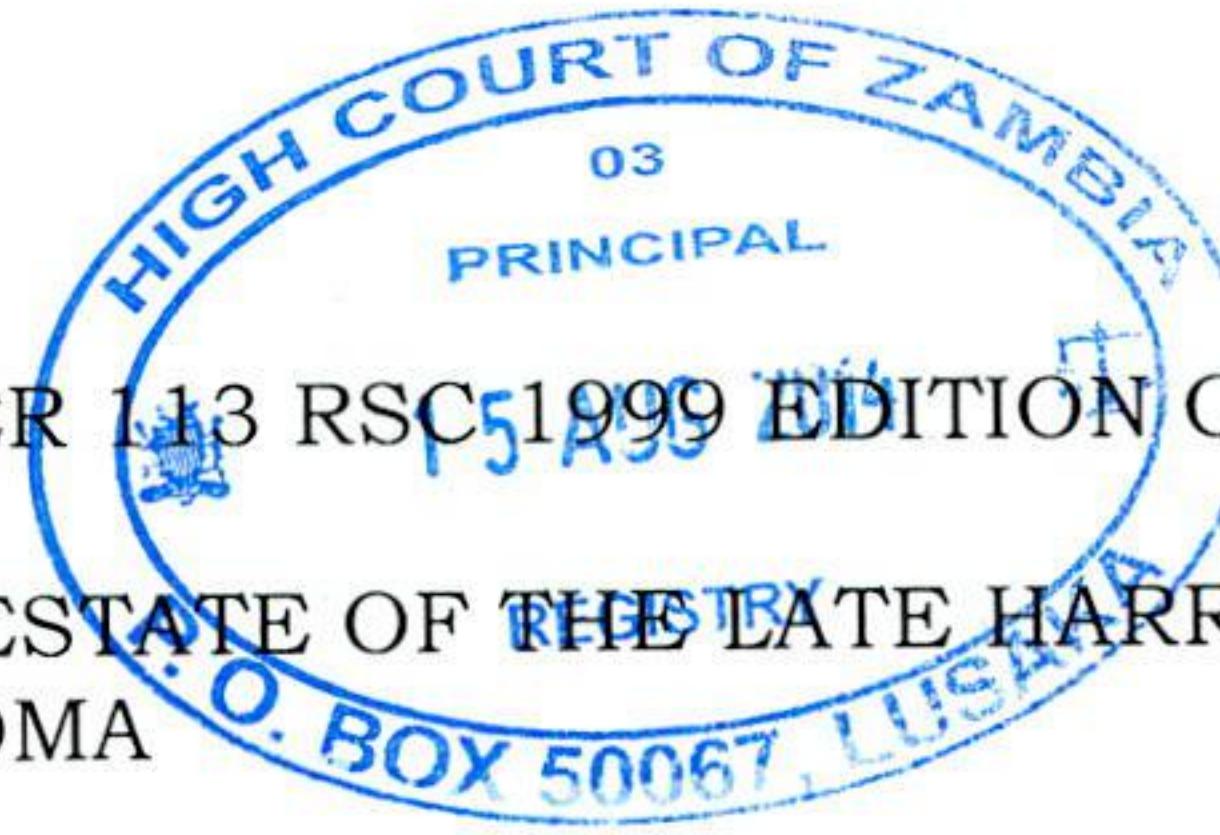


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**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2013/HP/1530

IN THE MATTER OF : ORDER 113 RSC 1999 EDITION OF ENGLAND
AND
IN THE MATTER OF : THE ESTATE OF THE LATE HARRON HASTINGS
NKHOMA



BETWEEN:

**YORAM NKHOMA (Suing as beneficiary of
The late HARRON HASTINGS NKHOMA)
AND
HAMILTON TEMBO**

APPLICANT

RESPONDENT

BEFORE HON. MRS. JUSTICE M.S. MULENGA THIS 15TH DAY OF AUGUST 2014.

FOR THE APPLICANT : IN PERSON
FOR THE RESPONDENT : IN PERSON

J U D G M E N T

Case cited:

1. Liamond Choka v Ivor Chilufya (2002) ZR 33.

The Applicant commenced this action by way of Originating Summons pursuant to Order 113 Rules of the Supreme Court (RSC) 1999 Edition claiming the following reliefs:

- 1. An order that the property known as stand No. 47/14 Bauleni falls within the estate of the late Harron Hastings Nkhoma and as such the Applicant is rightfully entitled to it by virtue of being beneficiary.*

2. *An order that any purported sale of the said property is null and void on account that it was executed by an incompetent person.*
3. *An order for leave to issue vacate possession in favour of the Applicant.*
4. *An order to reverse any purported change of ownership.*
5. *Meseni profit*
6. *Costs*
7. *Any other relief.*

