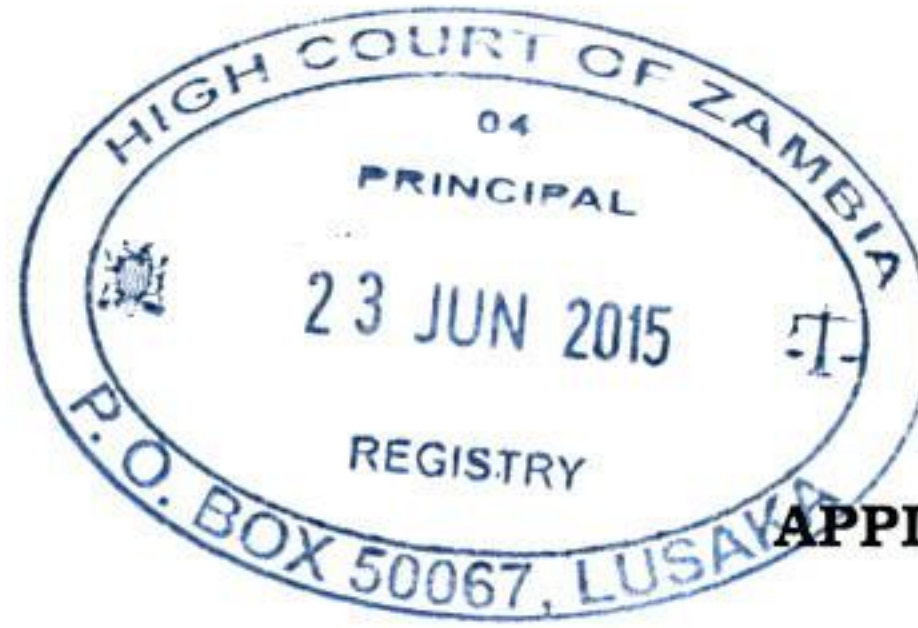


IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

2007/HP/0376

(Civil Jurisdiction)

BETWEEN:



MANUBHAI PARBUBHAI PATEL

APPLICANT

AND

SUMAN GANESH PATEL

RESPONDENT

BEFORE : HON. G.C.M CHAWATAMA

For the Plaintiff : Messrs Chilupe & Permanent Chambers

For the Defendant : Ms Viyuyi – Simeza Sangwa & Associates

RULING

AUTHORITIES REFERRED TO:

1. **Order 35 Rule 5 of the High Court Rules**
2. **Order 32 Rule 6 Rules of the Supreme Court**
3. **Section 79, of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia**

By way of writ of summons filed on the 28th March, 2014 the Plaintiff claims the following:-

- i. *An order to set aside the consent judgment dated 1st March, 2014 for fraud.*
- ii. *Costs*
- iii. *Damages to be assessed by the Deputy Registrar*
- iv. *Any other relief the court may deem fit.*

On the 23rd April, 2014 the Defendant filed a conditional memorandum of Appearance. Summons for an order to strike out statement of claims pursuant to Order 18 Rule 19 of the Rules of the Supreme Court of England (1999) Edition and an affidavit in support of the same was filed on the 20th April, 2014. Exhibited was a consent Judgment signed in the 1st March by my brother Honourable Mr. Justice A.M Wood and Advocates for the Applicant Messrs D Findlay and Associates and Messrs L.M Chambers Advocates for the Respondent.

Also exhibited is an order of the court dated 24th January, 2014 by my brother Honourable Mr. Justice A.M Wood. Having heard Counsel for the Applicant and Counsel for the first and second Respondent leave to issue writ of possession of Lot No. 3997/M Lusaka following the first and second Respondent's failure to make payment of the agreed monthly installments and comply with the consent judgment.

On the 30th July, 2014 an inter parte summons for an order of an interim injunction pursuant to **Order 27 of the High Court Rules**

and Order 29 Rule 1 of the Rules of the Supreme Court (1999) Edition and affidavit in support of the same.

On the 14th October, 2014 a ruling was delivered by the learned District Registrar Mrs. Mwaaka Chigali Mikalile related to the application for an order to strike out statement of claim pursuant to Order 18 Rule 19 of the Rules of the Supreme Court. The District Registrar was correct when she stated that the particulars of fraud as against the first Defendant have not been laid out in the statement of claim contrary to the law requiring that allegations of fraud must be particularized. The District Registrar was on firm ground when she stated that the state of claim in not having particularized fraud against the first Defendant has not disclosed any reasonable cause of action against it. The statement of claim was struck out against the first Defendant with costs. The same to be taxed in default.

