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IN THE COURT OF APPEAL FOR ZAMBIA

APPEAL NO. 07/2017

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:



PAN AFRICAN BUILDING SOCIETY

APPELLANT

AND

PEMBA LAPIDARIES LIMITED

1st RESPONDENT

LAPEMBA TRADING LIMITED

2nd RESPONDENT

CORAM: Mchenga, SC DJP, Chashi and Mulongoti, JJA

on 6th and 19th April 2017 and the 30th June, 2017

For the Appellant:

*K. Musaila, Messrs Chonta Musaila & Pindani
Advocates*

For the 1st and 2nd Respondents:

*Dr. JB Sakala SC, Messrs JB Sakala & Co. and
Prof. PM Mvunga SC, Messrs Mvunga Associates*

JUDGMENT

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. ***Construction and Investment Holdings Limited v William Jacks and Company (Zambia) Limited (1972) ZR 92 – Reprint.***
2. ***Lenton Holdings Limited v Airforce Moyo (1984) ZR, 66 – Reprint***
3. ***Buchman v Attorney General (1993 – 94) ZR 131***
4. ***Barclays Bank Zambia Plc v Zambia Union of Financial Institutions and allied Workers (2007) ZR, 106***

Legislation referred to:

5. ***The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia***
6. ***The High Court Act, Chapter 27 of the Laws of Zambia***

This is an appeal against the Ruling of the High Court which was delivered on 28th February 2015 in which the learned Judge refused the Appellant's application for the removal of a Caveat.

The chronology of events leading to the appeal from the glean of the record of appeal shows that the Respondents took an action against Industrial Credit Company Limited (ICCL), under Cause Number 2006/HP/330. They were consequently vide Judgment delivered on 14th January 2011, awarded damages for loss of the property known as subdivision H10 of Farm No. 748 Ndola, damages for all the equipment and materials that were sold by ICCL which were not part of the lease back agreement and damages for loss of business.

The award was to be assessed by the learned Deputy Registrar.

Armed with the said Judgment, the Respondents by virtue of being Judgment Creditors, on 22nd June 2011 lodged a Caveat on Stand Number 1200 Ndola, a property belonging to ICCL.

Subsequently ICCL entered into an agreement with the Appellants herein. According to the agreement, the Appellant was to acquire selected assets and liabilities of ICCL. Amongst the assets to be acquired was Stand Number 1200 Ndola (the Property).

When the Appellant instructed their lawyers for the transfer of title, it was discovered that the Respondents had lodged a Caveat on the Property. It was this that prompted the Appellant to commence proceedings in the Court below for removal of the Caveat.

The learned Judge in the Court below, after considering the affidavit evidence and submissions by Counsel, opined that the interest of a Judgment Creditor in the Property of a Judgment Debtor is recognizable as being lawfully claimed or held. The learned Judge was of the view that the fears of a Judgment Creditor over a Judgment Debtor who embarks on disposing of assets, are real and cannot be said to be unfounded.

Although the learned Judge conceded that the Property was not subject of the proceedings under Cause Number 2006/HP/330 and also that the Property had nothing to do with that case, she found that the intention of the Respondents was to use the Property to secure the Judgment Debt and therefore there was no confusion as

to which Property the Respondents should have placed the Caveat on.

The learned Judge further found that the Registrar at Lands and Deeds, saw a legitimate cause for him to have accepted the lodgement of the Caveat.

Disenchanted with the Ruling, the Appellant launched this appeal and advanced two grounds of appeal as follows:

- 1. That the trial Court erred in law and fact when it held that the Respondents had sufficient and justifiable interest in the Property in question to warrant the placing of the Caveat.*
- 2. That the trial Court erred in law and fact when it held that the Judgment under Cause No. 2006/HP/330 gave the Respondent an interest in the Property in question which property was not the subject of Cause 2006/HP/330, justifying the placing of a Caveat on the Property in question by the Respondent.*

At the hearing of the appeal, Mr. Musaila, Counsel for the Appellant, relied on the heads of argument and in reply and argued both grounds together as they were interrelated.

Counsel submitted that Section 76 of **The Lands and Deeds Registry Act⁵** governs the registration of Caveats. Our attention

was also drawn to the case of **Construction and Investment Holdings Limited v William Jacks and Company (Zambia) Limited**¹ where it was held that:

"Only if a person has or purports to have an enforceable interest in land, may he be justified in interfering with the rights of the registered proprietor by lodging a Caveat. The Caveator's cause for lodging a Caveat is dependant upon his claim to be entitled to an interest in land and that "reasonable", in this sense means "justifiable."

At page 98, Scott J, went on to say that:

"It seems to me to be necessary, therefore, to ask in what circumstances another person would have the right to prevent the registered proprietor dealing freely with the property registered in his name, and to my mind the answer should be if that other person has, or purports to have an enforceable interest in the property in question. If that other person has not and does not even purport to have any such interest in the property, then he should not in my opinion, be justified in interfering with the rights of the registered proprietor. I would say that a Caveator's

cause for lodging a Caveat is dependant upon his claim to be entitled to an interest in the land, and that reasonable in those circumstance must mean the same as justifiable. If he has not a justifiable claim then he cannot be said to have a reasonable cause for lodging a Caveat, and if he is not able to justify his claim, it must follow that his action in lodging the Caveat was without reasonable cause.....”

