

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPLE REGISTRY
HOLDEN AT LUSAKA
(Civil jurisdiction)**



BETWEEN:

TESNO GENERAL DEALERS LIMITED

PLAINTIFF

AND

**LUSAKA CITY COUNCIL
ATTORNEY GENERAL
TRADE KINGS(Z) LIMITED**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT**

Before the Hon. Mr. Justice M.D. Bowa in Chambers on 9th of April 2020.

For the Plaintiff: Mr. A Kasolo AKM Legal Practitioners

For the 1st Defendant Mrs. Y Muwowo In house Counsel

For the 2nd Defendant Miss J Mazubanyika Assistant Senior State Advocate

For the 3rd Defendant Miss S Kalima of J & M advocates

RULING

Cases referred to:

1. *Chikuta vs. Chipata Rural Council (1974) ZR. 242*
2. *Kafue House Safaris Limited and Zambia Wildlife Society and Attorney General Appeal no 13/2012*
3. *New Plast Industries Limited v Commissioner of Lands (2001) ZR. 51*
4. *Nigel Kalonde Mutuna & another v Attorney General 2013/HP /0674.*

5. *Corpus Legal Practitioners vs. Mwanadani Holdings (SCZ) judgment No. 50 of 2014*

6. *Teklemicael Mengstab & Semhar Transport & Mechanical Limited v Ubuchinga Investments Limited SCZ Appeal No. 218 of 2013*

Legislation referred to

1. *The Lands and Deeds Registry Act Cap 185 Of the Laws of Zambia Section 11(1) and (2)*

Other works referred to

1. *RSC of England 1999 edition order 14 A (1) & (2), Order*

This is the 1st Defendant's application raising issues in Limine pursuant to Order 14 A and order 33 of the Rules of the Supreme Court.

The notice filed on 5th January 2018 raised the following issues:

1. *That this action is improperly before this court VIZ, that the Registrar's exercise of lawful authority, pursuant to section 11 of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia, cannot be impugned under this writ of summons rendering the said writ irregular.*
2. *That the other reliefs sought are dependent on the Registrar's acts being impugned hence they are irregularly before this court at this time.*

3. *That this action must therefore be wholly dismissed with costs.*

The affidavit in support of the notice of intention to raise issues in limine was filed on 8th June 2018 and sworn by Georgina Kunda a Senior Legal Assistant in the 1st Defendant employ. She deposed that the Plaintiff commenced legal proceedings against the 1st Defendant on 14th August 2017 by way of writ of summons and affidavit statement of claim seeking amongst other things.

1. A declaration that they are the rightful and legal owner of stand N. Lus/12923
2. An order to reverse the cancellation of the certificate of title relating to stand No. Lus/12923
3. An order to rectify the lands Register.

It was contended the said writ of summons and statement of claim are irregular as the Registrar's exercise of lawful authority pursuant to section 11 of the Lands and Deeds Registry Act cannot be impugned under this mode of commencement. That by virtue of the said Act, where a person alleges an error or omission has been made in the Deeds Register, the aggrieved party should first notify

the Registrar of the same and if satisfied with the complaint, the Registrar may proceed to correct, such error or omissions.

That in the event that the aggrieved party is dissatisfied with the decision of the Registrar, he may proceed to apply to court for an order that the register be rectified to correct the anomaly. It was averred further that the other reliefs sought in the originating process are dependent on the Registrars acts which can only be impugned under the correct mode of commencement. The Deponent thus believed that the court has no jurisdiction to hear the matter calling for the dismissal of the matter.

The 1st Defendant also filed skeleton arguments in support dated 08th June 2018. It was submitted that this court has no jurisdiction to hear this matter as guided by the Supreme Court in the case **Chikuta vs Chipata Rural Council**¹ in which it was held that non-compliance with order 6 rule 1 deprives the court of jurisdiction to entertain any application wrongly commenced. Further reliance was placed on **Kafue House Safaris Limited and Zambia Wildlife Society and Attorney General**² and **New Plast Industries Limited v Commissioner of Lands**³ in emphasizing the

proposition that the mode of commencement of any action is generally provided by the relevant statute. In such cases a party has no option but to abide by the procedure prescribed. It was submitted that the effect of adopting the wrong procedure for commencement is that the trial judge has no jurisdiction to hear the matter.