On the 24th November, 2014 Mr. Sinyangwe wanted to be heard on the application for an injunction. Mr. Kawana pointed out that since the statement of claim has been struck out the injunction being sought cannot stand because the Plaintiff has no cause of action against the first Defendant. Mr. Sinyangwe informed the court that they were availed with the decision of the Registrar and noted that the writ and statement of claim were struck out. He submitted that this matter is against two Defendants, the same application was in regard to the second

Defendant. According to Counsel it follows the injunction application stands and cannot be dismissed in relation to the second Defendant.

In response Mr. Kawana informed the court that the injunction was meant to prevent the first Defendant from selling the property which was charged by the Plaintiff in a mortgage. He stated that the record will show that the statement of claim was specifically for that very same purpose. Secondly the Defendant does not have anything to do with the selling of the property. He brought to the court's attention that the second Defendant was the first Respondent; the Plaintiff being the second Respondent therefore the mortgage with the first Respondent was between the three parties to the action. It was assumed that the second Defendant was included in these proceedings.

On the 28th April, 2007 the Applicant filed originating summons and affidavit in support of the same. In his affidavit he stated that he was the lawfully registered owner of properties known as Plot 734 288 and subdivision A of stand 115, Lusaka and holds certificates of title number L2448 and L2446 in respect of the said properties certified copies of the titles were attached.

The Applicant has been unable to enter any transactions involving any of the said properties because the Respondent lodged caveats upon the properties. According to the Applicant

the caveat on subdivision A of stand 115 Lusaka has prevented the registration of a lease with Pep Stores Limited and is a hinderance to any possible future sale of the property.

According to the Applicant the Respondent has no sound reason for lodging the said caveat as he is not an intending Purchaser nor has he any other interest or claim in the properties legal or otherwise to justify the caveat he has placed on the properties. Further that the Respondent's expressed interest in support of the caveat is as a beneficiary of the estate of one Laite Rambhai D Patel of which estate none of the above properties form part.

An affidavit of service was filed on the 3rd May, 2007. On 17th May, 2007 Exparte summons for an order for substituted service order 1 or 3 of the High Court Rules Cap 27 and an affidavit in support were filed on the 23rd May, 2007 as order granted that effected by way of substituted service was signed.

Exhibited was a letter from the Applicant's Counsel to Shawana and Coy Advocates who informed the Applicant's Counsel that they had no instructions to accept process from Mr. Patel (the Respondent in this matter) there is proof by way of a copy of the originating summons to the Defendant by advertising – by way of an affidavit of service dated the 14th June, 2007. On the 8th August, 2007 an order that the caveats lodged against Plots 734,

288 and subdivision A of stand 115 were ordered to be removed forthwith.

On the 25th June, 2014 a notice of appointment of Advocates was filed by Counsel Simeza Sangwa and Associates. Counsel also filed a notice of intention to proceed after a year's delay pursuant to *Order 2 Rule 3 of the High Court Rules Cap 27 of the Laws of Zambia*. Filed on the same day were summons to set aside order removing caveat pursuant to *Order 35 Rule 5 of the High Court Rules Chapter 27 of the Laws of Zambia as read with Order 32 Rule 6 of the Rules of the Supreme Court of England (1999) Edition*. Also filed was an affidavit in support of the same.

According to the Respondent on the 6th February, 2002, he caused a caveat to be registered against stand 115/A Lusaka and the caveat appears as entry No. 11 on the Lands Register. According to the Respondent the removal of caveats of stands 734 and 288 were the subject matter before the court but inadvertently also ordered the removal of the caveat placed on stand No. 115/A Lusaka. The Respondent stated that the order removing the caveats on stand 734, 288 and 115/A is irregular as it is inconsistent with the relief that was sought in the originating summons. According to the Respondent the Applicant misled the court to sign an order which went beyond the scope of what was pleaded and prayed for in the action.

On the 18th November, 2014, Counsel for the Defendant was heard. This matter was coming up for hearing of the Respondent's application to set aside the removing of the caveat. Counsel informed the court that following an order for substituted service the Respondent's application was granted to the Applicant on 8th September, 2014 as the affidavit of service filed on the 5th November, 2015 will show. Counsel stated that they have not received any opposition to the application and rely on their affidavit in support of the application filed on the 25th June, 2014. Counsel submitted that they would also rely on Section 81 of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia.

Counsel further submitted that the caveator the Respondent is required to be summoned to show cause why the caveat should not be removed. The court was informed that in this matter the perusal of the affidavit in support of the application will disclose that the Respondent was not served with summons for the removal of the caveat. The affidavit the court was told will also disclose the Applicant and Respondent are cousins and the Applicant has at all times been aware of the Respondent's whereabouts. This is despite the fact that the Applicant obtained an order for substituted service on the grounds that the Respondent's whereabouts were unknown to him. It was Counsel's submission that the Respondent was precluded from

being in the originating application to remove the caveat because he was not served.

