

**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**2013/HP/1608**

**BETWEEN:**

**RICHARD REX MALAMBO**

**PLAINTIFF**

AND

**EVEN MAZILA**

**DEFENDANT**

*Before the Hon. Mrs. Justice A. M. Banda-Bobo, on the 22<sup>nd</sup> day of July, 2014*

**FOR THE PLAINTIFF:** Mr. G. Mhango of Nyangulu & Co.

**FOR THE DEFENDANT:** C. J. W. Banda, Legal Aid Counsel of Legal Aid Board

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

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***Case referred to:***

1. Bank of Zambia v Jonas Tembo & Others (2002) ZR 103
2. Musakanya Valentine Shula and Edward Jack Shamwana v The Attorney-General (1981)

***Legislation & other Works referred to:***

1. Spencer Bower and Turner (1969) Res Judicata, p22

The Plaintiff herein, commenced this action, by writ of summons with a statement of claim. He, among other reliefs applied for an interim order of injunction.

On the date the matter came up for hearing of the application for an injunction, the defendant's counsel Mr. Banda raised a preliminary issue, namely that this matter was wrongly commenced before this Court, as it ought to have come by way of appeal since the same had been adjudicated upon by the Mumbwa Subordinate Court, and who had determined the same in favour of the defendant herein.

It was contended that starting a fresh action is an abuse of court process and forum shopping. Counsel asked the Court to dismiss the action on that ground with costs.

In response, counsel for the plaintiff, Mr. Muhango said that the matter that was in the Mumbwa Subordinate Court related to **Plot No. 2061364** and referred the Court to exhibit "RM1" in the affidavit sworn by the plaintiff. He submitted that the issue before this Court relates to Plot 381, and the same was on title as per "RM3" of the exhibits which showed the history of plot 381. It was counsel's contention that the plaintiff bought the property from a Mr. Moola as per "RM4" which he said all talked about plot 381 and not Stand 2061364 Mumbwa.

He submitted that paragraph 3 of the affidavit in reply before this Court, exhibiting the affidavit in Mumbwa, is talking of Plot 20613464 Mumbwa and house No. 49 Mumbwa, but does not talk about plot 381.

Counsel argued that the plaintiff's case relates to plot 381 which had a certificate of title and which his client bought from the previous owner and indeed his own certificate of title. Counsel contended that the matter is properly before this Court as the subject property was never an issue in the Magistrate Court in Mumbwa. Consequently, it cannot now be a subject of an appeal as the same relates to a different property. It was his contention that the plaintiff has nothing to do with Plot 2061364 but rather with Plot 381, which he bought from Mr. Moola who acquired it in 1996.

In reply, Mr. Banda, submitted that the matter in the Subordinate Court was commenced to determine the irregularity regarding Plot 2061364 and property No. 381. He contended that the Ministry of Lands had written a letter as appear at "EM4" herein where the Permanent Secretary had indicated that the new sketch plan showed that Stand No. 2061 had been recommended to be property No. 381. Further, that the Permanent Secretary condemned the action of the Council as a violation of Mr. Mazila, and ordered that the action of allocating land be halted as Mr. Mazila was already the owner of the property.

Counsel contended that this issue was strongly canvassed in Subordinate Court, and that being the case, this matter is wrongly before this Court as it should have come by way of appeal.

He went further to submit that Stand No. 2061364 was subdivided and allocated in part to Mr. Moola who was even given title deeds but that this subdivision was illegally done, and that since this matter was dealt with in Mumbwa Subordinate Court and a judgment rendered, the same should have come on appeal.

I have carefully considered the oral submissions by counsel for the parties in this matter, and the exhibits to which I was referred.

The undisputed fact in this issue is that there was a matter on which judgment was passed by the Mumbwa Subordinate Court. What this Court needs to determine is whether that matter related to Plot 381 herein, which if it did, would then determine the question of whether this matter is improperly before this Court or not.