In this case, the 1st Defendant contends that commencing the present action by writ and statement of claim is misplaced and misconceived as the Registrar's exercise of lawful authority pursuant to section 11 of the Lands and Deeds Registry Act cannot be impugned by writ as the claim by the Plaintiff is challenging an administrative act committed by public authority. I was referred to the case of **Nigel Kalonde Mutuna & another v Attorney General**⁴ in which the court adopted the passage in matter of Council of Civil Service Unions and others vs. Minister for the Civil Service in which it was held that:

"An aggrieved person is entitled to invoke Judicial Review if he showed that a decision of a public authority affected him of some benefit or advantage which in the past he has been permitted to enjoy and which he could legitimately expect to be permitted to continue to enjoy either

until he was given reasons for its withdrawal and the opportunity to comment on these reasons or because he had an assurance that it would not be withdrawn before he had been given the opportunity of making representation against the withdrawal.”

It was submitted that by virtue of the above, the lawfulness or legality of an administrative decision or act committed by public body cannot be challenged by way of a writ as there is a specific mechanism put in place to address such matters. In addition, that section 11 (1) of the Lands and Deeds Registry Act provides for the procedure to be followed in the case that an error or omission has been made in the Deeds Register. The section provides:

“Where any person alleges that any error or omission has been made in a Register or that any entry or omission therein has been made or procured by fraud or mistake, the Registrar shall, if he shall consider such allegation satisfactory proceed, correct such error, omission of entry as aforesaid.”

That pursuant to the above, the aggrieved party should first notify the Registrar of the same and if satisfied the Registrar is then prompted to correct the error or omission. However that in case the aggrieved party is dissatisfied with the decision of the Registrar, he

may proceed to apply to the court for on the order that the register may be rectified to correct the anomaly as provided for in section 11(2) of the Act which reads:

“any person aggrieved by any entry or omission made in a register after application to the Registrar under subsection (1) may apply to the court for an order that the register may be rectified and the court may either refuse such an application with or without costs to be paid by the Applicant or it may, if satisfied of the justice of the case, make an order for the rectification of the register in such manner as it shall direct.”

The 1st Defendant concludes that the question that arises for the aggrieved party is how to challenge the decision of Registrar and opines that this should have been by way of Judicial Review as provided by Order 53 of the rules of the Supreme Court. In effect that the reliefs sought are dependent on the Registrar’s acts which can only be challenged under the correct mode being Judicial Review.

The 2nd Defendant supported the notice to raise preliminary issue by an affidavit in support dated 8th of August 2018 and skeleton arguments of even date. The Attorney General also questioned the mode of commencement of this action and emphasized that by

section 87 of the Lands and Deeds Registry Act a person aggrieved with the decision of the Registrar is required to proceed by way of an appeal to the court or the lands tribunal. Reliance was also placed on the Chikuta vs. Chipata Rural Council and New Plast Industries vs. Commissioner of Lands(Supra) holdings to argue that having failed to follow the statutory prescription on commencement, this court has no jurisdiction to grant the remedies sought.

The 3rd Defendant supported the notice and filed arguments in support dated 19th October 2018. They more or less repeated the same argument advanced by the 1st Defendant and referred me to numerous authorities all speaking to the want of jurisdiction of the High Court granted the seeming failure by the Plaintiff to adhere to the rules on the mode of commencement. The 3rd Defendant's point of emphasis was that the Plaintiff's claim is prematurely before the court by virtue of the its failure to exhaust all available avenues for enforcing any alleged rights prior to approaching the court.

The Plaintiff filed an affidavit in opposition dated 12th June 2018 sworn by Chilufya Bweupe counsel in the employ of the Plaintiff's advocates. She deposed that the commencement of this matter by

the Plaintiff was a result of the cancellation of its Certificate of Title relating to stand No. Lus/12923. That cancellation of the certificate of title is not provided for under section 11 of the Lands and deeds Registry Act Chapter 185 of the Laws of Zambia which deals with allegations of errors or omissions having been made in the Deeds Register. It was therefore contended that the Plaintiff's originating process was therefore not irregular as it is not alleging error or omission in the Deeds Register.

