

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

2017/HP/0988



**IN THE MATTER OF: LANDS AND DEED REGISTRY CAP 185
OF THE LAWS ZAMBIA**

**IN THE MATTER OF: PLOT NO.CHINIKA GARDEN HOUSE
PARK LUSAKA**

**IN THE MATTER OF: APPLICATION FOR DEED TRANSFER
OF PLOT NO. LUS/20582 INTO THE
APPLICANT'S NAME**

BETWEEN:

GOOD SHEPHERD COMMUNITY TRUST

APPLICANT

AND

ANUPHBAI MANUPHBAI PATEL

RESPONDENT

BEFORE HONOURABLE JUSTICE MR. MWILA CHITABO, SC

For the Applicant:

*Mr. Abel Muyembe (Describing himself as
National Coordinator for the Applicant)*

For the Respondent:

*Mr. D. Jere of Messrs Mvunga &
Associates*

R U L I N G

Cases referred to

1. *Mcfoy v. United Africa Company Limited* (1961) 3 All ER 1196
2. *Chikuta v. Chipata Rural Council* (1974) ZR 24
3. *National Milling Limited v. Vashee* (suing as Chairperson of Zambia Farmers Union SCJ Judgment No. 27 of 2000
4. *Manharial Horji Patel v. Surma Stationers Limited* (2009) ZR 112
5. *Ashmore v. Corporation of Lloyds* (No. 1) 2 All ER 486, (HL)
6. *United Engineering Group Limited v. Mackso Mungalu* (2007) ZR 30

Legislation referred to:

1. *Legal Practitioners Act, Chapter 30 of the Laws of Zambia*
2. *High Court Rules Chapter 27 of the Laws of Zambia Cap 27*

The genesis of this matter is that on 16th June, 2017, the Applicant Good Shepherd Community Trust launched proceedings against **ANUPHBAI MANUPHBAI PATEL** purportedly by mode of originating summons claiming for the following reliefs.

- (i) *An order for Deed of Transfer of Plot No. LUS/20582, Lusaka Garden House Park into the name of the Appellant.*
- (ii) *An order that the Respondent has no in Plot No. LUS/20582 Chinika Garden House Park for lack of demonstration thereof.*
- (iii) *An order restraining the general public, bogus land agents, party carders, area councilor from trespassing on the*

premises, or structure or dig quarry, sand or usage of explosive to blast underground stone.

(iv) Any relief deemed fit by the Court.

(v) Costs.

The originating summons was supported by an affidavit deposed to by one **Abel Muyembe**. The essence of which is that he is the national coordinator of the Applicant and he had been assigned to conduct the matter on behalf of the Applicant.

It was deposed that the Applicant had applied for the piece of land subject to these proceedings. He featured a diagram being exhibit "GSCT1". The Applicant also exhibited official print outs from the Lands Registry revealing that the registered and beneficial owner of the property was the Respondent. (See exhibit "GSCT5" and "GSCT6").

He further deposed that the Applicant has erected a Secretariat on the said piece of land LUS/20582, 3 houses. That the Applicant has learnt that the Respondent has since passed on. That party carders following the demise of the Respondent have invaded the property and are interfering the Applicants operation by assaulting officers and illegally distributing or allocating land.

He pointed out that a sum of K40, 000 to the Lusaka City Council as evidenced by exhibit "GSCT4". He concluded by seeking a Court order to effect a transfer from the Respondent into the Applicant.

On the even date, the Applicant applied ex parte for an order of interim injunction to restrain the Respondent, his agents, party carders, area councilor to be restrained from trespassing on the premises No. LUS/20582, Chinika Garden House Park, Lusaka.

I refused to grant the ex parte interim injunction on the following grounds;

Firstly – the originating summons did not reveal who had issued the process

Secondly – the supporting affidavit purported that the Applicant had instructed **Abel Muyembe** to act on its behalf; there was no evidence to that effect.

Thirdly even if it can be said that the said **Abel Muyembe** had been given authority to act on behalf of the Applicant, there is no evidence that Abel Muyembe is a legal practitioner who is qualified to act on behalf of another person or any legal entity.

Fourthly – there is no evidence as to the status of the Applicant (Good shepherd Community Trust). That is it was not demonstrated if the Applicant had legal capacity to sue in its own name.

Fifthly – the summons purports to claim for an order for transfer of property from the registered owner to it amongst other claims. The claims being canvassed can only be launched by mode of statement of claim.

Sixthly there was nothing emergent about the ex parte interlocutory application against a certificate of title holder.

