AMBER LOUISE GUEST
MILAN TRBONIC
v
BEATRICE MULAKO MUKINGA
ATTORNEY GENERAL

HIGH COURT
DR MATIBINI, SC, J
24TH MAY, 2010
2010/HP/0344

[1] Civil procedure - Commencement of action - Whether there is a choice between commencing an action by writ of summons or originating summons.

[2] Civil procedure - Res judicata - Meaning thereof.

[3] Land law - Caveat - Effect thereof.

This matter was commenced by originating summons. The plaintiffs sought an order restraining the 1st defendant from interfering with the 1st plaintiff's possession of stand number 1944, Kitwe. And a further order restraining the 2nd defendant from registering any further entries on the land register relating to the subject property, pending determination of this action.

Subsequently, the 1st defendant issued out of the Principal Registry a Notice to Raise Preliminary Issues. The following issues were raised:

a) whether the commencement of this action by originating summons is appropriate or not, taking into account that there are contentions issues;

b) whether the matter is res judicata, as the same was determined by Honourable Mr. Justice P Musonda, under cause number 2009/HP/0544; and

c) whether the purported removal of the caveat under entry 16 is supported by law or any judgment of the Court.

Held:

1. There is really no case where there is a choice between commencing an action by writ of summons, or by originating summons. Every action has to be commenced by way of writ summons.

2. A statutory instrument cannot amend an Act of Parliament. Any provision of a statutory instrument which is inconsistent with any provision of an Act shall be void to the extent of the inconsistency.

3. In order for a plea of res judicata to succeed, it must be demonstrated that a judgment should have earlier on been pronounced between the parties.

4. The underlying principle regarding the plea of res judicata is expressed in the maxim: reipublicaes at sit finis; litiam; meaning that it is in the public interest that there should be an end to litigation.

5. In terms of section 79 of the Lands and Deeds Registry Act, so long as a caveat in Form 8 remains in force, the Registrar of Lands and Deeds Registry is proscribed from making any entry on the register having the effect of charging or transferring or otherwise affecting the estate of interests protected by such caveat.

6. The proviso to section 79 however, provides that nothing in the context of section 79 shall prevent the completion of the registration of any instrument which has been accepted for registration before receipt of the caveat.

Cases referred to:

1. Chikuta v Chipata Rural Council (1974) Z.R. 241.
2. Zinka v Attorney General (1990 - 1992) Z.R. 73.
3. Attorney General v Mubiana Appeal Number 38 of (1993) (unreported).
4. Bank of Zambia v Anderson and Another (1993 - 1994) Z.R. 47.
5. Council of the University of Zambia v Calder (1998) Z.R. 48.
6. Shimonde v Another v Meridian BIAO Bank (2) Limited (1999) Z.R. 47.
7. National Milling Company Limited v Vashee (2000) Z.R. 98.
8. New Plast Industries v Commissioner of Lands and Another. (2001) Z.R. 51.
9. Bank of Zambia v Tembo (2002) Z.R. 103.
10. Kasama Municipal Council v Mulenga (2003) Z.R. 141.
11. C S Investments Limited and Others v Attorney General (2004) Z.R. 216.
12. Mukinga v Fuller and Others Appeal Number 138 of (2006) (unreported).
13. Kumbi v Zulu (2009) Z.R. 183.
14. Robinson v Robinson [1943] 44.
15. Samuel v Linzi Dresses Limited [1981] 1 ALL E.R. 803.

Legislation referred to:

1. Supreme Court Act, cap 25, s.8 Rules 12(1) and 70 (1).
2. High Court Act, cap 27, s.10 Order 5, Rules 1, (2) and 3; Order 2 Rule 3.
3. Rules of the Supreme Court (White Book) Order 5, Rules 2,4,5; and Order 2, Rule 3.
4. Land and Deeds Registry Act, cap 185, ss.76, 81, 83, and 87.
5. Interpretation and General Provisions Act, cap 2, s 20 (4).
6. Married Women Property Act 1882 s.17.
7. Trustee Act, 1893.
8. Land Transfer Act, 1897.

9. Employment Act, cap 268 s. 26.
10. English Law (Extent of Application) cap 11. s. 2 (e).
11. Act Number 14 of 2002 [An Act to Amend the English Law.
12. (Extent of Application] Act.
13. Act Number 15 of 2002 [An Act to Amend the Supreme Court of Zambia Act).
14. Act Number 16 of 2006 [An Act to Amend the High Court Act).
15. Statutory Instrument Number 115 of 1996 (the Local Government Service Regulations 1996).
16. Statutory Instrument Number 71 of 1997 (the High Court Amendment) Rules 1997 (Repealed and Replaced).
17. Statutory Instrument Number 69 of 1998 (the High Court Amendment) Rules 1998.

Works referred to:
1. D. Greenberg, Strouds Dictionary of Words and Phrases, Volume 3, Seventh Edition (London, Thomson Sweet and Maxwell, 2006)
2. Halsbury Laws of England, Volume 16, paragraph 1254

General Editors Notes: Section 2 of the English Law (Extent of Application) Act was on 12th April, 2011, repealed and replaced by the English Law (Extent of Application) (Amendment) Act No. 6 of 2011, by the deletion of paragraph (e). The repealed paragraph (e) was in the following terms:
"(e) the Supreme Court Practice Rules of England in force until 1999:
provided that or any other civil Court practice rules issued after 1999 in England shall not apply to Zambia except in matrimonial causes."

The net effect of the amendment contained in Act No. 6 of 2011 is therefore that the Rules of the Supreme Court (White Book) shall no longer be in force by virtue by section 2 of the English Law (Extent of Application) Act, chapter 11 of the laws of Zambia.

