

IN THE COURT OF APPEAL FOR ZAMBIA

APPEAL NO.167/2021

HOLDEN AT NDOLA

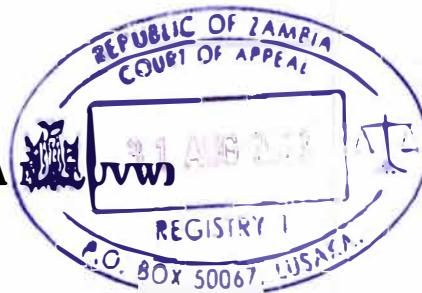
(Civil Jurisdiction)

BETWEEN:

STEVEN MAAMBO MOONGA

AND

ATTORNEY GENERAL



APPELLANT

RESPONDENT

CORAM: KONDOLO SC, NGULUBE, SHARPE-PHIRI JJA

On 24th August, 2023 and 31st August, 2023

For the Appellant In Person

For the Respondent: Mr. C. Watopa and Ms. M. Katolo both Assistant Senior State Advocates - Attorney Generals Chambers

R U L I N G

KONDOLO SC JA delivered the Ruling of the Court.

CASES REFERRED TO:

- 1. NFC Africa Mining Ltd v Techpro (Z) Ltd (2000) ZR 236**
- 2. David Tembo v Doyle B. Kapambwe, Machona Kapambwe, Henry Machina, Rose Madina Kamungu
CAZ/NOM/32/2018**
- 3. Fox Motors Spares Ltd v Khalid Gulan Mohammed & Saleh
- CAZ/55/2017**

4. Ladd v Marshall [1954] 3 All ER 754

LEGISLATION REFERRED TO:

- 1. Lands and Deeds Registry Act, Chapter 135, Laws of Zambia**
- 2. Lands Survey Act, Chapter 188, Laws of Zambia**
- 3. Snells Equity at page 53, paragraph 4**

1. INTRODUCTION

1.1. This is a ruling on the Appellants Motion for leave to subpoena or call the Surveyor General to clarify and confirm the Land re-planning in the Site Plan generated in the years 2007 & 2008 on Lots 13296/M, 132997, 13302/M, 13303/M & 13310/M, Chilanga, Lusaka and to compel the Commissioner of Lands to produce the documents listed in the Appellants amended Heads of Argument pursuant to **Supreme Court Rule 25 (1) (b) (i) and (ii) and Order V11 Rules (1) (2) (3) and Order 10 Rule 20 Court of Appeal Rules S.I. 65, Act No. 7, Laws of Zambia.**

1.2. The Motion was made on the following grounds;

1. That the Surveyor General be subpoenaed to Court to clarify and confirm the land re-planning carried out on the land described above and to compel the Commissioner of Lands to produce documents on the allocation of the same land to the Appellant.

2. That the Honourable single Judge of the Court of Appeal erred in dismissing the application for leave to subpoena or call the Surveyor General and to compel the Commissioner of Lands as the application was only for leave to issue a subpoena or call the Surveyor General and to compel the Commissioner of Lands and not for the two Heads of Department to be subpoenaed to appear before the Single Judge.
3. That the Honourable single Judge erred by dismissing the application as the Appellant's clearly stated intention was for leave to subpoena or call and compel the two Heads of Departments respectively at the hearing or when determining the appeal and not before.
4. That the Honourable single Judge erred by dismissing the application and not referring it to the bench at the appeal hearing despite the single Judge couching and acknowledging that the application was a preserve of the Court at the hearing of the appeal and when the Appellant in his application clearly requested that his application be considered when determining the appeal and clearly stated his intention for the application to be in place in readiness for the appeal hearing.

- 1.3. The affidavit in support attested that he has appealed against a judgement of the High Court and upon preparing the record of appeal. he realised that the evidence of the Surveyor Generals office was cardinal to his case as the issue in contention was in relation to the validity or authenticity of the site plan on the land re-planning of properties described in the motion.
- 1.4. That there was need to subpoena the Surveyor General to clarify, and confirm the validity, authenticity and procedure of the land re-planning and ownership of the properties which are in dispute.
- 1.5. That this vital technical evidence would enable the Court to arrive at a tangible conclusion.
- 1.6. That at the trial, the Respondent called incompetent witnesses who were not surveyors.
- 1.7. He further seeks that the Commissioner of Lands be compelled to produce, before this court, documents listed in the Appellants amended Heads of Argument.
- 1.8. He attested that he would be prejudiced if these documents were not produced whilst the Respondent would not be prejudiced if they were produced.
- 1.9. That he had made a similar application before a single judge of this Court who held that an application such as this was the

preserve of the Court after considering the entire record of appeal and the application was dismissed for want of jurisdiction.

