JP

IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 39/2017

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

TUNYA LODGE LIMITED 1ST APPELLANT

ESAU SYAMUSALE SYAMUCILIBA NEBWE 2ND APPELLANT

AND

NAMBOYO KALALUKA 1ST RESPONDENT

NGENDA SITUMBEKO 2ND RESPONDENT

ZAMBIA NATIONAL COMMERCIAL BANK PLC 3RD RESPONDENT

Coram: Chisanga JP, Chashi and Mulongoti, JJA

On the 2nd day of August 2017 and 18th day of December 2017

For the Appellants: *L. C. Zulu, Messrs Malambo & Company*

For the 1st & 2nd Respondents: *B. Gondwe, Messrs Buta Gondwe & Associates*

For the 3rd Respondent: *S. N. Wamulume, In house Counsel*

JUDGMENT

CHISANGA JP, delivered the judgment of the court

Cases Cited:

1. ***Salter Rix and Co. vs Ghosh (1971) 2 ALL ER 867***
2. ***Standard Discount Co. vs La Grange (1877) 3 CPD 67***
3. ***Salaman vs Warner* (1891) 1QB 734**
4. ***Henderson vs Henderson (1843-60) All ER 378***
5. **Bank of Zambia vs Tembo and others (2002) Z.R 103**
6. ***Zulu vs Avondale Housing Project Limited (1982) ZR 172 AT 175***
7. ***Kasote vs The People (1977) 191 ZR P 75***

8. ***Shula & Shamwana vs Attorney General (1981) ZR 261***
9. ***Bank of Zambia vs Jonas Tembo and others (2002) ZR 103***
10. ***The Attorney General Vs Achiume (1983) ZR1***
11. ***Zambia Consolidated Copper Mines Limited vs Mulenura SCZ Judgment No 15 of 1995***
12. ***Phiri vs The People (1973) ZR 168***
13. ***Macfadyeøn vs The People (1965) ZR1***
14. ***Cassell vs Broome (1972) 1 All ER 801***
15. ***Miliangos vs George Frank Ltd (1975) I ALL ER 1076***
16. ***John Fairfax & Sons vs de Witt (1958) 1Q.B 323***
17. ***Johnson vs Gore Wood & Company (a firm) (2001) 1 ALL ER P 481***

Other Works Referred to:

1. ***Black's Law Dictionary, The Dictionary of Law by L. B Curzon***
2. ***Halsbury's Laws of England 4th Edition Vol 16 paragraph 15- 26***
3. ***Supreme Court ruling of 22nd January 2013***

The court has before it an appeal from the decision of the judge in the court below, on a preliminary issue raised by the 3rd respondent, who was 3rd defendant in that court. The circumstances in which the preliminary issue was raised are these.

The appellants commenced an action by writ of summons, wherein they claimed for an order that the receiver manager do render an account for the period of its receivership from the date of appointment and takeover of the 1st appellant, to date; an order that the sum to be found outstanding after the account be liquidated in six months; an order that during the period of rendering an account, the defendants should not offer to sell the lodge. An

injunction enjoining the defendants from disposing of the lodge on Plot No. 1906 Livingstone was also sought.

An originating summons was in the meantime taken out by Namboyo Kalaluka and Ngenda Situmbeko who are 1st and 2nd respondents respectively, against Esau Syamusale Syamuciliba Nebwe, 2nd appellant to this appeal. By that process, the named parties sought removal of the caveat registered on Plot No. 1906, costs and any other relief.

On 16th December, 2009, the parties entered into a consent order, which we should reproduce for completeness.

*"**UPON HEARING** counsel for the plaintiffs and for the defendants and by consent **OF THE PARTIES IT IS HEREBY ORDERED THAT** the application for removal of caveat under Cause No. 2009/HP/1191 be consolidated with **Cause No 2009/HP/0092** and that all pending interlocutory applications under **Cause 2009/HP/0092** are hereby withdrawn.*

***FURTHER THAT** the application for removal of caveat will be heard and determined on 15th January, 2010, at 14:30 hours before Hon. Justice F. Lengalenga."*

The named judge heard the application for removal of the caveat, and rendered judgment on 20th July, 2010. The appellants were dissatisfied with that judgment, and appealed against it. An unsuccessful application to introduce new evidence on appeal was made by the appellant. The Supreme Court's reason for refusing the application was that by the consent order, the court below was restricted to the application for the removal of caveat.

