

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

2017/HP/2193



BETWEEN:

**JONATHAN VAN BLERK
DENNY NYONI (Suing as Administrator of
the estate of Violet Nyoni)
AND
THE ATTORNEY GENERAL
LUSAKA CITY COUNCIL
LEGACY HOLDINGS LIMITED
KWIKBUILD CONSTRUCTION
BANTU CAPITAL CORPORATION LTD**

**1st PLAINTIFF
2nd PLAINTIFF

1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT
5TH DEFENDANT**

*Before Hon. Mr. Justice Mathew L. Zulu, at Lusaka the 6th day of April,
2018*

For the 1st Plaintiff: Mr. E. L. Eyaa, Messrs. KBF & Partners
For the 2nd Plaintiff: N/A
For the 1st Defendant: Mr. A. Mwansa, SC, Mr. F.K. Mwale, Principal State Advocate and Ms. S. Mulenga, State Advocate
For the 2nd Defendant: Mrs. Y.N. Muwowo, Council Advocate
For the 3rd Defendant: N/A
For the 4th Defendant: Mr. R.M. Simeza, SC, and Mr. L. Mwamba, Messrs Simeza Sangwa and Associates with Mr. S.P. Chilembo, in-house legal counsel, Mathani Group.
For the 5th Defendant Mr. S. Sikota, SC, appearing and Mr. K. Khanda, Messrs Central Chambers.

R U L I N G

Cases referred to:

1. *Bank of Zambia v. Tembo and Others (2002) Z.R 103*
2. *B.P. Zambia Plc v. Interland Motors Limited (SCZ Judgment No 5 of 2001)*
3. *Kasote v. The Attorney General (1977) Z.R. 75 (SC)*

4. *Abel Banda v The People (1986) Z.R 105*
5. *Kundiona v. The People (1993-1994) Z.R. 59 (S.C)*
6. *Polythene Products Zambia Limited v. Cyclone Hardware and Construction Ltd and Attorney General (2012) Z.RVol 2 396*
7. *Professor Lupando Munkonge v. Rosemary Bwalya and 2 Others (2009/HP/1516 and 2010/HP/304)*
8. *Maheshkumar Soabhai Patel Himashu Patel v. Freeze- o- Matic Ltd and Ajoy J. Paul (SCZ Judgment No.3 of 2017)*
9. *Union Gold (Zambia Ltd) v. The Attorney General (SCZ Judgment No.14 of 2014)*
10. *Beatrice Mulamfu v. Kelvin Mukuka Mwamba (SCZ Appeal No. 80 of 2014)*
11. *Yakub Falir Mulla and 2 others v. Mohamed Jabi (SCZ Judgment No. 1 of 2018)*
12. *Hussein Safieddinne v. the Commissioner of Lands and two others (SCZ Selected Judgment No. 36 of 2017)*
13. *Lapemba Trading Ltd v. Pemba Lapidaries and Industrial Credit Company (SCZ/8/269/2013)*
14. *Chick Masters Ltd and another v. Investrust Bank Plc (SCZ/8/27/2014)*

Legislation referred to:

1. *The Lands Tribunal Act No. 39 of 2010.*
2. *The Lands Act Cap 184 of the Laws of Zambia.*
3. *The High Court Rules, Cap 27 of the Laws of Zambia.*
4. *The Rules of the Supreme Court of England, 1999 Edition (White Book)*

This is a combined ruling for the 1st plaintiff's application for an interlocutory injunction and the 2nd, 4th and 5th defendants' applications to dismiss the plaintiffs' entire action.

The history of the case can be discerned from the various affidavits on record. The parties have been involved in a legal battle over the ownership of Farm 4300, Lusaka from as far back as 1994. The 1st plaintiff commenced an action under cause number 1994/HP/5399 which was dismissed for impropriety. The Plaintiff recommenced the action in 1997 under cause number 1997/HP/272 and lost the case. He appealed to the Supreme Court on 12th August, 2002 and the appeal was dismissed. He applied by motion to have the decision revisited but later withdrew the application. On 13th July, 2010, he went back to the High Court and started another case under cause number 2010/HP/749 claiming that he is the legal owner of the property and seeking a declaration that the High Court and Supreme Court judgments were procured fraudulently. That action was dismissed for want of prosecution in August, 2012 and the application to review the ruling was also dismissed. The plaintiff commenced a new action in 2016 under cause number

2016/HP/607 for the same reliefs which was discontinued apparently to enable the parties explore an *ex curia* settlement.

