IN THE HIGH COURT FOR ZAMBIA **2016/HP/2418**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

BLACKWELL SIMBEYE **PLAINTIFF**

VS

ALLAN NJOBVU **1ST DEFENDANT**

UNKNOWN OCCUPIERS **2ND DEFENDANT**

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Plaintiff: *Mr. G. Tembo of Garius and Doris Legal Practitioners.*

For the Defendants: *Mrs. S. Chisanga of Messrs K.M.G.Chisanga Advocates.*

RULING

Cases Referred to:

1. *Bank of Zambia v Tembo and Others (2002) ZR 105*

2. *Smith v Clay (1767) 3. Bro. Ch. Ca. 639*
3. *Stella Upton v William Derek Walker (1971) ZR192*
4. *Million Hamun'gande and Others v William Mulopa Appeal No. 84/2019*
5. *Henderson v. Henderson (1843- 1860) ALL ER 378*

This was the Defendants' application to raise preliminary issues on points of law pursuant to Order 14A as read together with Order 33(3) of the Rules of the Supreme Court of England for the determination of the following questions of law:

1. Whether the principle of res judicata applies to these proceedings in view of the Plaintiff's claim that judgment was obtained against the 1st Defendant under cause 1990/HP/808.
2. In the alternative, whether the Plaintiff's claim is statute barred under the provisions of section 2(4) and 4(3) of the Limitation Act 1939.

The application was supported by an affidavit and skeleton arguments. The affidavit in support was deposed to by Blackwell Simbeye, the 1st Defendant herein. He deposed that the Plaintiff's claim was founded on a transaction that occurred in 1982 and an action that commenced in 1990. He averred that the Plaintiff had stated that he commenced an action that was commenced in

1990 under cause 1990/HP/808 and judgment was obtained against the deponent in November, 1990. The Plaintiff realized that the Court record and all his personal records pertaining to the above cause went missing in 1990 and that he had been making follow ups but to no avail.

He stated that despite the Plaintiff's realization in 1990, he had demonstrated that in a bid to locate the missing court record, he on 22nd June, 2016 wrote to the Honorable Chief Justice concerning the missing court record. He produced a copy of the letter making such request on the missing court record which was marked **"AN1"**.

He further averred that regardless of this letter, this action should have been commenced twelve years from the time the cause of action accrued. He stated that the cause of action arose immediately the Plaintiff realized the court record was missing in 1990 but this was done only in 2016 which was 26 years after the cause of action accrued. In view of this, it was averred that the Plaintiff had no claim of right to the property and even if he did, his claim was statute barred. The entire claim was therefore statute barred.

In Counsel's skeleton arguments it was submitted that in dealing with the issue of res judicata the Supreme Court in the case of **Bank of Zambia v Tembo and Others (2002) ZR 105** held that:

> *"In order that a defence of res judicata may succeed, it is necessary to show that the cause of action was the same, but also that the Plaintiff had an opportunity of recovering but for his fault have recovered in the first action, that which he seeks to recover in the second. A plea of res judicata must show either an actual merger or that the same point had been actually decided between the same parties"*

Counsel submitted that the defence of re judicata must succeed on the ground that the Plaintiff's claim is the same as the claim under the cause number 1990/HP/808 where he sued the 1st Defendant for inter alia the possession of Plot Number 601/08, the subject matter of this action. Judgment was rendered in favour of the Plaintiff. She argued that this is an action that falls within the ambit of the principle of res judicata to the protection of the Defendants and this Court should treat it as such.

With respect to the action being statute barred it was submitted that the Plaintiff's entire action is premised on a transaction that took place in 1982 and subsequently an action that was commenced in 1990. The Plaintiff contends that all records pertaining to cause number 1990/HP/808 have since gone missing and he alleges that he has been making follow ups from as far back as 1990. It was contended that curiously, neither the lawyer on record at the time nor the Plaintiff have a copy of the judgment of the Court.