The appellants then applied for leave to amend the writ of summons and statement of claim before the learned deputy registrar in the high court. Learned counsel for the 3rd respondent then raised a preliminary issue, arguing that that application was an abuse of court process as the matter had been adjudicated upon and was *res judicata* as a result. The learned deputy registrar upheld the preliminary issue, stating that the parties were bound by the terms of the consent order, and that the other reliefs had been discounted by consent. The appellants were dissatisfied with this ruling, and appealed to a judge in chambers.

The learned judge upheld the ruling of the learned deputy registrar because according to her, the parties had agreed, in the consent order, to withdraw all pending interlocutory applications under cause number 2009/HP/0092, thereby restricting the court to the application for removal of the caveat. The learned judge referred to the ruling of the Supreme Court on the motion to introduce new evidence on appeal in that respect. She went on to state that a consent order could only be challenged in a fresh action alleging fraud, mistake or misrepresentation. The judge further found that the plea of res judicata was applicable as the judgment of the court had not been set aside on appeal. She thus dismissed the appeal. It is that ruling which is appealed against in this court.

The grounds of appeal are as follows:

(1) The learned judge of the court below erred in law in upholding the decision by the Deputy Registrar that the Consent Order had the effect of discounting all other reliefs because in the Consent Order the parties agreed to withdraw all pending interlocutory applications under cause 2009/HP/0092 thereby restricting this court to the application for removal of caveat. The learned judge failed to construe the meaning of the expression "interlocutory applications".

(2) The learned judge of the court below erred in law in holding that the Deputy Registrar was on firm ground when he ruled that the plaintiff's action was caught up by the rule of res judicata.

(3) The learned judge of the court below erred in law by failing to uphold that there were substantive claims that were still pending in the consolidated action 2009/HP/0092 and 2009/HP/1191.

The arguments on ground one are that the learned judge in the court below misconstrued the meaning of *"interlocutory applications."* Reference is made to the definition of those words in **Black's Law Dictionary, The Dictionary of Law by L. B Curzon,** and it is argued, premised on those definitions, that interlocutory means interim, temporary and not final, but issued in the course of an action. Learned counsel argued that, interlocutory applications are a form of interim proceedings incidental to the main action and are as a general rule not final.

To demonstrate the difference between a final and an interlocutory application ***Salter Rix and Co. vs Ghosh***[1] is relied upon. Learned counsel also relied on ***Standard Discount Co. vs La Grange***[2] and ***Saloman vs Warner***[3] in that connection. Deriving from these authorities, it is argued that the learned judge in the court below failed to distinguish the difference between substantive and interlocutory reliefs, but viewed them as one and the same.

It is contended that substantive relief is in the nature of a claim endorsed on originating process, whereas interlocutory reliefs are endorsed on summons or motions for interim orders. It is submitted that what were withdrawn in the matter were all applications for such matters as interim injunctions, stay of execution and such like.

Our attention is drawn to the relief in the writ of summons issued in cause number 2009/HP/0092, and the relief endorsed on the originating summons in cause number 2009/HP/1191. Learned counsel then poses a question as to what happened to the substantive claims that were endorsed on the writ of summons issued in cause number 2009/HP/0092 since these were not interlocutory issues. It is contended that the consent order could not have had the effect of discounting these claims because they were not of an interlocutory nature.

On ground two, the argument is against the manner in which the rule of res-judicata was applied by the learned judge in the court below.

Reference is made to **Stroud's Judicial Dictionary of Words and Phrases.** According to learned counsel, four elements require to be met, for res judicata to apply. These are that the court must be seized with jurisdiction. Secondly, the judgment in question must have been pronounced on the merits. Thirdly, the subsequent case must be based on the same cause of action as the first action.

Fourthly, the parties in the subsequent motion must have been involved in the initial litigation.

It is contended that the third and fourth elements have not been satisfied in the present case as the matter is not subsequent litigation but a continuation of ongoing litigation between the same parties.

Learned Counsel refers to ***Henderson vs Henderson***[4] and **Bank of Zambia vs Tembo and Others**[6], and seeks to distinguish the present case from the facts in ***Henderson vs Henderson***[4]. According to learned counsel, the distinction is that the trial court could not have conveniently tried the claims brought by originating summons with those brought under the writ of summons. This is on account of the difference in the modes of hearing and the taking of evidence in the two processes. As a result, the removal of the caveat had to be heard, separately, and the trial of the claims and the writ of summons heard later.