Be that as it may, section 10 of the High Court Act chapter 27 of the laws of Zambia has been repealed and replaced by Act No. 7 of 2011___ being an Act to amend the High Court Act. Section 10 of the High Court Act previously provided that:
"The jurisdiction vested in the Court shall as regards practice and procedure, be exercised in a manner provided by this Act, and the Criminal Procedure Code, or by any other written law, or by such rules, order of directions of the Court as may be under this Act or the said Code, or such written law; and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of justice."

Section 10 of the High Court Act now provides as follows:
1) The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act, the Criminal Procedure Code, the Matrimonial Causes Act, 2007, or such written law, and in default thereof in substantial conformity with the Supreme Court

Practice, 1999 (White Book) of England and subject to subsection (2), the law and practice applicable in England in the High Court of Justice up to 31st December, 1999.

2) The Civil Court Practice, 1999 (Green Book) of England and any civil court practice rules issued in England after 31st December, 1999, shall not apply to Zambia."

The effective date of the amendment referred to above is also 12th April, 2010. Thus the White book is to be resorted to whenever there is a lacuna in the High Court Rules of practice and procedure.

Simachela (Ms.) of Messrs MNB Legal Practitioners for the plaintiff.
C. L. Mundia, SC, of Messrs C.L. Mundia and Company for the 1st defendant.
C. Mulenga State Advocate, Attorney General's Chambers for the 2nd defendant.

DR. MATIBINI, SC, J.: The short history of this matter is that on 5th April, 2010, the plaintiff commenced an action by way of originating summons. The originating summons is supported by an affidavit. By the originating summons, the plaintiffs are seeking for an order restraining the 1st defendant from interfering with the 1st plaintiff's possession of stand number 1944, Kitwe, and a further order restraining the 2nd defendant through the Registrar of Lands and Deeds registry, from making any further entries concerning stand 1944, Kitwe, on the Lands Register.

The originating summons and the supporting affidavit, are accompanied by an interlocutory application for an interim injunction. By the interlocutory application, the plaintiffs are seeking for an order to restrain the 1st defendant from interfering with the Plaintiff's quite possession of stand number 1944, and a further order restraining the 2nd defendant from registering any further entries, on the Land Register, relating to the subject property, pending determination of this action.

However, the 1st defendant on 23rd April, 2010, issued out of the principal registry a Notice to Raise Preliminary Issues. The Notice was issued pursuant to Order 33, Rule 3 of the Supreme Court Rules, hereinafter referred to as the White Book. In terms of Order 33, rule 3, I have the power to try preliminary questions. The determination of preliminary questions or issues serves a very useful purpose because it may culminate in the disposal of the whole case, or at least some aspect [s] of the case. Further, it may also significantly cut down the costs, and the time expended in pre-trial preparation, and in connection with the trial itself.

The 1st defendant has formulated or defined the preliminary issues as follows:-

a. whether the commencement of this action by originating summons, is appropriate or not, taking into account that there are contentious issues;

b. whether the matter is res judicata, as the same was determined by Hon. Mr. Justice P. Musonda, under cause No. 2009/HP/0544; and

c. whether the purported removal of the caveat under entry 16 is supported by law or any judgment of the Court.

The Notice to Raise Preliminary Issues was complimented with written submissions. The

preliminary issues will therefore be addressed, and resolved in the order that they have been presented in the Notice.

IS THE MODE OF COMMENCEMENT OF PROCEEDINGS APPROPRIATE?

In the first limb of the Notice to raise preliminary issues, the 1st defendant has invited me to determine whether or not the commencement of this action by originating summons is appropriate, bearing in mind the various contentious issues at play. In this regard, Mr. Mundia, SC, submitted that Order VI, rule 1, of the High Court rules as amended by Statutory Instrument Number 71 of 1997, provides that:-

"Except for petitions under the Constitution and Matrimonial Causes Act, and applications for writs of habeas corpus, every action in the Court shall notwithstanding the provisions of any written law, be commenced by writ of summons endorsed with or accompanied by a full statement of claim".

Furthermore, Mr. Mundia SC, drew my attention to Order 5, rule 2, of the White Book. Order 5, rule 2, is in the following terms:-

Subject to any provision of an Act or of the rules, by virtue of which any proceedings are expressly required to be began otherwise than by writ, the following proceedings must, notwithstanding anything in rule 4, be began by writ. That is to say, proceedings:-

a. In which the claims made by the plaintiff for any relief, or remedy for any tort other than trespass to land;

b. In which a claim made by the plaintiff's is based on allegations of fraud;

c. In which a claim is made by the plaintiff for damages for breach of duty whether the duty exists by virtue of a contract or of a provision made by or under an Act or independently of any contract or any such provision where damages in respect of personal injuries to any person or in respect of damage to any property.

In construing Order VI, rule 1, of the High Court Rules, as amended by Statutory Instrument number 71 of 1997, Mr. Mundia SC, relied on the Supreme Court judgment in the case of New Plast Industries v The Commissioner of Lands and the Attorney General (8), where it was held, following the decision in Chikuta v Chipata Rural Council (1), that

"…… there is no case in the High Court where there is a choice between commencing an action by a writ of summons. We held in that case [Chikuta] that where any matter is brought to the High Court by means of an originating summons, when it should have been commenced by a writ, the Court has no jurisdiction to make any declaration".

The Mr. Mundia, SC, submitted further that the decisions in the New Plast Industries (supra), and Chikuta (supra) cases, were subsequently followed in the case of Mukinga v Fuller and Others (12). The gravamen of Mr. Mundia SC's submission in this regard is that this action has wrongly been commenced, and must therefore be dismissed.

