

**IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

APPEAL NO. 260/2020

BETWEEN:

ADMINISTRATOR-GENERAL & OFFICIAL RECEIVER *(Suing as Personal Representative of the Estate of the late Simon Hanyona Michelo)* **APPELLANT**

AND

| | |
|--|----------------------------------|
| CHARITY NANKULO | 1ST RESPONDENT |
| LESLIE NANKULO | 2ND RESPONDENT |
| DAVID ABESHY MWEENE | 3RD RESPONDENT |
| STANLEY MALAMBO <i>(Sued as Administrator of the Estate of the late Anderson Nankulo)</i> | |

Coram: Makungu, Majula and Siavwapa, JJA
On the 22nd day of September, 2021 and 2nd day of December, 2021

For the Appellant : Mrs. F.M. Wamundia – Principle Legal Officer
Administrator General's Office
For the Respondents : No appearance

JUDGMENT

MAKUNGU, JA delivered the Judgment of the Court.

Cases referred to:

1. *Bank of Zambia v. Jonas Tembo & Others* (2002) ZR 103
2. *Hamalambo v. Zambia National Building Society* SCZ Appeal No. 64/2013
3. *Societe Nationale Des Chemis De Pur Du Congo (SNCC) v. Joseph Nonde Kakonde* (2013) 3 ZR 51
4. *Lenton Holdings Limited v. Airforce Moyo* (1984) Z.R. 55
5. *Chikuta v. Chipata Rural Council* (1974) Z.R 241
6. *Corpus Legal practitioners v. Mwanandani Holdings Limited* SCZ Judgment No. 50 of 2014
7. *Rural Development Limited v. Bank of Credit and Commerce (Z) Limited* (1987) Z.R 35

8. *Construction and Investments Holdings v. Willen Jacks Company Zambia Limited and Lenton Holdings Limited (1972) ZR 66*

Legislation referred to:

1. The Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia

1.0 INTRODUCTION

- 1.1 This appeal is against the ruling of the Hon. Mr. Justice W. G. K. Muma of the High Court dated 22nd July, 2020 dismissing the action for being *res judicata*.

2.0 BACKGROUND

- 2.1 On 8th May, 2020 the appellant herein commenced cause no.2020/HP/0464 against the respondents by way of writ of summons and statement of claim seeking the following reliefs:
- 1) *A declaratory order that property No. F/190a/A located in Lusaka (herein after 'the property') belongs to the late Simon Hanyona Michelo and therefore forms part of his estate;*
 - 2) *An order restraining the defendants from selling and continuing to intermeddle with the estate of the late Simon Hanyona Michelo;*
 - 3) *Damages and costs.*

- 2.2 Before the matter could be heard, the respondents applied for dismissal of the action for abuse of court process and *res judicata* pursuant to **Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia**. In an affidavit in support of the preliminary application sworn by the 2nd respondent, it was deposed that the appellant had previously commenced proceedings against the respondent under Cause No. 2008/HP/0140 claiming that the property in issue formed part of the estate of the late Simon Hanyona Michelo. He also claimed for the removal of the caveat placed on the property by the late Anderson Nankolo, a member of the Hanyona family now represented by the 3rd respondent. The claim was based on the allegation that the caveator and the respondents had no interest in the property.
- 2.3 It was further deposed that in a judgment dated 26th January, 2017, Judge Kawimbe, held that the surviving members of the Hanyona family have a beneficial interest in the property and that the nature of the interest was sufficiently disclosed. Therefore, the issue of ownership of the property had been conclusively determined in that action.

- 2.4 The appellant had filed an affidavit stating that cause no. 2008/HP/0140 was principally for the removal of the caveat and that the certificate of title was registered in the name of the late Simon Hanyona Michelo. That the issue of ownership did not arise in that matter.
- 2.5 That the pronouncement by Judge Kawimbe that the respondents have a beneficial interest in the property is only to the extent of their right to place a caveat on the same, and not that they are entitled to the property as legal owners.
- 2.6 That the caveat was only maintained because there were serious issues in contention amongst the parties. The appellant finally deposed that the matter is neither *res judicata* nor an abuse of the court process.

