

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

2012/HP/0818

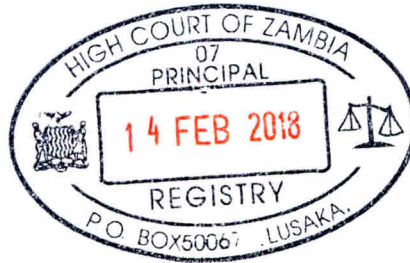
BETWEEN:

REX SITUMBEKO

AND

LANGANI NDOVI

ATTORNEY GENERAL



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

**BEFORE HONOURABLE MADAM JUSTICE G. MILIMO –
SALASINI IN CHAMBERS ON THE 14TH DAY OF FEBRUARY,
2018.**

For the Plaintiff:

*Mr. G. Lungu - Messrs Muleza
Mwiimbu and Company*

For the 1st Defendant:

*Mr. M. M. Chitambala - Messrs Lukona
Chambers*

For the 2nd Defendant:

*Ms. S. Chanda – State Advocate,
Attorney Generals Chambers*

R U L I N G

CASES REFERRED TO:

- 1. Lt. General Wilfred Joseph Funjika vs. The Attorney General*
- 2. Zambia Revenue Authority vs. Jayesh Shah*
- 3. Lt. Funjika vs. The Attorney General*
- 4. New Plast Industries vs. Commissioner of Lands and
Attorney General*
- 5. Chikuta vs. Chipata Rural Council*
- 6. Shell and BP Zambia Limited vs. Connidaris*

7. *Bank of Zambia vs. Aaron Chungu, Access Leasing Limited and Access Financial services*
8. *Kapoko vs. People (2016/CC/0023)*

LEGISLATION REFERRED TO:

1. *Constitution of Zambia (Amendment) Act o. 2 of 2016*
2. *High Court Act, Chapter 27 of the Laws of Zambia*
3. *Order 14A Rule 1 of the Rule of the Supreme Court*
4. *Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.*

This is the 1st Defendant's application by Notice of Motion for the Determination of preliminary questions or Points of Law and or construction pursuant to **Order 14A Rule 1 of the Rule of the Supreme Court.**

The 1st Defendant seeks the determination by the Court on the following questions or points of Law;

1. *Whether it was proper for the Plaintiff to commence this action by Writ of Summons and Statement of Claim instead of by way of Appeal?*
2. *If this Honourable Court finds that this action was wrongly commenced then what effect does the wrong commencement have on the following:*
 - i. *the Ex-parte Order of Interim Injunction granted to the Plaintiff on 14th August, 2012?*
 - ii. *the Caveat lodged by the Plaintiff in the Lands Registry in relation to property known as Stand No. 9613, Lusaka?*

iii. *the proceedings herein?*

He relies on the fact that the action was commenced by Writ of Summons and Statement of Claim to challenge the decision of the Registrar of Lands to cancel the Certificate of Title issued to the Plaintiff in respect of Stand No. 9613, Lusaka. That this Court granted the Plaintiff an Ex-parte Order of Interim Injunction on 14th August, 2012. He also relies on the fact that the **Lands and Deeds Registry Act** provides for an Appeal as a mode of challenging the decision of the Registrar.

The 1st Defendant relies on the following authorities in support of the motion:

1. *Section 87 and 89 of the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia.*
2. *Order 14A Rule of the Rules Supreme court of England (1999)*
3. *New Plaist Industries Limited vs. Commissioner of Lands and the Attorney General.*
4. *Bank of Zambia vs. Aaron Chungu, Access Leasing Limited and Access Financial Services Limited.*

In the Affidavit in Support of the Notice of Motion the 1st Defendant deposes that the action of the Plaintiff on 25th July, 2012 was to challenge the decision of the Registrar to cancel the Certificate of Title granted to him (the Plaintiff) in error, as shown in exhibit “**LN1**”, a letter of cancellation dated 4th April, 2004.

It is also deposed that the Plaintiff obtained an Ex-Parte Order of Interim Injunction on 14th August, 2012 but had earlier lodged a Caveat on 2nd March, 2011 on the property in dispute.

