

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

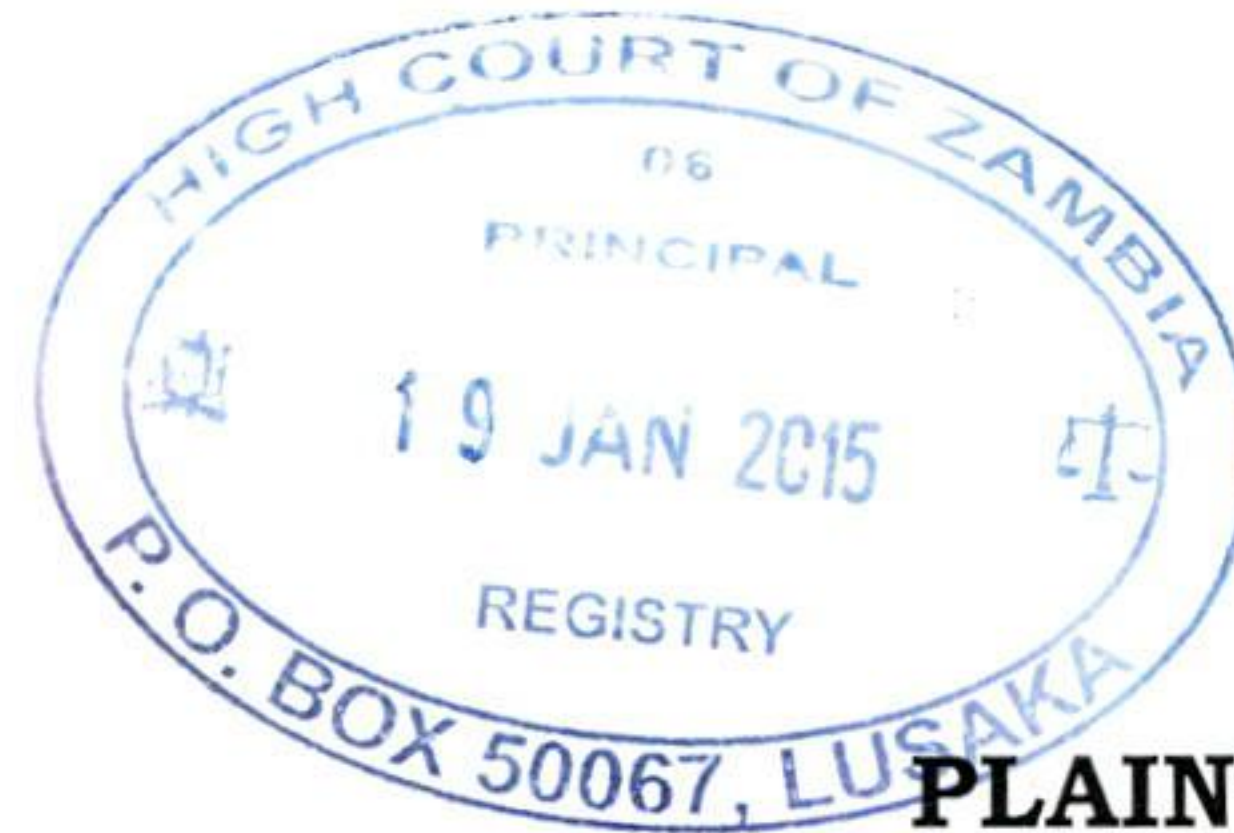
2014/HP/1092

BETWEEN:

PETER MWAMFULI

AND

EDWARD CHIBUNGA LUNDA



PLAINTIFF

DEFENDANT

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Plaintiff: Mr. B. Katuta of Messrs Loboko Chambers

For the Defendant: Mr. L.E Eya of Messrs KBF & Partners

**R U L I N G ON APPLICATION TO DISMISS ACTION FOR COURT
ABUSE OF COURT PROCESS OR SETTING ASIDE ORIGINAL
PROCESS FOR IRREGULARITY**

Legislation referred to:

