IN THE SUPREME COURT OF ZAMBIA **Appeal No. 189/2014**
HOLDEN AT LUSAKA **SCZ/350/2013**
(Civil Jurisdiction)

B E T W E E N:

ZAMBIA NATIONAL COMMERCIAL BANK **1ST APPELLANT**

AGRO FUEL INVESTMENTS LIMITED **2ND APPELLANT**

AND

EVERLIGHTER NDHLOVU **RESPONDENT**
(Suing as Administrator for the Estate
of the Late Christopher Siwila Ndhlovu)

Coram: **Hamaundu, Malila and Mutuna, JJS**
on 11th July, 2017 and 11th August, 2017

For the 1st Appellant: Mrs. S. N. Wamulume, Legal Counsel, Zambia National Commercial Bank

For the 2nd Appellant: Mr. S. Chikuba & Mr. B. Mutale, BTN Legal Practitioners

For the Respondent: Mr. H. H. Ndhlovu SC, HH Ndhlovu & Co.

JUDGMENT

Malila, JS, delivered the Judgment of the Court

Cases referred to:

1. *Attorney-General and Speaker of the National Assembly v. The People (SCZ Judgment No. 34 of 1999)*

Legislation referred to:

1. *High Court Act, chapter 27 of the laws of Zambia*
2. *High Court Rules Order 39*

This appeal has an exceptionally unusual litigation history. It is motivated by the relentless effort of Everlighter Soneni Ndhlovu, the widow of a deceased property owner, to save her late husband's property from sale following a foreclosure order given in favour of a bank. In her unremitting search for relief, she is drawn into protracted legal contraption as the lender bank, convinced that it is legally entitled to sell the foreclosed property, puts up robust resistance. The situation is compounded by a third party who assumes the veil of an innocent purchaser for value without notice of any encumbrances.

The property in question is known as Lot No. 3976/M, Ngwerere, Lusaka, (hereafter referred to as the 'subject property'). It is at the centre of the dispute in this appeal and has been a subject matter of litigation spanning over seventeen years before four different puisne judges in four different causes. The present appeal protests the judgment of the last of the four learned lower court judges that handled aspects of the dispute relating to the subject property. We shall refer to that High Court judge as the trial judge.

The facts of the matter are themselves fairly plain and can be recounted quite easily. The first appellant had lent money to Siwila Investments Limited, guaranteed by one Christopher Siwila Ndhlovu, now deceased (hereafter collectively called the 'borrowers'). The subject property, which was in the name of Christopher Siwila Ndhlovu, was used as security for the loan. A document dated 4th November, 1992 recording the loan and the subject property as security for that loan, was signed by the parties. A default in the repayment of the loan occurred, prompting the first appellant to commence proceedings against the borrowers in cause No. 1999/HP/766, seeking, among other relief, delivery or possession of the subject property, payment of all monies due to the first appellant and foreclosure over the subject property.

The borrowers opposed the claim through an affidavit. The matter was heard by Chulu J. in the absence of the borrowers or their legal representatives. Chulu J. ruled, on the basis of the conflicting affidavits before him, in favour of the first appellant on 29th November, 1999. It later came to be established that Christopher Siwila Ndhlovu had in fact died on 21st May, 1999 -

long before the hearing of the foreclosure proceedings before Chulu J.

In his ruling, Chulu J. ordered the borrowers to liquidate the amounts owing within three months from the date of the ruling, failing which the first appellant would be at liberty to foreclose without further notice. The borrowers neither liquidated the outstanding loan amount, nor did they appeal the said ruling. Unsurprisingly, in those circumstances, the first appellant foreclosed on the property. This was in April, 2001, and subsequently sold the property to the second appellant in September, 2002. Title could not be conveyed to the buyer immediately as, according to the second appellant, there was need to convert the leasehold from 14 to 99 years. In order to protect its interest, the second appellant lodged and registered a caveat on the property on 30th January, 2007.

