

**IN THE COURT OF APPEAL FOR ZAMBIA**

**APPEAL NO. 175/2021**

**HOLDEN AT NDOLA**

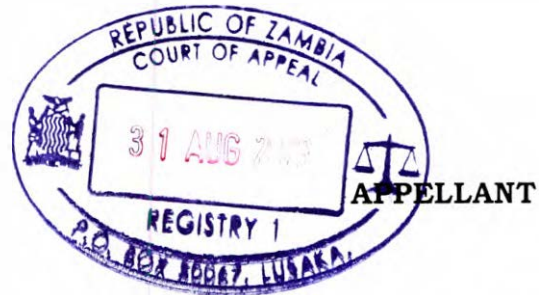
(Civil Jurisdiction)

**BETWEEN:**

**NEW POWER INDUSTRIES LIMITED**

**AND**

**SHISHOLEKA MWAMUCHENA MECKIE**



**APPELLANT**

**RESPONDENT**

**CORAM: KONDOLO SC, NGULUBE, SHARPE-PHIRI JJA**

**On 24<sup>th</sup> August, 2023 and 31<sup>st</sup> August, 2023**

*For the Appellant: Not Present*

*For the Respondent: Mr. J. Zulu of Messrs Japhet Zulu Advocates*

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## **J U D G M E N T**

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**KONDOLO SC JA** delivered the Judgment of the Court.

**CASES REFERRED TO:**

- 1. Sobek Lodges Limited v Zambia Wildlife Authority  
2008/HP/668**
- 2. Investment Holdings Limited v William Jacks & Company  
Ltd (1972) ZR**
- 3. Attorney General v D. Mpundu (1984) ZR 6 (S.C.)**
- 4. Ratcliff v Evans 1 QB 524 (1982)**

5. **Admark v Zambia Revenue Authority (2006) ZR 433**
6. **Anderson Kambela Mazoka & 2 Others v Levy Patrick Mwanawasa and 2 Others (2005) ZR 138**
7. **UNDI Phiri v Bank of Zambia (198 2005) (2007) ZMSC 21 (20<sup>th</sup> August 2007).**
8. **Mohammed v The Attorney General (1982) ZR 49**

LEGISLATION REFERRED TO:

1. **Lands and Deeds Registry Act**
2. **The Supreme Court Rules, Whitebook 1999 Edition (RSC)**
3. **Black's Law Dictionary**

**1. INTRODUCTION**

- 1.1. This is an appeal against the Ruling of the High Court delivered by Muma J on 19<sup>th</sup> March, 2021 in which he allowed the Respondent's application to remove a caveat placed by the Appellant on Stand No. 680 Chilanga, Lusaka.
- 1.2. The Respondent was the Applicant in the High Court, and the Appellant was the Respondent. We shall refer to the parties as the Appellant and the Respondent.

## **2. BACKGROUND**

2.1. In the lower Court, the Respondent commenced an action by originating summons against the Appellant seeking, inter alia, the following reliefs:

- 1. An order that the Respondent has no interest whatsoever in the property known as Stand No. 680 Chilanga, Lusaka province and that the Caveat placed on the property be removed by order of the Court.**

### **2. Damages**

- 2.2. In the Respondent's affidavit in support of the application, it was attested that the Appellant commenced an action against him under Cause No. 2017/HP/0489 and obtained an order of interim attachment of property against named properties.
- 2.3. It was further attested that the Appellant proceeded to lodge a caveat against the Respondent's property, Stand No. 680 Chilanga, which was not amongst the properties listed on the order of interim attachment of property.
- 2.4. The Respondent on that basis sought removal of the caveat.

**2.5. Appellants Response**

2.6. The Appellant filed an affidavit in opposition attesting that the properties attached by the order of interim attachment of property were insufficient as only the sum of K392,325 was recovered after the said property was sold and was thus insufficient to cover the Judgement debt of K1,125,000.

2.7. That the caveat was placed on the Respondent's property, Stand No. 680 Chilanga for the purpose of satisfying the Judgement sum of K1,125,000. That his only hope of recovering the money was to sell Stand No. 680 Chilanga and removing the caveat would make the Appellant's Judgement a mere academic exercise.

**2.8. Respondents Reply**

2.9. The Respondent's affidavit in reply shows that the Appellant obtained a default Judgement against the Respondent under cause no. 2017/HP/0489 and the properties listed in the order of interim attachment of property were executed against and sold.

2.10. The Respondent repeated that the caveat could not be placed on Stand No. 680 Chilanga as it was not subject of the proceedings under Cause No. 2017/HP/0489. Further, that

the caveat could not have been placed for the purpose of satisfying the Judgement debt because it was placed on 22<sup>nd</sup> September, 2017 which was well before the default Judgement was entered on 6<sup>th</sup> December, 2017.

- 2.11. That on 5<sup>th</sup> April 2019 the Chief Registrar at the Ministry of Lands wrote to the Appellant notifying him that the caveat was registered in error as there was no direct link between the matter in Court and Stand No. 680 Chilanga.

