

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



2018/HP/0106

**IN THE MATTER OF: ORDER 113 OF THE RULES OF THE SUPREME
COURT OF ENGLAND, 1999 EDITION**

AND

**IN THE MATTER OF: AN APPLICATION FOR SUMMARY POSSESSION OF
PROPERTY No LUS/13598 SITUATE IN THE CITY
AND PROVINCE OF LUSAKA**

BETWEEN:

CHIBWE LWAMBA

PLAINTIFF

AND

**KELVIN MUMBUNA MUTUTWA
AND ALL PERSONS UNKNOWN**

DEFENDANTS

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THE 27th
DAY OF MARCH, 2018**

For the Plaintiff : Mr W. Muhanga, AKM Legal Practitioners

For the Defendants : Mrs F. Muchiya, Barnaby and Chitundu Advocates

R U L I N G

CASES REFERRED TO:

1. *Chikuta V Chipata Rural Council 1974 ZR 241*
2. *Newplast Industries V Attorney General and another 2001 ZR 51*
3. *Liamond Choka V Ivor Chilufya SCZ No of 2002*
4. *Anti Corruption Commission V Barnet Development Corporation Limited 2008 ZR 69.*
5. *Robert Mbonani Simeza V Finance Bank SCZ/18/194/2009*

LEGISLATION REFERRED TO:

1. ***The Rules of the Supreme Court of England, 1999 edition***
2. ***The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia***

This is a ruling on a notice to raise preliminary issues, filed by the Defendants pursuant to Order 33 Rule 3, as read with Order 14A Rule 1 of the Rules of the Supreme Court, 1999 edition.

Counsel relied on the affidavit filed in support of the notice, as well as the skeleton arguments dated 13th February, 2018. She stated that the gist of the application was that Order 113 of the Rules of the Supreme Court of England, 1999, edition as seen from the editorial comments of the Order, and the judgment of the Supreme Court in the case of ***LIAMOND CHOOKA V IVOR CHILUFYA SCZ of 2002*** is limited to squatters, and those without genuine claim of right.

That in this case the Defendant had in the affidavit in support of the notice established that he has a legitimate interest as the Ministry of Lands through the Lusaka City Council had allocated him the subject property. Counsel asked the court to dismiss the action for want of jurisdiction, as it is trite law that the court has no jurisdiction to hear a matter when a wrong mode of commencing the action has been used. Further that it was clear from the affidavit in support of the Originating Summons that the Plaintiff had raised contentious issues, and had even exhibited 'CL5' to his affidavit, which was a letter from the Ministry of Lands indicating that he was issued a certificate of title erroneously and that it was intending to cancel it.

Counsel's submission was that these were serious issues that could not be determined by affidavit evidence, and as such the matter was improperly before the court. It was also submitted that they also challenged the power of attorney granting the Plaintiff authority to take out the action before the court. That this was on the basis that the owner of the property, subject of the matter, was in the United States of America (USA), yet the power of attorney exhibited was

executed here in Zambia, and had not been registered at the Ministry of Lands and at the High Court.

In response, Counsel for the Plaintiff stated that they relied on the affidavit in opposition and skeleton arguments filed on 26th February, 2018. In relation to the submissions on the mode of commencement of the action, Counsel stated that the Plaintiff had done using an Originating Summons claiming summary possession of the land, as provided in Order 113 of the Rules of the Supreme Court of England, 1999 edition, as the Plaintiff was the title holder to the land. That even as acknowledged by the Defendants, the Ministry of Lands intended to cancel that title, but had not done so, and therefore the title was subsisting at law. It was stated that the averments by the Defendants were mere allegations that could not be acted upon the court.

Further, that the preliminary issue could have come by way of affidavit in opposition, as Order 113 of the Rules of the Supreme Court of England, 1999 edition requires a Defendant to show cause why they should not be evicted from the land. That in the affidavit in opposition to the notice, the Plaintiff had shown that the Defendants had never been offered the land. Counsel submitted that when Order 113 of the Rules of the Supreme Court of England, 1999 is invoked, affidavit evidence is what is relied upon to dispose of the matter. That the Defendant had in the notice raised contentious issues, requiring the adducing of viva voce evidence, and if he wished to challenge the certificate of title, he could commence a fresh action.

It was submitted that while the Plaintiff in this matter is Chibwe Lwamba, the deponent of the affidavit in support of the Originating Summons was Mumba Lwamba, who had expressly stated the capacity in which he had sworn the affidavit, and was therefore not a party to the action, as alleged by Counsel for the Defendants. Counsel stated that the Defendants were challenging the power of attorney alleging fraud, and that the Plaintiff had in the skeleton arguments, shown that the onus was on the person alleging fraud to prove it on a higher standard of proof.

Further, that a person residing in the US could return to Zambia and execute a power of attorney, and the Defendants had not shown that the Plaintiff did not return to Zambia and so execute the said power of attorney. It was also stated that there was no evidence on record to show that the power of attorney was executed outside jurisdiction, and therefore the arguments lacked merit. Counsel prayed that the preliminary issues raised be dismissed with costs.