In his affidavit in support he states that he is one of the two surviving children of the late Harron Hastings Nkhoma who died in 1998 leaving behind among other things House No. 47/14 Bauleni Compound, Lusaka. That his sister Ronette Mbewe was appointed administratrix and she allowed her nephew by the name of Derrick Kaleya to be in occupation of the said house. That sometime in 1996 the said Derrick Kaleya found a job at King Farm and re-located thereto leaving the said house on rent to Tryson Kamanga. That sometime in 1997 the said Derrick Kaleya left employment and re-located back to the said house but was informed that the house had been sold to another person which prompted him to sue the said Tryson Kamanga in the Chilenje Local Court for vacant possession. The claim was upheld as shown in the certificate of Judgment marked "YN1". That the said Tryson Kamanga has since passed on and the Respondent has taken over purporting to be the beneficiary of the estate of the late Tryson Kamanga. That the Respondent has willfully refused and or neglected to render vacant possession of the said house without any justification. That the administratrix of the Applicant's late father's estate has

refused ever having sold the said property to the Respondent or Tryson Kamanga. That he thus seeks to be granted the reliefs sought herein in the interest of justice.

The Respondent in his affidavit in opposition disputed the claims stating that the said house number 47/14 Bauleni Compound first belonged to the late Tryson Kamanaga. That the late Tryson Kamanga never rented the said house but he was the actual owner which house was later sold to the Respondent by the family of the late Tryson Kamanga after his demise. That he bought the said house after obtaining a loan from his former employer as shown on exhibit 'HT2'.

That at the time the said Derrick Kaleya sued Tryson Kamanga the said Tryson Kamanga had already died therefore the purported Judgment of the Local Court is null and void. The Respondent disputes the fact that he is purporting to be the beneficiary of the estate of the late Tryson Kamanga and avers that he bought the said house from the relatives of the late Tryson Kamanga as shown in the copy of the letter of sale herein produced as exhibit 'HT1'. That he is occupying the said house as the legal owner having bought the same from the family of the late Tryson Kamanga who was the just owner therefore the Respondent is justified in not rendering vacant possession of the said house.

That the Respondent does not even know the administrator of the Applicant's father. That all the records for the said house are in his names as shown on the documents herein marked and produced as exhibits "HT3" to "HT5".

At the hearing both parties relied on their respective affidavits. The affidavits by the parties reveal triable issues fit for determination at the trial of this matter. I note that the Applicant has not exhibited any document confirming the ownership of the house in issue by his father. It well known that ownership of land or house is usually evidenced by documents of ownership from the council or other relevant institution. The Applicant is suing as a beneficiary and acknowledges that his sister is the administratrix of his late father's estate and has not explained why she is not suing as the rightful person to do so. The Applicant has exhibited a Local Court Certificate of Judgment of 16th March 1998 but which has been challenged by the Respondent as stating that at that time the person sued as Tryson Kamanga was already deceased thus the Judgment was questionable. These and other averrements in the affidavits show triable issues that cannot be resolved by way of summary proceedings.

The Applicant has brought this action pursuant to Order 113 RSC which provides that:

"Where a person claims possession of land which he alleges is occupied solely by a person a persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by Originating Summons in accordance with the provisions of this order."

This clearly states that Order 113 RSC is a summary procedure meant for eviction of squatters or trespassers without a claim of right.

In this case the Respondent has exhibited an occupancy licence from Lusaka City Council in his names for the subject house, exhibit "HT3"

while the Applicant has not exhibited any. The Respondent therefore cannot be termed as a squatter or trespasser subject to the summary procedure under Order 113 RSC.

Paragraphs 113/8/2 and 113/8/3 RSC clearly state that Order 113 is narrowly confirmed to a particular remedy and where the Applicant is aware of any serious dispute or the same is apparent, he must not use this procedure. This procedure is meant for clear cases with no issue to be tried and where there is no reasonable doubt as to the status of the alleged squatter or trespasser. In the facts as stated in the affidavits herein, this procedure is clearly inappropriate. This position was reiterated by the Supreme Court in **Liamond Choka v Ivor Chilufya (2002) ZR 33.**

Further, the Applicant is seeking a number of reliefs ranging from orders that the purported sale was null and void and that he is the rightful beneficiary, for reversal of change of ownership and mesne profits, among others. These reliefs cannot be obtained in proceedings under Order 113 RSC. Paragraph 113/8/2 RSC states in part that:

“... no other relief or remedy can be claimed in such proceedings, whether for payment of money, such as rent, mesne profits, damages for use and occupation or other claim for damages or for an injunction or declaration or otherwise.”

Thus it is apparent that most of the claims or reliefs sought by the Applicant herein are misconceived and cannot be entertained in these proceedings.

In light of the finding that this action under Order 113 RSC is irregular, inappropriate and misconceived, I hereby accordingly

dismiss this action. The Applicant is however at liberty to appropriately commence fresh proceedings by way of writ of summons

Costs are for the Respondent to be taxed in default of agreement.

Leave to appeal is granted.

Dated this 15th day of August 2014.



M.S. MULENGA
HIGH COURT JUDGE