It is thus contended that the matter was not caught by the plea of *res judicata*. This, according to learned counsel, is because no judgment was pronounced

regarding the claims endorsed on the writ of summons in cause number 2009/HP/0092. No findings of fact were ever made in any judgment regarding the claims arising in that cause. Further, no subsequent action was commenced after the consolidated cause that could amount to re-litigation of the same cause, as all the matters that were being pursued were in the same cause. It is further argued that the doctrine of res judicata is inapplicable to matters settled by consent orders, even were it to be said the consent order had the effect ascribed to it by the court below.

The arguments on ground one are extended to ground three. It is submitted that the court below failed to adjudicate on issues whether or not there were any aspects of the matter under cause number 2009/HP/0092 pending determination. This argument is predicated on ***Zulu vs Avondale Housing Project Limited***[6]. We are urged to uphold the appeal.

In opposing the appeal, it is submitted, on behalf of the 1st and 2nd respondents that the appeal is an abuse of process as argued in the court below. Learned counsel draws the attention of the court to the ruling of the Supreme Court at pages 41 to 50 of the record of appeal. It is submitted that this court is being invited to deal with a matter already dealt with by the Supreme Court with finality. Any contrary determination by this Court would go against the doctrines of *res judicata* and *stare decisis*. ***Kasote vs The People***[7] is prayed in aid regarding the latter doctrine.

Our attention is also drawn to **Halsbury's Laws of England 4th Edition Vol 16 paragraph 15- 26** where the learned authors discuss res judicata, and the instances in which it applies. It is then argued that the parties having consented, leaving only one matter to be determined, which was done, the matter is caught by the plea of res judicata. In furtherance of this argument, ***Shula & Shamwana vs Attorney General***[8], and ***Bank of Zambia vs Jonas Tembo and Others***[9] are relied upon.

The arguments advanced on behalf of the 3rd respondent are that other than removal of the caveat, no other issues fall to be determined by the trial court. She was therefore on firm ground in her finding and cannot be faulted. According to learned counsel, ***The Attorney General Vs Achiume***[10] is applicable. It is contended that as the consent order did away with all interlocutory applications before court, the only matter that was pending was removal of the caveat.

The matter was thus res judicata, and the attempt by the appellant to amend the process clearly went against the strict rule of res judicata.

Learned counsel contends that this court is bound by the Supreme Court ruling of 22nd January 2013, and relies on ***Zambia Consolidated Copper Mines Limited vs Mulenura***[11].

We have considered the arguments in support of the appeal. We note that we are being asked to construe the consent order which has already been

construed by the Supreme Court of Zambia, a court higher than this court. Learned counsel invites us to pronounce ourselves on the very question addressed by the Supreme Court on a motion to adduce new evidence on appeal. This invitation runs contrary to the principle of *stare decisis* by which this Court is bound. This principle was echoed in ***Kasote vs The People***[7].

In that case, the trial magistrate discussed the decisions of the Supreme Court in ***Phiri vs The People***[12] and ***Macfadyeon vs The People***[13] and declined to follow the later decision stating that it was rendered without reference to the earlier decision, which was to the opposite effect, and was therefore per incuriam.

When the matter went on appeal to the Supreme Court, the approach of the trial magistrate was decried in a discussion on the principle of stare decisis. Baron D.C.J, as he then was, delivering the decision of the court, referred to Lord Diplok's words in ***Cassell vs Broome***[14] where he stated the following:

> ***"It is inevitable in a hierarchical system of courts that there are decisions of the supreme appellate tribunal which do not attract the unanimous approval of all members of the Judiciary. When I sat in the court of appeal, I sometimes thought the House of Lords was wrong in overruling me. Even since that time there have been occasions of which the instant appeal itself is one, when, alone or in company, I have dissented from a decision of the majority of this House. But the judicial system only works if someone is allowed to have the last word and if that last word once spoken, is loyally accepted"***

Baron D C J also alluded to what fell from Lord Denning MR, as he then was in ***Miliangos vs George Frank Ltd***[15], on the matter, at page 1083:

> ***"In our system it is of the first importance that the decisions of the House of Lords should be loyally followed and applied by this court and all courts in all cases which they properly govern."***

When that case went on appeal to the House of Lords, Lord Wilberforce reaffirmed the principle as follows:

> ***"It has to be re-affirmed that the only judicial means by which decisions of this House can be reviewed is by this House itself...."***

Drawing on these persuasive authorities, Baron DCJ stated that it was rendered clear that decisions of higher courts are binding on all courts at a lower level.