Seventhly the Applicants affidavit revealed that the Respondent had demised. An action cannot therefore lie against a dead person. It can only be commenced and sustained through a personal representative of the deceased being an administrator or administratrix executor or executrix or such other lawfully appointed person to act in the estate of the deceased.

It is for these reasons that I rejected the ex parte interim application for an injunction and made it interparte returnable on 13th September, 2017 at 08:30 hours.

On 4th August, 2017, the Applicant obtained an exported order for substituted service before the Learned Deputy Registrar. On the return date, Senior Counsel Mr. D. Jere appeared before me and addressed me on a preliminary issue to terminate the proceedings of the applicant premised on Order 14A and Order 33 (a of the Supreme Court Rules1.

When I sat down to write the Ruling and upon careful scrutiny of the file, I did not find a notice of appointment of Advocates nor had this fact been disclosed upon which to anchor an application in limine for leave to be allowed to appear in the absence of a notice of appointment of advocates and for an undertaking to file the necessary notice shortly after the proceedings to regularize their Locus standi in the matter.

In the absence of such applications, I have ignored the submissions made as the Learned Senior Counsel had no locus standi to address me on the matter.

I heard the Applicant through Mr. Muyembe who quickly after I had highlighted the concerns raised in my reasons for rejecting the interim injunction he indicated that he will brief the Applicant and that he would use options of discontinuing the action.

I then on my own volition and motion closely looked at the pleadings which as I have alluded to in some of the preceding paragraphs and dealt with them item by item.

- (1) **Originating** summons did not reveal the person who issued the process. That defect is fatal. The Applicant is not a legal entity and as such has no capacity to sue in its name.

The Court of final resort had occasion to pronounce itself on the subject in the case of ***National Milling Limited v. A Vashee (suing as Chairman of Zambia Farmers Union)***³, Ngulube, CJ (as he then was) put it this way:-

“Holding (i) an incorporated association is not a legal person and therefore cannot sue or be sued. However, a contract purportedly made by or with an incorporated association is not necessarily a nullity.

(ii) *where there are numerous persons having the same interest in any proceedings, the proceedings may begin and unless the Court otherwise orders, continued by or against any one or more of them as representing one or more of them.*

In the case in casu, there has been no demonstration that the action has been brought in a representative capacity.

(2) **Signing of originating summons by Abel Muyembe**

The affidavit of service filed on 7th September, 2017, reveals that the said **Abel Muyembe** had issued proceedings as Attorney for the Applicant. Put differently as an advocate, lawyer or a legal practitioner.

That gentleman had conceded that he is not a qualified Advocate nor does his name appear on the prestigious much sought roll of legal practitioners. He therefore had no authority to commence proceedings on behalf of the Applicant.

I hereby bring this matter to the attention of the Honorable secretary of the Law Association of Zambia to investigate one **Abel Muyembe** (telephone 0975 106529) of plot No. LUS/20582, Chinika Garden Park Lusaka and ascertain if the said person has indeed committed any offence under the Legal Practitioners Act or any other written law and take such necessary action as the regulating association might deem fit, expedient, right and just.

The options should include inter alia

- (1) Lodging complaint with the police and subsequent prosecution
- (2) Obtaining consent from the Director of Public Prosecution and launching a private prosecution.

These powers may be exercised pursuant to Section 43 of the Legal Practitioners Act¹, it provides as follows:-

“Any unqualified person who willfully pretends to be, or take, or use any name, title, addition or description implying that he is qualified or recognised by law as qualified to act as an Advocate, or a notary publicly, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding three thousand penalty units or to a term of imprisonment not exceeding two years or both”

I must observe that the increasing number of people masquerading as Advocates and drawing legal documents on behalf of the unsuspecting members of the public is reaching worrisome levels. Regrettably, this also includes some Learned Attorneys who are “moon lighting” away from their chambers and are not revealed on the documents they have prepared.

The Law Association should disclose its mind to this malpractice as it has the undesired effect of maligning and bringing into disrepute the good standing of the noble profession.

The combined effect of items 1 and 2 above is that the proceedings herein were a nullity. They were commenced by an entity which has no capacity to sue or be sued. And further the process were signed or launched by an unqualified person.