About eight years after Chulu J's ruling on foreclosure, Everlighter Soneni Ndhlovu, the widow of the late Christopher Siwila Ndhlovu and Administratrix of his estate, appeared on the scene and swung into action. In February, 2007, she issued an originating summons under cause No. 2007/HP/0168 against

the second appellant, for the removal of the caveat placed on the subject property on grounds that her late husband was the registered owner of the property. She also obtained an *ex-parte* injunction against the second appellant restraining it from occupying or doing any work on the property. This matter was allocated to Musonda J., as he then was. On 26th February, 2007, Musonda J. discharged the *ex-parte* order of injunction he had earlier given, and on 2nd March, 2007 he ruled that the issue of ownership of the subject property had been determined in foreclosure proceedings before Chulu J. wherein the property was transferred to the first appellant which, in turn, sold it to the second appellant. The latter, according to the judge, was a bona fide purchaser for value without notice of any encumbrances. The action was accordingly dismissed.

Notwithstanding the clear implication of the judgment of Musonda J. and regardless of the fact that she did not avail herself of the option to appeal it, Everlighter Soneni Ndhlovu placed a caveat over the property to prevent the second appellant from obtaining title in its name. The second appellant was then prompted to commence a fresh action for the removal of that caveat. That action, which was cause numbered 2013/HP/103,

was allocated to Chashi J., as he then was. He determined that Everlighter Soneni Ndhlovu had no legal basis to maintain the caveat over the subject property. He accordingly ordered the removal of that caveat forthwith. In the view of Chashi J., the issue of ownership of the subject property was *res judicata,* having been a subject of prior court decisions by Chulu J and Musonda J.

The order of Chashi J was duly registered at the Lands and Deeds Registry and the caveat placed by Everlighter Soneni Ndhlovu was consequently removed. The second appellant then proceeded to obtain a certificate of title to the subject property in its name.

Everlighter Soneni Ndhlovu was unrelenting. She next took out originating summons against the first appellant. This new action, cause numbered 2007/HP/0439, was allocated to Phiri J. who, as we have stated already, was the trial judge. In that action, Everlighter Soneni Ndhlovu sought an order that there be no change of ownership of the subject property. She alleged that the ruling by Chulu J. given in November, 1999 was irregularly obtained as no notice of hearing was served on the late

Christopher Siwila Ndhlovu. Equally the ruling itself was never served after it was delivered by Chulu J in November, 1999; furthermore, that she, as Administratrix of the estate of Christopher Siwila Ndhlovu, was not aware of the court action; that there was in any case, a mortgage over the subject property in favour of Leasing Finance Company Limited which had possession of the title deeds at the time of the purported equitable mortgage in favour of the first appellant in respect of the subject property and that, at any rate, the appellant only had an order of foreclosure nisi and not an order absolute and could not therefore sell the property on that basis. For all these reasons, she prayed that the ruling of Chulu J as well as the foreclosure order be set aside.

After hearing the matter, the learned trial judge held that the foreclosure process which culminated in the sale of the subject property was irregular, unconscionable and done in bad faith. She rejected any suggestion by the appellant that the action was *res judicata,* maintaining that the parties to the action before her were different and the relief sought were equally different. She also held that the action was not statute barred.

Of particular note the trial judge, after reviewing some authorities, stated in her judgment as follows:

> **"It is clear from these authorities that an order of the court is essential for foreclosure. Where the mortgagee is not in possession, foreclosure absolute is usually followed by an order for possession and an order of sale, where necessary. In the current case, I find that it is undisputed that the defendant in cause No. 1999/HP/766 did not apply for an order of foreclosure absolute or sale of the property as directed in the ruling. Therefore, guided by the authorities referred to above, this court is satisfied that there was a serious irregularity in the execution or enforcement of the judgment culminating into the sale of Lot 3976/M."**

It was after that judgment that the second appellant applied for and was granted leave to join the proceedings.

