

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 305 of 2021
CAZ/08/2021/0429

BETWEEN:

ELIAS TEMBO

AND

ELEUTHERIUS MAPENZI CHIMANSA NYANGA
THE COMMISSIONER OF LANDS
LUSAKA CITY COUNCIL
ATTORNEY GENERAL

Appellant

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent

Coram: Kondolo, Sichinga and Sharpe-Phiri, JJA
on 25th November 2022 and 16th December 2022

For the Appellant:	Ms. D. Chisenga-Lumbwe of Messrs K. Mwale & Company
For the 1 st Respondent:	Mrs. L. S. Tembo of Messrs M.L Mukande & Company
For the 2 nd and 4 th Respondents:	Mr. P. Shampulo, Principal State Advocate of Attorney General's Chambers
For the 3 rd Respondent:	No appearance

JUDGMENT

Sharpe-Phiri, JA, delivered the Judgment of the Court.

Legislation referred to:

1. *The Rules of the Supreme Court of England, 1999 Edition (White Book)*
2. *The English Limitations Act 1939*
3. *British Acts Extension Act, Chapter 10 of the Laws of Zambia*
4. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*

Cases referred to:

1. *Peter David Lloyd v J.R. Textile Limited SCZ/8/201/2011, Appeal No. 137 of 2011.*

2. *Anti-Corruption Commission v Barnett Development Corporation Limited* (2008) Vol. 1 Z.R. 69
3. *Alex Dingiswayo Jere (suing as Administrator of the estate of the late Courtson Jere) v Edward Kangwa Mumbi* (SCZ No. 172 of 2010)
4. *Sachar Narendra Kumar v Joseph Brown Mutale* (SCZ Judgment No. 8 of 2013)
5. *Martin Nguvulu and 34 others v Marasa Holdings (T/A Hotel Inter-Continental Lusaka)* (SCZ/8/026/2016)

1.0 INTRODUCTION

- 1.1 This is an appeal against the Ruling of Yangailo J of the High Court delivered at Lusaka on 21st September 2021.
- 1.2 By that Ruling, the learned trial judge refused to dismiss the action in that Court on the appellant's application that the same was statute barred. The trial Court based its decision on the holding of the Supreme Court in the case of **Peter David Lloyd v JR Textiles Limited**¹.
- 1.3 By this decision, the trial Court also allowed the 1st respondent's application to join the 2nd, 3rd, and 4th respondents as defendants in the matter respectively.

2.0 BACKGROUND

- 2.1 The background of the matter is that the 1st respondent commenced proceedings against the appellant under **Order 113 of the White Book 1999 Edition**¹ seeking summary possession of Stand No. 24400 from the appellant.

The application was commenced by originating summons supported by an affidavit.

- 2.2 The appellant objected to the mode of commencement of the action by the 1st respondent by filing an application challenging the action. The trial Court declined to dismiss the appellant's case and instead opted to treat the action as though it had been commenced by way of writ of summons.
- 2.3 Subsequently, on 2 September 2021, the appellant raised a preliminary issue on whether the matter ought to be dismissed for being statute barred following which the court rendered its Ruling on the 21 September 2021 which decision is the subject of this Appeal.
- 2.4 The contention of the appellant in the affidavit in support of the preliminary issue was that the dispute relating to the property in question arose in 2006, which is over 13 years to the year 2020 when the action in the Court below was commenced. The appellant contended that the limitation period for land disputes is 12 years and thus the action in the Court below was beyond the statutory limitation period.
- 2.5 The 1st respondent opposed the preliminary issue by way of affidavit in opposition in which he averred that although the issue arose in 2006, the fact that he had a certificate of title for the subject property lawfully issued by the Ministry of Lands, brought the action within the exceptions to the limitation period.

2.6 In the Ruling, the trial Court also considered the 1st respondent's application for joinder of the 2nd, 3rd, and 4th respondents as co-defendants with the appellant.

2.7 The joinder application was premised on the fact that the appellant had produced documents purportedly issued by the Lusaka City Council and the Commissioner of Lands with respect to ownership of the subject property hence their interest and knowledge in the action.

3.0 **DECISION OF THE COURT BELOW**

3.1 The trial Court determined the matter on the strength of affidavit evidence and arguments of the parties. In dismissing the appellant's application to dismiss the action for being statute barred, the trial Court agreed that the **English Limitation Act 1939²** applies to Zambia by virtue of **Section 2 of The British Acts Extension Act³**.