3.0 ARGUMENTS BEFORE THE COURT BELOW

- 3.1 At the hearing of the application, the defendants relied on the affidavit in support.
- 3.2 The appellant relied on the affidavit in opposition and skeleton arguments.
- 3.3 The appellant submitted that the matter was not an abuse of the court process as there was nothing in the first claim that

necessitated the determination of ownership of the property as the certificate of title is registered in the name of the deceased. It was contended that the reliefs being sought by the appellant have never been dealt with by any court as the initial action was mainly for the removal of the caveat.

- 3.4 As to whether the matter was *res judicata*, the appellant submitted that according to the learned author, **Brian A. Garner. Black's Law Dictionary. 8th edition**, the three essential elements in determining whether or not a matter is *res judicata*, are that there should have been an earlier case on the issue; a final judgment on the issue; and the involvement of the same parties or parties in privity with the original parties.
- 3.5 The appellant finally submitted that it was incumbent upon the party pleading *res judicata* to show that the decision in the first law suit was conclusive as to the matters on the second suit. And that Judge Kawimbe did not adjudicate upon the issue of ownership as a reading of her decision shows.

4.0 DECISION OF THE COURT BELOW

- 4.1 In his ruling, Judge Muma considered whether the matter before him was *res judicata* and an abuse of the court process.

He considered the case of **Bank of Zambia v. Jonas Tembo & Others** ⁽¹⁾ where the Supreme Court held that:

- (i) *In Order that a defence of res judicata may succeed, it is necessary to show that the cause of action was the same, but also that the plaintiff had an opportunity of recovering and but for his own fault might have recovered in the first action that which he seeks to recover in the second.*
- (ii) *A plea of res judicata must show either an actual merger or that the same point had been actually decided between the same parties.*

4.2 The learned Judge then found that there was no dispute that there was an earlier action commenced in 2017 which was presided over by Judge Kawimbe who made specific pronouncements on the ownership of the property in issue. Judge Muma noted that at page 9 of the Judgment, Judge Kawimbe found that it was not in dispute that members of the Hanyona family had contributed herds of cattle towards the acquisition of the property in issue; and that the deceased was asked to purchase the farm on behalf of the family.

- 4.3 Judge Muma further found that respondents herein are the same as in the earlier matter, save for the Commissioner of Lands and Attorney General who were the 5th and 6th respondents respectively. That Judge Kawimbe found “... *that it is highly probable that the farm was acquired from the contributions of the Hanyona family members ...*” and that the appellant may not have been privy to the family’s agreement on the acquisition of the farm. Further that the Hanyona family members had a beneficial interest in the farm.
- 4.4 In this regard, Judge Muma determined that an inquiry had been made into the ownership of the property and hence the pronouncements in Judge Kawimbe’s judgment. His determination was that the issue to be resolved was not about ownership but appropriation of the property in issue to the various beneficiaries whose rights were recognized and established in the earlier judgment.
- 4.5 Consequently, the learned Judge found that the action before him was *res judicata* and dismissed it.

5.0 GROUNDS OF APPEAL

5.1 The appellant has appealed against the ruling of the court below and advanced four grounds of appeal couched as follows:

- 1) That the learned Judge erred in law and fact when he held that the action was res judicata as the issue of ownership had already been dealt with by the previous Judge when in fact the said court's findings were restricted merely to the question of whether or not the respondents had an interest which entitled them to place a caveat on the property in question.*
- 2) That the learned Judge misdirected himself by holding that an inquiry relating to the ownership of the property in issue was already made, when in actual fact there was no such inquiry held by the previous Judge.*
- 3) That the learned Judge erred by failing to appreciate that the previous Judge's decision to not remove the caveat was anchored on the fact that there were still issues in controversy that needed to be settled;*
- 4) That the learned Judge erred in law and fact when he dismissed the action without making a*

determination on the said issues in controversy, which issues indisputably relate to ownership of the property in question and can only be properly determined by a court of law.

6.0 APPELLANT'S ARGUMENTS

6.1 The appellant filed heads of arguments on 22nd December, 2020. In arguing grounds one and two together, the appellant's learned counsel submitted that the court below failed to apply its mind to the elements of *res judicata*, and referred us to the unreported case of **Hamalambo v. Zambia National Building Society** ⁽²⁾ where it was held that:

“Res Judicata means a matter that has been adjudicated upon. It is a matter that has been heard and determined between the same parties. The principle of Res judicata states that once a matter has been heard between the same parties, by a court of any competent jurisdiction, the same matter should not be reopened.”