In its memorandum of appeal filed on 22nd November 2013, the appellant formulated six grounds of appeal. In the first ground it is contended that the learned trial judge was wrong in holding that the issues raised under cause number 2007/HP/0439 which was before Phiri J., namely whether a mortgage properly existed between the parties and whether service of the foreclosure order was effected on the borrowers, were not adjudicated upon or ought to have been adjudicated

upon in cause number 1999/HP/766 decided by Chulu J. so as render them *res judicata.*

Under the second ground, it is contended that it was a misdirection on the part of the trial judge to hold that the foreclosure order pronounced by Chulu J. under cause number 1999/HP/766 was merely a foreclosure nisi and could not be a basis of a sale of the subject property.

In ground three, the argument put forth was that in the face of the ruling by Chulu J. of November, 1999, it was an error of law and fact on the part of the trial judge to hold that the appellant sold the subject property without a court order.

Ground four impeaches the holding of the trial judge that the foreclosure process that resulted in the sale of the subject property was irregular, unconscionable and done in bad faith.

In ground five the appellant argues that the court fell into error when it ordered the appellant to refund the sale proceeds of the subject property to the purchaser and that he was equally wrong in setting aside the conveyance of the subject property.

In the final ground of appeal, the appellant complains that the court should not have ordered the respondent's advocates to value the property and to conduct the sale, for to do so was a misdirection.

There was before the lower court a rather unnecessary overdose of legal issues for determination. Key among those were whether the action was time barred; whether it was *res judicata*; whether the borrowers or the respondent knew about the ruling of Chulu J. pronounced in November, 1999 and the conditions for the discharge of the outstanding debt set out therein; how an equitable mortgage was created over the subject property when there was subsisting a legal mortgage in favour of Leasing Finance Company Zambia Limited and the efficacy of any such equitable mortgage; how the appellant created an equitable mortgage without securing a deposit of title deeds by the borrowers; and more importantly, whether the legal requirements for the sale of the property were satisfied by the appellants – in other words whether the requirements for a mortgagee in possession to sell a mortgaged property had been satisfied.

In our view, the trial judge labored to give a legally satisfactory explanation as to why the action was neither statute barred nor *res judicata*. She likewise attempted an analysis as to why the action before her was not a review of the earlier actions involving the same property. She also endevoured to define with admirable clarity, the limits of the inquiry entailed by the action she was trying. While admitting that her powers were circumscribed, she defined and asserted jurisdiction in the circumstances.

Although the learned trial judge went on an extensive foray in determining many questions before she delivered her magistral judgment in which she arrogated to herself the power to determine certain question touching on the subject property, we are of the view that the real and only issue in this case is jurisdictional: did the trial judge, as High Court judge have the power to make the orders that she did in her judgment whose effect was to torpedo or overrule the judgment on foreclosure that was made by another High Court judge involving the same property? Interesting and stimulating as the issues the learned trial judge dealt with are, it seems to us that it is the jurisdictional elephant that stands in the path of the present

appeal. The question is not whether or not Chulu J, was procedurally or substantively right in arriving at his ruling of November 29, 2009. It is how a party aggrieved by that ruling should further engage the judicial process to address any perceived transgressions of either procedural or substantive law. Addressing this issue should, in our considered view dispose of the whole appeal. It is thus otiose to consider the grounds of appeal individually.

It is important to set out the exact claim that the respondent sought to have addressed in the fourth action, being cause No. 2007/HP/0439 whose determination by the trial judge birthed the current appeal. In her originating summons taken out on the 10th May 2007, Everlighter Soneni Ndhlovu sought the determination of the following questions or matters:

1. **That a Notice of Hearing was never served on the late Christopher Siwila Ndhlovu and that the ruling in cause No. 1999/HP/766 was delivered after his death.**

2. **That a copy of the ruling on the above cause dated 29th November 1999, was not served on the said Christopher Siwila Ndhlovu as he passed away on 21st My 1999, neither was it served on the Plaintiff.**

3. **That the execution of the said ruling was irregular and ought to be set aside and the defendant's claim in cause No. 1999/HP/766 be revisited.**

4. **That there be no change of ownership of property No. 3976/M Lusaka, and that the defendant be restrained by an injunction from dealing with the property in question until this matter is determined by this court.**

5. **Further and any relief the court may deem fit under the circumstances.**

6. **Costs be awarded against the defendant.**

Everlighter Soneni Ndhlovu's chief prayer was to have the ruling of Chulu J, set aside.