In its skeleton arguments dated 12th June 2018 the Plaintiff submitted that the 1st Defendants application is misconceived and should be dismissed with costs. It was argued that the facts leading to this action are clearly stated in the Plaintiff's statement of claim. The main contention being that its Certificate of title was cancelled without order of the court as there was an allegation of fraud by the 1st Defendant that led to the cancellation. The Plaintiff was thus seeking that the court reverses the cancellation and have the Lands and Deeds Register rectified following the reversal.

It was further submitted as clear from section 11 (1) and (2) of the Lands and Deeds Registry Act that the section primarily deals with

correction of omission and errors in the Lands and Deeds Register. This it was argued was not the case in the present matter as the Plaintiff was challenging the cancellation of its Certificate of Title by the Commissioner of Lands. I was referred to the case of **Corpus Legal Practitioners vs. Mwanadani Holdings**⁵ where the Supreme Court held the following.

“In our view, section 11 of the Lands and Deeds Registry Act is concerned with the process of correcting errors and omissions to entries made in the Lands Register by the Registrar of Lands and Deeds. It does not empower him to determine disputes which have the effect of determining the rights of the parties to any land or to cancel a Certificate of Title duly issued to the registered proprietor of the Land to which it relates.

In Anti-Corruption Commission vs. Barnett Development Corporation Limited, we held that, under section 33 of the Lands and Deeds Registry Act a Certificate of Title is conclusive evidence of ownership of land by the holder thereof, although it can be challenged and cancelled, for fraud or other reasons relating to improperly in acquisition. We further take the view that a person alleging fraud or any other impropriety, with regard to the issuance of a Certificate of Title must challenge the same through a court action and prove the allegation of fraud or other

impropriety, as the case maybe, to obtain a court order for the cancellation of the affected Certificate of Title by the Registrar of Lands and Deeds.

We therefore reject the argument by the Appellant that section 11 of the Lands and Deeds Act prescribes a condition precedent to apply first to the Registrar of Lands and Deeds to correct the Registrar of Lands before issuing process for cancellation of a Certificate of title.”

It was argued therefore, that the Supreme Court clearly pronounced itself in the interpretation of section 11 in that case.

It was submitted further that the outcome of this matter has the effect of determining the rights of the parties to the subject land and it is therefore regular that the Plaintiff commenced the action by writ. That in following the Corpus Globe case, the allegation of fraud should have been made by an application by the 1st Defendant to the Court for an order to cancel the title. Therefore that it is in the interest of Justice the 1st Defendant should proceed to make its defence so that the matter is fully determined at trial.

In further submissions in opposition filed into court on 5th of December 2018, the Plaintiff insisted that commencing the action by

appeal would limit the Plaintiffs claim to only seeking a reversal of the cancellation of the certificate of title whereas the Plaintiff seeks other reliefs which will determine ownership of the property and damages which again on authority of The corpus legal practitioners case would lead to a separate claim and hence multiplicity of actions. Lastly that this was not a matter suitable for determination as a preliminary issue pursuant to order 14 A. The Plaintiff concluded that the 1st Defendant's preliminary issue lacked merit and should therefore be dismissed with costs.

The 1st Defendant filed an affidavit in reply dated 22nd June 2018. It was contended that the text of section 11 of the Lands and Deeds Act includes the cancellation of a Certificate of title hence falling within the Plaintiff's claim that the cancellation was wrongly done and effected by the Registrar. Further that the use of word "error" in the section refers to among other things a wrong act, incorrect, misguided or mistake and therefore include the cancellation of a Certificate of Title as well. Further, that the Plaintiff in his pleadings sought for an order for the Lands register to be rectified which action can only be effected by way of the provisions of section 11 of

the Act. The deponent reiterated her belief that the mode of commencement of this action was wrong and should have been by way of Judicial Review.

