IN THE HIGH COURT OF ZAMBIA **2009/HP/1516**

AT THE PRINCIPAL REGISTRY **2010/HP/304**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN

PROFESSOR LUPANDO MUNKONGE PLAINTIFF

AND

ROSEMARY BWALYA 1ST DEFENDANT

COMMISSIONER OF LANDS 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

Before the Hon. Lady Justice F. M. Chisanga, this 26th day of January 2018.

For the Plaintiff: *R. M. Simeza of Messrs Simeza Sangwa and Associates*
For the 1st Defendant: *O. Ngoma of Messrs Lungu Simwanza & Company*
For the 2nd Respondent: *Nil*

RULING

Cases cited

1. ***Polythene Products Zambia Limited and Cyclone Hardware and Construction Ltd and Attorney General, (2012) 2 ZR P 396***
2. ***New Plast Industries vs Commissioner of Lands and Another (2001) ZR P 51***
3. ***Zambia National Holding Limited and Another vs Attorney General (1993-94) ZR 115***
4. ***Bank of Zambia vs Jonas Tembo (2002) ZR 103***
5. ***Attorney General & Others vs Fraser and Another (2001) ZR 87***

This ruling is on preliminary issues raised by the 1st defendant, on 24th February 2017. The Notice to raise a preliminary issue is made pursuant to Order 14A rule 1, as read with Order 33 rule 3 of the Rules of the Supreme Court. The issues raised are:

1. That this court has no jurisdiction to hear this matter in terms of S.13 (3) of the lands Act CAP 184 of the Laws of Zambia.
2. That at the time the amended Writ of Summons was filed in terms of the Order of Court dated 24th June 2014, the relief sought fell within the jurisdiction of the Lands Tribunal in terms of S.4 of the Lands Tribunal Act No. 39 of 2010.
3. That at the time of the filing of the amended Writ of Summons in terms of the Order of Court dated 24th June 2014, this court had no jurisdiction to try this matter as it only had appellate jurisdiction in terms of S. 16 of the Lands Tribunal Act No. 39 of 2010.

The Notice is supported by an affidavit in which the 1st defendant deposes that the plaintiff was allowed to amend his Writ of Summons and Statement of Claim by a Court Order dated 24th June 2014, whereupon the entire Pleadings were amended. That the plaintiff was challenging the re-entry of sub division E of subdivision 2 of subdivision A of Farm No. 396a, Makeni by the State, and its subsequent allocation to the 1st Defendant. That the 1st defendant is advised by her lawyers that any person who is aggrieved by any re-entry on any land by the State should challenge or contest such a re-entry within 30 days in the

Lands Tribunal. She has been advised that the High Court has no original jurisdiction to deal with a matter that can be dealt with by the Lands Tribunal as established by the relevant statute. Further, that all the reliefs sought by the plaintiff in the amended process are available in the Lands Tribunal unlike the High Court, which has appellate jurisdiction.

The Notice is opposed through affidavit sworn by one Luckson Mwansa, an advocate in the firm of Simeza Sangwa & Associates, seized with conduct on behalf of the plaintiff. The deponent gives a background to the application for amendment, which was granted by the Court. He then observes that the notice to raise the preliminary issues was filed almost three years after the amendment to the pleadings.

Skeleton arguments in support of the notice have been filed into court on behalf of the 1st defendant. My attention is drawn to section 13 (3) of the Lands Act CAP 184 of the Laws of Zambia which is in the following terms:

> ***"A lessee aggrieved with the decision of the President to cause a certificate of re-entry to be entered in the register may within thirty days appeal to the Lands Tribunal for an order that the register be rectified."***

I am equally reminded of the claim before me, which is cast in the following terms:

1. The plaintiff's claim is for *"A declaration that the 2nd defendant's purposed re-entry and allocation of sub division 2 of subdivision E of subdivision 1 of subdivision A of Farm No 369a Makeni, Lusaka as irregular and unlawful and therefore null and void."*

Reference is made to ***Polythene Products Zambia Limited and Cyclone Hardware and Construction Ltd and Attorney General***[1], where the Supreme Court held in summary that the High Court has no jurisdiction to hear a challenge of the re-entry of land by the Commissioner of Lands. I will reproduce the holding of the Court later on in the ruling. It is argued, premised on the said case that the court, in view of the clear provisions of section 13 (3) of the Lands Act, has no jurisdiction to entertain or hear and determine the claims based on a challenge to the certificate of re-entry made by the President through the Commissioner of Lands.