1.10. Appellants Arguments

1.11. The Appellant filed skeleton arguments in which argued quite widely and veered from the substance of this application. We shall only refer to the relevant parts of his arguments.

1.12. He argued that during the trial he commenced contempt proceedings against the Respondents attempt to secretly re-plan the land under litigation and in which action he had called the Surveyor General to clarify and confirm the land re-planning.

1.13. That the contempt proceedings were commenced before Chitabo J, as he then was, and later taken over by the trial judge herein Zulu J who did not conclude the proceedings. He argued that the trial Judge's failure to conclude the contempt proceedings prevented the Surveyor General from giving evidence on the land re-planning issue in the main trial. He stated that these issues were explained in the Appellants amended grounds of appeal and amended Heads of Arguments.

1.14. According to the Appellant, *“if the Surveyor General is not heard, it will set a very bad and dangerous precedent of making Court law basing on evidence from laymen on technical and professional matters thereby undermining professionalism and reality as well as compromising judicial integrity.”*

1.15. It was submitted that the orders under which the Court was moved empowered this Court to hear the motion.

1.16. That it was important for the Surveyor General to be called because the State had called incompetent witnesses who were not surveyors and it would be dangerous to rely on their testimony.

1.17. A great deal of the arguments consisted of attacks on the merits of the appeal when the only issue relevant to this application is to consider whether there is merit in the Appellants application to subpoena the Surveyor General and Commissioner of Lands.

1.18. **Respondents Arguments**

1.19. The Respondent did not file an affidavit in opposition and opted to argue on the law *viva voce*.

1.20. Mr. Watopa, on behalf of the Respondent submitted that **Order 7 Rules 1 and 2 CAR** provides that interlocutory shall be made substantially before a single Judge.

1.21. That the motion was incompetent because it was dismissed by the single Judge and the manner in which it had been brought to court was also incompetent.

1.22. That **Order 10 rule 20 CAR** provides that the hearing of appeals must be on the record. Counsel further cited the case of **NFC Africa Mining Ltd v Techpro (Z) Ltd** ⁽¹⁾ wherein the Supreme Court warned of dire consequences for parties that failed to comply with the rules of Court.

1.23. **Appellants Reply**

1.24. The appellant expressed surprise that the Respondents counsel opted to respond *viva voce* because he had served the Motion on them on 27th April, 2023 meaning that they had sufficient time to file their arguments.

1.25. He closed by stating that his motion clearly stated that it should be heard during the hearing of the appeal.

2. CONSIDERATION AND DECISION

2.1. The Appellant has brought this action under **Rule 25 (1) (b) (i) and (ii) of the Supreme Court Act** and the identical provision of **Section 24 (1) (b) (i) CAR** which states as follows:

“24. (1) The Court may, on the hearing of an appeal in a civil matter—

(b) where necessary or expedient in the interest of justice—

(i) order the production of a document, exhibit or other thing connected with the proceedings, the production of which may be necessary for the determination of the matter;

(ii) order a witness who would have been a competent and compellable witness at the trial to attend and be examined before the Court, whether that witness was or was not called at the trial, or order the examination of the witness to be conducted in the manner provided by the rules and allow the admission of a deposition so taken before the Court”