The plaintiff later commenced this action under cause number 2017/HP/2193 seeking the following reliefs:

- a) A declaration that the judgment of the High Court of Judicature of Zambia and the Supreme Court of Zambia under cause Number 1997/HP/272 and SCZ/8/190/2002 respectively were procured by fraudulent misrepresentation ;**
- b) A declaration that the acquisition of the portion of Farm 4300 Lusaka is null and void and ultra vires the provisions of the Lands Acquisition Act. 1970 (Repealed) as read with the Lands Acquisition Act, Chapter 198, Volume 12 of the Laws of Zambia;**
- c) A declaration that the plaintiff is the original and rightful owner of Farm 4300, Lusaka;**
- d) An order that the 3rd 4th and 5th defendants surrender their title certificates of title to the Commissioner of Lands for rectification/cancellation under section 11 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia;**
- e) an injunction restraining the barring the defendants from:
 - I. carrying on developments;****

- II. construction of buildings and other structures**
- III. Subdividing with the view to carryout construction works and building on the property, which activities are likely to compromise the environmental quality of the said Farm 4300 Lusaka.**

f) costs; and

g) any other relief the court may deem fit.

On 21st December, 2017, the 1st plaintiff obtained an *ex parte* Order of interim injunction pending an *inter partes* hearing. However, before the *inter partes* hearing, the 2nd, 4th and 5th defendants made separate applications but all aimed at dismissing the plaintiff's action on various grounds. When the matter came up for the *inter partes* hearing of the 1st plaintiff's application for confirmation of the *ex parte* Order of interim injunction, I proceeded to hear all the parties' applications at once.

Given the nature of the applications, I shall first deal with the 2nd, 4th and 5th defendants' applications regarding dismissal of the action. The outcome shall determine whether it will be necessary to delve into the interlocutory injunction.

The first application to dismiss the action was made by the 5th defendant on 9th January, 2018 by summons and a supporting affidavit sworn by Jordan Sibanda, the Director of Finance in the 5th Defendant Company. The main thrust of his affidavit is that this action is irregular because it was commenced during the Michaelmas Vacation without leave; is not attested in the current Chief justice's name; is statute barred as it was commenced after the statutory 12-year period; is res judicata and an abuse of court process; and that the relief sought to declare the High Court and Supreme Court judgments as having been obtained through fraud is untenable. In addition that the Writ was irregular because it was not properly attested in the current Chief Justice's name as required by Order VI rule 3 of the High Court Rules.

The application was also supported by skeleton arguments. Citing Order II rule 4 of the High Court rules, it was argued that the rules make it mandatory for a party to obtain leave before filing pleadings in the Christmas and Michaelmas vacations. That this action was irregular as it was filed on 15th December, 2017 during Michaelmas.

On the authority of section 4(3) and 26 of the Limitation Act, 1939, it was argued that the plaintiffs' action was statute barred because the cause of action arose in 2005 which was a period of over 12 years when the plaintiff commenced the action.

The 5th defendant filed addition skeleton arguments on 12th January, 2018 reiterating the earlier arguments. In addition, it was submitted that the plaintiff's action is res judicata and an abuse of court process since the issues raised were already litigated and determined on the merits. The cases of **Bank of Zambia v. Jonas Tembo and others**¹ and **B.P. Zambia Plc v. Interland Motors Limited**² were cited as authority.

It was further submitted that the High Court was bound by the principle of *stare decisis* and cannot overturn the decision of the Supreme Court. Thus, the plaintiff's case was untenable. The cases of **Kasote v. the Attorney General**³ and **Abel Banda v. The People**⁴ were relied on to that effect.

It is worth noting that although the 5th defendant's Summons were also intended to strike out the 5th defendant from the proceedings.

However, that application was not argued and I shall not deal with it at this stage.