It was submitted that the only evidence rendered by the Plaintiff of this alleged lost court record was a letter to the Honourable Chief Justice dated 22nd June, 2016 which was written twenty six years after the said judgment was obtained. She submitted that even if the said record could be retrieved at the time the formal request was made, it would still be impossible to enforce the said judgment on the premise that it is was statute barred.

She referred to section 4(3) of the Limitation Act 1939 which provides as follows:

> *"no action shall be brought by any person to recover any land after the expiration of twelve(12) years from the date on which the right of action accrued to him."*

It was argued that this action was commenced in 2016 by way of Originating summons. He justified his delay in commencing the action by exhibiting a letter addressed to the Chief Justice. It was Counsel's submission that it is trite law that the Plaintiff failed to commence proceedings within the time allowed by law. The Defendants contend that they have a defence that the action was commenced out to time which time limitation is prescribed by statute.

It was contended that the Plaintiff's claim qualified to be considered as a stale demand especially that the action was commenced twenty six years after the cause of action accrued. She argued that the Plaintiff sat on his rights and it was unreasonable for him to by failing to commence the action and continued to make follow up for over twenty years. Counsel referred to the learned authors of Stuart Sime: A Practical Approach to Civil Procedure, 14th Edition where they summed up the purpose of the limitation period as follows:

> *"Expiry of a limitation period provides the defendant with a complete defence to a claim. Lord Griffiths in Donovan v Gwentoys said "the primary purpose of a limitation period is to protect the defendant from the injustice of having to*

face a stale claim, that is a claim which he never expected to deal."If a claim is brought a long time after the event in question, the likelihood is that the evidence which may have been available earlier may have been lost and the memories of witnesses who may still be available will inevitably have faded or become confused. Further, it is contrary to general policy to keep people perpetually at risk."

It was contended that twenty six years was too long a time for a Court of equity to assist because the Plaintiff failed to exercise reasonable diligence in pursing his claim and cannot be permitted to suddenly wake up and invoke it when the Court is bound by statutory provisions.

Counsel called in aid the case of **Smith v Clay (1767) 3. Bro. Ch. Ca. 639** where it was held that:

"the court of equity which is never active in relief against conscious, or public convenience has always refused its aid to stale demands where the party has slept upon his right, and acquiesced from a great length of time. Nothing can call forth this court into activity but conscience, a good faith and reasonable diligence, where

these are wanting, the court is passive and does nothing."

It was submitted that the Court need not go to the merits of the case because the Statute of Limitation is not concerned with merits. Counsel cited the case **Stella Upton v William Derek Walker (1971) ZR192** where it was stated that:

"But the Statute of Limitation is not concern with merits. Once the axe falls, it falls and a defendant who is fortunate enough to have acquired the benefit of the Statute of Limitation is entitled, of course, to insist on his rights."

It was submitted that the Defendant insists on their rights and craved the indulgence of the court to heed to the statutory provisions of the Limitation Act.

In opposing the application the Plaintiff filed in an affidavit in opposition deposed to by himself. He deposed that he commenced an action against the Defendants in 1990 under cause number 1990/HP/808 and judgment was entered in his favour which is not disputed by the 1st Defendant. He stated that following the judgment he engaged the office of the Sheriff

through his advocates at the time and judgment was duly executed and possession was handed to him.

He produced a Writ of Execution marked **"BS1"**. He averred that following the execution of the Writ of Possession, the Defendant re-entered his premises without his authority. He stated that it was not disputed that he tried to locate the file at Court through his advocates at the time and all efforts were in vain. This prompted him to officially write to the Chief Justice on 22nd June, 2016 and a copy of this letter is produced marked**"BS2"**. The Chief Registrar acknowledged existence of cause number 1990/HP/808 however stated in his letter dated 19th August, 2016 but that they were unable to find this record. A copy of the letter was produced and marked**"BS3".**

He averred that he commenced the action within the statutory period because the Plaintiff's limitation period will not start to run unless and until the court record of cause 1990/HP/808 is located.