Counsel also cited the case of **Lenton Holdings Limited v Airforce Moyo²** where it was held that:

“To be effective, a Caveat should disclose the interest claimed. Where a copy of the Caveat is not produced in Court to prove the interest claimed, its registration at the Lands and Deeds Registry will raise a presumption that it disclosed an interest in favour of the person lodging it.”

It was Counsel’s submission that from the aforestated authorities, it is clear that a person intending to register a Caveat must disclose an enforceable interest in the Property, which interest must be lawfully claimed and justifiable as provided under Section 76 of **The Lands and Deeds Registry Act⁵**.

He then argued that the Respondent clearly had no justifiable or reasonable cause for lodging the Caveat. Counsel pointed out that the Respondents' only reason for lodging the Caveat is that they are Judgment Creditors under Cause Number 2006/HP/330.

Counsel further submitted that being a Judgment Creditor, particularly for a money Judgment does not entitle the Respondents to an interest in the Property, so as to justify the lodging of a Caveat. He also pointed out that the rules on enforcement of money Judgment are clear as per Order 42 of ***The High Court Rules***⁶.

According to Counsel, the Caveat was wrongly registered and it ought to be removed as it is not a mechanism for the enforcement of a money Judgment.

In response, Dr. Sakala, State Counsel, equally relied on the Respondents' heads of argument and argued the two grounds together.

He brought to our attention the fact that the Judgment of the High Court in cause number 2006/HP/330 was upheld by the Supreme Court under Appeal No. 49 of 2014.

He submitted that the Registrar of Lands and Deeds was satisfied that the Respondent had a justifiable and legitimate cause to protect

their Judgment against the debtor who might want to dispose of all of their assets as was the situation with ICCL.

State Counsel further submitted that, the learned Judge took into consideration the statement in the **Lenton Holdings Limited**² case where the Supreme Court stated at page 69 as follows:

“Although the terms of Section 76 (a) would appear to be very wide indeed as can be seen, yet they would not in our considered opinion, go so far as to cover rights other than those which are otherwise recognizable as being lawfully claimed or held”.

The learned Judge in the Court below considered whether the interest of the Respondents as the Judgment Creditors in the property of a Judgment Debtor was recognizable as being lawfully claimed and found that it was.

State Counsel argued that, the Court should take note that the Appellant appears to be vigorously pursuing the removal of a Caveat which was placed on the Property which does not belong to them, but ICCL, who were not brought in the picture at all. That as such the Appellant has no *locus standi*.

According to State Counsel, the Appellant appears to be asserting the rights of ICCL who have not been cited as a party.

In concluding, it was submitted that removing the Caveat in the face of the Judgment which has been confirmed by the Supreme Court and in the absence of any evidence to show that ICCL has any other assets whose value is capable of settling its indebtedness to the Respondents, would render the whole process of assessing damages in the Court below, a mere academic exercise.

State Counsel Prof. Mvunga adopted the submissions by State Counsel Sakala.

In reply, Mr. Musaila submitted that a party cannot raise a matter on appeal which was not raised in the lower Court.

Counsel cited the cases of **Buchman v Attorney General³** and **Barclays Bank Zambia Plc v Zambia Union of Financial Institutions and Allied Workers⁴** and argued that the issue of locus standi ought to be dismissed as it was not raised in the Court below.

That in any case, Section 81 of ***The Lands and Deeds Registry Act⁵*** gives the Appellant locus standi as purchaser of the property in issue.

From the onset, we are in total agreement with Counsel for the Appellant in tandem with the holding in the **Barclays Bank Zambia Plc⁴** case that where an issue was not raised in the Court below, it is not competent for any party to raise it in the appellate Court. The issue of the Appellant's locus standi was never canvassed by the Respondent in the Court below.

They are therefore, raising it for the first time before this Court. That being the case, we decline to entertain the same.

Having considered the Ruling of the learned Judge in the Court below, the grounds of appeal as set out above, the authorities cited and the submissions of Counsel, the question which arises for our determination essentially is whether the Respondents, as Judgment Creditors, are entitled in law to register a Caveat on the Property belonging to ICCL as a Judgment Debtor in Order to secure a Judgment debt.

Although a Caveat is not expressly defined under **The Lands and Deeds Registry Act⁵**, it is generally a caution or warning to a person searching the Register, of an outstanding equity claimed by the Caveator against any land. Its effect is as provided under Section 79 of the Act which states as follows:

“So long as a Caveat in form 8 remains in force, the Registrar shall not make any entry on the Register having the effect of charging or transferring or otherwise affecting the estate or interest protected by such Caveat”.