The 4th defendant's application to set aside originating process and dismiss the plaintiffs' action was filed on 26th January, 2018 pursuant to Order 18/19/1/a/d and Order 2/2 of the Rules of the Supreme Court of England, 1999 edition. It was supported by an Affidavit deposed by Mike Machila, the Executive Officer in the 4th defendant Company. He averred that the 4th defendant is a title holder to S/D "C" of farm 4300, Lusaka as confirmed by exhibit marked "MM3". Further that following the government's decision to compulsorily acquire farm 4300, Lusaka, there has been numerous unsuccessful litigation at the instance of the 1st plaintiff as evidenced by exhibits marked "MM1" and "MM2". The deponent stated that the originating process in this action is a mirror of the 1st plaintiff's earlier actions which emanated from the decision of the Government to compulsorily acquire farm 4300, Lusaka in 1997. Consequently, that this action was commenced after the 12-year statutory limit for actions relating to land.

The 4th defendant's counsel, Mr. Simeza, SC, also filed skeleton arguments to support the application. The gist of his arguments is threefold; First, that the Writ is irregular as it was tested in the name of the former Chief Justice, when it should have been tested in the name of the current Chief Justice; Second, that the Statement of Claim in paragraphs 8 to 38 contains evidence contrary to the rules on pleadings contrary to Order 18/7/9 of the Rules of the Supreme Court which states that material facts must be alleged generally without setting out the subordinate facts which are means of proving the material facts; and thirdly, that this court has the power to set aside or dismiss an action under Order 18/19 of the Rules of the Supreme Court, 1999 edition if it does not disclose a reasonable cause of action, frivolous and vexatious, or otherwise an abuse of process of the court. As regards the third part of his arguments, Mr. Simeza, argued that the plaintiffs' action seeks to overturn the decision of the Supreme Court on grounds that they were obtained fraudulently. He added that this relief sought is untenable as lower courts are bound by decisions of higher courts and only the Supreme Court itself can set aside or overturn its own decision. The cases of

Kasote v. the Attorney General³ and **Kundiona v. the People**⁵ were cited as authority on *stare decisis*.

It was also submitted that the machinery of the court should not be used as a tool to oppress registered owners of property through a multiplicity of processes as that amounts to an abuse of court process. Mr. Simeza relied on the case of **Bank of Zambia v. Tembo and Other**¹ that there should be an end to litigation and argued that the issue of farm 4300, Lusaka has already been settled and is *res judicata*.

It was Mr. Simeza's further contention that this action is statute barred as the action has been brought almost 27 years since the cause of action accrued to the 1st plaintiff, when it should have been brought within 12 years. That in any event, the Lands Tribunal is the appropriate forum to determine the matter as Section 4 (1) of the Lands Tribunal Act vests the jurisdiction to inquire into and determine disputes relating to land under the Lands Act in the Lands Tribunal.

The 2nd defendant advanced a similar application to dismiss the plaintiffs' case but pursuant to Order 14A and Order 33 of the Rules

of the Supreme Court. The application was supported by an affidavit dated 29th January, 2018, sworn by the 2nd defendant's Senior Legal Assistant, Georgina Kunda. The gist of the affidavit is that the plaintiffs' current action amounts to a multiplicity of actions and an abuse of court process because the 1st plaintiff had previously commenced similar actions for similar reliefs.

On 31st January, 2018, the 1st plaintiff, Jonathan Van Blerk, swore and filed an affidavit opposing both applications. He deposed that the matter under cause No. 2010/HP/0749 was never heard on its merits following its dismissal for want of prosecution. He explained that the matter under cause 2016/HP/0607 was discontinued to allow parties time to explore an *ex curia* settlement.

He averred that *res judicata* only applies to matters that have been determined on their merit which has not been done in the current action. He denied that the action was an abuse of process or an afterthought.

He deposed that the limitation period did not begin to run in 2005 but 2006 after the fraudulent activity of the 1st and 2nd defendant was discovered when the 4th defendant purchased a portion of the land in

dispute as evidenced by the certificate of title exhibited as “MM3” in the 4th defendant’s Affidavit in Support. He swore that the Limitation Act, 1939 would only become effective at the end of 2018.

He further deposed that the High Court is the correct forum as the court of first instance to instigate proceedings to set aside a judgment obtained by fraud or mistake.

At the hearing on 29th March 2018, there were no appearances by the 2nd plaintiff and the 3rd defendant.