- 2.2. We shall begin with the submission in opposition by the learned Assistant State Advocate suggesting that in terms of **Order 7 Rules 1 and 2 CAR, Order 10 Rule 20 CAR** this application was incompetent. That the Appellant had made a similar application which was dismissed by a single Judge.
- 2.3. To begin with **Order 7 Rule 1 (2)** states that an interlocutory application “may” be heard by a single Judge, it does not say it “shall” and **Order 7 Rule 2 (1) CAR** implies that an interlocutory application, such as *in casu*, made during the course of an appeal shall be made to the Court.
- 2.4. **Order 10 Rule 20 CAR** allows for applications under **Section 24 (1) (b) (i) CAR**, as the Appellant has done.
- 2.5. With regard to the matter being dismissed by a single Judge, Sichinga J A, quite correctly held that he lacked jurisdiction to hear the application because it was required to be heard by the Court.
- 2.6. The Respondents grounds for opposing the application are therefore without merit.
- 2.7. We shall now consider the merits of the Appellants application. Neither the **Supreme Court Act** nor the **Court of Appeal Act** explain how **Rule 25 (1) (b) (i) and (ii) of the Supreme Court**

Act and the identical provision of **Section 24 (1) (b) (i) CAR** should be applied.

2.8. This has however been addressed by case law as this Court has done in a number of matters including the case of **David Tembo v Doyle B. Kapambwe, Machona Kapambwe, Henry Machina, Rose Madina Kamungu ⁽¹⁾ and Fox Motors Spares Ltd v Khalid Gulan Mohammed & Saleh ⁽²⁾**.

2.9. In the cited cases, we noted that **Order 59/10/11 – 23 of the Rules of the Supreme Court, 1999 Edition (RSC)** explains the factors that an Appellate Court ought to consider in deciding whether or not to allow the production of fresh evidence after a trial on the merits was conducted in a lower Court.

2.10. New evidence should only be allowed where special circumstances warrant the production of such evidence and the special circumstances must satisfy the conditions set out in the case of **Ladd v Marshall ⁽⁴⁾** as follows;

- 1. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.**

2. The evidence must be such that, if given it would probably have an important influence on the result of the case, though it need not be decisive.

3. The evidence is such that it is presumably to be believed, or in other words, it must be apparently credible though it need not be incontrovertible.

2.11. **Order 59** also provides, in exceptional cases, for the admission of evidence where the **Ladd v Marshall (supra)** conditions have not been satisfied. **Order 59/10/18** allows an exception to be applied to *“evidence as to matters which have occurred after the date of the trial or hearing”*. The Order reads that, *“..... in order not to disturb the principal that there should be finality in litigation, the change must substantially affect a basic assumption made at the trial; the matter is one of degree.”*

2.12. The Appellant’s main bone of contention in the High Court was that he was entitled to the properties described in the motion, which were created after the re-alignment of boundaries and re-numbering of plots where his land was located. He contended that the new site plan had been approved by the Commissioner of Lands and Surveyor General.

2.13. It is actually quite inconceivable the Appellant could have expected to prove his case without producing convincing

evidence emanating from the offices of the Commissioner of Lands and the Surveyor General.

2.14. The Respondents witnesses, who the Appellant has condemned as incompetent, denied the Appellants claims in relation to his claim that the site plan was approved by the Commissioner of Lands and the Surveyor General. They may not have been surveyors but they were competent witnesses and the trial court considered their testimony.

2.15. The Appellant claims that the Surveyor General and Commissioner of Lands were unable to testify because of the contempt proceedings he alluded to. Contempt proceedings are interlocutory in nature and quite separate from the main trial. In our view nothing prevented the Appellant from issuing subpoenas for the production of documents or for compelling specific persons to appear before the Court.

2.16. The Appellant was always in a position to make this application before the trial Court. He perhaps omitted to do so on the misapprehension that the contempt proceedings prevented him from doing so. In these circumstances, allowing the Appellant to introduce fresh evidence at this stage by issuing subpoenas to the Commissioner of Lands and the Surveyor General to testify and produce documents will


amount to allowing him a second bite of the cherry and prejudicial to the Respondent.

2.17. The Appellants application falls short of the benchmark set in **Ladd v Marshall (supra)**.

2.18. The evidence the Appellant wishes to bring does not fall within the ambit of **Order 59/10/18** because everything the Appellant alluded to happened either before or during the trial and none of it occurred after the trial.

2.19. In the premises, we find the application has no merit and is accordingly dismissed with each party to bear their own costs.


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M.M. KONDOLO SC
COURT OF APPEAL JUDGE


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


.....
N.A. SHARPE-PHIRI
COURT OF APPEAL JUDGE