- 1. Order 18 Rule 19 of the Supreme Court of England, White Book 1999 Edition*
- 2. High Court Rules chapter 27 of the Laws of Zambia Order VII Rule 1*
- 3. Statutory Instrument No. 27 of 2012*

Cases referred to:

1. *Chansa Chipili and Another v Wellington Kanshimike* (2012) ZR 483
2. *Twampane Mining Corporation Society Limited v EM Storti Mining Limited* (2011) 3 ZR 67
3. *Enala Chirwa v Kachema Anne Zulu and Noah Mwansa appeal* No. 030/2012 SC (unreported)
4. *London Ngoma and 3 others v LCM Company of Zambia (in liquidation)* 1999 (ZR) 75

The genesis of this case is that the Plaintiff launched proceedings on 16th June, 2014 by way of a Writ of Summons and Statement of Claim seeking for the following reliefs:

- (a) *A declaration that the Plaintiff is the beneficial owner of all that piece of land known as Lot 18883/m Lusaka, Zambia.*
- (b) *An injunction restraining the Defendant from*
 - (i) *Entering and remaining on lot 18883/m Lusaka, Zambia*
 - (ii) *Interfering with the Plaintiff peaceable enjoyment of Lot No. 18883/m Lusaka, Zambia*
 - (iii) *Carrying on of any further developments, construction of any building or buildings*
 - (iv) *Digging, mining, quarrying or other activities likely to comprise the environmental quality of the said Lot 18883/m Lusaka*
- (c) *Costs*

The Plaintiff on the same day filed

- (i) *Exparte summons for an injunction pursuant to Order XXVII of the High Court Rules chapter 27*
- (ii) *Affidavit in support of exparte summons for an injunction and a certificate of urgency*

In a nutshell, the deponent Plaintiff, Peter Mwamfuli deposed that in 1998 he was offered two adjoining pieces of land namely Lot No. 11303/m and Lot No. 11304/m Lusaka. He referred to exhibit 'PM1 and PM2'.

That in the same year he applied for consolidation of the two pieces before separate certificates of title were issued.

That the consolidation was approved and the two pieces of land were consolidated on Lot 18883/m Lusaka and certificate of Title 39246 dated 20th June, 2005 was issued in his name. He produced exhibits PM3 and PM4 being photocopies of certificate of title and computer print out.

That on Saturday 5th July, 2014 the Defendant without any authority unlawfully entered upon his land and started drilling for water, digging and building the foundation for his proposed dwelling house.

That when confronted the Defendant refused to stop developments claiming that he is the owner of the land.

He further stated that the Commissioner of Lands in his letter dated 27th July, 2010 addressed to Messrs Permanent Chambers vide exhibit PM5 confirmed that he was the owner of Lot 18883/m. He prayed for the relief of an injunction.

On 21st July, 2014 I heard the Advocates for the Plaintiffs ex parte and on the basis of the material before me, I was satisfied that this was a fit matter which merited an injunction and I so granted it. The injunction was to remain in force until the interparte summons returnable on 7th August, 2014 at 14:30 hours.

The Defendant entered conditional memorandum of appearance on 31st July, 2014.

On the return date there was no appearance from the Plaintiffs Advocates, I accordingly discharged the interim injunction I had granted to the Plaintiff with costs.

On 6th August, 2014, the Defendant filed summons for an order to dismiss action for abuse of court process pursuant to order 18 rule 19 (18) of the White Book and or to set aside originating process for irregularity pursuant to Order VII Rule 1 of Chapter 27 of the Laws of Zambia and also pursuant to Statutory Instrument number 27 of 2012.

On 12th August, 2014 the application which was struck out on 7th August, 2014 for non appearance of the Plaintiff which resulted in the injunction being discharged was restored and the interparte

hearing for interlocutory injunction returnable on 16th December, 2014.

The application was fully argued and Ruling was set for delivery on 23rd January, 2014.

Meanwhile, the Defendant on 6th August, 2014 filed summons for an order to dismiss action for abuse of court process pursuant to Order 18 Rule 19 (18) of the White Book 1999 Edition and or to set aside originating process for irregularity pursuant to order XII Yule 1 of the High Court Rules cap 27.

