IN THE HIGH COURT FOR ZAMBIA **2018/HP/1166**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF: **Order 113 of the Rules of the Supreme Court of England (White Book) 1999 Edition Volume 1**

AND IN THE MATTER OF: **An application for Summary Possession of Property known as Lot 23080/M situate at Chongwe in the Lusaka Province**

BETWEEN:

FRANK MUSEBA TAYALI	**1ST APPLICANT**
SHERRY TUKALI SINZALA	**2ND APPLICANT**
AND	
JOSEPH PHIRI	**1ST RESPONDENT**
UNKNOWN ILLEGAL OCCUPIERS ON PROPERTY NO. L/23080/M SILVEREST AREA, CHONGWE	**2ND RESPONDENT**

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Applicants:	*Mr. M. Chitundu of Messrs Barnaby & Chitundu Advocates.*
For the Respondents:	*Mr. R. Musumali of Messrs SLM Legal Practitioners.*

RULING

***Legislation Referred to**:-*

1. *Rules of the Supreme Court of England (1999 Edition) White Book.*
2. *High Court Rules, Chapter 27 of the Laws of Zambia.*
3. *Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.*

Cases Referred to:-

1. *Khalid Mohamed v The Attorney General (1982) ZR 49.*
2. *Maurice Haurice Chilufya v Kelvin Kang'unda (1999) ZR 166.*
3. *Simeza and others v Mzeche and others Appeal No. 87 of 2007 SCZ /J No 23/2011.*
4. *Trevor Limpic v Rachael Mawere Appeal No 121/2006.*
5. *Trevor Limpic v Rachael Mawere Judgment No 15/2014 Appeal No 121/2006.*

Delay in delivery of the Ruling in this matter is deeply regretted. This was due to a combination of factors amongst which are out of the Station engagements.

This is a Summons by the 1st Respondent to set aside the Ruling dated 2nd May, 2019 holding that:

(i) the Applicants being the Legal and rightful owners of ***Lot No. L/23080 M Silverest Chongwe***.

(ii) the Respondents have illegally and without licence or Consent of the Applicants occupied the Applicants property and as such are trespassers.

(iii) the Costs of and incidental to these proceedings are for the Applicants and

(iv) granting leave to the Respondents to appeal.

The Summons is supported by an affidavit deposed to by one ***Joseph Phiri*** the 1st Respondent.

The essence of which was that he became aware of the Ruling of the Court on 17th July, 2019 through one of his Tenants ***Gilbert Singoyi*** which Ruling is marked as exhibit ***"JP1"*** .

He was also furnished with a letter dated 17th July, 2019 as shown by exhibit ***"JP2"*** from the Applicants. That he was not personally served the letter not withstanding that the Applicant's know his physical address at Zambia Air Force Head Quarters(HQ).

That he did not have sight of the Daily mail where Court process was advertised, that had he been served, he could have entered appearance and Defence.

That the Applicants know him because in 2017, when he developed the property, the 1st Applicant approached him claiming ownership of the property. He explained to him that he purchased the same property from one ***Arthur Chisanga Nkulika*** in 2016 and he showed him the same piece of land as his property.

That he is not a squatter on the property because he has a claim of right having purchased the same from ***Arthur Chisanga Nkulika*** as aforesaid as shown by a contract of sale marked as exhibit **"JP3".**

That he has made massive development to a tone of K2,755,000=00 and was earning a monthly income of K15,000=00.

That he has been advised by his Advocates and he has a strong case on the merits as confirmed by an intended affidavit in opposition to the Summons shown as exhibit **"JP5".**

He finally beseeched the Court to set aside the Ruling.

On even date this 1st Respondent filed an exparte Summons to Stay Order of execution of the aforesaid Ruling pursuant to ***Order 45 Rule II of the Rules of the Supreme Court of England***.

The summons was supported by one ***John Phiri.*** The essence of which was that, he had chances in his application to set aside the Ruling marked as exhibit "JP1" because he was not served with Court Process by the Plaintiffs despite being fully aware that he was of fixed abode and proprietor of the property in dispute.