3.2 The Judge highlighted that **Section 4(3) of the Limitation Act** did limit the time for initiating actions for recovery of land to 12 years from the date when the right of action accrued. However, she stressed that the provision was not applicable in this case as there was a Certificate of Title relating to the property in question issued to the 1st respondent. She emphasized that the 1st respondent could not be barred from terminating the appellant's adverse possession of the subject property in dispute.

- 3.3 In arriving at the said conclusion, the trial Court relied on the case of **Peter David Lloyd v J.R. Textiles Limited**¹ where the Supreme Court held that adverse possession cannot itself extinguish a registered proprietor's title.
- 3.4 The trial Court thus concluded that it was immaterial whether the registered proprietor, who in this case was the 1st respondent, had made any attempt to terminate the appellant's adverse possession of property within the prescribed 12 years to commence legal proceedings. The High Court accordingly dismissed the appellant's application on that basis.
- 3.5 On the question of joinder, the trial Court noted that the underlying principle for joinder of parties was to ensure that there is avoidance of multiplicity of legal proceedings arising from similar circumstances and ensuring that all contentious issues between parties are brought to finality.
- 3.6 The trial Court held that the presence of the 2nd, 3rd and 4th defendants who are the 2nd, 3rd and 4th respondents respectively was necessary to ensure that all matters in dispute in the matter or cause could effectually and completely be determined and adjudicated upon. The Court below accordingly ordered for the joinder of the said parties.

4.0 **THE APPEAL**

4.1 Being dissatisfied with the Ruling of the High Court, the appellant filed a Notice of Appeal and Memorandum of Appeal on 15 October 2021 advancing four grounds of appeal.

4.2 The grounds of appeal are as follows:

- (i) **That the learned High Court Judge in the Court below erred in law and fact in dismissing the appellant's application to dismiss matter for being statute barred when she held that the purported Certificate of Title in possession of the 1st respondent is one of the exceptions in so far as it relates to the Limitations Act of 1939 of the United Kingdom when in fact her proposition is not supported by any law.**
- (ii) **The learned trial Judge in the Court below misdirected herself in law and fact in refusing the appellant's application to dismiss action for being statute barred when she opined that the appellant belongs to the congregation of squatters and trespassers who was attempting adverse possession against the 1st respondent placing reliance on the case of Peter David Lloyd Vs Textile Limited SCZ/201/2011 notwithstanding that the case cited and in casu are fundamentally at variance and distinguishable.**
- (iii) **The lower Court erred in law and fact when it joined the 2nd, 3rd, and 4th respondents to the proceedings herein notwithstanding that the pleadings settled by the 1st respondent thus far do not disclose any cause of action against the aforementioned.**

- (iv) **The learned High Court Judge misdirected herself in law when she awarded costs to the 1st respondent despite the cause in casu being statute barred and an abuse of Court process.**

5.0 **APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL**

- 5.1 The appellant argued grounds 1 and 2 together advancing that the assertion that possession of a Certificate of Title provides an exception to the Limitation Act (UK) 1939 is not supported by any law hence the matter under Cause number 2020/HP/0800 in the Court below is statute barred and ought to be dismissed accordingly for want of jurisdiction.
- 5.2 The above submission was founded on the appellant's contention that the trial Court relied on the holding of the Supreme Court in the case of **Peter Taylor Lloyd vs J.R. Textile Limited** in which the Supreme Court held that it was immaterial whether a registered proprietor makes any attempt within the prescribed 12 years to commence legal proceedings for the purposes of terminating the squatter's possession.
- 5.3 The appellant contented that the **Peter Taylor Lloyd** case was distinguishable from the present case as the appellant in this matter obtained a Certificate of Title to the subject property whereas the Supreme Court in the **Peter Taylor or Lloyd** case was dealing with squatters attempting adverse possession. It was argued that the findings of fact themselves and other ownership documents submitted before the trial Court took the appellant out of the realm of a squatter, a term which was

described as referring to a person who settles on a property without any legal claim or title.

5.4 In arguing Ground 3, the appellant submitted that given the fulcrum of the relief sought by the 1st respondent in the Court below 'for an order for leave to issue a writ of possession', there was no basis upon which the trial Court should order for the joinder of the 2nd, 3rd, and 4th respondent as parties to the action in that court. The appellant argued that the three parties do not stand to be affected in any way by the proceedings in the Court below, hence the order of joinder of the said parties by the Court below is ultra vires.

5.5 In arguing ground 4, the appellant merely built on the foregoing arguments in relation to grounds 1 to 3 and submitted that the trial Court was equally wrong to award costs to the 1st respondent despite the cause being statute barred and an abuse of process.