In the Plaintiff's skeleton arguments in opposition to the application it was submitted that the Defendants could not rely of Order14A to raise a preliminary issue as the Defendants had not settled a defence in the matter yet. Counsel referred to the

learned author **Dr. P. Matibini in his text Zambian Civil Procedure: Commentary and Cases (2017) Volume at page 474** which states as follows:

" The requirement for employing the procedure under Order 14A are therefore as follows:

a) *A Defendant must have given notice of intention to defend*

b) *The question of law or construction is suitable for determination without a full trial of the action.*

c) *Such determination will be final as to the entire cause or matter or any claim issue therein; and*

d) *The parties had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination. After listing the preceding requirements in Mukelabai v Nalwamba and Others (2013) Vo. 2 ZR 312, 316-317, Chali J, made the following observations in relation with the same as follows:*

"It appears to me that the giving of notice of intention to defend is a prerequisite to making an application under Order 14A whether by summons, motion or orally at the hearing of a cause or matter or of an interlocutory."

Further, Chali J, pointed out:

"Under Order 11, rules 1 and 2 of the High Court Rules, Chapter 27 of the Laws of Zambia, the notice of intention to defend an action commenced by writ of summon is by filling a Memorandum of Appearance in the prescribed form which ought to be accompanied by a defence."

It was submitted that the Defendants herein could not rely on the provision of Order 14A and as such Notice of Motion must be considered without the said provision.

With respect to the argument, the matter is res judicata, it was Counsel's submission that in the case of ***Bank of Zambia v Tembo*** and Other referred to by the Defendants the Supreme Court referred to paragraph 1254 of Halsbury Laws of England Volume 16 which states that:

"In order that a defence of res judicata may succeed it is necessary to show that not only the cause of action was the same, but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of res judicata must show

either an actual merger, or that the same point had been actually decided between the same parties. Where the former judgment has been for the defendant, the conditions necessary to conclude the plaintiff are not less stringent. It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed."

Counsel submitted that before a matter can be found to be res judicata, the above authority prescribed a two-test question as follows:

i) Whether the cause of action in the earlier matter is similar to the current matter commenced by the Plaintiff; and

ii) Whether the Plaintiff could have recovered under the earlier matter but for their negligence, did not.

He referred to the learned author Dr. P. Matibini referred to earlier on the definition of a cause of action. It was contended that the cause of action in the present matter and the 1990 matter are not the same. He argued that this was because in the

1990 matter he was claiming ownership of the land which the Defendants had occupied as they did not want to yield vacant possession despite being demanded by the Plaintiff. Following the 1990 matter, the Plaintiff was granted possession by the Court Judgment which he obtained through the Sheriff thereby concluding the said cause.

It was his argument that conversely, the cause in issue arose as the Defendants returned on the premises which were duly handed to the Plaintiff. It was his submission that the principle of res judicata did not apply because the cause of action in the matter was different from the 1990 dispute and the said disputes were at different time even though in both causes being the recovery of the same land by the Plaintiff against the same Defendants.

He further contended that the Plaintiff under the 1990 matter did recover possession execution of the same was done as shown in exhibit *"BS1"*.

With respect to the argument that the matter is statute barred, it was submitted that the reliance by the Defendants on sections 2(4) and 4(3)was misconceived. It was submitted that these

provisions could only be relied on if judgment was entered against a party but not executed after a period of 12 years.

It was submitted that in the case in casu the right of action did not start counting and will only arise when the 1990 matter is found. It was his contention that this was because the action by the Plaintiff was one that was enforceable by a Writ of Restitution. Counsel again referred to the Learned Author Dr. P. Matibini at page 1411 where he comments as follows:

> *"The discuss regarding a recalcitrant defendant does not however, end here. It sometimes happens that a person ejected when a writ is enforced, regains entry at some later date. Such a person may, (instead of resort to contempt proceeding) be removed a second time under a writ of restitution. The application itself is made exparte. The Supporting affidavit deposes to the details of the wrong entry. The Court in turn looks for plain and sufficient nexus between the original recovery of possession, and the need to effect further recovery of the same. Resort to the writ of restitution is preferred to contempt proceedings"*

Counsel submitted that once a party had obtained judgment and enforced the same, if the Defendant returns to the premises, the Plaintiff's recourse lies in issuance of the Writ in aid of another Writ in the same cause. He argued that in order to obtain the aiding writ, leave of Court must be obtained in line with Order 46 Rule 3(2) of the White book.