### **3. DECISION OF THE HIGH COURT**

- 3.1. The trial Judge referred to **Section 76 of the Lands and Deeds Registry Act, Chapter 185, Laws of Zambia** which states that a person intending to register a caveat must be entitled to the land; beneficially interested in the land; in the process of transferring some interest in the land to some other person; or should be an intending purchaser, or mortgagee of the land in issue.
- 3.2. The learned trial Judge noted that Stand No. 680 Chilanga, Lusaka was not attached to the default Judgement and no order was made by the Court granting the Appellant an interest over the said property. That the Appellant had failed to show

that he has an enforceable interest in the property to justify the interference of the Respondent's rights by lodging a caveat.

#### **4. APPEAL**

4.1. The Appellant filed this appeal fronting three grounds as follows;

- 1. The lower Court misdirected itself in fact and in law when it held that the Respondent did not have interest in the property despite the Judgement under Cause 2017/HP/0489 in favour of the Respondent [sic] which has partially been executed.**
- 2. The lower Court misdirected itself in fact and in law when it awarded damages to the Applicant which were not pleaded.**
- 3. The lower Court misdirected itself in fact and in law when it awarded damages to the Respondent which were not proved.**
- 4. The lower Court misdirected itself in fact and in law when it did not take judicial notice that the**

**property No. 680 Chilanga is a subject of execution under cause no. 2017/HP/0489.**

- 4.2. **In ground 1** the Appellant cited **Black's Law Dictionary** which he said defines "*interest in property*" as "*Right to have advantage accruing from anything, any right in the nature of property but less than title, a partial or individual right to title or to a share.*"
- 4.3. He further cited **Section 76 of the Lands and Deeds Registry Act** and stated that the Appellant can be said to have an interest in the property by virtue of the beneficial claims which arise due to the sum of money the Respondent owes the Appellant.
- 4.4. The Appellant persisted with this argument and cited the case **Sobek Lodges Limited v Zambia Wildlife Authority** <sup>(1)</sup> and **Investment Holdings Limited v William Jacks & Company Ltd** <sup>(2)</sup> in which it was held that a party can lodge a caveat where it has a reasonable or justifiable claim to be entitled to an interest in land.
- 4.5. It was argued that the Appellant had a justifiable interest in the property arising from the sum of money owed to him by the

Respondent. That the caveat was placed solely for the purpose of securing his interests as the properties attached by the Court Order were not sufficient to cover the full amount of money owed by the Respondent.

- 4.6. **In ground 2** it was argued that the lower Court misdirected itself for awarding damages which the Respondent had not pleaded. The Appellant cited **Order 18 Rule 7 (1) The Supreme Court Rules, Whitebook 1999 Edition (RSC)** and the cases of **Attorney General v D. Mpundu** <sup>(3)</sup> and **Ratcliff v Evans** <sup>(4)</sup> which state that a claimant must clearly set out his claim to enable the other party to prepare an adequate reply. It was submitted that the Originating Summons only included damages as a claim which was not supported by pleadings.
- 4.7. The Appellant further submitted that this matter having been commenced by originating summons, the issue of damages ought to have been pleaded or included in the affidavit in support. In support of this, the following cases were cited; **Admark v Zambia Revenue Authority;** <sup>(5)</sup> **Anderson Kambela Mazoka & 2 Others v Levy Patrick Mwanawasa and 2 Others** <sup>(6)</sup> and **UNDI Phiri v Bank of Zambia** <sup>(7)</sup>.



4.8. **In ground 3** it was argued that that Respondent should not have been awarded damages which were not proved. The case of **Mohammed v The Attorney General** <sup>(8)</sup> was cited where it was held that *“persons who initiate civil proceedings must generally prove their case in order to succeed in their claim.”*

4.9. **Respondents Arguments**

4.10. **In response to ground 1** the Respondent referred to the letter from the Chief Registrar at the Ministry of Lands to the Appellant dated 29<sup>th</sup> March, 2019 advising the Appellant that the caveat was registered in error as there was no direct link between the matter in Court and the property in issue. (see page 28 of the supplementary record of appeal)

4.11. That caveat was registered against property No. 680 Chilanga which was not the subject of any Court proceedings or order of Court and that the Appellant did not meet the requirements of **Section 76 of the Lands and Deeds Registry Act** to enable him register a caveat against the said property.

4.12. **With regard to ground 2**, the response was that, this matter having been commenced by originating summons there was no requirement for pleadings as such matters are settled on

the basis of the claim in the originating summons as supported by the affidavit evidence. **Order 1 Rule 4 (1) and Order 18 A [sic] RSC.**

- 4.13. The Respondent argued that the damages claimed in the Originating Summons were supported by paragraph 8 of the affidavit in support.
- 4.14. **In ground 3** the Respondent cited the **Construction & Investment Holdings Limited Case (supra)** in which it was held that it was right and proper to condemn, in costs, a person who interfered with a registered proprietor's rights by wrongly registering a caveat.
- 4.15. **On ground 4**, it was submitted that there was no need for the trial Judge to take judicial notice of anything as all the material required for the learned trial Judge to make a decision was before him.
- 4.16. The Respondent submitted that the Judgement in cause 2017/HP/0489, upon which the Appellant had placed much capital, and which in any event did not encompass property No. 680 Chilanga, had put that matter to rest, where the trial Judge said, *"I therefore find that this matter has come to finality as the Judgement that was delivered has already been*