The stay denied he would suffer injustice and if successful the Judgment in his favour will be an academic exercise.

On 8th October, 2019, the Applicants affidavit in Support of Summons for Order to set aside the Ruling aforesaid. It was deposed to by Frank Museba Tayali.

The gravamen of which was that due service of process was effected on the 1st Respondent following the leave by the Court to serve process by substituted Service.

That a person named Arthur Chisanga Nkutika by the 1st Respondent is not known to the Applicants.

An official search at the Lands and Deeds Registry marked ***"FMT1"*** on property No L30004/M reveals that the said person has never owned that property.

That the said Arthur Chisanga Nkutika has never owned property ***number 2/23080/M*** which is according to official search is owned by the Applicants as shown by exhibit ***"FMT2"***.

That the Applicants only came to know the 1st Respondent by name when he moved unto their property and started developing the land without authority nor Consent from the Applicants.

That the Applicants property is in Silverest area of Chongwe as confirmed by letter from the Surveyor General as well as the relevant map as shown by exhibits ***"FMT3"*** and ***"FMT4"*** respectively.

That contrary to the Respondent's claim that property L30004/M that the same is situated in Mikango Barracks area of Chongwe exhibit ***"FMT5*** and ***FMT*** and ***"FMT6"*** clearly show that the property is in Silverest.

That in the circumstances, it is evident the contested property clearly belongs to the Applicant.

On 15th October, 2019, the Applicants filed in an affidavit in opposition to affidavit in Support of Summons for Order to stay execution of the Ruling of 2nd May, 2019. It was deposed to by ***Frank Museba Tayali.*** The essence of which was that the Ruling

was passed after due process was duly served on the Respondent by Substituted service and consequently, there are no prospects of the Ruling of the Court being set aside.

That the Applicant have conclusive ownership to their property L/3080M, Chongwe whereas the Respondent is Claiming ownership to property L/3004M and he does not even have title to that piece of land.

That the person named as ***Arthur Chisanga Nkutika*** is unknown to the Applicants and at no time did they authorise the said person to sell their property on their behalf.

That the said Respondent admitted at a meeting to being in the wrong building on their land when they had been sold a totally different piece of land.

That since the land belongs to the Applicants so do the fixtures.

The 1st Respondent filed in an affidavit in reply on 10th October, 2019 deposed to by Joseph Phiri. And in so far as it is not repetitive of previous affidavits, it was deposed that, he has never faced any disciplinary hearing with his employers since he joined them in 1999.

That he purchased plot from ***Arthur Chisanga Nkutika*** who availed him with an offer letter for property number L/30004/M, Chongwe, Lusaka being a piece of land with no developments and was shown the Land which Subject of this dispute.

That it was not specified if the property was in Mikango or Silverest area of Chongwe.

That it will be unjust enrichment if property was given to the Applicants taking into account the market value at K2,755,000=00 as shown in exhibit ***"JP1"***. He in conclusion deposed that he was not a trespasser.

The record also reveals that on 9th October, 2019, the Applicants took out ***exparte*** Summons of possession. It was supported by an affidavit deposed to by ***Frank Museba Tayali***. The essence of which is that not withstand due service on the Respondent of the Ruling of the Court of 2nd May, 2019 as shown by exhibits ***"FMT1"***

Exhibit ***"FMT2***", The Ruling, being exhibit "FMT3" and the memorandum exhibit ***"FMT4"*** warning the Respondent to comply with the Ruling of the Court.

I declined to grant the Leave Exparte directing that the application be heard interparte on 17th October 2019.

At the hearing, the Learned Counsel for both litigants relied on the respective affidavits filed in support and opposition to setting aside the Ruling of the central in this matter.

Both Counsel augmented their submissions ***vivavoce***. The submissions were helpful and I am indebted to Counsel. I will however not replicate the same. I however assure the parties that I

have taken into account their submissions as will be demonstrated in the Ruling.

On the Outset, I have disclosed my mind to the ***onus*** and burden of proof. It is on the one who is alleging and the burden in Civil Matters like the one in ***casu***.