Conversely, Ms. Simachela on behalf of the Plaintiff submitted that this action was properly

commenced. Relying on Order 30 of the High Court Rules, Ms. Simachela argued that this is a matter that ought to be disposed of in chambers, and therefore the plaintiff is entitled to commence this action by originating summons.

In advancing this submission, Ms. Simachela also relied on the New Plast Industries (supra) case, stating that the case lays down that the mode of commencement of any action is generally provided for by the relevant statute. Further, Ms. Simachela submitted that since the main action turns around the issue or question of title to land, it is a matter that has been appropriately canvassed in the originating summons; premised on affidavit evidence.

In the alternative, Ms. Simachela argued that should I hold that this action is wrongly commenced, then she would rely on Order 2, rule 3, of the White Book, which is expressed in the following terms:-

"The Court shall not wholly set aside any proceedings or the writ or other originating process by which they began on the ground that the proceedings were required by any of the rules to be began by an originating process other than the one employed".

Thus, Ms. Simachela invited me to deem this matter as though it had been commenced by way of writ of summons, and any affidavits sworn, are to stand as pleadings. Ms. Simachela concluded on this point that the deeming, would not work any prejudice against the defendants.

A convenient starting point in evaluating the submissions and arguments on this issue is the case of Chikuka v Chipata Rural Council (supra). This is the locus classicus on commencement of proceedings. For that reason, I will quote from the case in extensio. The facts giving rise to this case are that the appellant was the Secretary of the Chipata Rural Council. On 28th August, 1972, the appellant was convicted on two counts of forgery and uttering, and was sentenced to six months imprisonment. Prior to this, he had been suspended by the respondent. On 1st September, 1972, the Council met for the purpose of determining whether or not the appellant should be dismissed. Eventually, the appellant was dismissed from his employment with effect from the date of his conviction. As a result, the appellant brought an action before the High Court by means of an originating summons, seeking a declaration that he was still employed by the Council. The High Court refused to make the declaration sought by the appellant.

On appeal to the Supreme Court, Doyle, C.J., as he was then, delivered the judgment of the Court. In delivering the judgment, Doyle, C.J., observed as follows:

"The matter was brought before the Court by means of an originating summons. The practice and procedure in the High Court is laid down in the High Court Rules, and where they are silent or not fully comprehensive, by the English White Book. Under Order 5 of the English Rules of the Supreme Court, rule 2 lays down what proceedings must be began by originating summons; rule 4 the proceeding which may be began by either by writ or originating summons; and rule 5 proceedings that may be began by motion or petition. The Zambian rules are much more rigid. Under Order 6, rule 1, every action in the Court must be commenced by writ, except as otherwise provided by any written law or the

High Court Rules; Order 6, rule 2, states that any matter which under any written law rules may be disposed of in chambers, shall be commenced by an originating summons. Rule 3 provides for matters which may be commenced by an originating notice of motion. It is clear, therefore, that there is no case where there is a choice between commencing an action by writ of summons, or by an originating summons. The procedure by way of an originating summons only applies to those matters referred to in Order 6, rule 2, and to those matters which may be disposed of in chambers. Chamber matters are set in Order 30 of the High Court Rule 5. Counsel for the appellant was unable to show us where under the Order this matter could be began by an originating summons. Paragraph [j] of rule 11 of Order 30 does refer to "such matters as a judge may think fit to dispose of in chambers."

Doyle, C.J., went on to observe at P.244:

"That clearly is not so wide as to allow a judge, a carte blanche to hear any sort of action in chambers, and clearly does not apply to an action for a declaration which depends on evidence being called on both sides. Even if the English practice could be prayed in aid, it would not help, as there an action for declaration is brought by writ".

Doyle C.J., concluded that the proceedings where misconceived. As the matter was not properly before the trial judge, he had no jurisdiction to make the declaration requested, even if he had been so disposed. The appeal was accordingly dismissed.

The primary rule expounded in the Chikuta case (supra) is therefore that there is really no case where there is a choice between commencing an action by writ of summons or by originating summons. Every action has to be commenced by way writ of summons. The matters that may be commenced by way of originating summons were at the time of deciding the Chikuta case (supra) specified in Order 6, rule 2, and those matters that could be disposed of by originating notice of motion were specified in Order 6, rule 3.

In order to appreciate the decision in the Chikuta case (supra), it is instructive to recall that at the material time, Order VI of the High Court Rules provided as follows:-

1. Except as otherwise provided by any written law or these rules, every action in the Court shall be commenced by a writ of summons;
2. Any matter which under any written law may be disposed in chambers shall be commenced by originating summons; and
3. Any application to be made to the Court in respect of which no special procedure has been provided by any written law or by these Rules shall be commenced by Originating Notice of Motion.

Later on, on 28th May, 1997, and in a Gazette Notice dated 6th June, 1997, Order VI of the High Court Rules as expounded in the Chikuta case (supra) was amended by Statutory Instrument number 71 of 1997. Order VI as amended was couched in the following terms as prayed in aid by Mr. Mundia, SC, in this action:

1. Except for petitions under the Constitution and Matrimonial Causes Act, and

applications for writs of habeas corpus every action in the Court shall notwithstanding the provisions of any other written law be commenced by writ of summons endorsed with or accompanied by a full statement of claim;

2. The Court shall not issue any writ of summons which is not endorsed with or accompanied by a full statement of claim; and

3. The proper officer shall seal the official seal the writs of summons and the statement of claim on a separate sheet and shall return the copies to the person commencing the action.