The deponent states that the Plaintiff has commenced this action wrongly as it should have come to the Honourable Court or the Lands Tribunal by way of appeal and thus this Court has no jurisdiction to hear the matter. The 1st Defendant also submitted a Statement of Facts in which he outlined the background of the case. He informed the Court that his late father, Moses Machimo Ndovi was given Stand No. 9613 in 1984. That after being granted planning permission he constructed a 3 meter high wall fence, fixed a gate, constructed a three (3) room cottage, connected water and electricity, and a slab and walls to window level. He stated that in 1989 the Commissioner of Lands re-entered the property without notice of intention to re-enter. The 1st Defendant, who became the Administrator of the Estate of late Moses Machimo Ndovi discovered that some people had broken into the property and that the property had been re-allocated to the Plaintiff.

What followed was cancellation by the Registrar of Lands on the re-entered property in 2004, and a reversion of the Title to the 1st Defendant.

However, on 14th August 2012 the Plaintiff issued a Writ of Summons and Statement of Claim in the High Court, seeking an Order that the decision of the Commissioner of Lands to cancel Certificate of Title number L4375 was without fair basis and illegal. This action was made despite the fact that the 1st Defendant had previously commenced an action under Cause 2004/SPB/830 and had obtained an ex-parte injunction before the Magistrate Court, which action was transferred to the High

Court by the Subordinate Court for the reason of lack of Jurisdiction. The Subordinate Court did not hear the Ex-Parte Injunction Inter-parte and the Plaintiff then obtained an Ex-parte Order of Injunction in the High Court, thereby perpetuating his occupation on Stand 9613 Lusaka despite the cancelled Certificate of Title.

The Plaintiff filed an Affidavit in Opposition to the Motion together with Skeleton Arguments and Statement of Facts.

In opposing the motion, the Plaintiff states that the matter before this Court is not only on the cancellation of the Certificate of Title but on the action of the 1st Defendant who intends to sell the Plaintiff's property on which he has spent over Five Hundred Million Kwacha (K500, 000,000. 00) in developments. He denies the fact that his Certificate of Title was issued in error. He avers that when the property was re-entered, repossessed and re-allocated to him, he paid a sum of Six Thousand Three Hundred Kwacha (K6,300.00) through the 2nd Defendant, as compensation to the 1st Defendant.

The Plaintiff further argues that due to the nature of the claim, the Writ of Summons and Statement of Claim is the appropriate mode of commencement in the rightful Court, the High Court.

The Plaintiff also states that several appeals were made to the Commissioner of Lands and the matter was resolved by offering the 1st Defendant two (2) Plots as compensation for the loss of the Plot in issue, which the 1st Defendant rejected. He concludes by stating that this Court has Jurisdiction to hear the matter and

that the mode of commencement is curable and not fatal to the whole matter and can be amended in the interest of justice.

In the Skeleton Arguments, the Plaintiff has relied on the Constitution of Zambia Amendment **Act. No. 2 of the 2016** and the cases of **Lt. General Wilfred Joseph Funjika vs. The Attorney General**¹ and **Zambia Revenue Authority vs. Jayesh Shah**² (*unreported*). He reiterates that the main issue is not only the cancellation of the Certificate of Title but the desire by the 1st Defendant to dispose of the property in dispute.

I have noted the background on the property given by the Plaintiff in terms of what transpired when the Parties made representation to the Commissioner of Lands and his statement that the idea behind the re-allocation of two (2) Plots was to allow the 1st Defendant to sell one (1) Plot and from the proceeds of that sale to construct or build on the other Plot. However this fact is not supported by any documents and is not relevant to the preliminary question as it is a fact in the realm of the substantive issue.

The Plaintiff argues that the mode of commencement is not fatal to the case as the same may be amended in the interest of justice. He cites **Article 118(2)** of the **Republican Constitution**, as amended (**Act N. 2 of 2016**) arguing that the provisions of this Constitution should be taken into consideration as the Constitution is the Supreme Law of Zambia. He also relies on the case of **Lt Funjika vs. The Attorney General**³ (*supra*) where it was opined that ***“the constitution is the supreme law of Zambia and if any other law is inconsistent with the***

constitution, that other law is to the extent of the consistency void.”