In reply, it was submitted that the Rules of the Supreme Court of England, 1999 edition at page 1792 in the editorial notes clearly states that use of Order 113 of the said rules is discouraged where the Plaintiff is aware of the existence of a real dispute with the occupier of the land, but has no power to prevent use of the land. That the Plaintiff in his own affidavit in support of the Originating Summons had acknowledged his awareness of the Defendants interest in the subject property, and they therefore reiterated that a wrong mode of commencing the action had been used.

It was Counsel's further submission that as rightly submitted by Counsel for the Plaintiff, the certificate of title had not been cancelled, entailing that there was a dispute over the property, and it would therefore not be in the interests of justice that the matter be disposed of on affidavit evidence, as there was need to hear from the Ministry of Lands on why it intended to cancel the Plaintiff's certificate of title. That looking at the facts surrounding this case mere possession of the certificate of title did not warrant commencing the action under Order 113 of the Rules of the Supreme Court, 1999 edition.

On the deposing of the affidavit in support of the Originating Summons, Counsel stated that it is a clear rule of procedure that a person who is not a party to an action cannot swear an affidavit or on behalf of a party, except with that party's authority. That in this case the deponent of the affidavit had not shown that he had such authority, and in any event the power of attorney before the court left much to be desired. Counsel reiterated the prayer that the action be dismissed with costs.

I have considered the application. The preliminary issues raised were;

- i. *Whether or not it is tenable at law for this action to stand on account of the fact that Order 113 of the Rules of the Supreme Court, 1999 edition which provides for summary possession of land is restricted to squatters, whereas in the present case the Defendant is not a squatter, as he is the bona fide owner of the property known as LUS/ 13598, Lusaka.*
- ii. *Whether or not the Plaintiff can commence an action under Order 113 of the Rules of the Supreme Court of England, 1999 edition when he is aware of the real issues in dispute regarding the subject property.*
- iii. *Whether or not the Attorney to the Plaintiff, one Mumba Chilambwe Lwamba can depose to the affidavit in support of the Originating Summons when he is not a party to the proceedings.*
- iv. *Whether or not the Attorney to the Plaintiff has locus standi to prosecute this action without evidence of the power of attorney from the Plaintiff giving him authority to prosecute the matter on behalf of the Plaintiff.*
- v. *Whether or not this matter can be disposed of by affidavit evidence in view of the contentious issues raised by the Plaintiff in paragraph 12 of the affidavit in support of the Originating Summons regarding the intention of the Ministry of Lands to cancel the certificate of title.*
- vi. *Whether or not this honourable court has jurisdiction to hear and determine a matter where the wrong mode of commencement is used.*
- vii. *Whether or not this matter should be dismissed for irregularity and abuse of court process.*

Order 33 Rule 3 of the Rules of the Supreme Court of England, 1999, edition provides that;

“The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give

directions as to the manner in which the question or issue shall be stated.”

Order 14A Rule 1 of the said Rules of the Supreme Court on the other hand states that;

“(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have either -

(a) had an opportunity of being heard on the question, or

(b) consented to an order or judgment on such determination.”

Under Order 33 Rule 1 the court is empowered to determine any preliminary issue whether raised by the pleadings or not, and Order 14A also empowers the court to hear any preliminary application relating to the construction of any question of law or the construction of any document, which it considers suitable for determination without a full trial of the action, and which when determined will dispose of a matter, subject only to an appeal.

The Defendants have raised a number of preliminary issues and in determining the issues raised in the notice I will consider issues (i), (ii), (v), (vi), and (vii)

together as they are related, and issues (iii), (iv), together as they are also related. With regard to the first issues the question is whether it was competent for the Plaintiff to commence the action using Order 113 of the Rules of the Supreme Court of England, 1999 edition.

The Defendants in the skeleton arguments referred to Order 113 of the Rules of the Supreme Court of England, 1999 edition which states that;

“Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.”

They argued that at page 1792 of the editorial comments of Order 113 of the Rules of the Supreme Court of England, 1999 edition, it states that the procedure is restricted to situations where the land is occupied by persons who have entered or remained in possession of land without a licence, or consent of the person claiming possession. It does not extend to persons holding over after the termination of a lease. That where a person in possession of the land is a tenant who has a legitimate interest in the land, the Order cannot be invoked to commence proceedings.

It was further argued that the Defendant had shown in the affidavit in support of the notice that the property was repossessed by the Ministry of Lands, and he was offered the same, and was therefore not a squatter or trespasser on the subject land. That he could not be summarily evicted from the land and the case of ***LIAMOND CHOKA V IVOR CHILUFYA SCZ NO of 2002*** was relied on as authority.

The Plaintiff in the skeleton arguments however argued that the Defendant was never offered the land in issue, but made an application to be offered the said

land after the Commissioner of Lands issued a notice of intention to re-enter the said land. That the Defendant went ahead to develop the said property. It was the Plaintiff's argument that for one to be considered the owner of the property, they should have a certificate of title as provided in Section 33 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia, which the Plaintiff had.