6.0 **RESPONDENT'S ARGUMENTS OPPOSING THE APPEAL**

6.1 The 1st respondent opposed the appeal arguing ground 1 and 2 together. In his arguments, he reiterated that the lower Court was on firm ground when it held that ownership of Certificate of Title is one of the exceptions to the rule under **Section 4(3) of the Limitation Act 1939** hence the lower Court deciding to dismiss the action for being statute barred.

- 6.2 The 1st respondent submitted that the case of **Peter David Lloyd v J. R. Textiles Limited** which the lower Court relied on to arrive at its conclusion insulates him from the ambit of **Section 4(3) of the Limitations Act**.
- 6.3 The 1st respondent argued that it was therefore immaterial that he had commenced the action after the prescribed 12 year period had lapsed as he was the registered proprietor of the subject property and certificate of title No. 36065 duly issued to him by the 2nd respondent.
- 6.4 The 1st respondent added that it was undisputed that he was the owner of the subject property as title constitutes conclusive evidence of ownership as provided for under **Section 33 of the Lands and Deeds Registry Act⁴** as interpreted by the Supreme Court in the case of **Anti-Corruption Commission v Barnett Development Corporation²**.
- 6.5 The 1st respondent further contended that the appellant was properly described as a squatter by the lower Court citing the case of **Alex Dingiswayo Jere (Suing as Administrator of the Estate of Courtson Jere) v Edward Kangwa Mumbi³** where the Supreme Court determined that the appellant who might have had prior interest over the land in question had his interest extinguished after Certificate of Title for the subject land was issued to the respondent.

6.6 In arguing ground 3, the 1st respondent contended that the rationale for joining the 2nd, 3rd and 4th respondent by the lower Court is anchored on a well-founded principle as determined by the Supreme Court in the case of **Sachar Narendra Kumar v Joseph Brown Mutale**⁴, whose rationale enables the court to determine all matters in dispute in one cause, thereby preventing multiplicity of actions.

6.7 The 1st respondent argued in relation to ground 4 that the lower Court could not be faulted for awarding costs to him as a successful party as the award of costs is a discretionary remedy. He referred the Court to the case of **Martin Nguvulu and 34 others v Marasa Holdings (T/A Hotel Inter-Continental Lusaka)**⁵ in which the Supreme Court guided that the Courts ought to exercise the discretion on the award of costs judiciously, adding that among the important considerations in awarding costs which Courts ought to bear in mind is that costs ordinarily follow the event.

7.0 **APPELLANT'S ARGUMENTS IN REPLY**

7.1 The appellant filed a reply to the 1st respondent's arguments, in which he submitted that the 1st respondent was engrossed in the mistaken belief that the appellant was a squatter when in fact not. He argued that the case of **Alex Dingiswayo Jere** which the 1st respondent has relied upon is distinguishable from the present case as the said case dealt with the imperative of **Section 45 of the Lands and Deeds Registry Act**⁴

whereas *in casu* the appellant was in possession of a duly accepted offer letter from the 2nd respondent. The appellant added that the Ministry of Lands and Lusaka City Council still actively demanded ground rates and property rates from him.

7.2 The appellant added that the aforesaid facts take him outside the realm of “squatter” as envisaged by law, adding that the 1st respondent had never been in possession of the subject property.

7.3 Further, that at the time the 2nd respondent was allocating the subject land to the 1st respondent, the said land was not available for alienation as it had already been encumbered by the fact of the appellant’s possession. For the said reason, the appellant submitted that the **Peter David Lloyd** case was inapplicable to the facts *in casu*.

8.0 DECISION OF THIS COURT

8.1 We have carefully considered the evidence on record; the arguments of the parties and the Ruling being impugned. We are mindful that the contention in this appeal relates to the question of jurisdiction on the premise of time bar, as the substantive matter in the Court below has not yet been determined on its merits.

8.2 Having said that, it is our view that grounds 1 and 2 should be addressed simultaneously as both grounds of appeal relate

to the trial Court's refusal to dismiss the action based on time limitation, which conclusion, she arrived at based on the Supreme Court holding in the case of **Peter David Lloyd v J.R. Textiles Limited**¹. In that case, the Supreme Court held that:

'What it means is that adverse possession cannot in itself extinguish the registered proprietor's title at the Lands Registry, and it becomes immaterial whether the registered proprietor has made any attempt within the prescribed 12 years to commence legal proceedings for the purpose of terminating the squatter's or trespassers possession.'