The Plaintiff has also argued that **Article 267(1) of the Constitution** provides that “this Constitution shall be interpreted in accordance with the bill of rights and in a manner that:-

a) Provides its purpose, values and principles;

b) Permits the development of the law

It is also argued that cases should be decided on their own merit and not on technicalities and he relies on the case of **Zambia Revenue authority vs. Jayesh Shah**² and the Courts holding that:-

“Cases should be decided on their substance and merit. The rules must be followed, but the effect of a breach will not always be fatal if the rule is merely regulatory or directory.”

The Plaintiff thus states that should the Court find that the mode of commencement was inappropriate, the same should be amended in the interest of justice.

The Statement of Facts was also filed. Suffice to state that they did not respond to the issue before this Court and did not show whether a decision was communicated to the Plaintiff or not warranting him to commence the process by Writ of Summons. There was no comment on the provisions of the Lands and Deeds Registry Act on the conduct of the Registrar or the Commissioner of Lands in the Plaintiff’s Statement of Facts.

The 2nd Defendant also filed Skeleton Arguments and Statement of Facts in addressing the preliminary questions.

In the Skeleton Arguments, the 2nd Defendant, represented by the Attorney General, argues that the question on the mode of commencement must be in accordance with **Section 87 of the Lands and Deeds Registry Act** which states:-

“if the Registrar refuses to perform any act or duty which he is required or empowered by this Act to perform, or if a Registered Proprietor or other interested persons is dissatisfied with the direction or decision of the Registrar in respect of any application, claim, matter or thing under this Act, the person deeming himself aggrieved may appeal to the Court.”

The 2nd Defendant argues that the mode of commencement must be as is provided by Statute, when that mode is provided for. The case of **New Plast Industries vs. The Attorney General**⁴ is cited. Thus the mode of Appeal is the correct mode to resort to and not Writ of Summons or Judicial review. That according to the case of **Chikuta vs. Chipata Rural Council**⁵, it was held that:-

“the Court has no jurisdiction to hear a matter that is wrongly commenced.”

The 2nd Defendant addressed the second preliminary question which relates to the effect of wrong commencement in the following way:-

(i) Regarding the Ex-Parte Order of Interim Injunction granted to the Plaintiff on 14th August;

It is argued that generally, the Court will not sustain an Interlocutory Injunction unless the right to relief is clear and the injunction is necessary to protect Plaintiff from irreparable injury, mere inconvenience is not enough. The case of **Shell and BP Zambia Limited vs. Connidaris**⁶ was relied on regarding injunctions.

The 2nd Defendant argues that the Injunction should not be sustained. On the second part of the preliminary question being the status of the Caveat lodged by the Plaintiff, the 2nd Defendant argues that **Section 76 (a) of the Lands and Deeds Registry Act** justifies the Plaintiff's registration of the property against the disputed Party as he has an interest in the property. However, if the matter was wrongly commenced then the Caveat must be removed.

The statement of facts, have clarified the genesis of the issue in contention and this Court has noted these facts as background to the dispute. It is not the intention of this Court to begin to delve into the main matter but to answer the preliminary questions on point of law pursuant to **Order 14A of the Rules of the Supreme Court**, upon which the Notice of Motion was filed.

The hearing of the preliminary matter was not until 2nd November, 2017. The 1st Defendant made oral submissions in addition to the submissions made earlier. Counsel for the 1st Defendant, Mr Chitambala of Lukona Chambers, informed the Court that the Plaintiff's grievance was with the decision of the Registrar to cancel the re-entry of the late Moses Machimo Ndovi. That the other grievance was the decision to cancel the Plaintiffs

Certificate of Title for the reason that the original re-entry against the lease held by the late Moses Machimo Ndovi was erroneously made.

