

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



2017/HP/2010

IN THE MATTER OF: STAND NO 1133 CHELSTONE, LUSAKA

AND

**IN THE MATTER OF: THE LANDS AND DEEDS REGISTRY ACT, CHAPTER
185 OF THE LAWS OF ZAMBIA, SECTIONS 76 (1) &
81(1)**

AND

**IN THE MATTER OF: ORDER VI (2) AND XXX (11) OF THE HIGH COURT
RULES CHAPTER 27 OF THE LAWS OF ZAMBIA**

BETWEEN:

STEPHEN JERE

APPLICANT

AND

ANGELA SABE SIAMUUZWIDE

RESPONDENT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 9th DAY OF
FEBRUARY, 2018**

For the Applicant : Mrs P. Munthali, C.L. Mundia and Company

For the Respondent : No appearance

J U D G M E N T

CASES REFERRED TO:

- 1. Construction and Investment Holdings Ltd V William Jacks and Co (Zambia) Ltd 1972 ZR 66**
- 2. Lenton Holdings Limited V Airforce Moyo 1984 ZR 55**
- 3. Rural Development Corporation Ltd V Bank of Credit Commerce (Z) Ltd 1987 ZR 35**
- 4. Annette Chilima V Peter Chilima SCZ No 22 of 2000**

5. *Chibwe V Chibwe SCZ No 38 of 2000*
6. *Sobek Lodges Limited V Zambia Wildlife Authority 2008/HP/668*
7. *Bonaventure Kalulu V Bertonotti Angelo 2013/HP/1721*

LEGISLATION REFERRED TO:

1. *The High Court Rules, Chapter 87 of the Laws of Zambia*
2. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*

This action was commenced by way of Originating Summons on 17th November, 2017, pursuant to Order VI (2) and Order XXX (11) of the High Court Rules, Chapter 27 of the Laws of Zambia, in which the Applicant claims;

- i. *An order that the Respondent shows cause why the caveat placed on Stand No 1133, Chelstone in Lusaka should not be removed on account of the fact that the Respondent is not entitled, and has no beneficial interest in the said property.*
- ii. *An order for the removal of the caveat placed on Stand No 1133, Chelstone, Lusaka, upon the failure by the Respondent to show the requisite cause why such should not be removed.*
- iii. *Further or other relief that the court may deem fit.*
- iv. *Costs of and incidental to the application.*

The affidavit filed in support of the originating summons which was sworn by the Applicant, shows that Stand No 1133, Chelstone, Lusaka was owned by Sundiah Mbelenge Siamuuzwide as reflected by the certificate of title exhibited as 'SJ1' to the affidavit. That the Applicant purchased the said property from Sundiah Mbelenge Siamuuzwide, as shown by the contract of sale executed between the said parties, which was exhibited as 'SJ2' to the affidavit.

Paragraph 7 of the affidavit states that the Applicant paid the purchase price in full, and the same was evidenced by the acknowledgement exhibited as 'SJ3', and that the parties executed an assignment of the property, which was exhibited as 'SJ4'. The Applicant in paragraphs 9 and 10 of the affidavit avers

that the Respondent who is Sundiah Mbelenge Siamuuzwide's wife was aware of his intention to sell the property to the Applicant, and she was supposed to witness the execution of the said contract of sale, but was unavailable, resulting in her son witnessing the same.

Therefore, it came as a surprise to the Applicant that the Respondent placed a caveat on the said property despite the fact that she has no interest in the said property, as the property was solely owned by Sundiah Mbelenge Siamuuzwide, as seen on the certificate of title that had been exhibited. It is also deposed that the Respondent had failed to demonstrate what interest she has in the property, and that the only connection that had been established is that she is the wife to the person that previously owned the property. This the Applicant deposes is not sufficient interest in the property.

Therefore, the caveat was illegally placed on the property, and that meetings held between the Applicant and the Respondent, as well as Sundiah Mbelenge Siamuuzwide culminated in the Respondent agreeing to remove the said caveat, but she had refused or neglected to do the same. Therefore removal of the caveat would not prejudice her.