On the balance or preponderance of probability. ***Ngulube, DCJ*** (as he then was) put the debate to an end on the subject matter in the "often quoted" case of ***Khalid Mohamaed v The Attorney General***[4],He put it this way:-

"An unqualified proposition that a Plaintiff should Succeed automatically whenever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to Judgment. I would not accept a proposition that even if a Plaintiff's case has collapsed of its inanition for some reason or other Judgment should nevertheless be given to him on the ground that a case set up by the opponent has also collapsed. Quite clearly, a defendant in such circumstances' would not even need a defence".

I will now proceed to deal with the issues as raised by the parties.

(1) WHETHER 1ST RESPONDENT IS SQUATTER OR TRESPASSER TO THE LAND IN ISSUE

The affidavit evidence shows that the 1st Respondent bought property ***No L/30004M***, from one ***Chisanga Nkutika*** in 2017. Exhibit ***"JP3"*** being a copy of the Contract of Sale.

On the other hand, the Applicants have demonstrated that they are the rightful and beneficial registered owners of ***LOT 2308M Chongwe*** as pronounced in the Ruling of 2nd May 2019 which has disenchanted the 1st Respondent.

It is trite law that a Certificate of title is conclusive evidence of the property against anyone in the whole world.

Unless, it can be shown that the Certificate of Title was obtained either by fraud or mistake.

Section 34 of the Lands and Deeds Registry Act[3] speaks to their Legal Proposition.

The Court of final resort has led occasion to pronounce itself in a host of authorities, inclusive in the case of ***Maurice* Haurice Chilufya v Kelvin Kang'unda[2]**.

The 1st Respondent is not making any allegation that, the Applicants Title is fraught with illegality and was obtained by fraud nor mistake.

Applicants position is simply that he was shown the piece of land over which he has made tremendous unexhausted improvements to the value of ***K2,755,000=00*** as shown by exhibit "JP1" in the affidavit in reply to the affidavit in opposition.

The 1st Respondent admits that he was challenged by the Applicants in 2017 when they became aware that he was

encroaching on their land. He ignored this advise and proceeded on massive developments of the land. This goes to show that the Applicants neither gave the Consent nor licence to the 1st Respondent to move on their Land.

(2) WHETHER SERVICE OF PROCESS WAS REGULAR OR NOT

The 1st Respondent has attached the Service of this Court Process on him by substituted service.

The Applicants on the other having encountered difficulties to effect personal service on the Respondent opted for substituted service and that was granted.

Service by substituted service was in accordance with the Law and was good and regular.

(3) CIRCUMSTANCES PERMITTING SETTING ASIDE A DULY GRANTED JUDGMENT/RULING

It is trite law that the Critical Consideration in exercising the option to set aside a default Judgment is whether there is a defence on the merit.

Even if there might be malafides on the part of the litigant seeking the Judgment, even if the settling aside may inconvenience this successful litigant, the Court ought to set aside this Judgment and costs can be awarded to recompense the litigant who had secured a valid regularly obtained Judgment.

The apex Court had occasion to pronounce itself on this subject matter in the case of ***Simeza and Others v Mzeche and Others***[3].

An official search on ***Property No L3004M*** by the Applicants pursuant to ***Section 22 of the Lands and Deeds Registry Act*** as shown by exhibit ***"FMT2"*** of the Applicants affidavit in opposition to setting aside the Ruling shows that ***LOT 2308M*** Chongwe is owned by the Applicants.

As regards ***LOT 3004M***, it is presently owned by ***Janet Namukolo Mashenda*** as shown by exhibits ***"FMT2"*** Exhibit ***"FMT3"*** the Surveyor General has stated that the 2 properties are in 2 different locations.

It is obvious, the 1st Respondent found himself by mistake at the Applicant's property.