Counsel submitted that the court was misled in the signing of an order to remove the caveat on stand 115/A which order went by and the scope of what was pleaded and prayed for. The court was referred to the case of *Rural Development Corporation Limited V Bank of Credit and Commerce Zambia Limited 1987 2 L Reports at Page 35 and in particular at Page 39.*

In conclusion Counsel stated that justice can only be done by having the case heard on its merits. Counsel prayed that the order removing the caveat be set aside so as to allow the matter to be heard.

The first issue to be addressed is whether or not there was proper service of the originating summons and supporting affidavit to the satisfaction of the court. The Respondent says that there was not. He stated that the Applicant was his cousin who was well aware of his whereabouts and it is as such fallacious for him to have claimed that his whereabouts at the time the process was issued were unknown. The Respondent further stated that he has lived for the past (23) twenty-three years in the same neighbourhood as the current registered owner of stand No. 115/A who is also his brother and it is as such bewildering that the application to remove the caveat so as to

facilitate the transfer of the said property into his brother's name without informing him of the same.

The importance of proper service cannot be over emphasized, reason being that one maybe involved or become amendable to the jurisdiction of the court provided that they have been served with the writ of summons or originating equivalent. The consequence of this is twofold firstly the mere service will give the court power to try actions which are within the jurisdictions, secondly if the Defendant is not present within the jurisdiction the courts are denied power to try actions in which it will be appropriate for trial to be held within the jurisdiction. Although there was no personal service, there are other options opened to the Applicant.

In the matter before me an affidavit of service was filed on the 3rd May 2007. Exhibited was a letter from the Applicant's Counsel to Shamwana and Company whom they believed were acting for the Respondent. Exhibited is a letter from Shamwana and Company informing the Applicant's Counsel that they had no instructions to accept process from Mr. Patel (the Respondent in this matter). Failure to personally serve the Respondent and those perceived to be their lawyers led the Applicants on the 23rd May, 2007 to apply to the court for substituted service. The Applicant was granted an order that service of the originating

summons and supporting affidavit be and was to be affected by way of substituted service.

On the 14th June, 2007 an affidavit of service was filed in which the deponent Ketson Nkunika stated that on the 5th day of June 2007 he personally served copies of the originating summons to the Respondent by advertising in the Times of Zambia. He attached a copy of the advert (exhibit KN1). The same appeared in the Times of Zambia Newspaper dated the 4th June, 2007. Having taken the above steps the court is of the view that proper service was effected based on the information that was before the court. The second issue to address was whether or not this court should set aside the order removing the caveat pursuant to **Order 35 Rule 5 of the High Court Rules Chapter 27 of the Laws of Zambia as read with Order 32 Rule 6 of the Rules of the Supreme Court of England the (1999) Edition**, an account of the removal of the caveat being irregular as it is inconsistent with the relief that was sought in the originating summons.

A quick perusal of the originating summons shows that in the title Plot 734 Lusaka and Plot 288 Lusaka are mentioned as well as in the body of the originating summons. However, in the affidavit in support of originating summons especially in paragraph 3 and 5 the deponent who is the Applicant in this matter clearly refers to subdivision A of stand 115 Lusaka. The Respondent entered a caveat on property number Lus/115/A whose hectarage is 0791 as an intending mortgage. The Lands

Registry print out bears the same hectarage and number for entry number 13, entry number 14, and entry number 15 with the entry by the Respondent being entry number 11. I am fully persuaded that the parties are all referring to one and the same property. Thus I do not agree that the order removing the caveat on stand 734, 288 and 115/A is irregular and is not inconsistent with the relief that was sought in the originating summons. Thus **Order 35 Rule 5 of the High Court Rules** which states that:

“Any judgment obtained against any party may on sufficient cause shown be set aside by the court upon such terms as may seem fit.”

Nor **Order 32 Rule 6 Rules of the Supreme Court** which states:

“The court may set aside any order made ex-parte.”

Does not apply.

All applications brought to court should be brought within a reasonable time. In the matter before me the Respondent as an intending mortgage did not file any mortgage from the 2nd February, 2002 to date and to-date remains an intending mortgage. The Respondent knew or ought to have known that a caveat should not be treated as a final remedy as it is an interim measure. The Respondent seemed to have deployed the caveat as a final remedy which is irregular and an abuse of the process and what that process was intended to achieve.

The court is alive to the provisions of *Section 79, of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia* which states:

“So long as a caveat in form 8 remains in force, the Registrar shall not make any entry on the Register having the effect of changing or transforming or otherwise affecting the estate or interest protected by such caveat.”

The Registrar cannot be faulted for acting on an order of the court. The application to set aside the order removing the caveat is thus denied. Each party to bear their own costs. Right of appeal is granted.

DELIVERED AT LUSAKA THIS.....^{23RD} DAY OF.....^{JUNE}, 2015



G.C.M CHAWATAMA
JUDGE