

**IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO.88/2021
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

BETWEEN:

MAILA RODGER CHILELE

AND

PATSON MBAO

MWEENE HABATWA VINCENT



APPELLANT

1ST RESPONDENT

2ND RESPONDENT

CORAM : Chashi, Majula and Sharpe – Phiri, JJA

ON: 15th February and 15th March 2022

For the Appellant: C. Nhkata, Messrs. Paul Norah Advocates

*For the 1st Respondent: M. Nambao (Ms.), Messrs. Mulungushi
Chambers*

For the 2nd Respondent: N/A

JUDGMENT

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

- 1. African Banking Corporation Zambia v Mubende Country Lodge – SCZ Appeal No. 116 of 2016**
- 2. Leopold Walford (Z) Limited v Unifreight (1985) ZR, 203**
- 3. Henry Kapoko v The People**
- 4. Access Bank Limited v Group Five/Zcon Business Park Joint Venture (Suing as a firm) SCZ/8/52/2014**

Legislation referred to:

- 1. The Constitution of Zambia (Amendment) Act No. 2 of 2016**
- 2. The Limitation Act, 1939**

Other works referred to:

- 1. Halsbury's laws of England, Volume 27**

Rules referred to:

- 1. The High Court Rules, Chapter 27 of the Laws of Zambia**
- 2. The Supreme Court Practice, 1999 Edition (White Book)**

1.0 INTRODUCTION

1.1 This appeal emanates from the Ruling of Hon. Mrs. Justice Ruth Chibbabbuka delivered on 3rd February, 2021.

1.2 In the said Ruling, the learned Judge dismissed the preliminary issue raised by the Appellant to dismiss the action on account of it being statute barred as she found that the application was incompetently before the court.

2.0 BACKGROUND

2.1 On 2nd July, 2020, the 1st Respondent as Plaintiff in the court below, commenced an action against the Appellant herein and the 2nd Respondent as 1st and 2nd Defendants respectively, claiming the following reliefs:

- i. A declaration that the Plaintiff was the rightful owner of farm No. 4423 Mukonchi.**
- ii. That the Defendants be ordered to give vacant possession of the properties known as Farm 4423 Mukonchi and S/D B A of Farm 4423 Mukonchi to the Plaintiff, in default of which, the Plaintiff should issue writ of possession for the same.**
- iii. The Defendants be ordered to remove all the structures erected on the property, in default of which the Plaintiff be at liberty to demolish the same at the Defendant's costs.**
- iv. Damages for trespass and opportunity cost.**

2.2 According to the accompanying statement of claim, the 1st Respondent was the registered owner of Farm No.

4423 Mukonchi East Bank (the Farm), having been registered as such on 28th March, 1989. That, sometime in early 1990, the 1st Respondent was approached by the Appellant to rent the farm at K40.00 per annum, which was agreed.

2.3 The 1st Respondent averred that sometime in 1991, he was arrested for straying into Congo (DRC) and had to serve a sentence of 7 years. That upon his return to Zambia, he found that the title deed had been fraudulently transferred into the Appellant's name. Further, that the Appellant had also subdivided the farm and gifted 140,000 hectares to the 2nd Respondent, which is now registered as S/D B A of Farm No. 4423 Mukonchi.

2.4 The particulars of fraud were that, the Appellant purported that the 1st Respondent had signed all the necessary documents to transfer the property to the Appellant, and that the Appellant had paid a sum of K964, 000.00 as the purchase price of the farm, when in fact not.

3.0 PRELIMINARY ISSUE

3.1 On 11th September 2020, the Appellant filed a notice of intention to raise a preliminary issue pursuant to **Orders 14A/1, 33/3 and 2/2 RSC** advancing one issue for determination as follows:

“Whether the court could proceed to hear and determine the matter when the matter was statute barred.”

3.2 According to the Appellant, he was initially a tenant of the 1st Respondent and occupied the farm, which was mortgaged with Lima Bank. When the bank wanted to repossess the farm, the Appellant offered to repay the loan in exchange for the farm to pass on to him. When that was done, all the documents including the original certificate of title were passed on to the Appellant for purposes of changing ownership. The Appellant was accordingly issued a certificate of title.

3.3 It was further averred that the transaction having occurred around 1991 and the statutory limitation of 12

years from the time the right of claim accrued having expired, the action was statute barred. That, the 1st Respondent has always been aware of the status of the farm.

3.4 The 1st Respondent opposed the preliminary issue alleging that the action was not statute barred as fraud was being alleged. Further that, the matter was incompetently before the court as no intention to defend as required under **Order 14A RSC** had been given by the Appellant.

4.0 DECISION OF THE COURT BELOW

4.1 After considering the preliminary issue, the affidavit evidence and the arguments by the parties, the learned Judge observed that the Appellant had not filed a memorandum of appearance and defence. Relying on the case of **African Banking Corporation Zambia v Mubende Country Lodge Limited**,¹ the learned Judge opined that the giving of a notice to defend was a pre-requisite to applying for the matter to be disposed of under **Order 14A RSC** and that the notice of intention

consists of filing a memorandum of appearance with the defence. Further that, the filing of a conditional memorandum of appearance without a defence did not amount to an intention to defend.

4.2 The learned Judge also considered the effect of making the application under **Order 33/3** and **2/2 RSC**. The learned Judge again referred to the **Mubende case**¹ where it was held that **Order 33/3** cannot be invoked independently or to the exclusion of the mandatory requirements under **Order 14A**. As regards **Order 2/2**, the learned Judge ruled that, it is for setting aside of court process for irregularity and not disposal of matters on a point of law.

Premised on the foregoing, the learned Judge found that the Appellant's application was incompetently before her and accordingly dismissed it.

5.0 GROUNDS OF APPEAL

5.1 Dissatisfied with the Ruling of the lower court, the Appellant has appealed to this Court advancing 4 grounds of appeal couched as follows;

1. That the Honourable Court misdirected itself in law and fact when it ruled that giving of the intention to defend is a prerequisite to applying to have the matter disposed of under Order 14A Rule 1 of the Rules of the Supreme Court when the 1st Defendant was contesting the validity of the proceedings for being statute barred.
2. That the Honourable Court erred in law and fact when it ruled that the giving of the intention to defend is a prerequisite to applying to have the matter disposed of under Order 14A Rule 1 of the Rules of the Supreme Court when the 1st Defendant was contesting the validity of the proceedings for being statute barred without taking into account that the 1st Defendant also cited Order 2 Rule 2 of the Rules of the Supreme Court 1999 Edition (White Book).
3. That the Honourable Court erred in law and fact when it ruled that the 1st Defendant's

application is incompetently before the Honourable Court.

4. That the court erred in law and fact when it dismissed the 1st Defendant's application to dismiss the matter for being statute barred whose net effect was the matter to proceed to trial despite it being statute barred. The court would have to proceed with its inherent jurisdiction to dismiss the matter for being statute barred on its own volition by considering the full facts of the matter.

6.0 ARGUMENTS IN SUPPORT OF APPEAL

- 6.1 Mr. Nkhata, Counsel for the Appellant, relied on the filed heads of arguments dated 3rd May, 2021 and augmented the same with brief oral submissions.
- 6.2 In support of ground one, Counsel submitted that according to **Order 14A/1 RSC** and the **Mubende Case**,¹ the giving of the intention to defend is a pre-requisite to having the matter disposed of under **Order 14A/1 RSC**. That the filing of a conditional memorandum of

appearance without a defence is only applicable in circumstances where the defendant intends to challenge the validity of the proceedings.

6.3 In **casu**, the notice to raise preliminary issue filed by the Appellant was challenging the validity of the writ of summons on the grounds that the 1st Respondent's claim was statute barred. That, therefore, the filing of an intention to defend was not a requirement.

6.4 Counsel submitted that, the issues raised by the 1st Respondent in the statement of claim date back as far as 1991. Further that the 1st Respondent in his statement of claim averred that he only become aware of the fact that the farm was transferred to the Appellant after 7 years from 1991 when he returned to Zambia. According to the Appellant, what that entails is that, the 1st Respondent's right of action accrued in 1998.