As was held in the **Construction and Investment Holdings**¹ case, it forbids the Registrar from making any entry on the Register, having the effect of charging or transferring or otherwise affecting the estate or interest protected by the Caveat. The effect of a Caveat is that, the registered proprietor is prevented from showing a clear title, as the Property is encumbered.

A Caveat is therefore a statutory injunction preventing the Registrar from registering any instrument either absolutely, or until after notice of the intended registration or dealing be given to the Caveator or unless such instrument be expressed to be subject to the claim of the Caveator.

On the grounds upon which a Caveat may be lodged, we are guided by Sections 76 and 77 (1) of **The Lands and Deeds Registry Act**⁵ which states as follows:

“76. Any person-

- (a) *Claiming to be entitled to or to be beneficially interested in any land or any estate or interest therein by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied or otherwise, howsoever; or*
- (b) *Transferring any estate or interest in land to any other person to be held in trust; or*
- (c) *Being an intending purchaser or mortgagee of any land*

May at any time lodge with the Registrar a Caveat in Form 8 in the schedule.

- 77** (1) *Every Caveat shall be signed by the Caveator or by his attorney or agent, and shall state with sufficient certainty the nature of the estate or interest claimed by the Caveator, with such other information and evidence as may be required by any regulations under this Act.....”*

As acknowledged in the **Lenton Holdings Limited**² case, the terms of Section 76 would appear to be very wide. The grounds therefore, might be many and not exhaustive, but would not go as far as to

cover rights other than those which are otherwise recognizable as being lawfully claimed or held.

It is clear from the provisions of the Act and the authorities which have been cited, that for one to lodge a Caveat, he must have a Caveatable interest. Meaning a person must have a legal and equitable interest in the Property which is actual, current, sufficient, enforceable and justifiable.

It therefore follows, that if you have a Court Judgment against someone, it does not automatically mean you have a Caveatable interest and can lodge a Caveat over their Property. There must be some relation between the Judgment and the Property on which one intends to lodge the Caveat.

In our view, that is exactly what is envisaged under Section 77 (1) of the Act when it states that a person lodging a Caveat shall state with sufficient certainty the nature of the estate or interest claimed by the Caveator. There must be a relationship between the interest being claimed and the Property.

As earlier alluded to, despite the learned trial Judge acknowledging that the Property was not the subject of the matter under Cause Number 2006/HP/330 and also that the Property had nothing to do

with that case, the learned Judge erred in finding that the interest of the Respondents in the Property of the Appellant was recognizable as being lawfully claimed or held, as a Judgment which has no relationship to a Property does not give one a Caveatable interest, neither can it in that respect be used to secure a Judgment debt.

State Counsel Sakala was emphatic and supported the learned Judge's finding that the Registrar saw a legitimate cause for him to have accepted the lodgement of a caveat. It was his argument that the Registrar having been satisfied, the Respondents had a justifiable and legitimate cause to protect by lodging the Caveat.

Although in the case of **Lenton Holdings Limited**², as in the case in *casu*, a copy of the Caveat in Form 8 was never produced and the Court in the earlier case was of the view that it did not disclose the interest claimed, and they did not see how the Registrar could have accepted the document for registration if it did not specify some interest within the contemplation of Section 76, the two cases are distinguishable. In the case before us, a print out of the Lands Register was produced (refer pages 78-80 of the record of appeal) and at page 80 indicates the nature of the Caveat, as Caveat entered

claiming interest by virtue of Judgment creditors, which as we earlier alluded to was not a Caveatable interest.

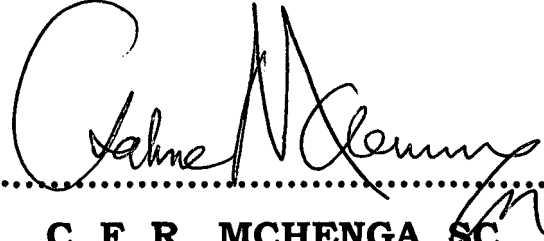
It should also be noted that it is not the Registrar's duty to determine the validity of the claim by the Caveator. He does not determine whether or not the particular claim made is a Caveatable interest or that the evidence offered in support is sufficient to support the claim, or that the nature of the Caveator's claim is appropriate. The Registrar's role is merely to be satisfied that the Caveat meets the requirements of Form 8 and the appropriate fee is paid. In appropriate cases, draw attention to the perceived defects in the substance of the claim or of the sufficiency of evidence and of the risks being run by the Caveator, record the Caveat and give notice of the same to the registered proprietor.


As long as a Caveat is procedurally correct and expressly sets out the nature of the estate or interest claimed, it will be accepted by the Registrar. It will then be for the Court to determine whether or not the particular estate or interest is Caveatable interest in the land as provided for under Section 81 of the Act.


Having found that the Respondents do not have Caveatable interest in the Property within the contemplation of Section 76 of the Act, we

allow the appeal and Order that the Registrar removes the Caveat forthwith.

Costs to the Appellant both in this Court and below and shall be taxed in default of agreement.


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


.....
J. CHASHI
COURT OF APPEAL JUDGE


.....
J. Z. MULONGOTI
COURT OF APPEAL JUDGE