Let me pause here and interpolate a few observations. First, as previously observed above, every action, save as otherwise provided by any written law, or the High Court rules, had to be commenced by writ of summons. However, Order VI, as amended by Statutory Instrument No. 71 of 1997, provided that save for petitions under the Constitution and Matrimonial Causes Act, and applications for writ of habeas corpus every action in the Court would notwithstanding the provisions of any other written law be commenced by writ summons.

The requirement in Order VI as amended by Statutory Instrument number 71 of 1997, that every action had to be commenced by writ of summons notwithstanding the provisions of any other written law obviously created or caused a fundamental problem. The fundamental problem created or caused was whether or not provisions of a statutory instrument could amend the provisions of an Act of Parliament. To illustrate the point, section 87 of the Lands and Deeds Registry Act, chapter 185 of the Laws of Zambia is in the following terms:-

"If the Registrar refuses to perform any act or duty which is required in this Act to perform or if a registered proprietor or other interested person is dissatisfied with the direction or decision of the Registrar in respect of any application, claim, matter or thing under this Act, the person deeming himself aggrieved may appeal to the Court."

The question that may be posed here is whether Order VI, rule 1, of the High Court Rules as amended by Statutory Instrument No. 71 of 1997, was at law capable of amending or repealing section 87 of the Land Deeds Registry Act. I opine that the answer is in the negative. This is so because a statutory instrument cannot amend an Act of Parliament. I am fortified in making this assertion, first by the case of Shimonde and Another v Meridien BIAO Bank [Z] Limited (6). Following the decisions in the Bank of Zambia v Anderson and Another (4); and Attorney General v Mubiana (3), the Supreme Court made it very clear that the provisions of an Act of Parliament could neither be ignored nor overridden by a mere statutory instrument. Section 20 [4] of the Interpretation and General Provisions Act chapter 2 of the Laws of Zambia is categorical on this point when it provides that:-

"Any provision of a statutory instrument which is inconsistent with any provision of an Act, Applied Act, or Ordinance shall be void to the extent of the inconsistency".

Second, and perhaps more pointedly the Supreme Court in the case of Kasama Municipal Council v Mulenga (10), was faced with a situation where it had to consider whether regulation 35 [4] of Statutory Instrument number 115 of 1996, was inconsistent with section 26 of the Employment Act. The Supreme Court held that any provision of a statutory instrument which is inconsistent with the provisions of an Applied Act, or Ordinance shall be void to the extent of the inconsistency. It is little

wonder therefore that Order VI of the High Court Rules, as amended by Statutory Instrument Number 71 of 1997, was subsequently repealed and replaced by Statutory Instrument Number 69 of 1998.

Thus, Statutory Instrument Number 69 of 1998, [The High Court [Amendment] Rules 1998, amended Order VI as provided in Statutory Instrument Number 71 of 1997, by the deletion of sub rules [1] and [2], and the substitution of the following:-

[1] Except as otherwise provided by any written law or these rules every action in the High Court shall be commenced by writ of summons endorsed and accompanied by a full statement of claim.

[2] Any matter which under any written law or these rules may be disposed in chambers shall be commenced by originating summons.

This is the regime that now governs the commencement proceedings in the High Court. It is against the backdrop of Statutory Instrument Number 69 of 1998, that I will resolve the question whether or not the current action has been properly commenced.

Ms. Simachela has submitted that this action has been properly commenced because in terms of Order 30, it is a matter that can be disposed of in chambers. It is instructive at this juncture to outline matters that may be disposed of in chambers. Order 30, rule 11, of the High Court Rules provides that the business to be disposed of in chambers shall consist of the following matters.

[a] Applications for time to plead, for leave to amend pleadings for discovery and production of documents, and generally all applications relating to the conduct of any cause or matter;

[b] An application by any person claiming to be interested under a Deed, Will, or other written instrument for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the person interested;

[c] An application by any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of a statute for the determination of such question of construction and for a declaration as to the right claimed;

[d] All proceedings in the Court under the Trustee Act, 1893, or under the Land Transfer Act 1897, of the United Kingdom;

[e] Applications as to the guardianship and maintenance or advancement of infants;

[f] Applications connected with the management of property;

[g] Applications for or relating to the sale by auction or private contract of property and as to the manner in which the sale is to be conducted, and for payment into Court and investment of the purchase money;

[h] All applications for the taxation and delivery of bills of cost and for the delivery by any advocate of deeds, documents and papers;

[i] All matters which under any other rule or statute were formerly allowed to be commenced by originating summons; and

[j] Such other matters as a judge may think fit to dispose of in chambers.

Clearly, Order VI, rule 2, as amended by Statutory Instrument Number 69 of 1998, is consonant

with Ms. Simachela's submission that this action qualifies to be disposed of in chambers, and therefore was properly commenced by originating summons. Although Ms. Simachela did not point out Order VI, Rule 2, of Statutory Instrument Number 69 of 1998, and in particular paragraph[s] under Order 30, rule 11, in the scheme of Order 30, rule 11, the authority or power to commence this action by way of originating summons is traceable to Order VI, rule [2], and paragraphs [b] and [c] of Order 30, rule 11. I am fortified in making this finding by the Supreme Court decisions in Zinka v Attorney General (2) and C.S. Investments Limited, and Others v Attorney General (11).

In view of Order VI, rule 2, of Statutory Instrument Number 69 of 1998, and Order 30, rule 11, paragraph [b] and [c], I therefore find and hold that this action was properly commenced by way of originating summons.

