

IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 225 OF 2023
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

FAITH NGAMBI

APPELLANT

AND

BARAN INVESTMENT LTD

RESPONDENT

CORAM: CHASHI, SICHINGA and SHARPE-PHIRI, JJA

ON: 30th APRIL AND 5th JUNE 2024

*For the Appellant: T. Chali, Messrs. Tresford Chali Legal
Practitioners*

For the Respondent: N/A

JUDGMENT

CHASHI JA delivered the Judgment of the Court.

Cases Referred to:

- 1. Chikuta v Chipata Rural Council (1974) ZR, 241**
- 2. Examinations Council of Zambia Pension Trust Scheme Registered Trustees and The Trustees of Examinations Council of Zambia Pensions Trust Scheme v Tecla Investments Limited - Selected Judgment No. 39 of 2018**
- 3. Krige and Another v Christian Council of Zambia (1975) ZR, 152**

4. **Makanya Tobacco Company Limited v J & B Estates Limited – SCZ Appeal No. 42 of 2012**
5. **Hotelier Limited, Odys Works Limited v Finsbury Investments Limited (2012) Vol 2 ZR, 220**
6. **New Horizon Printing Press Limited v Waterfield Estates Limited and Commissioner of Lands – SCZ Judgment No. 58 of 2015**
7. **Micheal Chilufya Sata v Chanda Chimba III, Zambia National Broadcasting Corporation, Muvi TV Limited Mobi TV International Limited (2011) Vol 1 ZR, 519**
8. **Hongling Xing Xing Building Company Limited v Zamcapital Enterprises Limited (For National Electronics Retail Limited) (2011) Vol 2 ZR, 105**
9. **Imbwili Investments Limited v The Attorney General (HP 691 of 2014) [2014] ZMHC 91**
10. **Isaac Lungu v Mbewe Kalikeka – SCZ Appeal No. 114 of 2013**
11. **African Banking Corporation Limited v Mubende Country Lodge Limited – SCZ Appeal No. 116 of 2016**

Legislation referred to:

1. **The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia**
2. **The English Law (Extent of Application) (Amendment) Act No. 6 of 2011**
3. **The High Court (Amendment) Act No. 7 of 2011**

Rules referred to:

1. **The Supreme Court Practice (Whitebook) 1999**

2. The High Court Rules, Chapter 27 of the Laws of Zambia

3. The Court of Appeal Rules, Statutory Instruments No. 65 of 2016

1.0 INTRODUCTION

1.1 This is an appeal against the Ruling of Honourable Mrs Justice A. N. Sitali, delivered on 23rd November 2022.

1.2 In the said Ruling, the learned Judge determined that Order 29/1 of the **Rules of the Supreme Court¹ (RSC)** was more comprehensive than Order 27/4 of the **High Court Rules² (HCR)** regarding urgent *ex parte* injunction applications and that the Respondent's omission to reference provisions of the **HCR²** did not negate the court's jurisdiction to grant the order.

1.3 Furthermore, the Judge concluded that the lease agreement between the Respondent and Comrie Nkoloma (the deceased) remained valid and was not void for want of registration.

2.0 BACKGROUND

- 2.1 The context of this appeal is that, on 1st July 2022, the Respondent entered into a lease agreement with the deceased, relating to Stand No. 87a/A/1/D, Waterfalls, Chongwe (the property). However, on 6th July 2022, subsequent to the signing of the lease agreement but before the payment of the agreed rentals and assuming possession of the property, the deceased passed away.
- 2.2 Following the funeral, the Respondent engaged the representative of the deceased to enforce the lease agreement. However, vide a letter dated 5th August 2022 (appearing at page 120 of the record), the Appellant contested the validity of the lease agreement and informed the Respondent that, due to inconsistencies surrounding the lease agreement, it had been rendered null and void.
- 2.3 Unhappy with the response, the Respondent commenced an action on 12th September 2022, against the Appellant by way of Writ of Summons and Statement of Claim seeking, *inter alia*, a

declaratory Order that it was the lawful lessee/tenant of the property, an Order for possession of the property, specific performance and an Injunction Order.

2.4 According to the attendant Statement of Claim, the Respondent suffered losses and damages due to its inability to take possession of the property and commence its business operations.

