

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2018/HP/0134

(Civil Jurisdiction)

**IN THE MATTER OF: SECTION 81 OF THE LANDS AND DEEDS
REGISTRY ACT CHAPTER 185 OF THE LAWS OF
ZAMBIA**

IN THE MATTER OF: FARM NO. 8589 MUMBWA



BETWEEN:

KASHIKOTO CONSERVANCY LIMITED APPLICANT

AND

DARREL WATT

RESPONDENT

CORAM: HONOURABLE JUSTICE MR. MWILA CHITABO, SC

*For the Applicant: Mr. M. Ndalameta of Messrs Musa Dudhia
& Company.*

*For the Respondent: Dr. John Mulwila ,SC of Messrs Ituna
Partners(Later Messrs Tutwa Ngulube and
Company) took over conduct of the matter.*

R U L I N G

Cases referred to:-

(1) *Chikuta v Chipata Rural Council (1974) ZR 241.*

(2) *Chick Masters Limited v Investrust Bank(Z)Limited Appeal No:
74 of 2014 (unreported)*

(3) *Handerson v Handerson (1843-1860) ALL ER 378*

Legislation referred:-

1. *Lands and Deeds Registry Act, Chapter 85 of the Laws of Zambia.*
2. *High Court Rules, Chapter 27 of the Laws of Zambia.*
3. *Supreme Court Rules of England white Book 1999 Edition.*

The legend of this case is that on 24th January, 2018 the Applicant launched originating summons pursuant to **Section 81₁ of the Lands and Deeds Registry Act** for the removal of a caveat lodged on farm 8589, 8590 and 8591 Mumbwa, Central Province, Lusaka.

After being duly satisfied that the Respondent had been duly served, i ordered removal of this caveat with the attending costs, under my hand and seal of Ruling dated 22nd November, 2018.

On 6th December, 2018, the Respondent applied for Review pursuant to **Order XXXIX(1) and (2) of The High Court Rules**².

The Review application was by Ruling dated 12th June, 2019 dismissed with no Order as the costs, put differently that I made no order as to costs.

The Applicant thus proceeded to tax its bill and the Honourable Taxing officer Mr. Francis Chulu signed a Certificate of taxation on 11th September, 2019.

On 15th October, 2019 the Respondents Advocates Messrs Tutwa Ngulube & Company filed summons to set aside the Judgment. It was supported by an affidavit deposed to by Precious Kunda a Legal Assistant in the Respondents Law firm the essence of which was

that the Respondent was not informed of the return date of the originating summons. That the matter was not heard on its merit.

On 22nd of October, 2019, the Applicant's Advocate filed notice to raise issue pursuant to Order 14A as read together with **Order 33/3 of the Rules of the Supreme Court of England.**³

The issues to be determined were:

- i. Whether the Respondents application should be dismissed for being an abuse of Court process.
- ii. Whether issues being raised by the Respondents are **resjudicata** and
- iii. Whether it is proper for the affidavit in Support of Summons to set aside Ruling/Judgment to be deposed by a Legal Assistant from facts that are not within her personal knowledge.

The notice to raise Preliminary issue was supported by an affidavit deposed to by one Senior Counsel Yosa Grandson Yosa, the gravamen of which was that the previous Advocates of the Respondent had been duly served with summons for leave to amend originating summons as evidenced by exhibit "**YGY¹**", that the Courts notice of hearing for the return date of 8th November, 2018 was duly served as shown by exhibit "**YGY²**". The application was heard and Ruling delivered on 22nd November, 2018. An attempt to review thiscollapsed as shown by Ruling dated 12th June, 2019 shown as exhibit "**YGY⁴**".

That no grounds have been disclosed to warrant setting aside the Ruling removing the caveat.

That the said Ruling has been perfected as shown by registration of the Ruling and TaxingCertificate shown as exhibits “**YGY**”⁵ and “**YGS**”⁶ respectively.

That the Respondent had even filed objection to this Bill of taxation.

That the Sheriff of Zambia has since levied execution as shown by exhibit “**YGY**”⁷

On 12th October, 2019, a notice of Claim of seized property was filed by a claimant.

On 23rd October, 2019, the Respondent filed exparte Summons to stay sale of goods seized in execution.