8.3 In line with the foregoing, the trial Judge concluded that it was immaterial for the 1st respondent as registered proprietor of land to have made any attempt to terminate the appellant's possession of the property.

8.4 The 1st respondent had moved the court in the action below on the premise that he is a title holder whose proprietary interest is covered under **Section 35 of the Lands and Deeds Registry Act** which provides that:

"After land has become the subject of a Certificate of Title, no title thereto, or to any right, privilege, or easement in, upon or over the same, shall be acquired by possession or user adversely to or in derogation of the title of the Registered Proprietor."

8.5 The evidence before the trial Court, as shown at pages 456 to 475 of the Record of Appeal, is that the appellant has had

interactions with the 2nd and 3rd respondents by himself and/or his predecessor in title to the subject land, which evidence also purports to show that he was offered the subject land. Whereas pages 32 to 40 of the same record show that title was issued by the 3rd respondent to the 1st respondent with a 99-year lease commencing 1st August 2001 for the subject property numbered as Stand No. 24400, Lusaka.

- 8.6 The question of the 1st respondent's right to possession of the subject property is the subject for determination by the lower Court.
- 8.7 The appellant sought to have the 1st respondent's action dismissed on the basis that it was statute barred although the 1st respondent is the title holder of the property on the premise, he did not take action to claim for possession of the property within the prescribed 12-year land dispute limitation period.
- 8.8 **Section 34 of the Lands and Deeds Act** ousts any provision of the rule of law or equity in relation to the rights of a registered title holder to advance his right to such land in a court action. The provision provides that:

“(1) No action for possession, or other action for the recovery of any land, shall lie or be sustained against the Registered Proprietor holding a Certificate of Title for the estate or interest in respect to which he is registered, except in any of the following cases, that is to say:

...

(2) In any case other than as aforesaid, the production of the Register or of a copy of an extract therefrom, certified under the hand and seal of the Registrar, shall be held in every court of law or equity to be an absolute bar and estoppel to any such action against the Registered Proprietor of land the subject of such action, and in respect of which a Certificate of Title has been issued, any rule of law or equity to the contrary notwithstanding." (emphasis ours)

8.9 It would thus appear safe to conclude that going by the foregoing provision, the rights of a registered title holder to defend his occupation of such registered land at any opportune time is supreme, subject only to the Constitution.

8.10 In the same vein that **Section 34(2) of the Lands and Deeds Registry Act** ousts the provision of any rule of law (the **Statute of Limitation** included), it cannot be said that the said right is only applicable in instances when the registered proprietor is called upon to justify his presence on such registered land.

8.11 It is our firm view that such registered proprietor can also defend his ownership of the subject land from any purported threats to his subsisting title, and this he can do at any time without any limitations as to time. For these foregoing reasons, we agree with the lower Court that a Certificate of Title is an exception to the provision of **Section 4(3) of the English Statute of Limitation**. Grounds 1 and 2 are accordingly unsuccessful.

8.12 In turning to ground 3, we will not belabor further as we have already noted the 2nd and 3rd respondents' involvement in the matter in the preceding paragraphs. The dispute between the appellant and the 1st respondent arises out of the fact that the 3rd respondent has now purportedly given the appellant an interest in the subject property which the 2nd respondent had earlier alienated to the 1st respondent.

8.13 Therefore, as rightly noted by the trial Court, the joinder of the 2nd, 3rd and 4th respondents is necessary to ensure that all matters in dispute in the matter could be effectually and completely determined and adjudicated upon.

8.14 We find that the trial Judge was on firm ground in ruling as she did to join the 2nd, 3rd and 4th respondents to the action to properly determine all the issues in contention with the relevant parties before court, thus potentially averting the possibility of multiple actions being brought to court. Ground 3 of appeal is unsuccessful.

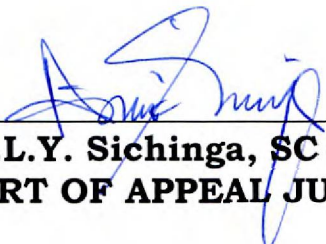
8.15 Having held as we have, we see no reason to fault the trial Court below in awarding costs to the 1st respondent. It is an entrenched practice that costs normally follow the event. In this regard, the 1st respondent, having been successful in the Court below, was properly awarded costs in the lower Court's inherent jurisdiction. Ground 4 therefore fails.

9.0 **CONCLUSION**

9.1 Given that the entire appeal has failed, we award costs of this appeal to the 1st respondent.



M.M. Kondolo, SC
COURT OF APPEAL JUDGE



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



N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE