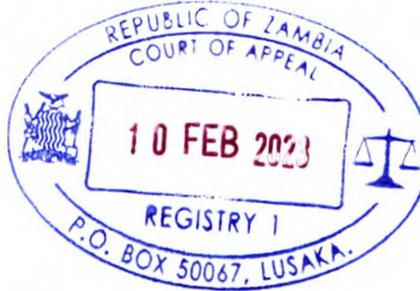


IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 26/2022
HOLDEN AT NDOLA
(Civil Jurisdiction)

BETWEEN:

MOHAMMED ABDI ALI



APPELLANT

AND

THE ATTORNEY GENERAL

1ST RESPONDENT

CHILILABOMBWE MUNICIPAL COUNCIL

2ND RESPONDENT

ERICK KANZENZI

(ON BEHALF OF MING'OMBA RESETTLEMENT COMMUNITY)

3RD RESPONDENT

LUBAMBE COPPERMINE LIMITED

4TH RESPONDENT

CORAM: Makungu, Ngulube and Banda-Bobo JJA

On the 17th day of November, 2022 and on the 10th day of February, 2023

For the Appellant: No appearance

For the 1st Respondent: No appearance

For the 2nd Respondent: Mr. B. M. Kayula- Director of Legal Services

For the 3rd Respondent: No appearance

For the 4th Respondent: Mr. G Kalandanya of GM Legal Practitioners

JUDGMENT

MAKUNGU, JA delivered the Judgment of the Court.

Cases referred to:

- 1. Major Richard Kachingwe v. Dr. Nevers Mumba (2013) Vol. 3 Z.R 17*
- 2. Mycogen Corporation v. Monsanto Company (2002) 28 Cal*
- 3. Bank of Zambia v. Jonas Tembo and Others SCZ Judgment No. 24 of 2002*
- 4. Rajagopalan Kothanda Raman v. Ngwira SCZ Appeal 163 of 2015*
- 5. D.E. Nhukwa v. Lusaka Tyre Services Limited (1977) Z.R 43*
- 6. B.P Zambia PLC v. Interland Motors Limited (2001) Z.R 37*
- 7. Twampane Mining Co-operative Society Limited v. E and M Storti Mining Limited (2011) Vol.3 Z.R 67 (SC)*

8. *Guest and Another v. Makinga & Another* (2011) Z.R 370
9. *A.S And C Enterprises Limited & Two Others v. Stanbic Bank Zambia Limited* (2012) Vol.1 Z.R 518 (HC)

Other authorities referred to:

1. *The White Book 1999, Edition.*

1.0 INTRODUCTION

1.1 This appeal is against the ruling dated 20th October, 2020 made by P.K Yangailo J, of the High Court on a preliminary issue raised by the 4th respondent pursuant to Order 14A Rules 1 and 2 of the Rules of the Supreme Court. The Judge dismissed the appellant's action (2020/HP/0297) for being *res judicata* because in her view, the subject matter (F/1884/K450 Chililabombwe had already been adjudicated upon in cause number 2017/HK/35. She further ordered that the 4th respondent's costs be borne by the appellant.

2.0 BACKGROUND

2.1 The writ and statement of claim in Cause number 2020/HP/0297 shows that the appellant sued the 1st to 4th respondents as 1st to 4th defendants respectively. He claimed for a declaration that he is the owner of property No. F/1884/K450, Chililabombwe as he holds title to it. That he purchased it from

the 3rd respondent but the 4th respondent claims to be the legal owner thereof and has fenced off the property.

2.2 He thus claimed for the removal of the fence, damages, costs and any other relief the court may deem fit.

2.3 It is clear from the affidavit in support of the preliminary application to dismiss cause No. 2020/HP/0297 that cause number 2017/HK/35 was commenced by originating summons under Order 113 Rule 1 of the Rules of Supreme Court (RSC) by KONNOCO Zambia Limited against Erick Kazenze (Group Leader of One Zambia One Nation Kasumbalesa Min'gomba Community Market), Mumba Pias, Abraham Kangwa and Other persons unknown in occupation of the subject property. The application was for summary possession of subdivision Q of Farm 1884, Chililabombwe, an Order of Injunction against the respondents, damages for unlawful occupation of the land and costs.

2.4 By Consent order dated 4th April, 2017 the parties in cause No. 2017/HK/35 agreed firstly, that a registered land surveyor from the Ministry of Lands be engaged to provide a report on whether or not the respondents had encroached on the applicant's land known as subdivision Q of Farm No.1884 Chililabombwe.

- 2.5 Secondly, that on the date of inspection and verification at the said land by the registered surveyor namely Mr. Victor Kowa of Konkola Copper Mines PLC (KCM) or any other officer familiar with the Ming'ome Resettlement Area nominated by KCM, the applicant and respondent's representatives be present.
- 2.6 Thirdly, that the report of the registered land surveyor should be final and conclusive as to all matters in dispute. Fourthly, that the costs for the surveyor be borne equally by the parties concerned.
- 2.7 It is clear from pages 67 to 71 of the record (Ruling dated 13th September, 2019 under cause No. 2017/HK/35 that the High Court Judge M.K. Makubalo who wrote the ruling did not accept the report from the surveyor as it merely showed that there was an overlap of properties but did not indicate which property was encroached.
- 2.8 Following that ruling, which ordered another survey, a surveyor's report was submitted by the Principal Land Surveyor in September, 2019 (at page 73 of the record of appeal) which states that the area being claimed by the community group encroached on subdivision Q of Farm 1884 by about 342Ha. Further that subdivision Q of Farm 1884 was on title at the time,

while the land being claimed by the community group was at sketched plan level, which was not yet approved.

2.9 On 4th October, 2019 the applicant KONOCCO Zambia Limited filed a writ of possession in 2017/HK/35 at (page 75 of the record) which was executed.

2.10 The appellant herein had applied for review of Judge Yangailo's ruling which dismissed his case.

3.0 DECISION OF THE LOWER COURT

3.1 On 6th April, 2020, the learned Judge made a ruling on that application in which she found no fresh evidence discovered since the decision which could not with reasonable diligence have been discovered earlier.

3.2 The appellant had claimed that his affidavit in opposition to the preliminary issue had not been considered and that he had exhibited it as "GN1." However, the learned Judge found that exhibit "GN1" was not the purported affidavit but the ruling dated 20th October, 2020. Consequently, the application for review was dismissed.

4.0 GROUNDS OF APPEAL

4.1 *The appellant has raised 3 grounds of appeal couched as follows:*

- 1. That the learned High Court Judge erred in law when she failed to take into consideration the affidavit in opposition to summons of notice to determine the matter on a point of law sworn by the plaintiff.***
- 2. That the learned High Court Judge erred in law and fact when she ruled that deciding over property number F/1884/K450 would amount to res judicata when in fact the property dealt with under cause number 2017/HK/35 had been sub-division Q of Farm 1884, thus, the subject matter in both actions is different.***
- 3. That the learned High Court Judge erred in law and fact when she ruled that the plaintiff was aware of Cause No. 2017/HK/35 and should have brought all the claims or issues in that cause, when to the contrary, the plaintiff was not aware of or a party to the proceedings under Cause No. 2017/HK/35 and had no locus standi in those proceedings and subsequently no interest in the property under that cause.***

5.0 APPELLANTS HEADS OF ARGUMENT

5.1 During the hearing of the appeal, the appellant relied on the heads of argument dated 8th February, 2022. In support of ground 1, counsel submitted that an affidavit in opposition to the Notice to Determine the Matter on a point of law sworn by the plaintiff was filed into court on time. Therefore the lower Court erred by not considering it when determining the application. We were referred to **order 14A, rule 1 (3) of the White Book** which provides that:

“The court shall not determine any question under this order unless the parties have either had an opportunity of being heard on the question or consented to an order or judgment on such determination.”

5.2 Counsel further cited the case of **Major Richard Kachingwe v. Dr. Nevers Mumba**¹ wherein the above principle was restated.

5.3 In arguing ground 2, counsel referred us to the Supreme Court of California case of **Mycogen Corporation v. Monsanto Company**,² where it was stated that:

“The doctrine of res judicata prevents re-litigation of the same cause of action in a

second suit between the same parties or parties in privity with them.”

- 5.4 On the strength of the above authority, counsel submitted that if a plaintiff cannot assert the same claim against the same defendant in a later lawsuit, the plaintiff's options are limited to the available appellate procedures.
- 5.5 Counsel submitted that the appellant was not a party to cause no 2017/HK/35 hence he is not bound by the Consent Judgment in that matter. He submitted further that the subject matter in cause number 2017/HK/35 was subdivision Q of farm no. 1884 and not farm no. F/1884/K450 which the appellant claimed in cause no. 2020/HP/02/93.
- 5.6 On ground 3, the appellant's counsel relied on the case of **Bank of Zambia v. Tembo and Others**³ where it was held that:

“In order that a plea or defence of res judicata may succeed, it is necessary to show that not only is the cause of action the same, but also that the plaintiff had an opportunity of recovering and but for his fault, might have recovered that which he seeks to recover in the second. It must show

that the same point had been actually decided between the parties.

A plea of res judicata must show either an actual merger or that the same point had been actually decided between the same parties.”

5.7 Counsel outlined the principles of res judicata in support of the submission that under cause number 2017/HK/35, the Judgment was made by consent and not after a trial. That the claim in cause no 2017/HK/35 was not similar to the claims in cause no 2020/HP/02/97 which was dismissed. Further, that the parties in the subsequent action were not the same as those in the first action.

6.0 2ND RESPONDENT’S HEADS OF ARGUMENT

6.1 The 2nd respondent filed heads of argument on 7th April, 2022 which were relied upon. In response to the 1st ground of appeal, counsel submitted that at the time of the High Court ruling, the appellant had not filed his affidavit in opposition and written submissions as directed by the Court. The case of **Rajagopalan Kothanda Raman v. Ngwira**⁴ was cited on the principal that

once statutory time expires, the court has no jurisdiction to deal with a matter.

6.2 Counsel further submitted that the appellant was supposed to file an affidavit in opposition on or before 2nd October, instead, he filed it late on 9th October, 2020. Counsel emphasized that when a court gives an order that a party files documents within a specified period and that time expires, the court has no jurisdiction to deal with the matter in the absence of any application to extend time. That according to the case of **D.E Nkhuwa v. Lusaka Tyre Services Limited**⁵ the court can only exercise its discretion to extend time where there is material before it. However, in the present case, no application for extension of time was made. Since the said affidavit in opposition was filed out of time the court was precluded from considering it.

6.3 The gravamen of the submission on grounds 2 and 3, was that although the appellant was not a party to cause number 2017/HK/35, the issue of ownership of subdivision Q of farm No. 1884 situated in Chililabombwe on which the 4th respondent has erected a wall was aptly decided before the High Court.

- 6.4 That the Consent Judgment is a final judgment on merits as the parties consented to it including the 3rd respondent from whom the appellant purchased property number F/1884/K450.
- 6.5 Counsel further stated that, the 3rd respondent was held to be an encroacher and thus could not have passed on any legal interest in the property to a 3rd party.
- 6.6 That since the said Consent Judgment has not been set aside the appellant cannot seek to re-litigate the same issue before any Court as this would amount to an abuse of court process. In support of this submission, reliance was placed on the case of **BP Zambia PLC v. Interland Motors.**⁶
- 6.7 It was submitted further that the issue of ownership of the 4th respondent's property is therefore *res judicata*. Counsel implored us to uphold the ruling of the learned trial Judge.

7.0 4TH RESPONDENT'S HEADS OF ARGUMENT

- 7.1 The 4th respondent relied on the heads of argument filed on 11th March, 2022.
- 7.2 The gist of the argument on ground 1, was that as the appellant failed to file his affidavit in opposition and supporting documents within the time frame given by the lower Court, the Court below was on firm ground to proceed to render its ruling

wherein it upheld the 4th respondent's application and dismissed the process for being *res judicata*.