*executed and that there is nothing to stay. It is my holding that this matter be dismissed and be disposed of as it has come to finality and that any further steps will be an academic exercise.”*

4.17. We were urged to dismiss the appeal.

## **5. DECISION OF THIS COURT**

- 5.1. We have considered the record of appeal and the arguments advanced by the parties and shall begin by addressing grounds 1 and 4 and thereafter grounds 2 and 3.
- 5.2. **In ground 1** the Appellant seems to suggest that the default Judgement obtained under cause no **2017/HP/0489** amounts to a beneficial interest that could be used to lodge a caveat against the Respondents Property No. 680 Chilanga, Lusaka.
- 5.3. The record shows that the property in contention was not the subject of litigation and as correctly observed by the trial Judge, no order was made by the Court granting the Appellant an interest over the said property.
- 5.4. The **Sobek Logistics Case (supra)** and the **Construction & Investment Holdings Limited Case (supra)** cited by the

Appellant do not help his case which fails to meet the criteria set out in **Section 76 of the Lands and Deeds Registry Act.**

- 5.5. Establishing an interest in property involves a direct link and in the absence of a legal document or Court order establishing such a link, being a mere debtor does not by itself link the debtor's property to the creditor.
- 5.6. The fact that the properties attached by the Court Order were not sufficient to cover the full amount of money owed by the Respondent, did not entitle the Appellant to place a caveat on any other property belonging to the Respondent. If the Appellant sought to execute against the said property, he should have obtained the necessary order from the Court. Ground 1 is therefore without merit and consequently fails.
- 5.7. **In ground 4** the Appellant submitted that the trial Judge ought to have taken judicial notice that property No. 680 Chilanga, Lusaka was under execution. A plethora of authorities which we shall not repeat were cited to support this submission.
- 5.8. We have stated in ground 1 that the default Judgement obtained by the Appellant against the Respondent did not in itself create any beneficial interest for the Appellant in the Respondents property to enable him to place a caveat.

- 5.9. We find it unnecessary to dwell on this ground because the trial Court taking judicial notice that the property listed in the interim preservation order was under execution, would not have created a beneficial interest for the Appellant in property No. 680 Chilanga, Lusaka as the said property was not listed in the interim preservation order. Ground 4 is equally without merit and is dismissed.
- 5.10. **Grounds 2 and 3** are in relation to the damages awarded to the Respondent by the trial Judge which the Appellant finds objectionable, alleging that they were neither pleaded nor proved.
- 5.11. As correctly observed by the Appellant, the purpose of pleadings is to alert the other party on the specific nature of the claim to enable him to defend himself. See **Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & 2 Others (2005) ZR 138**
- 5.12. According to **Order 18/0/2 RSC**, an Originating Summons is not a pleading, and neither is the affidavit in support of the originating summons.
- 5.13. However, matters such as the one *in casu* commenced by Originating Summons are summary proceedings where a trial

is deemed unnecessary as they can be conveniently disposed of on affidavit evidence in chambers. See **Order 5 Rule 4 RSC**.

5.14. In such matters pleadings are unnecessary because there is unlikely to be any substantial dispute on the basic facts and as per **Order 5 Rule 4 (2) (a) RSC** *“the sole or principle question at issue is or likely to be, one of the construction of an Act or of any instrument made under an Act, or of any deed, will, contract or other document, or some other question of law ...”*

5.15. This matter having been commenced by originating summons, it was sufficient for the Respondent to simply indicate on the summons that he was claiming damages. Paragraph 8 of the affidavit in support states that the Respondent seeks damages caused as a result of the Caveat being placed on the property. The Appellant was therefore put on adequate notice that the Respondent was seeking damages.

5.16. With regard to damages not being proved, we refer to and affirm the High Court case of **Construction & Investment Holdings Limited v Williams Jacks & Company (supra)** where it held that

*“..... where a caveators claim is not justifiable and he interferes with the rights of the registered proprietor so*


*that the latter suffers damage, it would appear to me that it is only right and proper that such damage should be laid at the door of the person who, by his action, caused it.”*

5.17. The Respondent claimed that he had suffered damage as a result of the wrongly placed caveat and in our view, having wrongly interfered with the Respondents property, the Appellant would, at the very least, be liable to pay the Appellant nominal damages.

5.18. We find nothing wrong with the trial Judge ordering the matter to proceed for assessment of damages. Grounds 2 and 3 are consequently dismissed.

5.19. This appeal fails entirely with costs to the Respondent.

  
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**M.M. KONDOLO SC**  
**COURT OF APPEAL JUDGE**

  
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**P.C.M. NGULUBE**  
**COURT OF APPEAL JUDGE**

  
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**N.A. SHARPE-P'IRI**  
**COURT OF APPEAL JUDGE**