and quashed the summary proceedings and all the attendant orders."

The action, which is subject of this appeal before us, was began by originating summons under Order 113. The court below observed that there were contentious issues but he proceeded to hear the matter in chambers, based on the affidavit evidence without a full trial. In **Vangelatos v Metro Investments Limited**¹⁰, the Supreme Court observed thus:

"we must say, at once here, that we agree with Dr. Mulwila. At the instance of the plaintiffs, the Court below ordered that this matter, began by originating summons, shall proceed as if it had been began by writ of summons and statement of claim. That Order was made pursuant to Order 28 rule 9 of the Supreme Court Rules 1999. Indeed, the plaintiffs drew a statement of claim to that effect. Once that Order was made, the matter was removed from Order 30 rule 11 of the High Court Rules. It had

become an open court matter; and no longer a matter to be disposed of in chambers. And trial should have been conducted in open court and not in chambers. Judgment too, should have been delivered in open court...In the present case, the learned trial Judge heard the matter and delivered Judgment in chambers. That was a mistake. The correct procedure is that trial of a contentious matter, involving declaration and damages, in a statement of claim, involving viva voce evidence, and in the general list of the High court, should be held in open court; and not in chambers. We are of further view that where chamber matters, such as removal of caveats and possession of land under Rules of the Supreme Court Order 113, are claimed together with contentious open court matters, such chamber matters will also be simultaneously dealt with contentious claims, in open court. This disposes of the submission by Mr. Linyama, as to what was, or was not, the main claims in this matter..."

Guided by the above, we are of the considered view that the court below fell into serious error when it proceeded as it did, to hear the matter in chambers, in the face of contentious issues. The Court found at page J3 that:

"the dispute in this case is not as to who legally owns the piece of land but whether the land in dispute was properly given to the applicant by the traditional leadership."

We opine that this dispute could not have been resolved under Order 113 of the RSC, which is only appropriate when dealing with squatters and others without any genuine claim of right to the land or as already pointed out where the case is uncontested or there are no issues to try. The Judge clearly misdirected himself in line with the authorities above.

We are of the considered view that even though none of the parties applied to have the case deemed as though began by writ of summons and statement of claim nor did the respondent apply to have it struck out because of the dispute between the parties, the Court should have done so on its own motion as argued by Mr. Gondwe.

Order 113 is inappropriate in cases such as this where there is a dispute over boundaries and ownership. The respondents allege that they have been occupiers of the land for a long time. And that Chief Shakumbila had no authority to give the land to the appellant. The appellant on the other hand has since converted the land to leasehold and was given a certificate of title which the Court ordered should be cancelled.

These contentious issues should have been resolved after a full trial and not summarily in chambers. As matters stand some of

the issues remain unresolved even after the judgment of the court below such as the dispute over the boundaries. The High Court Judge simply considered the documents filed by the respondents and accepted them as proof of the boundaries and proceeded to cancel the appellant's title, summarily without a hearing. This was a serious misdirection. It was imperative for him to have received evidence in open court where witnesses would have been cross examined as submitted by counsel.

In light of all the foregoing we allow grounds one to four of the appeal.

Coming to ground five, we wish to state that the primary consideration for the Court faced with an application for review, is whether the fresh evidence could not, with reasonable diligence have been discovered before the hearing. Secondly, that the fresh evidence would have material effect upon the decision of the Court. In this case the documents could have been discovered with reasonable diligence and so the application for review should not have been entertained.

However, as already alluded to the matter was disposed of in chambers. No trial was conducted so there was no opportunity for the parties to adduce oral evidence and even documentary

evidence via bundles of documents. The mode of commencement was obviously wrong. It is patent from the two affidavits in support of the application for review that the evidence raised therein needed to be tested through cross examination.

The Judge should have received evidence from the Surveyor General among others, which would have helped to resolve the boundary dispute.


We reiterate that Order 113 of the RSC is not appropriate where there are contentious issues and a real dispute between the parties. The High Court erred to embark on resolving them under Order 113. The Judge fell in serious error when he even proceeded to cancel the appellant's title.

In the net result the appeal is successful. Mr. Phiri properly conceded in that regard as the appeal has merit, as not all issues in controversy were resolved. Following the Supreme Court decision in **Liamond Choka v Ivor Chilufya**⁹ we set aside the judgment of the court below; thus the summary proceedings and all the attendant orders are quashed.

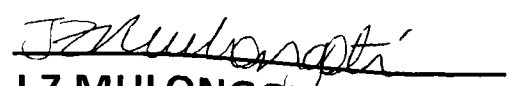
We remit the matter back to the High Court for trial to be conducted in open court before another Judge.

Each party to bear own costs.

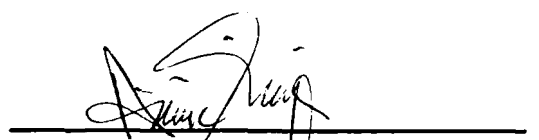
Delivered at Lusaka the 15th day of December, 2017



C.F.R MCHENGA
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL



J.Z MULONGOTI
COURT OF APPEAL JUDGE



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