The Court of final resort had occasion to pronounce itself on issue of writs without authority. This was in the case of **Bellamano v. Ligure Lombada Limited**⁵, Gardner, JS (as he then was) His Lordship held as follows:-

“Holding 1 *The issue of a writ without authority is an abuse of Court process and the appropriate remedy is an application to strike out the writ. Thereupon the action may be stayed or dismissed or Judgment may be entered. Supreme Court Practice (1976) Order 19 Rule 19.*

Holding 2 *An application to set aside the writ for irregularity is not the appropriate procedure in a case of a writ issued without authority. When it is an appropriate procedure, the application will not be granted if the Applicant has taken any fresh step in the action after becoming aware of the irregularity. Entering of unconditional appearance is evidence of such step.*

Holding 3 *If the want of authority can be cured, the Court will in a proper case only stay the action and will not dismiss it entirely.*

Holding 4 *(per curiam) it is always necessary an application for the summons or notice of application to contain a reference to the order or rule or other authority under which relief is sought”*

In the case in casu, the circumstances are totally different. The lack of authority by Able Muyembe masquerading as an Attorney is beyond redemption. This is compounded by the legal incapacity of the Applicant to sue in its own person as alluded to above.

Allowing the action to subsist in its state will be unproductive which will only serve the purpose of squandering the valuable Courts time. To this effect I visited the case of **Ashmore v. Corporation of Lloyds⁵, No. 1 (1992) 2 All ER 486 HL.** Lord Roskill had this to say at page 488:-

“In the Commercial Court and indeed in any trial Court, it is the trial Judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisors of the parties to assist the trial Judge in carrying out his duty. Litigants are not entitled to uncontrolled use of a trial Judge’s time, other litigants await their turn. Litigants are

only entitled to so much of the trial Judges time as is necessary for the proper determination of the relevant issue”

The above highly persuasive legal pronouncement is the correct statement of the law and I hereby adopt it and follow it as good law.

Back in our jurisdiction, the Court of final resort had occasion to pronounce itself on the subject of Court time economy in the case of **United Engineering Group Limited v. Mackso Mungalu**⁶. Chirwa, J,S (as he then was) commended litigants who move swiftly to dispose of an action without further delay, expense or harassment of witnesses when he said:-

“The objection was rightly taken at the right time not to waste the Courts time to proceed with trial”

In my view, this position is in tandem with the courts duty to expeditiously and inexpensively deal with and dispose of matters before it in accordance with the law.

Lord Denning had occasion to pronounce himself on void and null situation in the case of **Mcfoy v. United Africa Company Limited**¹, he put it this way:-

“If an act is void, then it is a nullity. It is not only bad, it is incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient for the Court to declare it so. And any proceedings which is founded on it is also bad and

incurably bad. You cannot put something on nothing and expect it to stand, it will collapse”

(3) **Mode of commencement**

Order 6 of the High Court Rules¹ dictates that all actions be commenced by writ and statement of claim unless there is particular legislature that prescribes the mode of commencement for example by petition, or by originating summons or notice of motion or by judicial review or by writ of habeas corpus.

In the present case, the Applicant seeks a relief for a declaration for a transfer of property order. This obviously is not such a claim as can be dealt with by summary procedure route nor has it been demonstrated under what piece of legislation the action has been anchored to authorise for such mode of commencement.

The Court of final resort had occasion to pronounce itself on the wrong mode of commencement. This was in the case of **Chikuta v. Chipata Rural Council** where it was held that

*“The High Court has no jurisdiction to grant a remedy where an action is brought under a wrong mode of commencement”
(paraphrased)*

(4) **Action against deceased**

I have already somewhere in one of the preceding paragraphs observed that an action cannot lie against a deceased person in his

name. That can only be sustained by or through a personal representative of the estate of the deceased.

(1) **Cause of action**

I have perused and combed the pleadings herein. There is no cause of action disclosed against the Respondent that which would entitle the Applicant to a Judgment or remedy by the Court in favor of the Applicant.

The Court of final resort had occasion to pronounce itself in the case of ***Manharial Harji Patel v. Surma Stationers Limited***⁴, Sakala CJ, (as he then was) put it this was in holding 8:-

“A cause of action is a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person”

There is no substratum to justify why a registered beneficial owner of the property in question in this case the Applicant, as revealed by the Lands and Deeds Registry printout ought to be deprived of his property.

Death of a bonafide registered owner of property on its own has never been a justifiable reason to divest the registered owner of his title or legal interest in land.

On the foregoing, it is obvious the Applicants action herein was ill fated and destined not to see the light of litigation and was destined

to crash and fail. The proceedings were a nullity. They were null and void as Lord Denning said in the **Mcfoy** case:-

"You cannot put something on nothing and expect it to stand. It will collapse"

The entire action is dismissed. As regards costs, taking into account my observation that there is no notice of appointment of Advocates for the Respondent, I will make no order as to costs.

Leave to appeal to the superior Court of Appeal is refused.

Delivered under my hand and seal this 18th day of September, 2017



Mwila Chitabo, SC
Judge