

JLW

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



IN THE MATTER OF: ORDER 113 RULE 1 OF THE SUPREME COURT (1999 EDITION)

BETWEEN:

MARY KAMERA, RESTONE CHIPIMO CHIPETA **APPLICANT**

**SARAH KAULULE, JUSTICE LLYOD SIAME AND
JUSTICE FREDERICK MWELA CHOMBA (Suing as
Trustees for the United Church of Zambia)**

AND

DR. LUFWENDO LISHOMWA **RESPONDENT**

**BEFORE HON. MRS. JUSTICE P.C.M. NGULUBE ON 11TH DAY OF
NOVEMBER 2015**

FOR THE APPLICANTS : MR CHITUNDU – MESSRS BARNABY AND
CHITUNDU ADVOCATES

FOR THE RESPONDENT : MAJOR LISITA – MESSRS CENTRAL
CHAMBERS

JUDGMENT

Cases referred to:

1. **Hughes v Metropolitan Railway Co, [1977] 2 A.C. 439**

2. **Central London Properties [1947] K.B. 130,**
3. **Spiral Conidaris Appeal number 157 of 1999 (unreported)**
4. **Ubuchinga Investment v Ticklay Michael Mainstab and Semar Transport and Mechanical Ltd, Appeal no.39/2012 Supreme Court Judgment no.25 of 2014.**
5. **Liamond Choka v Ivor Chilufya (SCZ Judgment no.8 of 2002)**

Legislation referred to:

1. **Rules of the Supreme Court of England (RSC) 1999 Edition**

By way of Originating Summons pursuant to Order 113, Rule 1 of the Rules of the Supreme Court of England, the Applicant commenced this action on 5th June, 2015 claiming an Order of possession of plot 33 Clixby Estate from the Respondent.

In the Affidavit in Support of the Originating Summons, Rodgers Ng'ambi in his capacity as Administrative Secretary in the United Church of Zambia deposed that the Applicant was offered the remaining extent of Farm no. 86a Clixby Estates Kasaka on or about 19th January, 1995 by the Government of the Republic of Zambia. That upon satisfying all the terms of the said offer, the Applicant was issued with a Certificate of title number L255 of Farm number 86a as produced and marked "RN1".

That on 20th March, 1990, the Applicant leased a portion of the said property, being subdivision 33 Clixby Estate to one Evans Munyama who paid survey fees for the said land. Produced were letters marked "RN2" and "RN3". That it is

against the Applicant's policy to sell land and therefore even the said Evans Munyama as lessee had no rights to sell or assign the land to a third party.

The Deponent stated that unknown and without knowledge, consent or authority of the Applicant or that of Evans Munyama, the Respondent moved on Subdivision 33 Clixby Estate using false documents alleging that the Applicant's legal tenant authorised him to do so as per produced document marked "RN4".

That the Applicant and Evans Munyama denied ever subleasing the subject property to the Respondent or anyone else and subsequently advised the Respondent to stop any developments that were being carried out on the land as he was illegally occupying it. Produced and marked, "RN5" a copy of the letter advising the Respondent to cease works on the subject property.

Further that the Applicant and the Respondent engaged in countless correspondence over the issue but the Respondent continued with the developments on the subject property. That efforts to reason with the Respondent proved futile despite not having any justification for being on the land. That the Respondent had been unreasonable by demanding compensation from the Applicant as a condition of vacating the subject property.

That the Respondent has further proceeded with construction of a road through other people's farms leased to them by the Applicant thereby causing great damage to the said farms besides trespassing therein. That the Applicant

is the registered proprietor of the subject property and the Respondent has no legal claim to the subject property.

In the Affidavit in Opposition to the Originating Summons, the Respondent deposed that he was invited by the Munyama family through Milton Munyama, the son to Evans Munyama, the lessee of subdivision 33 farm no 86a Clixby Estate, to take over the subject property. That he was to pay Evans Munyama the money spent on connecting electrical power to the plot.

That upon insistence, he was later introduced to the Church Synod Project Secretary Reverend B.S. Kazovu who informed him that the subject property had been abandoned since 2004 and had been repossessed from Evans Munyama due to failure to pay lease fees.

That he was shown a letter dated 26th August, 2005 written by a Georgina Payne, the Acting Projects Secretary informing the plot holders that there would be a meeting on 2nd September, 2005 and failure to attend by the plot holders who had not developed their plots would result in the plots being forfeited to the Church. That the plots would then be allocated to persons who could immediately develop them. Produced and marked, "LL1" copy of the said letter.

That after several meetings with Reverend Kazovu in the presence of his agent Joses Mwansa and Milton Munyama, the Reverend told the Respondent to go ahead with the development of the plot. That he was also given a go ahead by the Church Convenor in the presence of his agent Joses Mwansa, Milton

Munyama and his agent Japhet Mbedza. That he was further advised that the paper work could be finalised later.

The Respondent deposed that he thus concluded the agreement by commencing payments of the agreed K8, 000, 000 (K8, 000 rebased) to Evans Munyama through Milton and also started clearing the subject property. That later on Milton handed over a power of attorney, letter of intent and a letter requesting to allocate the western portion of the subject property to the Respondent.

That later, Bornface Mafwela, as new project secretary who had taken over from Reverend Kazovu informed the Respondent that he was aware of the Respondent's interest in the subject property as briefed by his predecessor and that what was needed was formalisation of the documentation so that work on the plot could go on unimpeded since the subject property had been abandoned for too long.

That following the advice by Bornface Mafwela, the Respondent agreed to settle all outstanding arrears in annual fees since 2004 which Evans Munyama had not paid. That the Respondent also applied to the Church for the subject property in January, 2012 but he was never invited for interviews. Produced and marked "LL2" and "LL3" copies of the application form and the receipt for the application fees.