- 7.3 The cases of **D.E Nkuwa v. Lusaka Tyre Services Limited**⁵ and **Twampane Mining Co-operative society Limited v E and M Storti Mining Limited**⁷ were cited on the principle that rules of court must be obeyed and those who fail to strictly adhere to rules prescribing time lines do so at their own peril.
- 7.4 It was submitted that if the appellant wanted the court to consider his affidavit in opposition, he should have applied for an extension of time. Counsel further contended that even if the appellant had filed its affidavit in opposition in good time, the lower court would have arrived at the same decision.
- 7.5 On grounds 2 and 3, the 4th respondent's counsel submitted that the 3rd respondent from whom the appellant bought property number F/1884/K450 on 18th August, 2017 was a party to the proceedings in which a consent judgment was entered adjudging the 4th respondent as the owner of subdivision Q of farm 1884 which was later renumbered F/1884/K450. That the 1st to 3rd respondents sold the property to the appellant after the Consent Judgment was executed and not before.

- 7.6 Counsel further submitted that the 3rd respondent was adjudged to have encroached onto the 4th respondent's property and a boundary wall was erected to prevent further encroachment. That the appellant claims ownership of part of subdivision Q of Farm 1884 as property number F/1884/K450 which lies within the boundaries of the 4th respondent's property. That this was not disputed by neither the 1st, 2nd nor the 3rd respondent.
- 7.7 Counsel further submitted that cause no. 2020/HP/02/97 was instituted in an attempt to re-litigate the question of ownership of the land forming part of Subdivision Q of farm no. 1884 in Chililabombwe.
- 7.8 Counsel contended that the appellant is trying to mislead the court because property number F/1884/K450 is not distinct from sub-division Q of farm no. 1884. Counsel cited the case of **Guest and Another v. Makinga & Another**⁸ on res judicata and the case of **A.S and C Enterprise Limited and Another v. Stanbic Bank Zambia Limited**⁹ on the importance of the courts to finalize litigation.
- 7.9 On the strength of the above authorities, counsel contended that the ownership of the subject matter of this appeal was dealt with under cause number 2017/HK/35 to finality. That it is

immaterial whether the appellant did or did not know about cause 2017/HK/35, as the principle of res judicata entails that all parties affected by a judgment are precluded from re-litigating. We were therefore urged to dismiss the appeal with costs.

8.0 NON-APPEARANCE OF 1ST AND 3RD RESPONDENTS

8.1 The 1st and 3rd respondents did not appear before us and did not file any heads of argument.

9.0 ORAL ARGUMENTS

9.1 At the hearing of the matter, the 4th respondent's advocate reiterated his written arguments. Suffice to state that he informed us that Konnoco Mining which was the plaintiff in cause No. 2017/HK/35 had its name changed to Lubambe Mining.

10.0 OUR DECISION

10.1 We have carefully considered the record of appeal and the arguments by counsel on behalf of the appellant, 2nd respondent and 4th respondent.

10.2 As regards the first ground of appeal, we take note that on 9th October, 2020 the appellant filed an affidavit in opposition to the Notice of motion which was filed pursuant to order 14A Rules 1 and 2 of the Rules of the Supreme Court in cause No. 2020/HP/0297. The same appears on pages 11 to 12 of the record of appeal. An affidavit in reply thereto dated 21st October, 2020 appears at pages 122 – 123 of the record. We agree with the 2nd respondent that the affidavit in opposition was filed about 6 days late as it was supposed to be filed on 2nd October, 2020.

10.3 We hold that the lower Court erred by not considering both affidavit in opposition and affidavit in reply even though exhibit “GN1” filed by the appellant was incorrect as it was not the affidavit in opposition but the Ruling of 20th October, 2020. **Order 14A, rule 1(3)** makes it mandatory for the court to give all parties concerned opportunity to be heard on the point of law raised before determining the matter. It is trite law that a hearing can consist of hearing oral argument or oral evidence or considering affidavit evidence or other documents.