That unless the Defendants could show that the said certificate of title was obtained by fraud, then in line with Section 134 of the said Lands and Deeds Registry Act, it could be cancelled on the grounds of being obtained by fraud or for reasons of impropriety, as held in the case of **ANTI CORRUPTION COMMISSION V BARNET DEVELOPMENT CORPORATION LIMITED 2008 ZR 69**.

In this case the Plaintiff had commenced the action pursuant to Order 113 of the Rules of the Supreme Court of England, 1999 edition as he is in possession of a certificate of title for the property. The Defendant on the other hand claimed that after a notice to re-enter the Plaintiff's property was issued, he was offered the same through the Lusaka City Council. Order 113 of the Rules of the Supreme Court 1999 edition is used where there are squatters or persons who have entered or remained on a property without the authority of the owner. In terms of the scope of the Order, Order 113/8/2 states that;

"The application of this Order is narrowly confined to the particular circumstances described in r.1, i.e. to the claim for possession of land which is occupied solely by a person or persons who entered into or remain in occupation without the licence or consent of the person in possession or of any predecessor of his. The Court has no discretion to prevent the use of this summary procedure where the circumstances are such as to bring them within its terms, e.g. against a person who has held over after his licence to occupy has terminated (Greater London Council v. Jenkins [1975] 1 W.L.R. 155; [1975] 1 All E.R. 354) but of course the

Order will not apply before the licence has expired. The Order applies to unlawful sub-tenants.

This order does not extend to the claim for possession of land against a tenant holding over after the termination of the tenancy.

Further Order 113/8/3 states that;

“Where the existence of a serious dispute is apparent to a plaintiff he should not use this procedure”.

In this matter it is clear from the affidavits on record that there is a dispute as to whether the Plaintiffs land was re-entered, and therefore going by Order 113/8/3 of the Rules of the Supreme Court seen above, the use of Order 113 in determining this matter is not appropriate. The question that arises next is what is the fate of the matter? The Defendant in the skeleton arguments referred to the case of ***CHIKUTA V CHIPATA RURAL COUNCIL 1974 ZR 241*** which they argued discouraged the commencement of actions involving contentious matters using Originating Summons, as well as the case of ***NEWPLAST INDUSTRIES V ATTORNEY GENERAL AND ANOTHER 2001 ZR 51***, where it was held that the court has no jurisdiction to make declarations where a wrong mode of commencement is used.

In the ***NEWPLAST INDUSTRIES V ATTORNEY GENERAL AND ANOTHER 2001 ZR 51*** case, the court stated that ***“We are satisfied that the practice and procedure in the High Court is laid down in the Lands and Deeds Registry Act. The English White Book could only be resorted to if the Act was silent or not fully comprehensive. We therefore hold that this matter having been brought to the High Court by way of Judicial Review, when it should have been commenced by the way of an appeal, the court had no jurisdiction to make the reliefs sought. This was the stand taken by this court in Chikuta v Chipata Rural Council where we said that there is no case in the High Court where there is a choice between commencing***

an action by a writ of summons. We held in that case that where any matter is brought to the High Court by means of an originating summons when it should have been commenced by a writ, the court has no jurisdiction to make any declaration.”

Order 113/8/4 of the Rules of the Supreme Court seen above allows a Plaintiff to use that Order when commencing proceedings as provided in Rule 1 of that Order, but discourages use of that Order when there is a serious dispute. Therefore in this matter, while the Plaintiff could have used Order 113 to commence the proceedings as he has a certificate of title to the property, there is a dispute over the same, and therefore the use of the Order was not appropriate, as there are contentious issues, which can only be resolved by the adducing of viva voce evidence. Thus it cannot be said that the Plaintiff per se invoked a wrong method of commencement, which would consequently mean that this court has got no jurisdiction to make any declarations on the same, as the presence of the contentious matters renders the mode of commencement unsuitable, due to the need to adduce viva voce evidence.

It is different from the **NEWPLAST** case above where instead of an appeal as a mode of commencement being used, judicial review was employed. Order 113/8/14 states that ***“Moreover, if the Court should hold that there is some issue or question that requires to be tried, or that for some other reason there ought to be a trial it may give directions as to the further conduct of the proceedings, or may order the proceedings to continue as if begun by writ.”*** As there are contentious issues in this matter, I deem the matter as if it had been commenced by writ of summons, and accordingly order that the Plaintiff shall within 14 days from today file a writ of summons and statement of claim, failure to which the matter shall be set aside for irregularity.

The other issue relates to whether the attorney for the Plaintiff Mumba Lwamba can depose to the affidavit in support of the Originating Summons when he is not a party to the proceedings, and whether he has the authority of

the Plaintiff to do so. The matter having been deemed to have been commenced by Writ of Summons entails that the affidavit in support of the Originating Summons will no longer be considered in this matter. Suffice to state that in the case of **ROBERT MBONANI SIMEZA V FINANCE BANK SCZ/18/194/2009** it was held that ***“at law anybody can be a witness for a company or indeed any other litigant. He can be such a witness either as a deponent of an affidavit or in oral form. What matters mostly is that he should personal knowledge of the facts he is testifying on.”***

Costs shall be in the cause. Leave to appeal is granted.

DATED THE 27th DAY OF MARCH, 2018

kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**