6.5 However, the 1st Respondent only took out an action against the Appellant in 2020, nearly 22 years from the date the right of action accrued. That this clearly offends the provisions of section 4 of **The Limitation Act**² which

prohibit any action for the recovery of land after the expiration of 12 years from the date on which the right of action accrued.

6.6 It was further argued that, even in the event that this Court upholds the Ruling of the lower court, the failure to file an intention to defend was not fatal but curable. Relying on the case of **Leopold Walford (Z) Limited v Unifreight**,² Counsel submitted that breach of a regulatory rule is curable and not fatal.

That, therefore, the lower court ought to have ordered the Appellant to file his defence so that the application to dismiss the matter be heard on merit.

6.7 In addition, Counsel referred us to **Article 118(2)(e) of the Constitution**¹ and the case of **Henry Kapoko v The People**³ and submitted the lower court should have considered the merits of the Appellant's application and not merely dismissed it for procedural technicalities.

6.8 Lastly, Counsel submitted that the lower court erred by not taking into account the fact that the Appellant also

relied on **Order 2/2 RSC**, which provides that the court can set aside originating process for irregularity.

6.9 In support of ground four, Counsel referred us to **Order 13 of The High Court Rules (HCR)** and submitted that, the lower court failed to exercise its inherent jurisdiction to dismiss the matter for being statute barred. That this a proper case in which the lower court ought to have acted on its own volition in light of the fact that the facts and circumstances of the case were clear.

6.10 We were urged to uphold the appeal and set aside the Ruling of the lower court.

7.0 ARGUMENTS OPPOSING THE APPEAL

7.1 In response, Ms. Nambao, Counsel for the 1st Respondent, relied on the filed written heads of argument dated 23rd June, 2021.

7.2 Counsel referred us to **Order 14A/2/4 RSC** and the **Mubende case**¹ and submitted that, it is the filing of the memorandum of appearance together with a defence that constitutes a notice of intention to defend. Therefore, a party who seeks to rely on **Order 14A RSC**, must file a

notice of intention to defend and in the absence of such notice, the court is devoid of jurisdiction to entertain the application.

- 7.3 In **casu**, the Appellant did not adhere to the requirement under **Order 11 /1 HCR** which requires the filing of a memorandum of appearance and defence before invoking **Order 14A RSC**. That the Appellant instead filed a conditional memorandum of appearance which is contrary to the Supreme Court's guidance in the **Mubende case** as to when a conditional memorandum of appearance without defence is applicable.

It was submitted that, the filing of a conditional appearance does not amount to an intention to defend and thus it is inapplicable under **Order 14A RSC**.

- 7.4 It was further argued that, notwithstanding the failure by the Appellant to adhere to the requirements of **Order 14 A RSC**, the matter in **casu** was not statute barred on account of fraud. That therefore, this case falls within the ambit of Section 26 of **The Limitation Act²** which provides that in cases of fraud or mistake, the limitation

period begins to run when the plaintiff discovers the fraud or mistake. And in this case, the 1st Respondent only discovered the fraud in 2016.

7.5 With regard to the Appellant's reliance on **Article 118(2)** of **The Constitution**¹, Counsel again relied on the **Mubende Case**¹ and **Access Bank Limited v Group Five/ZCON Business Park Joint Venture (Suing as a firm)**⁴ and submitted that **Article 118(2)** was not enacted as a shield for litigants from complying with procedural rules.

7.6 Lastly, we were urged to dismiss the appeal for lack of merit.

8.0 DECISION OF THIS COURT

8.1 We have considered the record of appeal, the arguments by both counsel and the impugned Ruling of the lower court.

8.2 The issue that falls for determination in this appeal is quite a simple one. Whether the Appellant's application to raise a preliminary issue pursuant to **Orders 14A/1**,

33/3 and 2/2 RSC was competently before the lower court?

