

**IN THE HIGH COURT FOR ZAMBIA**

**2017/HP/1749**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

*(Civil Jurisdiction)*



IN THE MATTER OF: THE PROPERTY KNOWN AS  
SUBDIVISION 11 OF SUBDIVISION 88  
OF FARM 401a, LUSAKA

IN THE MATTER OF: SECTION 81 OF THE LANDS AND  
DEEDS REGISTRY ACT CHAPTER 185  
OF THE LAWS OF ZAMBIA

IN THE MATTER OF: AN APPLICATION FOR REMOVAL OF  
REGISTERED CAVEAT

**BETWEEN:**

JOSEPH CHILINDA

**APPLICANT**

**AND**

JOSEPH PHIRI

**RESPONDENT**

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO ON  
16<sup>TH</sup> JANUARY, 2018.**

*For the Applicant: Mr. S. Simwanza – Messrs. Lungu  
Simwanza & Company*

*For the Respondent: N/A*

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**JUDGMENT**

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**CASE REFERRED TO:**

1. *Rural Development Corporation vs. Bank of Credit & Commerce Limited (1987) ZR 35.*

**LEGISLATION AND OTHER WORKS:**

1. *Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia; and*
2. *The High Court Act Chapter 27 of the Laws of Zambia.*

The Applicant JOSEPH CHILINDA by way of Originating Summons made pursuant to **Section 81** of ***The Lands and Deeds Registry***<sup>1</sup> seeks the following: -

- (i) *That the caveat registered against Subdivision 11 of Subdivision 88 of Farm 401a, Lusaka by the caveator, JOSEPH PHIRI, be removed; and*
- (ii) *That the costs occasioned by this application be in the cause.*

The application is supported by an Affidavit in Support filed herein on 10<sup>th</sup> October, 2017, sworn by JOSEPH CHILINDA, the Applicant herein. It is deposed that the Applicant sometime in the year 2016, agreed to purchase the property known as *Subdivision 11 of Subdivision 88 of Farm 401a, Lusaka* from one JOSEPH PHIRI, the Respondent herein. Pursuant to the said Agreement, the Applicant complied with all the terms of the agreement and subsequently, the Certificate of Title for the aforementioned property was issued to him by the Ministry of Lands. The Certificate of Title marked "**JC 1**" was exhibited herein and it indicates JOSEPH CHILINDA as the Title holder. It is also averred that the Applicant, upon obtaining the Certificate of Title, mortgaged the property in issue to Development Bank of Zambia and later managed to discharge the said mortgage. A Memorandum of Discharge of Mortgage marked "**JC 2**" was exhibited herein.

The Applicant deposed that he went to the Lands and Deeds Registry of the Ministry of Lands, so that he could discharge the registered Mortgage, but did not succeed as he was informed that there was a caveat registered by one JOSEPH PHIRI. A printout of the Lands Register, was exhibited marked "**JC 3**", which shows that the Respondent entered the caveat on 1<sup>st</sup> March, 2017 claiming an interest due to failure to pay the agreed purchase price. According to the averment made by the Applicant, the Respondent has no claim whatsoever against the Applicant in respect of the property in issue as he was paid in full as per agreement, whereupon the Respondent executed the Deed of Transfer in favour of the Applicant. It is also averred that the Applicant tried to contact the Respondent to no avail. He therefore urged this Court to order that the caveat be removed so that he can be able to deal with his property as he wished.

The Applicant made several attempts to locate the Respondent in order to serve him the originating process, but all efforts to find him proved futile as his residential address was not known. The Applicant thus applied for an order of leave to serve by way of substituted service, which application was granted on 9<sup>th</sup> November, 2017. Following the Court's Order, the Applicant caused to be published in the Zambia Daily Mail, an advertisement by way of substituted service on the Respondent. A copy of the extract of the advertisement was exhibited herein marked "**WCK 1**" and was attached to the Affidavit of Service filed herein on 22<sup>nd</sup> November, 2017.

I scheduled the matter for hearing on 16<sup>th</sup> January, 2018 at 11:00 hours. The Respondent was not in attendance and no reason was advanced to show why he was not in attendance. I therefore proceeded to hear the matter in accordance with **Order 35 Rule 3** of **The High Court Rules**<sup>2</sup>. The said order is couched in the following terms: -

***"If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the Court may, upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant."***

At the said hearing, Learned Counsel for the Applicant, Mr. Steven Simwanza, made *viva voce* submissions, in which he reiterated the contents of the Affidavit in Support.

I have considered the application by the Applicant for an Order that the caveat on *Subdivision 11 of Subdivision 88 of Farm 401a, Lusaka* be removed and that the Applicant be at liberty to deal with the property, as prayed. The Applicant's application is properly before the Court. The Court in the case of **Rural Development Corporation vs. Bank of Credit and Commerce (Z) Limited**<sup>1</sup> held that: -

***"Although Section 81 of the Lands and Deeds Registry Act provides no procedure for removal of a caveat, an originating summons is the proper form for commencing proceedings for removal of a caveat"***.

**Section 81 (2)** of **The Lands and Deeds Registry Act<sup>1</sup>** empowers the Court “**upon proof that such person has been summoned**” to make such order as it seems just. The Applicant, unable to locate the Respondent, applied to serve the originating process by substituted service and this was effected pursuant to the Order of Court dated 9<sup>th</sup> November 2017, by way of advertisement in the Zambia Daily Mail Newspaper on 20<sup>th</sup> November 2017. According to **Section 81 (1)** of **The Lands and Deeds Registry Act<sup>1</sup>**, an interested proprietor or other interested person may summon the caveator to attend before the Court or Judge to show cause why such caveat should not be removed. The Respondent was served with the said summons as per Affidavit of Service on record and has not come before Court to show cause why the caveat should not be removed.

There is evidence, in the form of Certificate of Title No. 18287 issued in the names of the Applicant. Further, there is evidence in the form of a Lands Printout showing that on 12<sup>th</sup> February, 2016 a Deed of Transfer between the Respondent and Applicant was registered in the Lands Register. The Caveator JOSEPH PHIRI, who is the Respondent herein, registered the caveat on 1<sup>st</sup> March 2017 as claiming an interest that arose for failure to pay the agreed purchase price. I am of the view that if JOSEPH PHIRI had an interest or claim to the property in dispute, he would not have executed the Deed of Transfer that was registered on 12<sup>th</sup> February, 2016. Accordingly, I find that the Respondent JOSEPH PHIRI does

not have an interest or claim to warrant the continued entry of a caveat on *Subdivision 11 of Subdivision 88 of Farm 401a, Lusaka*.

For the foregoing reasons, I Order that the caveat lodged on *Subdivision 11 of Subdivision 88 of Farm 401a, Lusaka* by the said JOSEPH PHIRI be forthwith removed by the Registrar of the Lands and Deeds Registry. I make no order as to costs.

**Delivered at Lusaka the 16th day of January, 2018.**



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**P. K. YANGAILO**  
**HIGH COURT JUDGE**