2.5 A perusal of the record reveals that the Appellant did not enter appearance nor settle a defence.

3.0 PRELIMINARY ISSUES

3.1 On 3rd October 2022, the Appellant took out a motion to raise a preliminary issue on a point of law pursuant to **Orders 14A/1** and **33/7 RSC¹** as read with **The English Law (Extent of Application) (Amendment) Act²** and **The High Court (Amendment) Act³**, on the following grounds:

1. Whether the interim injunction is based on the correct law.

2. Whether as a result of 1 above, the court had jurisdiction to issue the interim injunction.

3. Whether the Lease Agreement is void for want of registration under the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.

3.2 In support of the notice of motion, the Appellant contended that the lease agreement that was signed on 1st July 2022, ought to have been registered with the Ministry of Lands in compliance with Section 4 of **The Lands and Deeds Registry Act**¹. Failure to register a document requiring registration, as mandated by section 4 of the Act, rendered the lease agreement void and unenforceable. The Appellant maintained that the court cannot give effect to the agreement or confirm an injunction issued on the basis of its invalidity.

3.3 The Appellant also objected to the **ex parte** injunction application made under Order 29/1 **RSC**¹, arguing that it should have been made under Order 27/4 **HCR**². The Appellant claimed that there is no **lacuna** in the law that necessitated the use of Order 29/1 **RSC**¹. Therefore, the court lacked jurisdiction to grant an **ex parte** injunction order as

the application was made under the wrong provision of the law.

- 3.4 The Respondent opposed the motion and posited that the application for an *ex parte* interim injunction made under Order 29/1 **RSC**¹ was not irregular. The Respondent contended that the Rules of the Supreme Court were more exhaustive regarding the matter of injunctions, providing more circumstances under which a party could apply for an interim injunction *ex parte*.
- 3.5 Regarding the validity of the lease agreement, it was submitted that, it was only executed five days prior to the demise of the deceased and the reason it remained unregistered with the Ministry of Lands is due to the need for the appointment of an administrator of the estate of the deceased.
- 3.6 Furthermore, the lease agreement was not executed in Lusaka and therefore fell within the purview of section 5(2) of **The Lands and Deeds Registry Act**¹ which provides for registration to be done within 90 days, a period that had not yet elapsed at the time of commencement of this action.

3.7 In reply, the Appellant reiterated that the lease agreement should have been registered within 30 or at most 90 days from the execution date, and both periods have now lapsed.

4.0 RULING OF THE COURT BELOW

4.1 Upon reviewing the application to raise a preliminary objection and hearing arguments from both sides, the learned Judge addressed the first and second preliminary issues simultaneously.

4.2 The Judge referred to the case of **Chikuta v Chipata Rural Council**¹ and found that Order 29/1 **RSC**¹ was more comprehensive in its provisions than Order 27/4 **HCR**² for urgent *ex parte* applications for an injunction. The Judge noted that Order 29/1/2 **RSC**¹ allows for the making of an *ex parte* application for an injunction in cases of urgency, while Order 27/4 **HCR**² does not have a similar provision.

4.3 Consequently, the learned Judge opined that the failure by the Respondent to cite the relevant provisions of the **HCR**² relating to the grant of an

injunction did not deprive the court of its jurisdiction to grant the *ex parte* order of injunction. Thus, the interim injunction was properly granted pending an *inter partes* hearing of the application. The first and second preliminary issues were, therefore, dismissed.

4.4 Coming to the 3rd issue, the Judge found that the lease agreement did not clearly specify where it was executed, even though it indicated that the property was situated in Chongwe while both parties were based in Lusaka. According to the Judge, the parties' affidavit evidence also did not provide any clear indication, making it difficult to determine whether the lease agreement should have been registered within 30 or 90 days, as per the provisions of Section 5 (2) of **The Lands and Deeds Registry Act**¹.

4.5 The learned Judge opted to apply the 90 day time frame provided in Section 5 (2)(b) of **The Lands and Deeds Registry Act**¹ and rejected the Appellant's assertion that both time frames under section 5(2) (a) and (b) had expired.

4.6 Based on the foregoing, the learned Judge found that the lease agreement executed between the Respondent and the deceased remained valid and was not void for want of registration. This is because the 90-day period within which the lease agreement was supposed to be registered had not expired when the Appellant terminated the lease agreement, nor had it expired at the time of the commencement of the suit. As a result, the 3rd preliminary issue also failed.