The first point I must make is that there were several adjournments in this matter and aborted sittings for one reason or the other. At the hearing of the matter slated for 11th of July 2019, the Plaintiff, 1st, and 3rd Defendant were not present and did not sufficiently excuse their absence. I therefore directed that that I would proceed to deliver my ruling based on the filed documents as I now do. In doing so I carefully considered the parties respective affidavits and filed submissions.

This preliminary issue is brought pursuant to order 14A making provision for disposal of matters on a point of law. The 1st Defendant proceeded to move the court by way of notice of intention to raise preliminary issue as opposed to Notice of Motion and or summons as required by Order 14 A rule 2. For ease of reference Order 14A/2 of the RSC provides that:

“An application under rule 1 may be made by summons or motion or (notwithstanding Order 32 rule 1) may be made orally in the course of any interlocutory application to the court.”

The rule was subject to the Supreme Court’s interpretation in **Teklemicael Mengstab & Semhar Transport & Mechanical Limited v Ubuchinga Investments Limited**⁶ in which the court made clear that proceeding by way of notice rendered the application incompetent. The Supreme Court went further to state that where a wrong mode to move a court is used the case should be dismissed. The preliminary issue before me must thus fail on this account alone.

I have however deemed it necessary to consider the arguments advanced by the parties. As a point of observation, I wish to register my immediate disapproval of counsel disregarding the rules pertaining to affidavits. Order 5 rule 15 provides.

“An affidavit should not contain extraneous matter or contain legal argument.”

Contrary to this rule, the affidavits in support and in reply both contain legal argument citing sections and offering interpretation.

This cannot escape the court's eye and comment and is practice that is to be frowned upon and discouraged.

That said, the gist of the Defendant's argument is that section 11 (1) and (2) requires that acts by the Registrar to rectify errors or omission complained about ought to follow the procedure set therein. The 1st Defendant suggests the challenge ought to be by judicial review whereas the 2nd Defendant suggests the court action should have proceeded by way of appeal. The 3rd Defendant argues the action was premature as the grievance procedure set out in section 11 of the Act ought to have been exhausted before commencing the action. Common to all arguments was the question of the court's lack jurisdiction to hear and grant the reliefs sought

I do not see the basis for the claim for the judicial review as the section relied upon by the 1st Defendant makes reference to an application to the court as a mode of commencement in case a party is dissatisfied with the decision of the Registrar which is quite distinct from an application for Judicial review under order 53 of the RSC. I would agree that there is a grievance procedure provided for that is expected to be exhausted before such an application can

be made to the court. However I disagree that this was the procedure expected to be adopted in this case or that an appeal was the appropriate mode of commencement in this action.

As pointed out by the Plaintiff, their grievance was the cancellation of its Certificate of Title by the Commissioner of Lands on account of alleged fraud. The court is thus moved in an action commenced by writ in which a call for a pronouncement of the party's respective rights is made and if successful the court can proceed to order the rectification of the register after reversing the cancellation of the title deed. This is not possible under the grievance procedure provided for in section 11 which is of limited application and by which no pronouncements of rights can be made.

There is further no debate on the pronouncement the Supreme Court made in the cited case of Corpus Globe Legal Practitioners vs. Mwanadani Holdings (Supra) on the import of section 11 of the Lands and Deeds Registry Act. The court quite clearly stated that a person alleging fraud or any other impropriety with regard to the issuance of a Certificate of Title must challenge the same through a court action and prove the allegation of fraud or other impropriety,

as the case maybe, to obtain a court order for the cancellation of the affected Certificate of Title by the Registrar of Lands and Deeds. The Plaintiff question the cancellation of its title that it contends was not backed by any court order and seeks a determination of its rights which is clearly outside the ambit of section 11 as ruled by the Supreme Court.

I would therefore hold that there was nothing inappropriate about the Plaintiff commencing its action by writ in this matter and would dismiss the Defendant's preliminary issue for lack of merit with costs to the Plaintiff to be taxed in default of agreement.

The matter will come up for a status conference to issue orders for directions on 23rd of April 2020 at 09:30 hours.

Dated at Lusaka the *12* day of *April* 2020



HON. JUSTICE M.D BOWA