The decision sought to be impugned before us is that of the learned judge in the court below, rendered on 30th September, 2016, as earlier indicated. The learned judge referred to the decision of the Supreme Court in the Notice of Motion under cause SCZ number 63/2011, wherein the appellants were seeking leave to introduce new evidence on appeal pursuant to section 25(1)(b)(iv) and (2) of **the Supreme Court Act**. She noted that after considering the motion, the Supreme Court ruled that the said motion was not properly before it, and that by the consent order that was signed and filed in the court below, all pending interlocutory applications under cause

2009/HP/0092 were withdrawn and the court restricted to hearing and determining the application for removal of the caveat. The Supreme Court went on to state that the appellant's allegation, that an account on the receivership of the 1st and 2nd respondents was not dealt with by the court below was flawed because the court below was restricted to the removal of the caveat. The motion was misconceived and incompetent and was dismissed with costs.

It is apposite to examine the Supreme Court ruling for present purposes. That court outlined the background to the motion before it. Mumba Acting DCJ, as she then was, delivered the ruling of the court. She noted that the parties had consolidated their cases under cause 2009/HP/1191 and 2009/HP/0092, and agreed to allow the court below to deal only with the application to remove a caveat under cause 2009/HP/1191 and also agreed to withdraw all pending interlocutory applications under cause 2009/HP/0092. After the judgment on the removal of the caveat was rendered, the appellants appealed to the Supreme Court. The application for leave to adduce new evidence on appeal was made while that appeal was pending.

Upon considering that application, the Supreme Court construed the consent order to mean that all other applications that were pending before the court were withdrawn by consent. That the court below was thus restricted to the caveat application and could not deal with the rest of the claims. The court stated that even the order for an account by the 1st and 2nd respondents was discounted by consent of the parties, and that out of the six reliefs sought only

the first relief was left for the determination of the court below. The court dismissed the application as a result.

The reason assigned for the refusal of leave to adduce new evidence on appeal was that the consent order restricted the court below to the application to remove the caveat. That was the ratio decidendi.

It will be noticed that Mr Zulu argued the motion to adduce new evidence on appeal in the Supreme Court. He was thus aware of the reason the Supreme Court declined to entertain the application, and that reason was that upon construing the consent order, the court found that only the caveat remained to be determined upon by the High Court judge. It is surprising therefore that learned counsel, aware of the principle of *stare decis*, would seek to impugn the decision of the learned judge in the court below, arrived at upon adherence to the words that fell from the Supreme Court on the self-same question. Needless to state, Lengalenga J, was bound by the decision of the Supreme Court, and could not be drawn into differentiating between interlocutory and substantive reliefs when confronted with the preliminary issue raised by the 3rd appellant. We are similarly circumstanced, as we possess no power to delve into and purport to adjudicate on an issue determined by the Supreme Court. As a lower court, we are bound by the principle of stare decisis.

We should state that the effect of consolidation is that the actions concerned proceed thenceforth in chambers and at the trial as a single action. See

ODGERS'S PRINCIPLES OF PLEADING & PRACTICE IN CIVIL ACTIONS IN THE HIGH COURT OF JUSTICE, London Stevens & Sons 1971 P 263.

An application may also be made for an order that the concerned actions come into the list before the same judge on the same day. It is for the judge to determine questions as to the procedure and costs. This method has the advantages of consolidation, while maintaining the identities of the causes of action. In ***John Fairfax & Sons vs de Witt***[16], two actions, still bearing their original character as separate and distinct actions were for convenience listed and heard together, and the Court of Appeal held that that order did not make them anything else than two actions, and that an order for costs against a party who was not a party to the other action could not be made, merely because the actions were listed and heard together. Such an order for costs could only be made if both actions had been consolidated. It was also stated that consolidation had the effect of turning separate proceedings into one set of proceedings.

In the case with which we are presently engaged, the two actions having been consolidated, they proceeded before the learned judge as one only. We agree that applications concerning removal of caveats are made in chambers. However, once an action for removal of a caveat is consolidated with another requiring the leading of oral evidence, the matter has to be heard in open court. This is on account of the fact that the action now proceeds as one action, and the other reliefs require the leading of oral evidence.