On 4th of November, the Respondent took out summons to settle balance in monthly installments.

It is trite law that when a Preliminary Notice of motion is filed which has the capacity to determine proceedings on points of law, such an application, motion or notice has to be dealt with first.

I am indebted on the very helpful submissions of this Applicants for the Attorney.

I will therefore deal with this preliminary issues raised by this Applicant.

(1)(a) **WHETHER THE RESPONDENTS APPLICATION IS NOT AN ABUSE OF COURT PROCESS**

The record reveals that, following the Ruling of Court 22nd November, 2018 an attempt to review that Ruling failed by Ruling dated 12th June, 2019.

The Respondent then purported to apply for setting aside the Ruling/Judgment on the ground that the Respondent was not given an opportunity to be heard.

The affidavit was sworn by one **Precious Kunda** an Assistant in this Respondents Lawyer's Law firm.

It is trite that it is undesirable for Advocates. I should add Assistants in a litigant's Law firm to swear affidavits in contentious matters like in this. Such affidavits are ineffectual. This Legal proposition was settled in this "**often quoted**" **Case of Chikuta v Chipata Municipal Council¹**"

On this score alone, I would dismiss the Respondents application to try to torpedo the Ruling of this Court ordering removal of the caveats placed on the named properties.

1(b) **Filing opposition to bill of taxation**

By submitting to the taxation process, confirms the view that the Respondent had found no merit in appealing against the Ruling of this Court dispatching the Review application under **Order XXXIX of the High Court Rules**.

1(c) **Summons to settle bill of costs in installments.**

The application to settle this justly taxed bill by monthly installments is an admission of liability on the Costs.

It is a desperate attempt to delay the successful litigant to harvest the fruits of its Judgment.

1(d) **Demonstration of a bonafide Claim where litigant seeks to set aside a Judgment.**

It is trite law that it is this defence on the merit that should persuade the Court to vacate a duly obtained Judgment. The malafides of the litigant should not defeat the disenchanted litigants application to set aside Judgment on the Sole ground that such litigant is guilty of malafides or transgressions.

In casu, it has not been demonstrated that the Respondent has any arguable defence on the merit.

I agree with the Applicants Submissions that the Respondents manouvres is a classic example of an abuse of Court process. A case in point amongst a plethora of Judicial precedent on the subject matter is the Supreme Court Case of **Chick Masters Limited V Investrust Bank PLC²**.

The Respondents conduct is disapproved.

(2) **WHETHER THE ISSUES RAISED BY THE RESPONDENT ARE NOT RESJUDICATA.**

The Court of final resort had occasion to pronounce itself on the doctrine of **Resjudicata**, it was put this way:-

“The Phrase resjudicata is used to include two separate States of Things. One where a judgment has been pronounced between parties and findings of fact are involved as basis of that Judgment. All parties affected by the Judgment are then precluded from disputing those facts in subsequent litigation between them. The other aspect of the term arises when a party seeks to set up facts, which if they had been set up in the first suit would or might have affected the decision. This is not strictly raising an issue which has already been adjudicated, but it is convenient to use the phrase resjudicata as relating to that position”.

The underlying rationale is that there must be an end to litigation.

The case of **Handerson v Handerson**³ from foreign jurisdiction is instructive.

Back in our jurisdiction, the Summit had the following to say on the subject matter:

“There are three essential elements for this doctrine to apply, these are:

(1)an earlier judicial decision on the issues

(2) a final judgment on the merits

(3) The involvement of the same parties in privity to the original parties”

In sum, the Applicants Preliminary issues anchored on points of law are richly anchored. They succeed for purposes of clarity, firstly the Preliminary issues having succeeded. The respondents application to set aside the Ruling/Judgment of this Court ordering the removal of Caveat on the named properties collapses.

Secondly, there cannot be a Stay of execution as the Ruling/Judgment has been perfected as has been demonstrated.

Thirdly, the issue of notice to claim of goods taken into execution involves a 3rd party. The Sheriff of Zambia is within his permissible grounds to take out interplader Summons before the Learned Deputy Registrar.

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

Leave to appeal to the Superior Court of appeal is granted within the prescribed time.

**DELIVERED UNDER MY HAND AND SEAL THISDAY
OF JULY, 2020**



MWILA CHITABO, SCJ