Mr. Simeza, SC relied on the Affidavit in Support and skeleton arguments filed on 26th January, 2018 which he augmented orally. He contended that the relief that the plaintiff seeks, that is, to have the 4th and 5th defendants’ certificates of title annulled is untenable because that power is a preserve of the Lands Tribunal. He drew the court’s attention to the case of **Polythene Products Zambia Ltd and Cyclone Hardware and Construction Ltd v. AG**⁶ cited in **Professor Lupando Munkonge v. Rosemary Bwalya and commissioner of Lands and Attorney General**⁷.

He added that this action was ill feted from inception and ought to be dismissed with costs especially that the Plaintiff is a busy body who has been litigating for a long time.

Mr. Sikota, SC, on behalf of the 5th Defendant adopted the arguments advanced by Mr. Simeza, SC, and also relied on the 5th defendant's skeleton arguments dated 9th January, 2018 and the additional arguments filed on 12th January, 2018. He went further to argue that the 1st plaintiff's skeleton arguments dated 23rd January 2018 should be totally disregarded as they are based on purported facts not deposed to in any affidavit before the court. He argued that it was improper for the 1st plaintiff to submit on facts that have not been laid before the court. He submitted that the 1st plaintiff cannot run away from his Affidavit which shows that nothing happened on the land for at least 24 years.

The 2nd defendant's counsel, Mrs. Muwowo, relied on the affidavit in support of the application to dismiss the case dated 15th January, 2018. She too adopted the submission by Mr. Simeza, SC proffered on behalf of the 4th defendant that this Court does not have jurisdiction to overturn a decision of the Supreme Court and that the

action is an abuse of court process. According to her, the declaration sought by the 1st plaintiff that the earlier judgments were procured by fraudulent misrepresentation have the same effect of overturning the Supreme Court's decision.

In response, Mr. Eyaa relied on the affidavits in opposition dated 23rd January, 2018 and 31st January, 2018, respectively. He contended that all the issues raised apart from issue of limitation are curable and do not warrant a dismissal of the action. He submitted that the fraud in this action was only discovered when the properties were being leased to the 4th and 5th defendants in 2006 and 2011, respectively, as indicated in the Affidavit.

Mr. Eyaa further submitted that the statement of claim shows that the 1st plaintiff is seeking a declaration that the judgment of the High Court and the Supreme Court were procured by fraudulent misrepresentation which this court has jurisdiction to grant, thus, the argument by Mr. Simeza, SC that the correct forum for the plaintiff's case is the Lands Tribunal is flawed.

In reply, Mr. Simeza argued that the alleged fraud is not against the 4th and 5th defendants but against the 1st and 2nd defendant. Since it

is the 4th and 5th defendants who have raised the issue of the Statute of Limitation, the 1st plaintiff cannot rely on alleged fraud on the 1st and 2nd defendant's part to bar them from raising the defence. The case of **Maheshkumar Somabhai Patel Himasham Patel v Freeze-o-Matic Ltd and Ajoy and Paul**⁸, was called in aid to the effect that fraud is an exception to limitation if perpetrated by the party who is raising the defence. Mr. Simeza, submitted that there was no fraud alleged at the time the properties were being acquired by the 4th and 5th defendants and it has not been pleaded. Further, that the 1st plaintiff was aware of his rights for over 30 years from the time the property was acquired but he only commenced the action in 2017, way out of time.

Mr. Simeza went on to submit that this court lacks jurisdiction to grant the reliefs sought such that the 1st plaintiff's argument that the omissions or irregularities in this matter are curable save for the limitation, is untenable. Further, that apart from the issue relating to pleading evidence, all the other irregularities render the action dismissible.

Mr. Sikota, SC added that the 4th and 5th defendants were *bona fide* purchasers for value and were not party to the alleged fraud. He submitted that in terms of section 26 of the Limitation Act, 1939, the plaintiffs' claims cannot stand because in the event that there was fraud, the 1st plaintiff would have discovered the fraud earlier with reasonable diligence but failed to do so.

I have considered the affidavit evidence, the written and oral arguments by the parties for which I am grateful. The 2nd, 4th and 5th defendants have raised a number of issues all targeting the regularity of the plaintiffs' action. The way I see it, the fate of this case primarily hinges on two main issues, that is, whether this court has jurisdiction to deal with land disputes such as the present case and whether the action is *res judicata* and an abuse of court process. The outcome of these two issues will determine whether it will be necessary for me to delve into the other issues raised.