5.0 THE APPEAL

5.1 Dissatisfied with the Ruling of the lower court, the Appellant lodged an appeal before this Court advancing three (3) grounds of appeal couched as follows:

- 1. The learned trial Judge erred both in law and fact when she held that the time frames for registration of the Lease Agreement had not expired. Meanwhile the record shows that the date of Application for Preliminary Issue, date of hearing the Preliminary Issue, date of**

Affidavit in Opposition to Preliminary Issue and date of Ruling on Preliminary Issue, all took place after the expiry of time frames for registration of Lease Agreement.

2. The learned trial Judge erred both in law and fact when she held that there is a *lacuna* in our rules of procedure for grant of an *ex parte* injunction.

3. The learned trial Judge erred both in law and fact when she held that the Defendant terminated the lease agreement but has proceeded to hear the main matter whose main claims are, *inter alia* specific performance, declaration as the lawful Tenant and vacant possession, by issuing Order for Directions.

6.0 ARGUMENTS IN SUPPORT OF THE APPEAL

6.1 Mr. Chali, Counsel for the Appellant, relied on the filed heads of argument dated 17th July 2023. In support of ground one, the Appellant relied on sections 4 and 5 of **The Lands and Deeds Registry**

Act¹ and submitted that the lease agreement was signed on 1st July 2022 and was for a duration of over one year and as such fell within the ambit of documents to be registered under **The Lands and Deeds Registry Act**¹.

6.2 The Appellant further pointed out that if the document was signed on 1st July 2022, the 30 days elapsed on 30th July 2022. However, if it was executed in Chongwe, it ought to have been registered within 90 days which would have elapsed on 28th September 2022. According to the Appellant, the application to declare the Agreement null and void for want of registration was only made on 3rd October, 2022 which was outside the registration time of 30 or 90 days.

6.3 The Appellant relied on the cases of **Examinations Council of Zambia Pension Trust Scheme Registered Trustees and The Trustees of Examinations Council of Zambia Pensions Trust Scheme v Tecla Investments Limited**², **Krige and Another v Christian Council of Zambia**³ and **Makanya Tobacco Company Limited v J & B**

Estates Limited ⁴, where it was established that non-registration of documents renders the agreement void and unenforceable. Therefore, the Appellant argued that in this instance, the court cannot uphold the agreement and validate an injunction based on its supposed validity.

6.4 In support of ground two, it was submitted that the Respondent obtained an interim injunction by applying to court pursuant to Order 29 **RSC**¹. It was contended that resorting to the Whitebook is only necessary when our laws are lacking or insufficient to address the situation. However, in *casu*, there is no *lacuna* in the law as Order 27/4 **HCR**² adequately addresses situations involving injunctions in cases of contract breaches.

6.5 The Appellant relied on the cases of **Hotelier Limited, Odys Works Limited v Finsbury Investments Limited**⁵, **New Horizon Printing Press Limited v Waterfield Estates Limited and Commissioner of Lands**⁶ and **Micheal Chilufya Sata v Chanda Chimba III, Zambia National Broadcasting Corporation, Muvi TV Limited and**

Mobi TV International Limited⁷ and submitted that the Order of interim Injunction should be set aside due to its irregularity.

- 6.7 In support of ground three, it was submitted that the lower court's finding that the lease agreement was terminated, implied its non-existence and thus rendered a trial unnecessary, as specific performance cannot be granted in the absence of an agreement. The Appellant cited the case of **Hongling Xing Xing Building Company Limited v Zamcapital Enterprises Limited (For National Electronics Retail Limited)**⁸ which established that specific performance cannot be pursued in the absence of a valid agreement.
- 6.8 In the present case, it was argued that there was no necessity to proceed with the hearing for the reliefs being sought, given that the lower court had already ruled that the lease agreement was terminated. We were urged to uphold the appeal.

7.0 ARGUMENTS OPPOSING THE APPEAL

- 7.1 At the hearing of the appeal, neither the Respondent nor their lawyers were in attendance. Nonetheless, we note that they did file their heads of argument, dated 20th July 2023 which will be considered.
- 7.2 In support of ground one, the Respondent contended that the lower court rightfully found that the time frame for registration of the lease agreement had not lapsed. Referring to Sections 4, 5 and 6 of **The Lands and Deeds Registry Act**¹, it was argued that the lease, signed on 1st July 2022, for a 10-year term, fell within the ambit of the documents required to be registered.
- 7.3 However, registration was delayed as the Respondents and the deceased were still finalising the lease agreement. Moreover, following the demise of the deceased, there was a need to await the appointment of an administrator to the estate of the deceased.
- 7.4 Furthermore, the Appellant's denial of the Respondent's rights, including taking possession of

all the copies of the lease agreement and withholding the certificate of title, thwarted any attempts to enforce the agreement. It was argued that this conduct prompted the Respondent to commence legal action.