There is also a supplementary affidavit filed on 17th January, 2018, with leave of the court, which exhibits the reason that the Respondent lodged the caveat, which are that she wants to protect the matrimonial home from being sold by her husband without her knowledge. Exhibit 'SJ1' to the said affidavit is a print out from the Lands Register to that effect.

The Respondent did not file an affidavit in opposition despite being served process by substituted service, after leave was obtained from the court, and she did not attend the hearing. At the hearing Counsel for the Applicant applied for leave to file a supplementary affidavit in support of the Originating Summons, which leave was granted. She further submitted that they relied on the affidavit in support of the application, as well as the supplementary affidavit, and skeleton arguments.

That in order for a caveat to be placed on a property, the caveator must reveal their interest in the property. Counsel stated that in this case the interest had been stated as protecting sale of the property by the husband, who is the registered owner of the property, without the Respondent's knowledge. It was submitted that such interest is not envisaged in Section 76 of the Lands and Deeds Registry Act, adding that such interests only arise in Matrimonial Causes. Counsel went on to state that the Respondent and her husband were not getting divorced, and as such, the interest did not apply.

It was also stated that a contract of sale as well as an assignment having been executed, and the purchase price paid in full, the caveat was ineffective, and should be removed. Further that the Respondent should be liable to pay damages pursuant to Section 81 (1) and (2) of the Lands and Deeds Registry Act, which provides that a person who lodges a caveat without reasonable cause, shall be liable to compensate a person who suffers damage. Further that the Respondent should bear the costs of the proceedings as she placed the caveat when she had the knowledge that she had no interest in the property, and was aware that the property was being sold, and did not object to the same.

I have considered the evidence. This action was brought pursuant to Order VI (2) and Order 30 Rule 11 of the High Court Rules, Chapter 27 of the Laws of Zambia. Order VI Rule (2) of the High Court Rules provides that;

“Every writ of summons shall be in the appropriate form as set out in the First Schedule with such variations as circumstances may require”.

Order 30 Rule 11 of the said High Court Rules on the other hand states that;

“The business to be disposed of in chambers shall consist of the following matters, in addition to the matters which under any other rule or by statute or by the law and practice for the time

being observed in England and applicable to Zambia may be disposed of in chambers:

- (a) Applications for time to plead, for leave to amend pleadings, for discovery and production of documents, and generally all applications relating to the conduct of any cause or matter;**
- (b) An application by any person claiming to be interested under a deed, will or other written instrument for the determination of any question of construction arising under the instrument and for a declaration of the rights of the person interested;**
- (c) An application by any person claiming any legal or equitable right, in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of a statute, for the determination of such question of construction and for a declaration as to the right claimed;**
- (d) All proceedings in the Court under the Trustee Act, 1893, or under the Land Transfer Act, 1897, of the United Kingdom; Business to be disposed of in chambers**
- (e) Applications as to the guardianship and maintenance or advancement of infants;**
- (f) Applications connected with the management of property;**
- (g) Applications for or relating to the sale by auction or private contract of property, and as to the manner in which the sale is to be conducted, and for payment into Court and investment of the purchase money;**
- (h) All applications for the taxation and delivery of bills of cost and for the delivery by any Advocate of deeds, documents and papers;**

- (i) ***All matters which under any other rule or statute were formerly allowed to be commenced by originating summons;***
- (j) ***Such other matters as a Judge may think fit to dispose of in chambers.”***

Reliance was also placed on the case of ***RURAL DEVELOPMENT CORPORATION LTD V BANK OF CREDIT COMMERCE (Z) LTD 1987 ZR 35*** which held that;

“Although s. 81 of the Lands and Deeds Registry Act, Cap. 287 provides no procedure for the removal of a caveat, an originating summons is the proper form for commencing proceedings for removal of a caveat.”

In this case the Respondent placed a caveat on the property known as Stand No 1133 Chelstone, Lusaka, belonging to Sundiah Mbelenge Siamuuzwide on 6th July, 2016. The Applicant in this matter deposed that he bought the said property from Sundiah Mbelenge Siamuuzwide as shown by the contract of sale exhibited as ‘JS2’ to the affidavit in support of the application. Exhibit ‘SJ3’ to the said affidavit is an acknowledgement that Sundiah Mbelenge Siamuuzwide signed, stating that he had received the full purchase price of K820, 000.00 indicated in the contract of sale on 25th July, 2016.