8.3 The answer to the foregoing question, as rightly observed by the lower court and submitted by Counsel for the Respondent, is to be found in the **Mubende case**.¹ In the said case, the Supreme Court gave clear guidance on the procedure to be followed when a party seeks to rely on **Order 14A RSC**.

8.4 We also had the occasion to consider issues surrounding **Order 14A RSC** in the case of **Kashikoto Conservancy Limited v Darrel Alexander Watt** in which we fully adopted and applied the the Supreme Court's guidance in the **Mubende case**.¹ It was held that one of the requirements that must be satisfied before invoking **Order 14A**, is the giving of notice of intention to defend and that what constitutes a notice of intention to defend is the filing of a memorandum of appearance accompanied by a defence.

8.5 In the present case, upon being served with the writ of summons, the Appellant filed a conditional memorandum

of appearance with the view to set aside the proceedings for irregularity. Subsequently, the Appellant made an application pursuant to **Order 14A, 33/3** and **2/2 RSC** to dismiss the matter for being statute barred.

8.6 It is plain and simple that the Appellant did not satisfy the requirements of **Order 14A** which require the filing of an intention to defend. That, instead the Appellant opted to file a conditional memorandum of appearance which according to the above authorities does not constitute an intention to defend. Therefore, in the absence of an intention to defend, the Appellant could not rely on **Order 14A RSC** to contest the proceedings.

8.7 As regards the Appellant's reliance on **Order 33 RSC**, the Supreme Court in the **Mubende case** stated as follows:

"The import of Order 33, rule 3 RSC is that a preliminary point of law can be raised at any stage of the proceedings, including the period before trial. To that extent, we agree with the appellant that the parties need not wait for setting down the matter for trial before an application to determine a preliminary

point of law can be raised. We should quickly make the point however, that Order 33 rule 3 cannot be invoked independently or to the exclusion of the mandatory requirements of Order 14A RSC, which require the filing of a notice of intention to defend as a pre-requisite to raising a preliminary point of law. We stated earlier in this judgment that in the context of our rules, a notice of intention to defend is the filing of a memorandum of appearance with a defence..."

8.8 As stated in paragraph 8.6 above, the Appellant did not satisfy the requirements of **Order 14A RSC**, as such, he could not seek refuge in **Order 33/3 RSC**. We, therefore, see no reason to interfere with the finding of the lower court.

8.9 Coming to **Order 2/2 RSC**, the lower court was of the view that, the Appellant could not rely on it because it is intended for the setting aside of court process for irregularity and not disposal of matters on a point of law.

We are inclined to agree with the lower court's position because we hold the view that irregularity goes to the form and not to the substance. And it is for this reason that most irregularities are not fatal but curable.

8.10 The Appellant on one hand alleges that the matter is statute barred having been commenced nearly 22 years after the right of action accrued and as such is contrary to section 4 of **The Limitation Act.**² On the other, the Respondent alleges fraud on the part of the Appellant and therefore, falls within the ambit of section 26 of **the Limitation Act,**² which provides for the postponement of the limitation period in the event of fraud or mistake.

8.11 It is clear that the parties are not agreed on the date the right of action accrued, making it a triable issue that needs further interrogation. There is need for evidence to be adduced to prove the date of accrual before concluding that the matter is statute barred. We are of the view that such issues cannot be disposed of under **Order 2/2 RSC.**

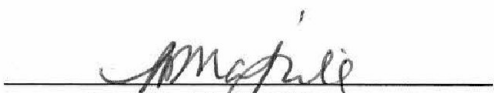
8.12 Given what we have stated in the preceding paragraphs, the learned Judge was correct in dismissing the Appellant's preliminary issue as it was incompetently before her. For the avoidance of doubt, all four grounds of appeal lack merit.

9.0 CONCLUSION

9.1 The net result of our decision is that the appeal has no merit and is accordingly dismissed with costs to the 1st Respondent to be paid forthwith. The matter is remitted back to the same learned Judge of the High Court for further direction in the matter. Costs to the 1st Respondent. Same to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



B.M. MAJULA
COURT OF APPEAL JUDGE



N.A. SHARPE PHIRI
COURT OF APPEAL JUDGE