The argument that the application for removal of the caveat had to be first dealt with in chambers, and thereafter a trial held cannot prevail, as the two actions were consolidated, and not merely listed to be heard at the same time by the judge. The procedure proposed by learned counsel would have been applicable had the actions been merely listed to be heard together, and not consolidated.

We note that in the Notice of Motion for leave to adduce new evidence, the 2nd appellant asserted, in the affidavit in support that the learned judge did not address the remaining issue, but only addressed the question of removal of the caveat. It seems to us that the appellants were cognisant that the actions proceeded as one after consolidation, and not as separate action as now argued. Had the view being advanced now been held then by the appellants, they would not have applied for leave to adduce further evidence.

We move to consider the argument that the elements of res judicata were not satisfied, as the matter before the court below was no new action based on the same facts, but a continuation of the same. The parties, according to counsel, were not involved in an initial matter.

We have stated above that once consolidated, matters proceed as one action. The highest court at the time pronounced the import of the consent order, viz, that all the other claims had been abandoned. Indeed, by confining themselves to the question of the caveat before the trial judge, the appellants abandoned the other claims. This is tantamount to withdrawal of those claims. We agree

that the principle of res judicata applies to claims that could have been claimed in an action, but are not so claimed, as stated in ***Henderson vs Henderson***[4].

In the present case, the claims of the parties in the consolidated action related to Plot LIV 1906, which was advanced as security for the loan availed to the appellants by the 3rd respondent. The 3rd respondent appointed the 1st and 2nd respondents receiver managers. They took possession and executed a contract of sale with the purchaser. Subsequently, the appellants took out an action in which they claimed for an account to be rendered by the receiver manager from date of appointment and possession of the 1st appellant's property. They also sought an order that during the rendering of the account the defendant should not offer the lodge for sale, among other reliefs. Clearly, the genesis of the cause of action was the appointment of the receiver manager, and the proposed disposal of the mortgaged property. It is rendered crystal clear that any claim pertaining to those matters fell to be raised and ventilated in the consolidated action.

The abandonment of the other claims has not been shown to have been premised on some mutually agreed understanding that those claims that were abandoned would be litigated later.

We have considered and derived guidance from ***Johnson vs Gore Wood & Company***[17], where the House of Lords allowed an appeal against the order of dismissal in the court below for abuse of process. The facts were that Mr. Johnson and his company Westwood Homes Ltd of which he was major

shareholder, or alter ego, had claims against Gore Wood & Company, a law firm that had acted for the company in a proposed purchase of land. It later transpired that as a result of the solicitor's negligence, Westwood Homes Ltd suffered damage and commenced an action against that firm of solicitors. Mr. Johnson also indicated that he would later seek redress against the law firm in his personal capacity. This much was understood by the firm of solicitors. The claim by West Wood Homes was negotiated and settled and later, Mr. Johnson commenced the action against the law firm. It was that action that the law firm sought to nip in the bud by raising a preliminary issue. The trial judge refused the application, holding that the action was not an abuse of process. The firm appealed to the Court of Appeal and succeeded, that court holding that there was abuse of process in accordance with ***Henderson vs Henderson***[4].

On appeal to the House of Lords, their Lordships were of the view that the parties to the settlement of West Wood Home's action, that is, Mr. Johnson and the firm of solicitors proceeded on the basis of an underlying assumption that a further proceeding by Mr. Johnson would not be an abuse of process, and that it would be unfair or unjust to allow the firm of solicitors to go back on that assumption. It was observed that the terms of the settlement agreement to which Mr. Johnson was a party, and the exchanges which preceded it strongly pointed towards acceptance by both parties that it was open to Mr. Johnson to issue proceedings to enforce a personal claim, which could then be tried or settled on its merits.

As earlier observed, nothing of the sort occurred in the present action. It must be assumed therefore that the abandonment of the claims was unconditional. That being the case, the claims are caught by the principle of res judicata, as they could have been raised and determined in the consolidated cause. On the foregoing, this appeal is devoid of merit and is dismissed accordingly, each of the grounds having failed, although dealt with together. The respondents will have the costs hereof, to be agreed and in default taxed.

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F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

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J. CHASHI
COURT OF APPEAL JUDGE

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J. Z. MULONGOTI
COURT OF APPEAL JUDGE