Counsel drew to the attention of the Court, the provisions of **Section 87** and **89** of the **Laws of Zambia and the Deeds Registry Acts, Cap 185** which clearly states that any person aggrieved with a decision of the Registrar shall appeal against that decision before the High Court. The 1st Defendant argued that the Plaintiff does not have a choice on how to commence proceedings before this (the High Court) as the Act prescribes the procedure of dealing with the decision of the Registrar. He relies on the Supreme Court decision in the case of **New Plast Industries vs. Commissioner of Lands and Attorney general**¹ (Supra) where the Court held:-

“it is not entirely correct that the mode of commencement of any action is largely dependent on the relief sought. The correct position is that the mode of commencement of any action is generally provided by statute.”

He argued that this was the same position in the case of **Bank of Zambia vs. Aaron Chungu Access Leasing, Limited and Access Financial Services**.⁷

The 1st Defendant submitted that the present action is wrongly before this Court and, contrary to the Plaintiff's argument, the default is irredeemable because the Supreme Court has guided that the effect of wrong mode of commencement of an action is that the Court has no jurisdiction to grant any relief under an

action that is wrongly commenced. He cited **New Plast** case where the Supreme Court, in referring to **Section 10 of the High Court Act, Chapter 27 of the Laws of Zambia** held that:-

“thus where a statute provides for the procedure of commencing an action, a party has no option but to abide by that procedure.”

He argued that this Court has no jurisdiction to make the relief sought and also referred to the case of **Chikuta vs. Chipata Rural Council** (Supra). On the Statement of Claim, the 1st Defendant argued that the statement of claim before this Court clearly shows that the Plaintiff seeks to challenge the decision of the Registrar. He submitted that this (challenge) can only be by way of appeal. He further argued that the impropriety goes to the root of the entire action. He submitted that the default by the Plaintiff is not the same procedural default which may arise within proceedings that are properly before the Court as envisaged in **Article 118 (2)(e)** of the Constitution as amended. He dispelled the Plaintiff’s argument that according to **Article 118(2)(e)** matters must be argued on procedural technicalities as this does not arise in the present matter. He proffered that the instruction does not apply to substantive defects that abound the action herein. That **Article 118**, is applicable to procedural irregularities that can be cured without affecting the substantive issue, but the irregularities in the present action go to the root of the matter whereby the Court has no jurisdiction to entertain the action.

The 1st Defendant asked the Court to dismiss the action and set aside any order that may have been granted in this action, and that the Plaintiff be condemned in costs.

The Plaintiff in opposing the application relied on his Affidavit in Opposition filed on 17th May, 2017 and the Skeleton Arguments filed the same day. He told the Court that he commented on **Article 118**.

The 2nd Defendant submitted that it had filed skeleton arguments on which it relied.

Having considered the submissions of the Parties to this action, I found it necessary to outline the history or background of this Case in order for the Parties to be reminded of the genesis of the issue. In so doing I have found the following facts:-

1. *I find as a fact that the 1st Defendant's father, Moses Machimo Ndovi, was given a certificate of Title for Stand No. 9613 Lusaka on 20th May, 1984. I find as a fact that on 24th November, 1989 the Commissioner of Lands re-entered the property without notice to Moses Machimo Ndovi to re-enter.*
2. *According to the 2nd Defendant, the Commissioner of Lands, the re-entry was registered on 18th August, 1989. An inspection conducted on 24th November, 1993 revealed improvements which were valued at Six million three hundred thousand kwacha (K6, 300, 000.00 old currency).*
3. *It is a fact that the Plaintiff in the present case was given a Certificate of Title for the said Stand No. 9613, Lusaka on 14th August, 1996 after payment of Six million three hundred thousand kwacha (K6, 300, 000.00 old currency) in two*

installment's through the principle accountant at Ministry of Lands toward the re-entered property.

4. *It is a fact that the Commissioner of Lands, however cancelled the Certificate of Title for the Plaintiff on 6th April, 2004 and reverted the property to the 1st Defendant, by a letter of Cancellation. The Commissioner of Lands also advised the Plaintiff in that letter to **"claim the sum Six Million Three Hundred Thousand Kwacha that he had paid as compensation for the previous title holder from the Ministry"***
5. *Finally, I find as a fact that as a result both Plaintiff and the 1st Defendant have a contingent interest in the property Stand L9613.*

To address the preliminary questions that arise from the facts, I must consider each question in accordance with the **Lands and Deeds Registry, Act, Chapter 185 of the Laws of Zambia** which is the guiding statute.