Ms. Simachela advanced an alternative argument that if this action is found to have been wrongly commenced, it should be deemed as having been commenced by way of writ of summons. In postulating this alternative argument, Ms Simachela relied on Order 2, rule 1(3), of the White Book. Although I have already decided that this action has been properly commenced, I have nonetheless found it necessary to address the alternative argument obiter dicta, in view of the seminal changes that have taken place in our procedural law, as I will demonstrate below.

To begin with, it is instructive to note that by Act Number 14 of 2002 an Act to amend the English Law [Extent of Application] Act, section two of the principal Act has been amended by the insertion at the end of paragraph (d), the following new paragraph (e):

"the Supreme Court Practice Rules of England in force until 1999, provided that the Civil Court Practice 1999 (The Green Book) of England or any other Civil Court Practice Rules issued after 1999 in England shall not apply to Zambia except in Matrimonial Causes."

Further, Act No. 15 of 2002, an Act to amend the Supreme Court of Zambia Act amended section 8 of the Supreme Court Act. In order to appreciate the amendment of section 8 of the Supreme Court Act, it is necessary to reproduce section 8. Section 8 is in the following terms:

"8 The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act and Rules of Court. Provided that if this Act or Rules of Court do not make provision for any particular point of practice and procedure, the practice and procedure of the Court shall be (i) in relation to criminal matters, as nearly as may in accordance with the law and practice for the time being observed in the Court of Criminal Appeal in England; (ii) in relation to civil matters, as nearly as may be in accordance with the law and practice for the time being observed in the Court of Appeal in England."

By Act number 15 of 2002, the Supreme Court Act is amended by the insertion at the end of paragraph (ii) of the following words:

"except that the Civil Court Practice 1999 (The Green Book) of England or any other Civil Court practice rules issued after 1999 in England shall not apply to Zambia unless they relate to Matrimonial Causes."

Furthermore, by Act No. 16 of 2002, an Act to amend the High Court Act, section 10 of the High Court Act was amended. Again, in order to appreciate the import of the amendment introduced by Act Number 16 of 2002, it is necessary to reproduce section 10. Section 10 of the High Court Act is in the following terms:

"10 The jurisdiction vested in the Court shall, as regards practice and procedure, be exercised in the manner provided by this Act, and the Criminal Procedure Code, or by any other written law or by such rules, or directions of the Court as may be made under this Act or the said Code or such written law and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice.

By Act Number 16 of 2002, section 10 of the High Court Act is amended by the insertion of the following new proviso:

"provided that the Civil Court practice 1999 (The Green Book) of England or any other Civil Court practice rules issued after 1999, in England shall not apply to Zambia unless they relate to Matrimonial Causes."

Therefore, Acts Number 15 and 16 of 2002, limit and delineates the adoption of the practice being observed in the Court of Appeal and in the High Court of Justice in England in relation to civil and criminal matters. However, Act Number 14 of 2002, has far reaching ramifications. In order to appreciate the ramifications of Act Number 14 of 2002, it is necessary to refer to the Supreme Court judgment in the case of Kumbi v Zulu, (13).

The facts leading to the Kumbi case (supra) are that a single judge of the Supreme Court on her own motion granted leave in an "unless" order, directing the applicant to file her record of appeal out time within a period of fourteen days. Failure to file the record of appeal within the fourteen days, it was ordered, would result in the appeal being dismissed. The "unless" order that was granted by the single judge was of course consistent with the decision of the Supreme Court to mention but one, in the case of Council of the University of Zambia v Calder (3). In the Calder case (supra), the Supreme Court held inter alia, that once an "unless" order has taken effect ,the appeal is deemed to have been dismissed. As it turned out, the appellant's counsel in the Kumbi case (supra), for a variety of reasons, failed to file the record of appeal within the fourteen days stipulated by the "unless" order. Accordingly, the appeal stood dismissed.

Despite the fact that the appeal stood dismissed, Mr. Malambo SC, filed a motion pursuant to Rule 70 (1) of the Supreme Court Rules to restore the dismissed appeal to the active cause list. Mr. Malambo, SC, raised two major arguments in support of restoration of the appeal.

First, he relied on Rule 12(1) of our Supreme Court Rules made pursuant to the Supreme Court Act, chapter 25 of the laws of Zambia. Rule 12 (1) provides that:-

"The Court shall have power for sufficient reason to extend time for making any application, in including an application for leave to appeal or for bridging any appeal or for taking any step in

accordance with an appeal notwithstanding that the time limited therefore may have expired, and whether the time limited for such purpose was so limited by the order of the Court or by the Rules or by any written law."

Second, Mr. Malambo, SC, submitted that prior to the enactment of Act Number 14 of 2002, referred to above, the White Book only filled gaps in our own practice and procedure. However, with the insertion of paragraph (e) in section 2 of the English Law (Extent of Application) Act chapter 11 of the Laws of Zambia, the White Book has now been incorporated in our rules of procedure. In pressing this argument, Mr. Malambo, SC, invited the Supreme Court to follow the English decision in the case of Samuel v Linzi Dresses Limited (15), which overturned the position in England that once an appeal has been dismissed after failing to comply the "unless" order it cannot be revisited. In short, Mr. Malambo, SC, valiantly argued that the decision of the Court of Appeal in the case of Samuel v Linzi Dresse's Limited (supra), has a binding effect on the Zambian Courts It is no longer a persuasive authority.

In delivering the judgment of the Supreme Court, Chibesakunda, JS, observed as follows:

"As argued by state counsel, before section 2 of the English Law (Extent of Application) Act No. 14 of 2002, the Rules of the Supreme Court (only filled gaps in our own practice and procedure). With the insertion of paragraph (e) in section 2 of the English Law (Extent of Application) Act chapter 11, the whole of the 1999 edition of the White Book has been incorporated in our rules and procedures.