Further reference is made to ***New Plast Industries vs Commissioner of Lands and Another***[2] where the Supreme Court held that it is not entirely correct that the mode of commencement of any action largely depends on the reliefs sought. The correct position is that the mode of commencement of any action is generally provided by the relevant statute. Reliance is equally placed on ***Zambia National Holding Limited and Another vs Attorney General***[3] where, the Supreme Court held as follows:

> ***"As a general rule no cause is beyond the competence of and authority of the High Court. No restriction applies as to the type of cause and other matters as would apply to lesser courts. However, the High Court is not exempt from adjudicating in accordance with the law, including complying with procedural requirements, as well as substantive limitations, such as those one finds in mandatory sentences or other specification of available penalties in civil matters the types of choice of relief or remedy available to litigants under the various laws or causes of action.***

Premised on the said case, it is argued that the High Court's unlimited jurisdiction under Article 94(1) of the Zambian Constitution is subject to compliance with prescribed procedure.

Learned counsel proceeds to submit that in accordance with Orders 14 rule 1 and 33 rule 3, it is competent for me to hear the preliminary issue and dismiss it. It is submitted that issues of res judicata do not arise, as it is not the Order of amendment of the writ of summons dated 24th June 2014 that is being challenged. Rather it is the jurisdiction of the Court that is questioned.

The plaintiff has filed skeleton arguments opposing the preliminary issues raised. It is argued therein that the 1st defendant is estopped from raising the objections to the amendments as the Court has already adjudicated on the application to amend. My attention is drawn to the definition and ambit of res judicata as stated by the Learned Authors of Halsbury's Laws of England 4th Edition Volume 16. ***Bank of Zambia vs Jonas Tembo (2002)***[4] is also referred to in that connection.

It is further argued that the 1st defendant had opportunity to raise the issues she is now raising at the time she opposed the application for leave to amend the pleadings since the Lands Tribunal Act No. 39 of 2010, which forms the basis of her objection was already in force at the time the application for leave to amend was made. That she slept on her right when she neglected to raise the issues touching on the jurisdiction of the Court to hear the matter.

It is alternatively argued that an amendment takes effect from the date of the original document, in terms of Order 20 rule 8(8) Rules of the Supreme Court, as explained in the said Order.

On the question whether the Lands Tribunal had jurisdiction to determine the matter in 2009, my attention is drawn to ***Attorney General, Ministry of Works and Supply vs Fraser and Another***[5], where it was held that the Lands Tribunal had no jurisdiction to cancel a certificate of tile in land matters. That in terms of the Lands and Deeds Registry Act CAP 185, the jurisdiction to order cancellation of certificate of title lay with the high court.

It is argued that clearly, the Lands Tribunal had no jurisdiction to order cancellation of certificate of title before enactment of the Lands Tribunal Act which extended its jurisdiction. It is pointed out that at the time this matter was commenced, the Lands Tribunal had no jurisdiction to grant the relief, and to avoid forum shopping the action was appropriately commenced in the High Court which had jurisdiction to grant all the reliefs sought by the plaintiff.

It is contended that the challenge was made in 2009, as shown by the original version of the writ and statement of claim. At that time, the court had jurisdiction to hear challenges regarding the Commissioner of Land's decision to re-enter property. That section 4 of the Lands Tribunal Act No 39 of 2010, which widened the jurisdiction of the Lands Tribunal was not yet in force in 2009 when the re-entry was made. I am thus urged to dismiss the objections raised, with costs.

I have considered the preliminary issues and the arguments for and against them. I do not conceive the issues raised as an attack on the application to amend the statement of claim. The 1st defendant questions the power of this court to determine the plaintiff's claims, as stated on the amended writ of summons.