7.5 The Respondent relied on the case of **Imbwili Investments Limited v The Attorney General**⁹ where it was held that section 6(i) of **The Lands and Deeds Registry Act**¹, grants the court discretion to extend the time within which to register a document required to be registered under the Act, provided there are valid reasons for the failure.

7.6 It was argued that based on the foregoing, the assertion that the lease agreement is void due to lack of registration holds no merit.

7.7 In support of ground two, it was asserted that the lower court was justified in recognizing a *lacuna* in our laws concerning the issuance of *ex parte* injunctions. Referring to the case of **Isaac Lungu v Mbewe Kalikeka**¹⁰, the Respondent pointed out that the application for an interim injunction was filed under Order 29/1 **RSC**, as it offered a more

exhaustive framework compared to the **HCR**, specifying the circumstances under which a party can seek an *ex parte* injunction.

7.8 Furthermore, it was contended that this ground was purely academic, as the injunction that had been granted was subsequently discharged.

7.9 In support of ground three, it was argued that the learned Judge was justified in proceeding to hear the main matter. The contention was that the case before the court involved additional claims and despite the lease being considered cancelled, other claims could stand independently. Consequently, the court was deemed justified in issuing orders for directions.

8.0 ANALYSIS AND DECISION OF THE COURT

8.1 We have considered the Ruling being impugned and the arguments advanced by both the Appellant and the Respondent.

8.2 Upon a careful examination of the record, it revealed that the Appellant did not enter an appearance or file

a defence; if they did so, then the same was not reflected on the record.

8.3 It is essential to recognise that appeals typically involve a re-hearing on the record. In this regard, Order X Rule 9 (5) of **The Court of Appeal Rules³ (CAR)** outlines the list of documents required to be compiled in the record of appeal. This compilation is critical to ensure that an appellate court has access to all pertinent materials, given that its jurisdiction to re-hear a matter is confined to what is contained on the record.

8.4 Notably, and of interest to this appeal is Order X Rule 9 (5) (g) which provides as follows:

“The record of appeal shall contain the following documents in the order in which they are set out:—
(g) copies of documents in the nature of pleadings, so far as it is necessary for showing the matter decided and the nature of the appeal.”

8.5 In light of the above, the absence of the pleadings, particularly the memorandum of appearance and defence, leads to the inference that they were never filed. This raises the question of whether the

Appellant was justified in taking out a motion to raise a preliminary issue under Orders 14A/1 and 33/7 **RSC**¹.

8.6 The Supreme Court in the case of **African Banking Corporation Limited v Mubende Country Lodge Limited**¹¹ discussed the requirements for making an application to dispose of a case on a point of law under Order 14A **RSC**¹. The Court held as follows:

“It is plain from the preceding paragraph that there are certain requirements which must be satisfied before a matter can be disposed of on a point of law. One such requirement, according to Order 14A/1-2/2, RSC is the giving of notice of intention to defend...”

In the view that we take, what constitutes a notice of intention to defend, in the context of our rules, is the filing of a memorandum of appearance which is accompanied by a defence. It, therefore, follows that the filing of a memorandum of appearance with a defence is a pre-requisite to launching an application under Order 14A, RSC. The record shows, as we alluded

to earlier, that contrary to the mandatory requirements of Order 11, rule 1 of the High Court Rules, the appellant did not file a memorandum of appearance and a defence before invoking Order 14A, RSC. Consequently, we cannot fault the trial Judge in finding that the conditions favourable in invoking Order 14A, RSC were not present.”

- 8.7 According to the above authority, it is evident that in our jurisdiction, notice of intention to defend equates to filing a memorandum of appearance and a defence. Therefore, in the absence of both, the Appellant had no basis to file a motion to raise a preliminary issue under Order 14A **RSC**¹. Consequently, the learned Judge should not have entertained the motion, as it was incompetently before her. Since the learned Judge lacked jurisdiction to hear the motion, the ensuing Ruling is deemed void and unenforceable, and is hereby set aside. The matter is sent back to the High Court before the same Judge for the issuance of orders of directions.

8.8 In light of our decision, there is no need to discuss the grounds of appeal.

9.0 CONCLUSION

9.1 In sum, the appeal lacks merit and is accordingly dismissed with costs to the Respondent. Same to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



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



N.A. SHARPE-PHIRI
COURT OF APPEAL JUDGE