Now by statute, the Zambian Courts are bound to follow all the rules and procedure followed in England as stated in the 1999 edition of the White Book. The entire provisions of the Rules of the Supreme Court as expounded in the White Book, 1999 edition including the decided cases are now Zambian law by statute, and as such binding on the Zambian Courts. So the case of Samuel v Linzi Dresses Limited (supra) is no longer a persuasive authority. It is a binding authority in Zambia."

By the same token, Order 2, rule (1) 3, of the Rules of the Supreme relied on by Ms. Simachela has by virtue of the English Law (Extent of Application) Act been incorporated in our system of law and has therefore the force of statutory law. The net result is that by Order 2, rule 1(3), Zambian Courts would be constrained in setting aside originating process on the ground that the rules of any Court required the action to be begun in a particular way. This position is also in any case consistent with decisions made by the Supreme Court in the past, that deprecate the practice of defeating causes of action on account of technicalities. (See National Milling Company Limited v Vashee (7))

IS THE MATTER RES JUDICATA?

In the Notice to Raise Preliminary Issues, I have been invited to decide whether or not the present action is res judicata. It has been submitted by Mr. Mundia SC, that the questions or issues presented in this action have already been determined by my learned brother Justice P. Musonda in cause number 2009/HP/0544. Furthermore, Mr. Mundia SC, submitted that the questions or issues presented in this action were also determined by the Supreme Court in Appeal Number 138 of 1996, between Beatrice Mulako Mukinga [the 1st defendant in this action] and Kelvin Clifford Fuller. In this regard, Mr. Mundia SC, submitted that the Supreme Court held that the marriage between Beatrice

Mulako Mukinga, and Kelvin Clifford Fuller was valid under Lozi customary law.

Ms. Simachela submitted however, that the matter at hand is not res judicata as argued by Mr. Mundia SC, Ms. Simachela, relied on the case of Bank of Zambia v Tembo (9); where it was held that;

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

Ms. Simachela submitted that it is abundantly clear that the parties to the cause of action in 2009/HP/0544, are different from the parties before this Court. Ms. Simachela also pointed out that the cause of action in 2009/HP/0544, is different from the present action in that the former action concerns entitlement to the matrimonial property under the Married Woman's Property Act; while the latter concerns title to a property claimed by an innocent purchaser for value without notice.

I have visited the judgment of my learned brother Mr. Justice P. Musonda in cause number 2009/HP/0544, and the Supreme Court judgment in Appeal Number 138 of 2006. The judgment in appeal number 138 of 2006, was delivered on 28th April, 2008. The action in cause number 2009/HP/0544 was commenced on 30th April, April, 2009. The Supreme Court appeal preceded the High Court matter. The significance of these events will become apparent in due course.

I will begin by considering appeal number 138 of 2006, because it came first in time. In the judgment delivered by Chirwa, JS, the Supreme Court observed that originally the action was between the appellant [Beatrice Mulako Mukinga], and the 1st respondent Kelvin Clifford Fuller. Later on, the 2nd respondent [Air Products Limited], and the 3rd respondent [Lonrho Properties Limited], where joined to the proceedings. However, prior to the commencement of the trial, counsel for the appellant [Beatrice Mulako Mukinga], indicated to the Court that they were discontinuing the proceedings against the 2nd respondent [Air Products Limited], and the 3rd respondent [Lonrho Properties Limited]. The Notice of Discontinuance was to be filed within a week. The Notice of Discontinuance was however not filed. The trial therefore proceeded on the basis that the action was between the appellant [Beatrice Mulako Mukinga], and the 1st respondent [Kelvin Clifford Fuller].

It is instructive to note that by the appellant's [Beatrice Mulako Mukinga] amended statement of claim, the Plaintiff claimed the following reliefs:-

a. a declaratory order that the conveyance of stand number 1944 Kitwe, into the defendant's name from Consolidated Property Limited, be declared null and void and that the said conveyance violated Zambian law on property ownership;

b. that the said property known as stand number 1944 Kitwe, be sold under order of the Court and proceeds be shared between the parties equally, and rentals received by the judgment to date be accounted for by the defendant and 50% of such rentals be paid to the plaintiff;

c. that the 2nd defendant, Air Products Limited of South Africa should account for all rentals paid to the 1st defendant and that further rentals be paid into Court pending the determination of the main matter herein;

d. that the 1st defendant pays her US5,000 for personal effects sold in contemplation of settlement in South Africa;

e. an injunction to stop the 1st defendant from receiving further rentals from Air Products Limited, but that the rentals be paid into Court pending settlement of the matter;

f. interest on all the money owing to the plaintiff from the 1st defendant at short term bank deposit rates as approved by Bank of Zambia, to the date of judgment and thereafter current bank lending rate to date of settlement; and

g. any other relief the Court may deem fit and appropriate and costs.

The Supreme Court in the course of this judgment observed that the trial judge found that the Plaintiff [Beatrice Mulako Mukinga], had not adduced any evidence on which the trial Court could declare the conveyance of stand number 1944 Kitwe, to the defendant [Kelvin Clifford Fuller] null and void, because the Registrar of Lands and Deeds Registry had not been made a party to the proceedings.

Further, the trial judge found that sufficient evidence had not been adduced to justify the Court to order that the defendant [Kelvin Clifford Fuller], should pay US5,000.00 as 50% of the proceeds from the sale of household property. Ultimately, the trial judge held that there was no marriage between the plaintiff [Beatrice Mulako Mukinga], and the defendant Kelvin Clifford Fuller]. It was against these findings that the plaintiff appealed to the Supreme Court.

The appellant [Beatrice Mulako Mukinga] advanced three grounds of appeal.