By these claims, the plaintiff seeks a declaration that the 2nd defendant's purported re-entry and re-allocation of subdivision 2 of subdivision E of subdivision 1 of subdivision A of Farm No 396a Makeni Lusaka was irregular and unlawful, and therefore null and void. A declaration that the 1st defendant acquired the said subdivision fraudulently, and a further declaration that the decision by the 2nd defendant to offer the said subdivision to the 1st plaintiff was made in bad faith are also sought. An order for cancellation of the Certificate of Title No 0664 issued to the 1st defendant is equally craved, among other reliefs.

Reference to the amended writ of summons in the Notice to raise a preliminary issue is in connection with the jurisdiction of the Lands Tribunal as conferred by section 4 of the Lands Tribunal Act No. 39 of 2010. It cannot be said it is the amendment of the statement of claim that is questioned in the preliminary issues raised. Res judicata does not arise, the circumstances being inapt for such a plea.

I agree that the 1st defendant could have raised the issues he is now raising earlier. She could have done so upon being served with process by the plaintiff, or soon thereafter.

However, the fact that she did not raise the issues earlier is inconsequential as will soon be seen. Section 13 of the lands Act Cap 183 of the Laws of Zambia which is Act No. 25 of 1995 provides as follows:

"13.(1)Where a lessee breaches a term or a condition or covenant under this Act the President shall give the lessee three months' notice of his intention to cause a certificate of re-entry to be entered in the register in respect of the land held by the lessee and requesting him to make representation as to why a certificate of re-entry should not be entered in the register.

(2) If the lessee does not within three months make the representations required under subsection (1), or if after making representations the President is not satisfied that a breach of a term or a condition of a covenant by the lessee was not intentional or was beyond the control of the lessee, he may cause the certificate of re-entry to be entered in the register.

(3) A lessee aggrieved with the decision of the President to cause a certificate of re-entry to be entered in the register may within thirty days appeal to the Lands Tribunal for an order that the register be rectified."

It will be observed that by the time the plaintiff commenced this action, the Lands Tribunal had jurisdiction to hear and determine appeals relating to the re-entry of land by the President. The effect of this provision was pronounced

by the Supreme Court in ***Polythene Products Zambia Limited vs Cyclone Hardware and Construction Ltd and Attorney General***[1]. That Court held inter alia that:

3 Section 13(3) of the Lands Act provides that a party aggrieved by a certificate of re-entry in the register, may within thirty days appeal to the Lands Tribunal for an order that the register be rectified.

4. The appellant being aggrieved by the Certificate of re-entry on stand number 12094, Lusaka, had no option but to appeal to the Lands Tribunal, on its challenge of the certificate of re-entry.

5. The trial judge had no jurisdiction to hear the appellant's challenge of the re-entry process of the Commissioner of Lands.

This decision clearly states that the high court has no jurisdiction to entertain a challenge of a re-entry made by the Commissioner of Lands. Jurisdiction is expressly conferred on the Lands Tribunal by statute. It should also be remembered that there can be no estoppel against a statute.

I note that at the time the action was commenced, the Lands Tribunal had no jurisdiction to cancel a certificate of title, the power to do so having only been conferred by Act No. 39 of 2010. Be that as it may, that aspect did not negate the provisions of section 13(3) of the Act. Still, a re-entry could only be challenged before the Lands Tribunal by way of appeal. Before the Lands Tribunal Act No. 392 of 2010 was enacted, the Lands Tribunal had power as held in the ***Attorney General & Others vs Fraser and Another***[5], to

recommend cancellation of a certificate of title. The lack of power to order cancellation of a certificate of title had no effect on its jurisdiction over challenges to the re-entry process. On the foregoing, it is inevitable to uphold the first preliminary issue raised by the 1st defendant as it is beyond question that this court has no jurisdiction to entertain a challenge to the re-entry of the land in question.

As regards the second and third issues, a re-entry was challengeable before the Lands Tribunal even before the Lands Tribunal Act No. 39 of 2010 was enacted. That being the case, this court had no jurisdiction to try this matter from the date it was first filed into court.

This matter has progressed considerably, and the 1st defendant participated in the proceedings, until it was realized the Court had no jurisdiction. That being the case, justice would be best served if each party bears own costs. I thus dismiss this action for want of jurisdiction, and order that each party bears its own costs. Leave to appeal granted.

Dated the ...26th... day of ...January... 2018

F. M. CHISANGA
HIGH COURT JUDGE