This Court has been asked to dismiss these proceedings on grounds that they are improperly before Court because this matter was determined by the Local Court and the right way to proceed would be by way of appeal. Counsel for the plaintiff argued that the matter in the Mumbwa Subordinate Court related to Plot 2061364

and not Plot 381 which is the property in contention in the matter before Court.

In simple terms, is this matter res judicata?

It is trite that for one to plead res judicata, there must have been a decision on a legal or equitable issue by a Court of competent jurisdiction. The party pleading res judicata must show on the facts of the case that a final judgment on the merits of the case has been entered by a Court of competent jurisdiction.

In the case of **Bank of Zambia v Jonas Tembo & Others**<sup>1</sup>, the Supreme Court held that:

- “(i) In order that a defence of res judicata may succeed, it is necessary to show that the cause of action was the same,*
- (ii) A plea of res judicata must show either an actual merger or that the same point has been actually decided between the same parties, which is the case here.”*

The case of **Musakanya Valentine Shula and Edward Jack Shamwana v The Attorney-General**<sup>2</sup> is also instruction where the Supreme Court held that:

*“Res judicata is a strict rule of law and the parties are*

***bound by any decision made by a competent court.”***

Consequently, once a matter has been adjudicated upon by a Court of competent jurisdiction, it becomes final and cannot be raised again before another or the same Court. Earl Jowit, in the **Dictionary of English** states, at page 1534 a final judgment is,

***“A final judgment already decided between the same parties or their privies on the same question by a legally constituted Court having jurisdiction is conclusive between the parties and the same cannot be raised again.”***

It is a legal requirement that for a plea of res judicata to stand, the Court that made the final determination must be a Court of competent jurisdiction to hear and make that determination. See the work of **Spencer Bower and Turner (1969) Res Judicata, p22.**

In the matter in casu, there has been no argument about the competence of the Mumbwa Subordinate Court which heard and passed the judgment on which it has been contended that the matter before this Court is res judicata.

I already found as a fact that there was a matter before the **Mumbwa Subordinate Court Class II** in which the defendant in the matter in casu was the applicant and the plaintiff herein was

the respondent. In that matter, the presiding Magistrate stated in his ruling at "R3" as appear at exhibit "EM3", inter alia that:

***"I have ruled in favour of the applicant. I hereby order the respondent to stop all development on property No. Mum/381 which is part of Stand No. Mum 2061. I declare that property No. Mum/2061 belongs to the applicant and he shall enjoy the two servants quarters situated at that stand."***

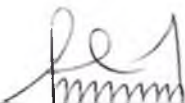
To the same "EM3" is attached the order of injunction restraining the respondent from interfering with the applicant's quiet enjoyment of property No. Mum/381 which is part of property No. 2061, including the two servant's quarters.

In the matter in casu, counsel for the plaintiff, in opposing the preliminary issue vehemently argued that the matter in casu only related to Plot No. 381 and not 2061, which he said had nothing to do with his client. However, "EM3" herein clearly shows that the decision by the Magistrate at Mumbwa related to property No. Mum/381 which was a part of 2061. From the above, it is clear that matters relating to Plot Mum/381 were adjudicated upon by a Court of competent jurisdiction. There is much force in the Defendant counsel's contention that this matter is wrongly before Court as it is res judicata. The presiding Magistrate had even granted the respondent, in his judgment leave to appeal, but for reasons known to only himself he did not appeal.

Having shown that the subject property was indeed the one on which the Magistrate in Mumbwa, a Court of competent jurisdiction, adjudicated upon in a final judgment, this Court agrees with the defendant that this matter is incompetent before this Court. The matter should have come by way of appeal and not the commencement of a fresh action on the same facts. Indeed this would appear to be a case of forum shopping which is frowned upon by Courts of Law. The action is therefore dismissed with costs to the defendant to be taxed in default.

Leave to appeal is granted.

**DELIVERED AT LUSAKA THIS 22<sup>ND</sup> DAY OF JULY, 2014**



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**MRS. JUSTICE A. M. BANDA-BOBO  
HIGH COURT JUDGE**