10.4 We hold that although the appellant was given an opportunity to file an affidavit in opposition which he filed late without leave

of court, the reason why the lower court did not consider it was because it was not found on record and not because it was filed late.

- 10.5 Since an affidavit in reply was also filed, the second respondent waived its right to apply to set aside the affidavit in opposition for irregularity (see **Order 2 Rule 2 of the White Book**). We take it that the respondents would not have been prejudiced if both affidavits had been considered by the lower Court and that the decision would have been different.
- 10.6 The case of **Rajagopalan Kthanda Raman v. Ngwira**⁴ cited by the 2nd respondent is inapplicable to the facts of this case as there was no statutory time limit which was breached in this case.
- 10.7 The case of **D.E Nkuwa v. Lusaka Tyre Services Limited**⁷ cited by 2nd respondent also does not apply as there was no application for extension of time before the lower Court. Since filing the affidavit in opposition late was a curable defect, the lower Court's jurisdiction was not ousted as the defect would have most likely been rectified if the appellant was given an opportunity to do so or if the Court had exercised its discretion to consider the affidavit.

10.8 We are fully aware of the workings of the courts and can safely presume that most likely, the registry staff did not place the affidavit in opposition and affidavit in reply on the record, otherwise the learned Judge would have seen them and taken them into account when determining the application for review. Upon not finding the affidavit in opposition, the Judge should have inquired about it from the Court Registry Personnel to ascertain whether it was not filed or adjourned the matter to another date so that the parties could be heard on the important legal issues raised.

10.9 For the foregoing reasons, the 1st ground of appeal succeeds.

10.10 The 2nd and 3rd grounds of appeal will be dealt with together as they are related. We observe that, the appellant was not a party to cause no. 2017/HK/35 and could not have raised the issues he raised in the dismissed action 2020/HP/0297 in the earlier action. We further take note that KONNOCO Zambia Limited the applicant in cause no. 2017/HK/35 had its name changed to Lubambe Copper Mines Limited as the record shows.

10.11 The appellant has pointed out that the subject properties under the two actions are different, he claims F/1884/K450 while the 2017 case involved subdivision Q of Farm No. 1884. Although

the 4th respondent claims that sub-division Q of farm no.1884 was later renumbered F/1884/K450, there has been no determination by any court that property F/1884/K450 encroaches on the other property and if so, to what extent. The survey report at page 104 of the record states *inter alia* that the basis of determining encroachment on any piece of land is the survey status of the pieces of land under review.

10.12 It also states that the community group was claiming ownership of the same portion of land. Further that subdivision Q of Farm 1884 is on title, while the land being claimed by the community was at sketch plan level and that plan had not yet been approved.

10.13 It follows that the extent of the land owned by the community group which was sold to the appellant might not be encroaching on subdivision Q of Farm 1884. The appellant has shown no interest in subdivision Q of Farm No. 1884 and there is no cogent evidence that he was aware of the matter pertaining to the same.

10.14 On the basis of the authorities of **Major Richard Kachingwe v. Dr. Nevers Mumba**¹ and **Bank of Zambia v. Jonas Tembo and Others**³ cited by the appellant, we find that the lower court misdirected itself when it determined the matter pursuant to

Order 14 A Rule 1 (3) of the Rules of the Supreme Court without hearing the appellant. Further, as explained above, the matter is not *res judicata*. Therefore, we find merit in both grounds 2 and 3.

11.0 CONCLUSION

11.1 All in all, the appeal succeeds and the ruling dated 20th October, 2020 is hereby set aside. The dismissed action is restored, to be heard by a different Judge. We order that the appellant's costs be borne by the 4th respondent only, because if the 4th respondent had not raised the preliminary objection, that matter would have proceeded to trial and been determined by now. Accordingly, the costs may be taxed in default of agreement.


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C.K. MAKUNGU
COURT OF APPEAL JUDGE


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P.C.M. NGULUBE
COURT OF APPEAL JUDGE


.....
AM BANDA-BOBO.
COURT OF APPEAL JUDGE