The Respondent deposed that he later received a letter in February, 2012 from the Church General Secretary instructing him to cease all work on the subject

property as the papers Milton Munyama transmitted were allegedly forged. That when works on the subject property stopped, there were protestations from the workers to various political offices as a result, the General Secretary informed the Respondent that work could resume. That at this stage, well over K250, 000,000 (K250, 000 rebased) had been expended on the subject property.

That there were various correspondence on the issue between the Respondent and the Applicants representatives as exhibited in letters marked, "LL4", "LL5" and "LL6".

The Respondent stated that he occupied the subject property based on the assurances from Reverend Kuzova, Mr Kasanga and Mr Mufwela as well as the fact that the subject property had been abandoned for a while by Mr Munyama who failed to develop it.

That following a meeting, the Trustees of the Applicant Church decided that the Respondent was to vacate the subject property but due to the intervention of the political leadership in the area, the Respondent was instructed to re-occupy the subject property and resumed developing the property including grading a road with the full permission of the owners of adjoining farms.

That the Respondent's alleged failure to move off the land was due to the misrepresentations and encouragement by the Applicant's lawful agents. That it would be inequitable to repossess the subject property because of massive

investment and employment created. That rather the Applicants ought to formalise the transfer of the lease to the Respondent.

When the matter came up for hearing, Learned Counsel for the Applicant relied on the contents of the Affidavit in Support of the Originating Summons and further added that it was trite law that any interest in land transferred to a party should be evidenced in writing. That the Respondent had failed to exhibit any documents to demonstrate that the title holder had given him interest in the land.

Learned Counsel thus prayed that possession of the subject property be granted to the Applicant Church.

In response, Learned Counsel for the Respondent relied on the contents of the Affidavit in Opposition to the Originating Summons, Affidavit in Opposition to the Order of Injunction and the ruling dated 7th October, 2015. He further submitted that the Affidavit evidence indicated that the Applicant was aware of the Respondent's presence on the subject property and that the Applicant's agents led the Respondent into believing that the issue of the sublease would be normalised.

Relying on the cases of **Hughes v Metropolitan Railway Co, [1977] 2 A.C. 439**¹ and **Central London Properties [1947] K.B. 130**², Learned Counsel submitted that the facts reveal an element of promissory estoppel in the sense that there was an equitable waiver which the applicant could not renege from as it had waived its rights to the subject property.

It was further submitted that by section 13 of the High Court Act, that the High Court administers both law and equity concurrently. That the principles of equity have to be applied in this case. That since the Applicants suppressed the information that the Respondent had been co-opted into developing the land, it was contended that the Applicant came to Court with dirty hands.

Learned Counsel further argued that it would be unjust enrichment if the Respondent loses out on the subject property as the Applicant stands to gain at his expense. That there would be need for restitution if the Applicant is granted possession as decided in Spiral Conidaris Appeal number 157 of 1999 (unreported)³ and Ubuchinga Investment v Ticklay Michael Mainstab and Semar Transport and Mechanical Ltd, Appeal no.39/2012 Supreme Court Judgment no.25 of 2014.⁴

It was submitted that the most reasonable solution to the matter was to normalize the lease as restitution would be onerous on the Applicant.

In reply, Learned Counsel for the Applicant relied on the contents of the Affidavit in Reply to the Affidavit in Opposition to the Order of Injunction. Counsel further submitted that as per Respondent's Affidavit evidence, he purportedly acquired interest in the subject property in 2011 and that immediately the Applicant got to know of it, they consistently wrote to him to leave the land as per "RN5".

That there was no proof of the allegation that the Applicant's agent led the Respondent to develop the subject property. Learned Counsel further urged the

Court to invoke the parole evidence rule that written proof overrides oral assertions.

It was submitted that the fact that the Respondent attempted to apply for the subject property goes to confirm that he had no subsisting interest in the subject property and therefore, the lease cannot be formalized.

Further that if there is to be compensation, the Respondent was to claim it from the third party who allegedly defrauded him. That in this jurisdiction, one cannot acquire land by adverse possession and that the Court should protect the Applicant's rights as title holder.

I have carefully considered the Affidavit evidence and the Submissions made by Counsel for the parties.

Order 113 of the Rules of the Supreme Court of England provides as follows;

"where a person claims possession of land which he alleges is occupied solely by a person or 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 provision is a summary procedure afforded to Land Owners as against squatters and it strictly applies to a narrow scope of matters. In the decided case of **Liamond Choka v Ivor Chilufya**⁵ the Supreme Court held that ;

“The summary procedure under Order 113 can only be suitable for squatters and others without any genuine claim of right or who have since transformed into squatters.”

The learned authors of the White Book have amplified on the applicability of the order by stating that;

“the order would normally apply only in virtually uncontested causes or in clear cases where there is no issue or question to try; i.e. where there is no reasonable doubt as to the claim of the Plaintiff to recover possession of land or as to the wrongful occupation of the land without licence or consent and without any right, title or interest thereto.”

Therefore, in the determination of this application, this Court has to satisfy itself beyond reasonable doubt as to the Applicant’s claim to recover possession of the stand in issue as against the Respondent and that the Respondent is a squatter.

While it is an undisputed fact that the Applicant is the title holder of the subject property, the Respondent alleges to be occupying it with the full knowledge of the agents of the Applicant. The veracity of such an assertion or the lack thereof can only be ascertained in a trial which this summary procedure does not allow.

In the light of the Respondent's allegations, I am of the view that this is not a proper case to be dealt with under Order 113 of the Rules of the Supreme Court.

Based on the foregoing, I decline to grant the relief sought and accordingly dismiss the action.

Costs to the Respondent.

Dated this 11th November, 2015



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P. C. M. NGULUBE
HIGH COURT JUDGE