6.2 We were also referred to the case of **Societe Nationale Des Chemis De Pur Du Congo (SNCC) v. Joseph Nonde Kakonde**

⁽³⁾ which establishes that: *“in order for a defence of res judicata to succeed, it must be shown that the cause of action was the same and that the plaintiff had an opportunity to recover what he might have recovered in the first action which he now seeks to recover. Further, that a plea of res judicata must show either an actual merger or that the same point had actually been decided between the same parties.*

6.3 It was contended that the court in the initial action, did not delve into the issue of ownership of the subject property in that it stated at page J13:

“Let me state that the issue whether an action for possession or recovery of land can lie against Simon Hanyona’s estate is not within the purview of this action. I will therefore, not be drawn into it.”

6.4 It was submitted further that the reliefs being sought in this matter have not been dealt with by any court as the initial action was for the removal of the caveat, and not for the determination of the legal owner of the property. Therefore, a plea of abuse of court process and res judicata cannot succeed.

6.5 The appellant’s counsel contented that, there was a certificate of title in Simon Hanyona Michelo’s name which is conclusive

evidence of ownership. This entails that the issue of ownership was not and could not have been realistically pleaded in the first action. Thus, at page J13 of the judgment in the first action, the court noted that, *"It was inconceivable that the appellant would be well placed to challenge the Hanyona family members' claim of beneficial interest in the farm, in the absence of a full inquiry."*

6.6 In the premise, it was contended that it is clear that Judge Kawimbe did not hold an inquiry into the ownership of the property in issue.

6.7 As regards grounds three and four, it was submitted that the lower court erred in dismissing the action without determining all the issues in controversy. We were referred to page J14 of the judgment in the first action, where the court stated as follows: *"It is trite that a caveat is not a final remedy and should never be deployed as a final measure. Granted that there are still serious issues in controversy amongst the parties, I order that the caveat be maintained until those issues are finally determined"*

6.8 Consequently, it was submitted that there was no abuse of court process as the issues before the court below had not been dealt with in the initial action.

6.9 To this end, we were urged to uphold the appeal.

7.0 RESPONDENTS' ARGUMENTS

7.1 The respondents' heads of argument were filed on 15th September, 2021. Learned counsel for the respondents addressed the grounds of appeal in the manner that the appellant did.

7.2 In responding to grounds one and two, the respondents considered the ruling of Judge Kawimbe with particular emphasis on the excerpts from pages J12 and J13 lines 15 to 18 and 9 to 15 respectively as follows:

"The evidence adduced shows that the Hanyona family members contributed herds of cattle towards the acquisition of Farm 190a Namayani, Lusaka. Further, that the late Simon Hanyona Michelo, one of the members of the Hanyona family was assigned to buy the farm on behalf of the family. The evidence was not disputed by the applicant."

"It is therefore, quite inconceivable, that the applicant would be well placed to challenge the Hanyona family members' claim of beneficial interest in the farm, in the

absence of a full inquiry. Accordingly, I hold that the surviving members of the Hanyona family do have a beneficial interest in the farm and that the nature of the interest has been sufficiently disclosed.”

“I further hold that the late Anderson Nankulo, a member of the family, and whose mother Saliya Hanyona contributed twelve herds of cattle towards the acquisition of the farm, had beneficial interest.”

7.3 In this regard, the respondents’ counsel submitted that the issue of the ownership of the land in question was determined in the first action as the court found that the said land belongs to the Hanyona family.

7.4 It was contended that, Judge Muma’s finding that the farm did not belong exclusively to the deceased was made on the basis of the earlier judgment and he rightly concluded that the matter was *res judicata*.

7.5 Citing the **Bank of Zambia v. Jonas Tembo & Others**, ⁽¹⁾ case it was argued that the same point between the same parties was determined in the earlier action. Therefore, the subsequent action was not only *res judicata*, but an abuse of the court

process. Counsel submitted that if the appellant was dissatisfied by Judge Kawimbe's judgment, he ought to have appealed instead of commencing a fresh action.