These were as follows:-

1. that the trial judge erred in law and in fact by holding that the plaintiff did not have any interest in property known as stand number 1944 Kitwe, when in fact there was evidence given before him that the aforesaid plaintiff, and the defendant were husband and wife and that the production of a marriage certificate was not the only evidence to prove marriage;

2. that the Court erred in law and fact by holding that there was no evidence adduced to prove that the conveyance of the aforesaid stand number 1944 Kitwe, to the 1st defendant was null and void, when the issue was one of law in that the 1st defendant was an employee on an employment permit only and therefore not permitted to own real estate in Zambia; and

3. the trial judge erred in law and in fact by condemning the plaintiff in costs allegedly that she had that interest as there was overwhelming evidence before the aforesaid Court and its rejection without sufficient ground was a serious misdirection.

The Supreme Court after evaluating the evidence and arguments advanced before it held as follows:-

a. that circumstantial evidence led to the irresistible conclusion that there was a marriage between the parties. Accordingly, the Supreme Court reversed the trial judge on this point;

b. the appellant had adduced sufficient evidence to prove her interest in the property;

c. since the property became a matrimonial home, title or ownership of the matrimonial home had to be determined in terms of the Married Women Property Act 1882;

d. by section 17 of the Married Women Property Act 1882, legal proceedings had to be commenced by originating summons; and

e. since the action in appeal number 138 of 2006, was commenced by writ of summons, instead of originating summons, the appeal was dismissed on the ground that it was wrongly commenced.

In view of the decision to dismiss the appeal, the Supreme Court opined that it would be an academic exercise to delve into the other grounds of appeal.

A year later, on 30th April, 2009, the 1st respondent [Beatrice Mulako Mukinga], decided to launch a fresh action in cause number 2009/HP/0544, against Kelvin Clifford Fuller.

The cause of action as endorsed on the originating summons was reformulated as follows:-

1. a declaratory order that by virtue of section 17 of the Married Women's Property Act 1882, the plaintiff should have a 50% share of the matrimonial home known as stand number 1944, Kitwe, as she was lawfully married to the defendant;
2. the defendant should be ordered to account to the plaintiff for all the rentals he has received from the date of the said property was put on a lease, to the date of judgment, and that the share due to the plaintiff should attract interest at statutory rates;
3. the defendant should pay to the plaintiff with interest US $5 000 at statutory rates being 50% of the amount realized from the sale of household goods and crockery;
4. damages for mental strain and anguish arising from the denial of property rights by the defendant as a married person;
5. in the alternative, the plaintiff claims that since the defendant has benefited from the lease of stand number 1944, Kitwe, the said property be conveyed into her name; and
6. any other relief the Court may deem fit and appropriate and costs.

In a judgment delivered on 6th November, 2009, my learned brother Justice P. Musonda held that:

(a) the plaintiff [Beatrice Mulako Mukinga] was entitled to fifty percent interest in the matrimonial home, and the household goods;

(b) either party was at liberty to buy out the other after undertaking an independent valuation of the matrimonial property;

(c) the plaintiff was entitled to US$ 5 000=00 as compensation for contributing to the acquisition of the household goods;

(d) the defendant (Kevin Clifford Fuller) was ordered to account for the rentals receivable which were to be shared on a fifty fifty basis;

(e) the US 5 000=00 referred to in paragraph (c) above, and the rentals received would attract interest at short-term deposit rate from the date of commencement of proceedings, to date of judgment. Thereafter, the computation of interest was to be based on long-term deposit until the judgment debt was paid in full; and

(f) the legal costs of the proceedings were to follow the event, and to be taxed in default of agreement.

The present action was commenced on 8th April, 2010. The parties are Amber Louise Guest (1st plaintiff), Milian Trbovic (2nd plaintiff), Beatrice Mulako Mukinga (1st defendant) and Attorney General (2nd defendant). The endorsement on the originating summons is for an order restraining the 1st defendant from interfering with the 1st plaintiff's possession of stand number 1944, Kitwe, and an order restraining the defendant from making any other entries concerning stand number 1944, Kitwe, on the Lands Register.

The question that falls for determination therefore, is whether or not cause number 2010/HP/344, is res judicata, when considered against the backdrop of Appeal Number 138 of 2006, and cause number 2009/HP/0544. In addressing this question it is necessary to consider the phrase res judicata itself.

According to Strouds Judicial Dictionary of Words and Phrases Volume 3, seventh edition. [London, Thomson; Sweet and Maxwell, 2006] P. 2379.

"The phrase res judicata is used to include two separate state of things. One is where a judgment has been pronounced between parties and findings of fact are involved as a basis of that judgment. All the parties affected by the judgment are then precluded from disputing those facts, as facts in any subsequent litigation between them. The other aspect of the term arises when a party seeks to set up facts, which if they had been set up in the first suit, would or might have affected the decision. This is not strictly raising any issue which has already been adjudicated, but it is convenient to use the phrase res judicata as relating to that position (Robinson v Robinson (14) at 44 Per Henn Collins, J).

This plea cannot be entertained but on the production of the record of the Court on which it is founded or on some valid reason being given for its non-production."

The Supreme Court also had occasion in the case of Bank of Zambia v Tembo and Others (9), to consider the phrase res judicata. In the course of hearing the appeal, the Court's attention was drawn to a passage from paragraph 1254 of Halsbury Laws of England, Volume 16, which highlights the essentials of res judicata. The paragraph reads as follows:

"In order that a defence of res judicata may succeed it is necessary to show that not only the cause of the action was the same, but also that the plaintiff has had an opportunity of recovering and but his own fault might have recovered in the first action, that which seeks to recover in the second. A plea of res judicata must show either an actual merger, or that the same point had been actually declared between the same parties where the former judgment has been for the defendant, the conditions necessary to conduct the plaintiff are not less stringent. It is not enough that the matter alleged to be concluded might have been put in issue or that the relief sought might have been claimed. It is necessary to show it was actually so put in issue or claimed."