The application was supported by an affidavit deposed to by Edward Chibinga Lunda the Defendant.

In a nutshell he deposed that on 13th September, 2013 he brought out an action against Leonard Kanyanda claiming for a sum of K100,000.00 on a loan which was secured with Lot 1134/m Leopards Hill Road, New Kasama, Lusaka with interest and costs in cause No. 2013/HP/1354 the Writ and Statement of Claim were exhibited as exhibit ECL1.

He deposed that the property Lot 11304/m was in the name of Leonard Kanyanda vide exhibit "CL2" a copy of certificate of title No.228171.

He also produced exhibit "ECL3" being an offer from the Ministry of Lands in favour of the said Leonard Kanyanda generated on 9th March, 2014.

He deposed that on 22nd October, 2013 he obtained a consent judgment being exhibit "ECK4" wherein Mr. Leonard Kanyanda, the Defendant offered 6 acres out of 10 acres of Lot No. 11304/m Leopards Hill Road New Kasama, Lusaka as compensation in kind in full settlement of the claim for loan recovery.

That pursuant to the said court judgment; he registered his interest with the Ministry of Lands and subsequently applied to the Surveyor General for subdivision. He produced exhibits "ECL5", "ECL7" and "ECL8" copies of Lands Register print out letter for subdivision, sketch plan and receipts evidencing the formalities.

He deposed that on 20th November, 2013 the Plaintiff seeing some developments on the property took some building materials and left his business card showing that he was the Chief Administrator of the High Court – see exhibit "ECL9".

He deposed that he (the Defendant) called the Plaintiff verbally and through letter dated 20th November, 2013 to desist from intimidating him as certificate of title No. 39246 of Lot No. 18883 he was referring to was his farm plot in Makeni, Lusaka. That it was a ploy to confuse officers at Ministry of Lands.

He referred to exhibits "ECL 10 to ECL14" which were copies of letter warning Defendant, Letter by Plaintiff to the Planning authority to subdivide Farm 18883, Makeni Lusaka Surveyor General Form 1 lodgment schedule and Sketch plan (not a

consolidation) as claimed by the Plaintiff in paragraphs 3 and 4 of the Statement of Claim, but a subdivision.

He deposed that consequently the minutes were approved and the Plaintiffs own exhibits PM3 and PM5 are not complete certificate of Title of Lot 11303 and 11304/m or related to Lot 18883/m as per requisite consolidation.

He exhibited exhibits ECL 15 being sitting plan for the authority. He deposed that the court judgment was granted on the basis of a certificate of title No. 228171 of Lot No. 11304/m. That the consent judgment concerns the same subject matter alleged to be lot 18883/m, Lusaka which is subject to this litigation and is still subsisting.

He pointed out that had the Plaintiff followed the advice of the letter of 27th July, 2010 and having full information that lot 11304/m Lusaka was not cancelled in the Lands Registry system he could not have commenced these proceedings. He produced exhibit "ECL16" legal advice from Messrs Permanent Chambers the then lawyers for the Plaintiff.

He deposed further that on advise given to him by his Advocates the writ of summons and statement of claim purported to have been served upon the Defendant is irregular in material particular as the and his Advocates full address is not endorsed in terms of amended High Court Rules.

He concluded by deposing that this matter is before another court and the Plaintiff should not forum shop and prayed that the proceedings herein be set aside on the foregoing or on irregularity.

The Plaintiff Peter Mwamfuli filed in affidavit in opposition to application to dismiss action for abuse of court process or to set aside process for irregularity. He conceded that the non endorsement of his postal address and two electronic addresses for himself nor his Advocates was an inadvertent error.

He deposed that he had never brought any action against the Defendant in any court in Zambia or outside regarding the subject matter of this action which either is pending, adjudicated or dismissed and neither has the Defendant against me.

I should point out at this stage that the Plaintiff did not overtly oppose the Defendants application to dismiss action in the main body of the affidavit other than the captioning in the heading.