Although the issue of jurisdiction of this court in land disputes was not raised in the summons, it was raised during the hearing and I will proceed to consider it on the basis of Order 14A/2 of the Rules of the Supreme Court. The issue whether this court has jurisdiction

to entertain disputes relating to land in view of section 4 (1) of the Lands Tribunal Act was definitively determined by the Supreme Court in the case of **Union Gold (Zambia) Ltd v. The Attorney General**⁹ and reaffirmed in **Beatrice Mulamfu v. Kelvin Mukuka Mwamba**¹⁰ and **Yakub Falir Mulla and 2 others v Mohamed Jabi**¹¹. The position is that section 4 of the Lands Tribunal Act does not oust the jurisdiction of the High Court in land disputes as a court of first instance. Therefore, an aggrieved party has a choice of forum between the High Court and the Lands Tribunal. The cases of **Polythene Products Zambia Limited and Cyclone Hardware and Construction Ltd and the Attorney General**⁶ and **Professor Lupando Mukonge and Rosemary Bwalya and 2 Others**⁷ cited by Mr. Simeza, SC do not apply. I, therefore, find that this court has the jurisdiction to deal with this matter.

I now turn to consider the issue of whether this matter is *res judicata*. The principle of *res judicata* is based on the public interest that the court should not be clogged by redeterminations of the same disputes and the private interest that a man should not be vexed twice with same litigation. See: **Hussein Safieddinne v. the Commissioner of**

lands and two others¹². To prove res judicata, one must show that the cause of action was the same and the plaintiff had an opportunity to recover in the first action what he seeks to recover in the second action. See: **Bank of Zambia v. Jonas Tembo and others**¹.

I have carefully perused the record. It is apparent that following the decision of the government to compulsorily acquire Farm 4300 Lusaka, the 1st plaintiff sought legal redress and commenced various actions to recover similar reliefs that he now seeks in this action. The issues raised were determined by the High Court under cause no. 1997/HP/272 and on appeal by the Supreme Court under cause SCZ/8/190/2002. The 1st plaintiff's claims that these judgments were obtained by fraudulent misrepresentation is merely an attempt to circumvent the law and have this court overturn the decision of the Supreme Court. This is unacceptable. The authorities cited by Mr. Simeza, SC on *stare decisis* are apt. Once a matter has been decided by the Supreme Court, unless it is referred back to this court for rehearing, the matter is entombed into permanent dormancy. The issue of whether or not the 1st plaintiff has discovered that there was fraud in the judgments of this Court and the Supreme Court is

inconsequential as this court cannot through this action indirectly reopen the issue of the compulsory acquisition of farm 4300, Lusaka which was already decided by the Supreme Court. I am fortified by the case of **Lapemba Trading Ltd v. Pemba Industrial Credit Co**¹³. Since the issues raised were either litigated or would have been raised in the earlier cases, I find that this matter is *res judicata* and an abuse of court process. I am guided by the principles laid down by the Supreme Court in **Chick Masters Ltd and another v. Investrust Bank Plc**¹⁴ as follows:

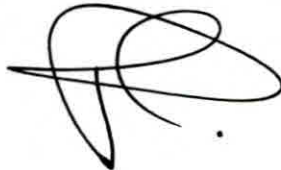
We expressed similar sentiments in BP Zambia Plc v. Interland Motors Limited where we stated as follows: For our part, we are satisfied that, as a general rule, it will be regarded as an abuse of process if the same parties relitigate the same subject matter from one action to another or from judge to judge. This will be so especially when the issues would have become res judicata or when they are issues which should have been resolved once and for all by the first court in conformity with the court's inherent power to prevent abuses of its processes. A party in dispute with another over a particular subject should not be allowed to deploy his grievances piecemeal, in scattered litigation and keep hauling the same opponent over the same matter before various courts. The administration of justice would be brought into disrepute if a party managed to get conflicting decisions or decisions which undermine each other from two or more different judges over the same subject matter.

Having established that this matter is *res judicata* and an abuse of court process, this action is at an end and is accordingly dismissed. I shall not delve into the other issues raised by the parties. Accordingly, the *ex parte* order of interim injunction that was granted on 21st December, 2017 is discharged.

I award costs to the 2nd, 4th and 5th respondents to be taxed failing agreement.

Leave to appeal is granted.

Delivered at Lusaka this 6th day of April, 2018.



MATHEW. L. ZULU
HIGH COURT JUDGE