It was further submitted that in the facts in case in casu demonstrates that the 1990 matter is an existent cause. It was not disputed that the 1990 matter record had gone missing and this was confirmed by the Acting Chief Registrar in his letter dated 19th August, 2016. It was Counsel's contention that the Plaintiff could not proceed to enforce this right under that cause. It was his submission that the cause of action for obtaining possession would arise when the 1990 matter was found.

It was submitted that the Plaintiff was in a position where neither he nor the judiciary had been unable to locate the 1990 matter. He argued that the Plaintiff had now taken step and issued the within process in order to not be denied the fruits of his judgment indefinitely by the Defendants who have obtained a purported title for the premises on which they were evicted. Counsel referred the Court to Section 13 of the High Court Act which provides that

the Court Administers law and equity concurrently. He argued that in the present case, equity must come to the aid of a Plaintiff who is currently being deprived of his premises by the Defendants because the Court record could not be located to enable him seek leave to issue subsequent writs of execution. He called in aid the maxim *"equity will not suffer a wrong to be without a remedy"* which must be invoked by this Court.

It was further submitted that the vanishing of the 1990 matter which is a prerequisite for the grant of further possession to the Plaintiff hindered him from enjoying the immediate fruits there under and as such the statute of limitation could not arise until the said record is found.

Counsel further argued that the Plaintiff's case fell under the exceptions provided for under section 22(c) of the Limitation Act. He argued that the disappearance of the court record of the 1990 matter amounted to a disability on the Plaintiff's part which made him unable to prosecute the matter. He referred to the definition of disability under the Black's Law dictionary which is defined as:

"inability to perform some function ;especially the inability of one person to alter a given relation with another person."

It was Counsel's contention that because the absence of the court record amounted to a disability which rendered the Plaintiff incapable of prosecuting his case, he fell within the exception of commencing the matter within 30 years where there is a disability.

He finally argued that this matter could not be justly concluded without full trial being conducted.

I have carefully considered the arguments by both parties. The Defendant has raised two key issues in its preliminary. The first issue is that the matter before me is ***res judicata*** and secondly that the matter is statute barred. The Defendants' main argument for this application is that the case in casu was fully determined under cause number 1990/HP/808 which was on the same facts, the same parties and the same subject matter. It was further argued that the matter was concluded in 1990 and the Plaintiff now alleged that the Defendant returned to the same piece of land shortly after the Courts judgment in 1990. Counsel argued

that this current cause of action accrued shortly after the `1990 judgment and therefore was about 26 years old. According to Counsel, this matter was statute barred because it was more than the 12 years limitation that is provided by the statute of Limitation.

The Plaintiff on the other hand contends that the Defendant had not filed in its intention to defend. Therefore, the application to raise the preliminary issue was premature. It was further argued that the matter was not ***res judicata*** because the issues arising were not the same and that that the matter was not statute barred because the statute of limitation would only arise once the missing court record is found.

A quick perusal of the record shows that the matter was instituted by way of Originating Summons pursuant to Order 113 Rule(1) of the Rules of the Supreme Court of England. This application was supported by an affidavit deposed to by the Plaintiff filed on 13th December, 2016. The Defendant filed in an affidavit in opposition on 27th December, 2016. The matter was later recommenced by way of writ of summons by the Plaintiff and a Memorandum of Appearance and defence was filed into Court on 25th October, 2018. By a Consent of Order dated 31st

December, 2018 it was agreed that the said defence would not be expunged from the record.

In view of the quick review of the record, I do not agree with the argument by Counsel for the Plaintiff that this application is incompetently before me because there was no intention to defend on record. The record clearly shows a defence.