The Defendant filed in an affidavit in reply. He deposed that the Plaintiff had not adequately addressed the issue of abuse of court process of using a certificate of title for plot 18883/m Makeni, Lusaka to commence an action against the Defendant claiming for 11304/m Leopards road New Kasama which is in the name of Leonard Kanyanda.

He deposed further that plot no. 11304/m Leopard Hill road, New Kasama was now offered to the Plaintiff as the content of exhibit ECL 16 reveals that he was merely one of interested party who sat

on his right; and therefore it is irregular for the Plaintiff to use certificate of title of plot 1888/m Makeni Lusaka to claim ownership of plot No. 11304/m, New Kasama, Lusaka.

The Defendant filed skeleton arguments. The thrust of their argument is that the Plaintiff was at liberty to apply to be joined to the consent judgment since they were an interested party. They referred to the case of **London Ngoma and 3 others vs LCM Company Limited and another (SCZ Judgment No. 22 of 1999)**. The Plaintiff filed a number of relevant authorities for the proposition that court's should allow for actions to proceed to be determined on merit.

They called in aid cases of **Mwambazi v Monester Farm [1977] ZR 108; Parlzaski (z) Ltd v Willy Kit Ltd [1977] ZR 357; Yousuf v Mahtani Group of Companies [2011] 1 ZR 278 and Quest and Another v Mukinga** Learned Counsel for the Defendant Mr. Eya augmented the defendants application by submitting orally in support of the affidavit evidence.

In summary he submitted that plot number 11304/m Lusaka is the property subject to proceedings in cause number 2013/HP/1353 in action between Mr. Chibinga Edward Lunda and Leonard Kanyanda wherein a consent judgment was sealed. In that consent a portion of 6 acres was added to the Defendant in this action (Mr. Chibinga Edward Lunda).

He submitted that the said consent judgment was served on him by the Defendant as he was an interested party in the piece of land. He pointed out that it was incumbent upon the Plaintiff to apply to the court to add himself to the proceedings. That commencing fresh proceedings would be a duplication of actions which may result in conflicting judgments of 2 (two) courts of equal jurisdiction.

He pointed out that since the Plaintiff is arguing that plots 11303/m and Lot No. 1134/m Lusaka were consolidated into 18883/m Lusaka, it is an admission that the dispute relates to the same piece of land under litigation in cause number 2013/HP/1353. He argued that the evidence on record shows that plot 18883/m Lusaka is actually situated in Makeni and not in New Kasama where Plot 11304/m is situated and to which Mr. Leonard Kanyanda has unimpeachable Title Deeds.

He referred the court to the case of ***Seed Company Limited v Private Limited 1999 (ZR)***, where the court held that

“The only way to challenge a judgment by consent if a party has interest would be to start a fresh action to specifically challenge that consent judgment”.

He submitted that the Plaintiff has not done that. He further referred to the case of ***London Ngoma v LCM and United Bus Company Limited (in liquidation) appeal No. 91 of 1997 (unreported)*** where it was held that *“the Appellant had interest in*

the matter and they should therefore have been notified of any actions taking place concerning the property on which they had paid a deposit which were subject to a contract”.

He concluded by submitting that the actions by the Defendant in these proceedings were an abuse of court process and the action should be set aside and dismissed.

On the last limb of failure to provide electronic address, he submitted that that too was a ground to set aside the action on account of irregularity.

Mr. Katuta Learned Senior Counsel for the Petitioner in his oral submissions relied on the affidavit in opposition to the application and the skeleton head of arguments that had been filed and the consolidation list of authorities.

On the first limb of failure to provide electronic address he submitted the omission is curable and the court should allow the case to be determined on merit by going to full trial.

On the second limb he submitted that the consent judgment No. 2013/HP/1354 being referred does not affect the Plaintiff in this matter as he was not a party to the action therein.

Further he submitted, the consent judgment being alluded to relate to plot No. 11304/m whilst the action herein relates to plot 18883/m Lusaka. He submitted that contentious issues have been raised which can only be resolved through trial. Finally, he submitted that the action ought not to be dismissed.