The contention by the Applicant is that the Respondent has no interest in the property, as firstly she is not the beneficial owner of the same, and secondly that while she lodged the caveat with the reason that she did not want her husband Sundiah Mbelenge Siamuuzwide to sell the same without her knowledge, such interest could only arise where there were matrimonial proceedings, and there were none.

The law relating to caveats is found in Sections 76 to 83 of the Lands and Registry Act, Chapter 185 of the Laws of Zambia. Section 76 of the said Act authorizes the registration of caveats. It states that;

“Any person-

- (a) claiming to be entitled to or to be beneficially interested in any land or any estate or interest therein by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise howsoever; or**
 - (b) transferring any estate or interest in land to any other person to be held in trust; or**
 - (c) being an intending purchaser or mortgagee of any land;**
- may at any time lodge with the Registrar a caveat in Form 8 in the Schedule.**

The reason why a caveat is being placed is required to be disclosed, as provided in Section 77 of the said Lands and Deeds Registry Act, which provides that;

“(1) Every caveat shall be signed by the caveator or by his attorney or agent, and shall state with sufficient certainty the nature of the estate or interest claimed by the caveator, with such other information and evidence as may be required by any regulations under this Act, and shall appoint a place or give an address within 4.83 kilometres of the Registry at or to which notices and proceedings relating to such caveat may be served or addressed.

(2) Every caveat shall be entered on the Register as of the day and hour of the reception thereof by the Registrar.”

Thus the question in this case is whether the Respondent disclosed her interest in Stand No 1133, Chelstone, Lusaka when she lodged the caveat against the property, and based on that the caveat should not be removed? The Applicant in the skeleton arguments referred to the case of **SOBEK LODGES LIMITED V ZAMBIA WILDLIFE AUTHORITY 2008/HP/668**, stating that the case is instructive that an application for removal of a caveat under Section 81 of the

Lands and Deeds Registry Act, places a burden on a respondent to show cause why the caveat should not be removed.

That in considering whether or not a caveat should be removed, the court should bear in mind the provisions of section 76 of the Lands and Deeds Registry Act that a person intending to register a caveat must be entitled to the land, beneficially interested in the land, in the process of transferring some interest in the land to some other person, or should be an intending purchaser or mortgagee of the land in issue.

Further reference was made to the case of **LENTON HOLDINGS LIMITED V MOYO SCZ No 9 of 1984** which held that ***“to be effective, a caveat should disclose the interest claimed. Where a copy of the caveat is not produced in court to prove the interest claimed, its registration at the Lands and Deeds Registry will raise a presumption that it disclosed an interest in favour of the person lodging it.”***

The case of **BONAVENTURE KALULU V BERTONOTTI ANGELO 2013/HP/1721** was also referred to, and it was submitted that the case held that a caveat can be placed by any person, so long as they disclose the interest they have in the said property. That the Respondent whilst having no interest in the property proceeded to illegally register a caveat against the property.

Counsel also submitted that the effect of registration of a caveat is that no one can deal with the property until it is removed, as provided in Section 79 of the Lands and Deeds Registry Act. That the case of **CONSTRUCTION AND INVESTMENT HOLDINGS LTD V WILLIAM JACKS AND CO (ZAMBIA) LTD 1972 ZR 66** interpreted the section and held that;

“(i) The effect of a caveat is that the Registrar of Lands and Deeds is forbidden to make any entry on the Register having the effect of charging or transferring or otherwise affecting the estate or interest protected by the caveat. The registered proprietor is therefore prevented from showing a clear title.

(ii) Only if a person has or purports to have an enforceable interest in land may he be justified in interfering with the rights of the registered proprietor by lodging a caveat. The caveator's cause for lodging a caveat is dependent upon his claim to be entitled to an interest in land and that 'reasonable' in this sense means 'justifiable'.