As argued by the 1st Defendant and the 2nd Defendant, **Section 87** provides the procedure for decisions from the Registrar. The Section is specific that:-

"if a Registered Proprietor or other interested person is dissatisfied with the direction or decision of the Registrar ... the person deeming himself aggrieved may appeal to the Court."

As has been demonstrated by the authorities cited the mode of commencement is by way of appeal. I therefore find on this first preliminary question that the mode of commencement is by way

of appeal and order that the plaintiff pursues the correct mode of commencement. Having found that mode of commencement was improper, this court has no jurisdiction to determine this matter therefore the action is dismissed.

On the second preliminary question regarding the Ex-Parte Order of Interim Injunction granted to the Plaintiff on 14th August, 2012. I order that the injunction be discharged forthwith.

On the issue of the Caveat lodged by the Plaintiff, I refer the Parties to **Part VI of the Lands and Deeds Registry Act**, which provides for Caveats. Under **Section 76** any person claiming to be entitled to or to be beneficially interest in any land...

“and Section 79 states that so long as a Caveat remains in force, the Registrar shall not make any entry on the Registrar having the effect of changing or transferring on otherwise affecting the estate or interest protected by such Caveat.”

In this part of the **Lands and Deeds Registry Act, Section 81** provides for procedure of removal of the Caveat.

Therefore, in the present case, even if an injunction is discharged due to the incorrect procedure of mode of commencement, it does not follow that the Caveat is vacated. Both Parties are claiming an interest. The Caveat shall subsist until the matter is determined, because the Caveat was registered to prevent any step being taken while the matter is being adjudicated upon.

On the third preliminary question of the proceedings herein, the Matter is dismissed for want of jurisdiction, in this Court.

I have taken cognisance of the Plaintiff's argument that if the issue before this Court only centred on cancellation of a certificate of title, the proper mode of commencement of this action would be by way of appeal, but the issue goes beyond the cancellation of the title deed. That the events that surround this matter such as the attempt by the 2nd Defendant subsequently offered two Plots to the 1st defendant as compensation, which the 1st Defendant rejected, is another issue.

The Plaintiff argues that the mode of commencement is not fatal to the whole case as the same may be amended. The Plaintiff relied on **Article 118(2)(e)** of the Constitution as amended (supra), and the case of **Funjika vs. Attorney General (supra)**.

The arguments of the Plaintiff and his reliance on the two authorities above demonstrates a misconception of the **Article 118(2)(e)** of the Constitution and the context of the holding in the Funjika case.

In the case of **Kapoko vs. People (2016/CC/0023)**⁸ the Constitutional Court in guiding on **Article 118(2)(e)** held that **Article 118(2)(e)** is not intended to do away with existing principles, Law and procedures, even where the same may constitute technicalities. It is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality. The Court stated at J33 that:-

“... Article 118(2)(e) is not intended to do away with existing principle, laws and procedures, even where the same constitute technicalities. It intended to avoid a

situation where a manifest injustice would be done by paying unjustifiable regard to technicality.”

The argument of the Plaintiff and his reliance on **Article 118(2)(e)** is misplaced and it is not correct for the Plaintiff to state that the Constitution is the Supreme Law and where any law inconsistent with the Constitution that law is to the extent of the consistency void. The Plaintiff suggest that if the provisions of **Section 87 of the Lands and Deeds Registry Act** are inconsistent with Article 118(2)(e) that act is void to the extent of inconsistency.

The authority of **Zambia Revenue Authority vs. Shah** is applied out of context in relation to the issue of mode of commencement. I do not accept the arguments of the Plaintiff in regard. So too on his reliance on **Article 267 of the Constitution**, and interpretation in accordance with the Bill of Rights, the argument holds no water for the Proper mode of commencement to be complied with.

I therefore dismiss this action for wrong mode of commencement but **ORDER** that the Caveat is maintained until determination of the matter regarding L6913, Lusaka.

Dated the 14th Day of February 2018

G. Milimo J

**G. MILIMO-SALASINI
HIGH COURT JUDGE**