It is plain to us from the relief sought by the Everlighter Soneni Ndhlovu that her grievances have their genesis entirely in the ruling of Chulu J.

The question we have to ask is what the effect would be of a determination of the issues raised in the action before the trial judge in favour of the respondent. The answer is simple. A determination favourable to the movant of the originating summons on the issues placed before the trial court or some of them, would have the effect of overruling or reversing the ruling of Chulu J. This would invariably provoke the coordinate

jurisdiction rule. By this principle, judges of coordinate jurisdiction should not overrule each other's decisions or judgments.

In terms of section 4 of the High Court Act, chapter 27 of the laws of Zambia, judges of the High Court have equal powers, authority and jurisdiction. In the case of **Attorney-General and Speaker of the National Assembly v. The People**[1] we were confronted with a situation where two High Court Judges appeared to compete for jurisdiction. The case was first brought before one High Court Judge (Muyovwe J) who heard the arguments for and against the application. She dismissed the application. The respondents then brought the same application before a different High Court Judge (Ndhlovu J) who granted the application and gave an *ex parte* injunction. We ruled that the second judge did not have jurisdiction to entertain the application. We clarified in that case that the High Court is one single court with many judges. A person aggrieved by a decision of that court should therefore avail himself/herself with the right of appeal which is ordinarily available to them.

Yet, an appeal is only one option available to such a party. At least two other options exist. One of these is to apply for the matter to be reviewed by the same court. Upon such review, the earlier ruling could either be varied, set aside or indeed retained unchanged.

Order 39 of the High Court Rules vests power in a judge of the High Court to review his/her own judgment or decision. It provides as follows:

1. **Any judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and upon such review it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision.:**

   Provided that where the judge who was seized of the matter has since died or ceased to have jurisdiction for any reason, another judge may review the matter.

2. **Any application for review of any judgment or decision must be made not later than fourteen days after such judgment or decision. After the expiration of fourteen days, an application for review shall not be admitted, except by special leave of the judge on such terms as seem just.**

The other option available is to apply to set aside the ruling or order obtained in the absence of the respondent. The respondent

could in this regard have resorted to Order 35(5) of the High Court Rules, chapter 27 of the laws of Zambia. That rule provides as follows:

> **5. Any judgment obtained against any party in the absence of such party, may, on sufficient cause shown, be set aside by the court upon such terms as may seem fit.**

Turning to the appeal before us, the respondent could quite legitimately have utilized one of the three options we have set out above. It was ill-advised for the respondent to have chosen instead to commence a fresh action which is unprocedural and reminiscent of forum shopping.

Commencing a fresh action for purposes of setting aside a judgment or decision of the High Court would have been a tenable course to pursue had the decision been concluded by the consent of the parties. Besides encouraging a multiplicity of actions over the same issues, the route taken by the respondent has the potential to cause damage to the orderly development of the law by creating conditions that would facilitate conflicting decisions among judges with coordinate jurisdiction.

Although the respondent may well have had meritorious grievances, and we by no means make that determination, she chose a totally wrong forum to ventilate them. All her complaints could and should in fact have been channeled to the High Court through the same cause in which Chulu J, made the ruling which she finds disagreeable, or should have appealed that ruling to us.

The upshot of our decision is that this appeal has merit and is bound to succeed for the reasons we have given.

The appellant shall have its costs.

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E. M. Hamaundu
SUPREME COURT JUDGE

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Dr. M. Malila SC
SUPREME COURT JUDGE

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N. K. Mutuna
SUPREME COURT JUDGE