7.6 We were therefore urged to find that the subsequent matter was *res judicata* and to dismiss the appeal.

7.7 With regard to the third and fourth ground of appeal, it was submitted that page 10 of Judge Kawimbe's judgment shows that she was of the view that the question to be determined was not whether the estate of the late Simon Hanyona Michelo is liable to an action for possession or recovery of land, but rather, who the farm devolved to. In determining this question, her Ladyship placed reliance on **Section 76 of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia** and the case of **Lenton Holdings Limited v. Airforce Moyo** ⁽⁵⁾ which guide that a caveator must show that he has a beneficial interest in the land or estate in issue, and must show the nature of the interest claimed in the land or estate.

7.8 In addition, the court in the first action having found that members of the Hanyona family contributed herds of cattle towards the acquisition of the property in issue, it followed that

those family members had a beneficial interest in the said property.

- 7.9 Counsel finally submitted that the court was correct in declaring the subsequent action, *res judicata* and urged us to dismiss the appeal with costs.

8.0 THE DECISION OF THIS COURT

- 8.1 We have read the record of appeal and carefully considered the arguments made by counsel on both sides. There are five grounds of appeal which we shall tackle together **as the issue as we see it is; whether the matter before Judge Muma was *res judicata*.**

- 8.2 It is clear from the record that in cause no. 2008/HP/0140 which was presided over by Judge Kawimbe, the appellant claimed for the following reliefs:

A declaration that the caveator had no entitlement or beneficial interest in property number F1900/A Lusaka, Zambia, an order that the caveat be removed, costs and any other relief the court may deem fit.

- 8.3 About eight (8) years later, in cause No.2020/HP/0464 which was presided over by Judge Muma, the appellant claimed

ownership of the subject property, an injunction to restrain the respondents from intermeddling with the estate, damages and costs.

8.4 Following the **Bank of Zambia v. Jonas Tembo and Others** ⁽¹⁾

we ought to look at three crucial questions, firstly whether the respondent had shown that the cause of action was the same.

Secondly, whether it was evident that the appellant (plaintiff) had an opportunity of recovering in the first action that which he sought to recover in the second action, but for his own fault could not recover. Thirdly, whether the same point had actually been determined between the same parties.

8.5 It is clear that the first action was brought by originating summons pursuant to **section 81 (1) and (2) of the Lands and Deeds Registry Act** which provides as follows:

***“81 (1) Such registered proprietor or other interested person may, if he thinks fit, summon the caveator, or the other person on whose behalf such caveat has been lodged, to attend before the court or a Judge thereof to show cause why such caveat should not be removed.*”**

(2) Such court or Judge, upon proof that such person has been summoned, may make such order in the premises, either ex-parte or otherwise, as to such court or judge seems meet.”

8.6 We therefore opine that in the action for removal of the caveat, the parties herein and the court rightly focused on the grounds for the removal of the caveat.

8.7 However, we must point out that the appellant wrongly claimed for a declaratory order that the caveator had no entitlement or beneficial interest in the property and thus no right to lodge a caveat because by law one can only claim for a declaration by way of writ of summons; see the case of **Chikuta v. Chipata Rural Council**.⁽⁵⁾

8.8 In the case of **Corpus Legal Practitioners v. Mwanandani Holdings Limited**,⁽⁶⁾ the Supreme Court had elucidated section 81 (1) of the Lands and Deeds Registry Act in relation to a claim for the removal of a caveat.

8.9 The court determined that under the circumstances of that particular case, to insist that the claim for the removal of the caveat must be brought in a separate action, commenced by

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8.8 In the case of **Corpus Legal Practitioners v. Mwanandani Holdings Limited**, ⁽⁶⁾ the Supreme Court had elucidated section 81 (1) of the Lands and Deeds Registry Act in relation to a claim for the removal of a caveat.

8.9 The court determined that under the circumstances of that particular case, to insist that the claim for the removal of the caveat must be brought in a separate action, commenced by

originating summons, would amount to asking that the different claims in the case, although involving the same parties and arising from the same set of facts, be severed and brought in separate actions and that would amount to a multiplicity of actions which is always frowned upon. So the lower courts order that the proceedings be amended to include a relief for the removal of a caveat was upheld.

8.10 What is applicable to this matter is the Supreme Court's statement that the **Rural Development Limited v. Bank of Credit and Commerce (Z) Limited** ⁽⁷⁾ case is only applicable where the sole claim in an action is for an order for the removal of a caveat.