Mr. Eya in his reply submitted that the Plaintiff has deposed that there was consolidation of 18883/m and surely the judgment forms part of the proceedings in consent judgment and the proceedings before this court.

I am indebted on the researchful industry of both Learned Counsel. The Plaintiff herein in his affidavit contends that Lots number 11302/m and lot number 11304m Lusaka were consolidated before separate Title Deeds could be given into lot 18883/m Lusaka and a certificate of title given on 20th June, 2005.

On the other hand Mr. Leonard Kanyanda has a certificate of title issued on 17th July, 2013. It is under this certificate of title that the consent judgment between Mr. Kanyanda and Mr. Lunda was based on in the consent judgment dated 22nd October, 2013.

The consent judgment was served on the Plaintiff in the present action since he had an interest in the piece of land he alleges is covered by certificate of Title in respect of plot 18883/m Lusaka.

Without delving into analyzing the conflicting affidavit evidence what is clear is that the Plaintiff herein is claiming interest in the land which is subject to a consent judgment aforesaid which ceded portion of 6 acres to the Defendant in this case before me.

It is that judgment that gave right to the Defendant herein to start development on his land which prompted the Plaintiff in this case to launch the proceedings herein.

I agree with the Learned counsel for the Defendant that, it is trite law that a person affected by a consent judgment should apply to the court if he has cause can show sufficient interest. This is supported by the Supreme Court case of **Enala Chirwa v Kachema Anne Zulu and Hoah Mwansa Appeal No. 030/2012 SC (unreported)** and also the case of **London Ngoma, Joseph Biyela, Richard Ngombe, Friday Simwanza and LCM Company of Zambia (in liquidation) 1999 ZR 75** wherein the Supreme Court stated inter alia

*“The arguments by the Respondents that the Appellants cannot be joined after consent judgment has been entered cannot be supported. The Learned Deputy Registrar erred in dismissing the application on the ground that they cannot be joined since a consent judgment had been delivered. In accordance with our decision of **Attorney General v Aboubacar Tall** the court has inherent jurisdiction”.*

If this court was to proceed there is real danger that a decision might be reached upon by the court which might conflict the sealed consent judgment of another court of equal jurisdiction. Since the interests of the parties in this piece of land which the Defendant is occupying by virtue of the consent judgment of the court, the Plaintiff is also claiming the piece of land in occupation by the Defendant on the basis that he has a title deed which was

consolidated and resulted in issue of certificate of title relating to plot 18883/m Lusaka.

On the foregoing I am satisfied that launching of separate proceedings in this matter taking into account the genesis of the case, is an abuse forum shopping.

The preliminary issue succeeds.

In respect of the irregularity or non compliance with order XII (1) of the High Court Rules chapter 27 in respect of endorsement of electronic address of the Plaintiff and his Advocates, the Supreme Court had occasion to rule in the case of **Chama Chipili and another v wellington Kashimike (2012) 3 ZR 483** in Ruling number (2) that

“An irregularity on account of procedure would not be fatal because corrective action can be taken to allow the action to stand so that triable issues can be proceeded with if that was not all that was irregular”.

It was further held in Ruling number (3) that Order (2) (2) of Supreme Court Rules of England, White Book (1999) Edition, clearly provides that a second chance can be given to the party which has occasioned the irregularity, the party can be allowed to correct it.

In the present case, there is more to it than the failure to provide electronic addresses. So even if this ground was to fail I was still going to set aside the proceedings as already adjudged above.

I must also however take opportunity to restate that warning given by the Supreme Court in the case of **Twampane Mining Corporation Society Ltd v E.M Storti Mining Limited (2011) 3 ZR 67** in Ruling number (vi) that

“To choose to ignore Rules is to do so at one’s own peril”.

In conclusion the preliminary issue in respect of abuse of court process and duplicity succeeds. The action herein is dismissed. This does not however mean that the Plaintiff is precluded to pursue alternative remedial action before an appropriate court.

The costs are for the Defendant which costs are to be taxed in default of agreement. The parties are informed of their right to appeal to the Supreme Court.

Dated this ^{19th} Day of January, 2015.



Mwila Chitabo, SC
Judge