(4) WHETHER SUSTAINING OF RULING OF 2ND MAY, 2019 WILL AMOUNT TO UNJUST ENRICHMENT

The Apex Court had occasion to pronounce itself on the Subject matter in the Case of ***Trevor Limpic v Rachael Mawere and 2 others***[4]. Briefly, this was a case in which the High Court found the acquisition of a piece of land fraudulent and cancelled a Certificate of Title issued to the Appellant on account of fraud. Upon upholding the appeal, the Supreme made an Order for assessment of the Value of unexhausted improvements by the Appellant, they observed at page J11 as follows:-

"But before we leave this matter, we wish to say that, the pictures which were shown in the motion that was made in this appeal, the Appellant has expended a lot of money on the property in question. To allow the respondents take the property in question with the massive improvements made by the appellant will amount to unjust improvement of the Respondents. Equity does not allow that the improvements be assessed by the Deputy Registrar and the Appellants be paid by the Respondents the worth of the improvements. For the avoidance of doubt, this Judgment is not a bar to the Appellants and the Respondents entering into a genuine transaction for the sale of the property in question from the Respondents to the Appellant if the parties so wish"

Disenchanted by Order of assessment, R.A Chongwe, SC for the Respondents moved the full bench of 9 Judges of the Apex Court. The Court held inter alia that the earlier Order, Ordering assessment of the value of the unexhausted improvements was held per ***incuriam*** and they proceeded to vacate the earlier Order for assessment.

The Court observed in the said Judgment of ***Trevor Limpic v Rachael Mawere***[5].

" Our reasoning after considering the evidence on record, the submissions and the authorities, was based on the law of equity which is that the person who sells property can confer no better title than he himself (the opposite gender inclusive

has. It comes from the maxim nemo dat quod non habet. Thus, we came to the Conclusion, as the Learned Trial Judge, that Martin Mawere had no authority to sell and could confer no better title. That a transaction made under those circumstances was fraudulent and as such could not acquire good title. Consequently, we found no reason to fault the lower Court".

Under Consideration, the issue is not that of fraud. The issue is that of the 1st Respondent being shown a piece of land belonging to the Applicants by one ***Arthur Chisenga Nkutika*** either by mistake or design. In my view, the principle in the ***Mawere Case*** aptly applies to the ***case*** in ***casu***.

(5) IS CASE FIT FOR DISPOSAL UNDER ORDER 113 OF RSC?

The answer is in the positive. Firstly, the Applicants are the legitimate owners of LOT No 23080/M Chongwe.

Secondly, the Applicants never consented nor allowed the 1st Respondent to take possession nor did they give him a licence.

Thirdly, the property that the Applicant purchased from one ***Arthur Chisanga Nkutika*** being ***LOT/30004/M*** Lusaka is a completely different piece of land from that of the Applicants as revealed by the official searches conducted under Section 23 of the ***Land and Deeds Registry Act***.

(6) CONCLUSION

On the foregoing, I find that the application to torpoedo the Ruling dated 2nd May, 2019 is destitute of any merit and it is dispatched.

Before I leave the subject, I wish to adapt the pronouncement by the apex in the Limpic ***Case Appeal No. 121 of 2006*** at Page J11:

> ***'This Judgment is not a bar to the Appellants and Respondents entering a genuine transaction for sale of the property in question from the Respondent to the Appellants if the parties so wish".***

The parties should take a leaf from the Supreme Courts reflection. Alas, it is said the outcome of litigation in uncertain.

(7) APPLICATION FOR STAY OF THE RULING OF 2ND MAY 2019 PENDING THE HEARING OF DELIVERY OF THE APPLICATION TO SET ASIDE RULING

The application to set aside the aforesaid Ruling having Collapsed, it follows that the Applicants application fails.

(8) LEAVE TO LEVY WRIT OF POSSESSION

Factoring in the observations of the apex court in the immediate preceding paragraph 6, I order that the Applicants are granted leave to take possession of the property subject to these proceedings after 14 days from the date hereof.

(9) COSTS

The costs are for the Applicants to be taxed in default of agreement.

I grant leave to appeal to the Superior Court of Appeal Court.

Delivered Under My Hand And Seal this ..7th....... day of August, 2020

Mwila Chitabo , SC
Judge