8.11 Our understanding is that a case for the removal of a caveat commenced by originating summons should not include other claims. We observe that in her judgment, Judge Kawimbe did not make any declaration and rightly so; see **Chikuta v. Chipata Rural Council**; ⁽⁵⁾ although we should not lose our focus on the judgment appealed against.

8.12 The point is that in the first action, the appellant did not and could not claim for a declaration with regard to ownership of the farm land as he was restricted by law to claim the removal of

the caveat. So the respondents had not shown that the cause of action was the same. They also failed to show that the appellant had an opportunity of obtaining in the first action the same reliefs which he sought to obtain in the second action, but for his own fault did not claim the same.

8.13 Having answered the first two questions, we now turn to the 3rd question whether the issue of ownership had already been determined between the same parties. It is clear that the second action involved the same parties as the first except that the Commissioner of Lands, Attorney General and the interveners who were cited as respondents in the first action were not included in the second. In our view, the most important factor is whether the same issues were finally determined in the first action, since the same parties before us were involved in both actions in the lower court.

8.14 At page J13 Judge Kawimbe found it “inconceivable that the appellant would be well placed to challenge the Hanyona family’s claim of beneficial interest in the farm, in the absence of a full inquiry.” And at J14 she held that *“a caveat is not a final remedy and should never be deployed as final measure. Granted that there are still serious issues in controversy amongst*

the parties, I order that the caveat be maintained until those issues are finally determined.”

8.15 Therefore, Judge Kawimbe did not carry out a full inquiry into the ownership of the property and or any other claim made by the appellant in the subsequent action and did not make a final determination of all the issues in dispute between the parties as her primary focus was on the question whether the caveat could be maintained.

8.16 Judge Kawimbe referred to Sections 76 and 77 of the lands and Deeds Registry Act which provide for procedural matters for the lodging of caveats. She also referred to the cases of **Construction and Investments Holdings v. Willen Jacks Company Zambia Limited** ⁽⁸⁾ and **Lenton Holdings Limited v. Airforce Moyo** ⁽⁴⁾ which pertain to the effect of a caveat and state that only a person who purports to have an enforceable interest in land may be justified in interfering with the rights of a registered caveat and that; according to section 77 (1) a caveator should disclose the interest claimed.

8.17 The learned Judge Kawimbe proceeded to interpret section 81 (1) of the Lands and Deeds Registry Act at J12 that “it places the burden of proof on a caveator to give good reason why the

caveat should be maintained. In other words, it is not for the applicant to show why a caveat should not be removed but for a caveator to justify why it should not be removed.”

8.18 Our understanding is that it was in an effort to justify why the caveat should not be removed that the respondents adduced evidence to the effect that the farm in question was acquired from contributions made by several members of the Hanyona family. The court accepted that evidence and found that the surviving members of the Hanyona family have beneficial interest in the farm.

8.19 The foregoing findings were not meant to be a final decision as to who owns the property in issue but to determine whether the caveator was justified in lodging the caveat. This is clear from the findings that followed at page 14 of the said judgment; that Anderson Nankulo, the caveator and member of the family whose mother contributed 12 herds of cattle towards the acquisition of the farm had beneficial interest in the property in issue. Consequently, he was entitled to register a caveat.

8.20 For the foregoing reasons, we hold that the issues raised in the second action were not finally determined in the first one.

8.21 For the reasons stated above, in the judgment appealed against, the lower court misdirected itself and erred when it dismissed the matter for being *res judicata*.

8.22 It follows that all the grounds of appeal have merit and they must therefore succeed.

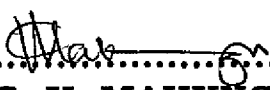
9.0 CONCLUSION

9.1 Finally, it may be concluded that the lower court erred to dismiss the action for being *res judicata* as in the first action, the appellant did not have an opportunity of raising the issues raised in the second.


9.2 The first action was brought pursuant to section 81 (1) and (2) of the Lands and Deeds Registry Act which restricted the appellant to claiming the removal of the caveat.

9.3 The reliefs of ownership of property, damages and an injunction claimed in the second action were not determined in the first one.

9.4 The appeal therefore succeeds in its entirety with costs to the appellant which may be taxed in default of agreement.

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C. K. MAKUNGU
COURT OF APPEAL JUDGE

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B. M. MAJULA
COURT OF APPEAL JUDGE

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M. J. SIAVWAPA
COURT OF APPEAL JUDGE