I will now proceed to consider the application before me. With respect to the argument that this matter is res judicata because the matter under cause number HP/1990/808 was with respect to the same subject matter, the same parties and on the same facts. The Plaintiff in opposition to the notice to raise preliminary issues argued that the two matters were completely different. It was contended in the 1990 matter he was claiming ownership of the property occupied by the Defendants and he was granted possession. In the case in casu, the Plaintiff states that the issue arose when the Defendants returned to the property even after judgment was entered in his favour. It was further contended that the Plaintiff did not recover possession and execution of the same piece of land.

With respect to whether the matter is ***res judicata***, I have carefully considered the statement of claim before me and the Plaintiff is claiming the following:

1. For an Order that the Plaintiff is the bona fide legal owner of the demised premises known as Plot No. 601/08 Chawama Improvement Area Lusaka
2. An Order for the immediate vacant possession of the demised property known as Plot No. 601/08 Chawama Improvement Area Lusaka
3. An Order restraining the 1st and 2nd Defendants from interfering or disturbing the Plaintiffs peaceful and quiet enjoyment of the demised premises known as Plot No. 601/08 Chawama Improvement Area Lusaka.
4. Damages for inconvenience and loss of the use of the said property.

The Plaintiff has confirmed that the matter before the court in the 1990 cause was pertaining to ownership of the land in question and vacant possession was given to him. He has also exhibited the writ of execution for the said property. The rules on ***res judicata*** have been well established in the case of ***Bank Of Zambia v Tembo*** and others cited by the Defendants.

The Court of Appeal in the case of ***Million Hamun'gande and Others v William Mulopa Appeal No. 84/2019 delivered on 18th February, 2020*** referred to Halsbury's Laws of England, 4th Edition, Vol. 16, in paragraph 1528 which states that:

> *"in order that a defence of* res judicata *may succeed, it is necessary to show that the cause of action was the same, and also that the plaintiff had an opportunity of recovering but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of res judicata must show either an actual merger or that the same point had been actually decided between the same parties"*

In view of this the Court of Appeal had this to say:

> *"The doctrine of res judicata arises in circumstances where a court is faced with a second action similar to an earlier action concluded by a Judgment of the court. The purpose of the principle of res judicata is to support the good administration of justice in the interests of both the public and the litigants, by preventing abusive and duplicative litigation."*

I also call in aid the celebrated case of ***Henderson v. Henderson (1843- 1860) ALL ER 378*** where it was held that:

> *"where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole cases, and will not, except in special circumstances, permit the same parties to open the same subject of litigation, in respect of the matter which might have been brought forward as part of the subject in content, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies except, in special cases, not only to points on which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."*

While it is has not been disputed that the Court record for the 1990 matter went missing, it is evident that the subject matter and the parties are the same. The Plaintiff has also confirmed that in the 1990 matter he sought for the determination that he was the owner of the land in issue and sought for vacant possession. This is exactly the Plaintiff's claim in the present matter before me. The record shows that judgment was duly executed in favour of the Plaintiff and vacant possession was handed to him. I have no doubt in my mind that this matter was already duly decided upon under cause number 1990/HP/808.I therefore agree with Counsel for the Defendant's arguments that this matter is res judicata and I have no jurisdiction to re-hear a matter on the same facts, the same parties and the same subject matter. As far as this Court is concerned there is already a judgment of this Court on this matter which decided that the Plaintiff is the owner of Plot No. 601/08 Chawama and vacant possession was duly given to him.

On this aspect alone the application by the Defendants succeeds. Even having looked at the arguments by the Plaintiff pertaining to the Statute of Limitation, Section 22 of that Act does not apply

to the Plaintiff's case because the issue of disability referred to there under do not apply to the Plaintiff in this case.

I therefore find that the Defendants application succeeds because the matter in question is re judicata having been fully decided by this Court in 1990 in favour of the Plaintiff. The main matter is therefore terminated pursuant to Order 14A of the White book. I order that cost follow the event.

Leave to appeal is granted

Dated the 5th **day of** August **2020**

MWILA CHITABO, S.C.

JUDGE