As seen from the provisions of Section 79 of the Lands and Deeds Registry Act, as well as the case of **CONSTRUCTION AND INVESTMENT HOLDINGS LIMITED** cited above, the registration of a caveat prevents any dealings with the land, pursuant to which the caveat is registered. It therefore follows that any person who registers a caveat on a property ought to have justifiable reasons for doing so, as a caveat restricts the owner of land from dealing with it. The case of **LENTON HOLDINGS LIMITED V AIRFORCE MOYO 1984 ZR 55** dealt with the scope of Section 76 of the Lands and Deeds Registry Act and it was stated in that case that;

“Although the terms of section 76(a) would appear to be very wide indeed, as can be seen, yet they would not, in our considered opinion, go so far as to cover rights other than those which are otherwise recognisable as being lawfully claimed or held. However, Section 77 (1) which we have set out would appear to require that the caveat should disclose the interest claimed.”

Going by the rationale advanced in the above case that while Section 76(a) of the Lands and Deeds Registry Act is wide in its provision as to who may register a caveat on a property, such persons need to have a right or interest that is recognizable as stipulated in Section 77 of the said Act. A perusal of Section 76(a) shows that any person claiming to be entitled to or to be beneficially interested in any land or any estate or interest therein by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise howsoever has a right to register a caveat on a property.

Indeed the provision of the section is wide in scope, and covers any recognizable interest at law. The Respondent is on record as being the wife to the beneficial owner of the property, Sundiah Mbelenge Siamuuzwide. It is trite that the law provides that a spouse has interest in matrimonial property as held in the case of **CHIBWE V CHIBWE SCZ No 38 of 2000**, as long as they show that they contributed to the acquisition of the property, even if the property is not registered in their name. Therefore that amounts to an interest in the property which is recognizable at law, and in my view falls within the provisions of Section 76(a) of the Lands and Deeds Registry Act.

However the question is whether by virtue of being a spouse to a beneficial owner of property to which one may have interest by virtue of contributing to the acquisition of such property, is a justifiable reason for lodging a caveat against a property when there are no matrimonial proceedings? In my opinion, this would not be justifiable, as there is no event triggering the disposition of the property that would defeat the adjustment of the property acquired during the marriage, and which would entitle the party to a marriage that is not the registered owner of the property to lodge a caveat, as the marriage is still subsisting.

In the case of **ANNETTE CHILIMA V PETER CHILIMA SCZ No 22 of 2000** where the appellant brought an action against the respondent under Section 17 of the Married Women's Property Act 1882 for an order for the share of the matrimonial properties whilst she was still married to the respondent, the Supreme Court noted that;

***“When man and woman join in (Holy) matrimony they become one body, one flesh and during the subsistence of their marriage they acquire and own property jointly and indivisibly and until the marriage is put asunder, none of them should be heard to say he owns this or that property. It necessarily follows that the court is not competent to order distribution or share of matrimonial property between the parties where a marriage is still subsisting.*”**

This is so even where the parties are on separation. To hold otherwise would not only be striking a death nail in a principle which is sacrosanct but would also be opening a Pandora box in this era of greed for wealth. This would inevitably lead to unstable marriages”

Therefore where a marriage is still subsisting, there can be no sharing of matrimonial property, which is the position in this case. On that basis, the Respondent had no interest to lodge the caveat, and as the burden was on her to show cause why the caveat should not be removed, and she has not done so, I find that the caveat was not legally lodged, and I direct that it be removed forthwith.

As to the damages claimed pursuant to Section 82(1) of the Lands and Deeds Registry Act, it is my considered view that this is not a proper case in which such a claim should be awarded, as while it has not been shown that there were or are matrimonial proceedings that prompted the lodgment of the caveat by the Respondent, thereby indicating that the marriage was subsisting at the time of lodgment of the caveat.

However the Respondent may have had her own fears in relation to the disposition of the property, looking at the Lands Register exhibited as ‘SJ1’ to the supplementary affidavit, which shows that Sundiah Mbelenge Siamuuzwide executed a number of mortgages to secure the payment of monies lent, which could be said to have threatened the security of the family in the event of default of payment. I make no order as to costs. Leave to appeal is granted.

DATED THE 9th DAY OF FEBRUARY, 2018

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**