It is clear therefore from what has been stated above that in order for a plea of res judicata to succeed, it must be demonstrated that a judgment should have earlier on been pronounced between the parties. As a result, the parties are precluded from re-litigating matters on which finding of facts have earlier on been made by the Court, and formed the basis of the judgment. Further, by a plea of res

judicata, a party may be prevented from pursuing a cause of action if it is demonstrated that party had an opportunity earlier on of recovering in the first action that which he seeks to recover in the second action. The underlying principle regarding the plea of res judicata is expressed in the maxim; reipublicaes ut sit finis litium, meaning that it is in the public interest that there should be an end to litigation. (see Bank of Zambia v Tembo and Others (supra) at P. 106)

The central question therefore is whether or not the questions or issues presented in this action have been previously pronounced on, in either appeal number 138 of 2006, or cause number 2009/HP/0544. To recapitulate, the cause of action in the present action is for an order restraining the 1st defendant from interfering with the 1st plaintiff's possession of stand number 1944, Kitwe, as well as restraining the 2nd defendant from making any other entries concerning stand number 1944, Kitwe.

It will be recalled that the determination that was made in the main appeal number 138 of 2006, was that there was a valid Lozi marriage between the 1st defendant in this action, and Kevin Clifford Fuller. The determinations or pronouncements that were made in cause number 2009/HP/0544, were as follows:

(i) that the 1st defendant [in this action] had an interest in the matrimonial property;

(ii) either party had the liberty to buy out the other;

(iii) the 1st defendant [in this action] was entitled to the sum of US 5 000=00, as contribution to the acquisition of household goods; and

(iv) that Kevin Clifford Fuller, was to account for the rentals received.

Clearly, not only are the parties different in appeal number 138, of 2006, from cause number 2009/HP/0544, and now 2010/HP/344, but so are the causes of action. I also accept the submission by Ms Simachela that while the action in cause 2009/HP/0544 relates to entitlement to the matrimonial property, and if I may add, household goods, the present action concerns title to a property claimed by an innocent purchaser for value without notice.

I therefore hold that the present action is not res judicata.

IS THE REMOVAL OF THE CAVEAT SUPPORTED BY LAW OR ANY JUDGMENT OF THE COURT.

The 1st plaintiff [Amber Louise Guest] in this action has deposed in the affidavit in support of the originating summons that sometime in April, 2009, he was offered stand number 1944, Kitwe, by Kelvin Clifford Fuller, who was the registered owner of the property and was in possession of a certificate of title relating to the property. A search conducted at the Lands and Deeds Registry revealed, the 1st plaintiff deposed, that the subject property was free from encumbrances, and the last entry was entry number 16 directing that the caveat entered by the 1st defendant be removed and certificate of title number L5824 be upheld.

Mr. Mundia SC, has taken issue with the manner the caveat was removed. It is Mr. Mundia SC's contention that the caveat placed by the 1st defendant could only be removed by the 1st defendant pursuant to Section 81 (1) of the Lands and Deeds Registry Act.

Ms. Simachela elected not to address this issue, rationalizing that this issue cannot be argued as a preliminary issue because it goes to the core of the action and only the Registrar of Lands and Deeds Registry could respond to the issue on oath.

The law governing the administration of caveats is found in part VI of the Lands and Deeds Registry Act, chapter 185 of the Laws of Zambia.
Section 76 provides that any person-

[a] Claiming to be entitled to or to be beneficially interested in any land or any estate or interest therein by virtue of any unregistered agreement or other instrument or transmission or of any trust expressed or implied or otherwise howsoever or;

[b] Transferring any estate or interest in land to any other person to be held in trust or;

[c] Being an intending purchaser or mortgagee of any land may at any time lodge with the Registrar a caveat in form 8 in the Schedule.

It is important to note that, in terms of section 79 of the Lands and Deeds Registry Act, so long as a caveat in form 8 remains in force, the Registrar of Lands and Deeds Registry is proscribed from making any entry on the register having the effect of charging or transferring or otherwise affecting the estate or interest protected by such caveat. The proviso to section 79, however, provides that nothing in the context of section 79 shall prevent the completion of the registration of an instrument which has been accepted for registration before the receipt of the caveat.

The question or issue that is posed for determination in this regard is whether the purported removal of caveat under entry 16 is supported by law or any judgment. It is instructive to note that section 83 provides that a caveat may be withdrawn by the caveator or by his attorney or agent under a written authority. Alternatively, the consent of the caveator may be given for the registration of any particular dealing expressed to be made subject to the rights of the caveator.

Another mode of removing a caveat in terms of section 87, of the Lands and Deeds Registry Act, is for a registered proprietor or other interested person, if he thinks fit is to summon the caveator or the person on whose behalf such caveat has been lodged to attend before the Court or a judge to show cause why such a caveat should not be removed. These are the only two lawful ways or means by which a caveat may be removed. So, whether or not any of these two avenues were followed in the removal of the caveat in this case, is a question of fact, which can only be determined conclusively by adducing evidence and canvassing this issue during the trial of this action. I therefore accept the submission by Ms. Simachela that this issue cannot be concluded in the context of the present application.

Granted the outcomes in this application, I order that the costs for this application shall be awarded to the plaintiffs.

Leave to appeal is granted.

Application allowed.