

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



2018/HP/1624

IN THE MATTER OF:

ORDER 113 RULES 1-3 OF THE RULES OF  
THE SUPREME COURT OF ENGLAND, 1999  
EDITION

AND

IN THE MATTER OF:

AN ORDER FOR SUMMARY POSSESSION OF  
LAND OCCUPIED BY UNKNOWN  
RESPONDENTS

AND

IN THE MATTER OF:

PROPERTY KNOWN AS LOT NO 179/28  
KANYAMA SITUATE IN THE LUSAKA  
PROVINCE OF THE REPUBLIC OF ZAMBIA

BETWEEN:

**KALE KELVIN**  
*(Suing in his capacity as Administrator  
Of the estate of the late Maybin Mfumbe)*

**APPLICANT**

AND

**PERSONS UNKNOWN**

**RESPONDENT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 9<sup>th</sup>  
DAY OF JULY, 2020**

*For the Applicant : BCM Legal Practitioners*

*For the Respondent : in person*

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**R U L I N G**

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LEGISLATION REFERRED TO:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*

## **2. *The Rules of the Supreme Court of England, 1999 edition***

This is a ruling on an application made by the respondents on 15<sup>th</sup> May, 2020, pursuant to Order 39 Rule 2 of the High Court Rules and Order 45 of the said Rules, for an order for special leave to review the judgment out of time, and to stay execution of the said judgment.

The background leading to the application is that the applicant commenced this action on 17<sup>th</sup> September, 2018 by way of originating summons, claiming;

- i. An order for summary possession of Lot No 179/28 Kanyama which is occupied by unknown persons.*
- ii. An order that the unknown persons be evicted from Lot No 179/28 Kanyama.*
- iii. Costs.*
- iv. Any other relief that the court may deem fit.*

No appearance was entered to the originating summons, and on proof of service being filed through an affidavit of service dated 27<sup>th</sup> November, 2018, on 29<sup>th</sup> November, 2018, I heard the applicant and delivered judgment granting the reliefs sought. There is on record an affidavit of service dated 19<sup>th</sup> February, 2019, in which the applicant deposes that he served the judgment on the respondents on 29<sup>th</sup> November, 2018, and they refused to acknowledge receipt of the same. A writ of possession was filed on the said 19<sup>th</sup> February, 2019, which was re-issued on 21<sup>st</sup> February, 2020.

In the affidavit in support of the application for special leave to review the judgment out of time, and to stay execution of the said judgment, which is deposed to by Mwaka Njobvu, she deposes that she was not served the originating summons or the judgment that was delivered. Further, that she is not cited as a party to these proceedings, despite the applicant being aware that she legally acquired a portion of the land in contention from the holder of the certificate of title, as shown on the contract of sale marked as 'MN1' to the affidavit.

It is further stated that the Mwaka Njobvu executed the contract of sale with John Trimorio Phiri, who had earlier bought the portion of land from Gwali Simunzigili, with the authority of his elder brother Mumbwali Simunzigili, the title holder of the property. This is evidenced by exhibits 'MN2-MN4', being the offer for sale of the land, authorization of the sale and the certificate of title.

Mwaka Njobvu also deposes that on 12<sup>th</sup> May, 2020, bailiffs went and evicted her and others from the various structures after they executed a writ of possession, and that is when the deponent learnt that there was a judgment. Exhibited as 'MN5' is a copy of the Sheriff's writ of execution. The averment is that Mwaka Njobvu proceeded to the Ministry of Lands where she conducted a search on the property, and she obtained a print out on 14<sup>th</sup> May, 2020, which is exhibited as 'MN6', and it reflects the owner of the property as Mumbwali Simunzigili.

The contention is that had the court had sight of the Lands Register, it would not have arrived at the judgment that it did, and that the applicant only relied on the letter of offer from Kanyama Development Committee who are not the title holders to the land nor are they a statutory body mandated to sell land. Further, that the applicant also

relied on a ground rent bill that was issued by the Lusaka City Council which cannot supersede the certificate of title that was issued by the Ministry of Lands.

The applicant filed an affidavit in opposition on 16<sup>th</sup> June, 2020, in which he avers that the deponent of the affidavit in support of the summons for special leave to review, Mwaka Njobvu has always refused to accept court process. He further deposes that Mwaka Njobvu and the other respondents have always been aware of the proceedings and they have denied having any interest in the land.

It is also contended that Mwaka Njobvu's claims are untenable as the persons she is claiming are the original owners of the land are not party to these proceedings, and they are not holders of the certificate of title to the land, which is exhibited as 'MN4' to the affidavit in support of the summons for review.

It is the applicant's averment that when Mwaka Njobvu entered upon the land, she found that there were already built structures, and she should have enquired about the said structures from the alleged vendors of the property. The applicant relies on exhibit 'KK1' the receipt for ground rent issued by the Lusaka City Council to show that the late Maybin Mfumbe owned the land. He states that the certificate of title exhibited by Mwaka Njobvu is in relation to a different property, and is not subject of these proceedings.

Further, that Mwaka Njobvu has not demonstrated that there is new evidence that has surfaced upon which this honourable court can exercise its discretion to review the judgment out of time.

In the affidavit in reply, Mwaka Njobvu states that she is one of persons cited as unknown persons in the originating summons. She reiterates that she not served the originating summons or the judgment, and that it is incorrect to state that she has no interest in the property, when in fact she has built and lives on the land in question. It is also deposed that original owners of the property were never served the court process and that they have not been cited in these proceedings, despite the applicant being aware of their names.

That while the applicant in the affidavit in opposition avers that the documents that Mwaka Njobvu has exhibited do not show that the persons who sold her the land are the title holders of the land, exhibit 'MN3' to the affidavit in opposition clearly shows that Gwali Simunzigili was granted authority to sell the land on behalf of the title holder. Further, that the letter of offer exhibited as 'MN2' to the affidavit in support of the summons for review shows that Gwali Simunzigili executed the contract of sale on behalf of Mumbwali Simunzigili, the owner of the property.

I have considered the application. It was brought pursuant to Order 39 Rule 2 and Order 45 of the High Court Rules, Chapter 27 of the Laws of Zambia. Order 39 provides as follows;

***“1. Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision:***

judgment. She has further averred that she only became aware of the proceedings and the judgment when the bailiffs went to execute a writ of possession on the property on 12<sup>th</sup> May, 2020, as shown on the seizure form exhibited as 'MN5' to the affidavit in support of the application.

The applicant in the affidavit in opposition states that Mwaka Njovu together with the other respondents who are unknown, have been aware of the proceedings and the judgment. The two affidavits of service which are on record, the first being the one dated 27<sup>th</sup> November, 2018, shows that Edgar Banda an advocate seized with conduct of the matter on behalf of the applicant, served the originating process on the respondents on 18<sup>th</sup> September, 2018, and they refused to sign.

The second affidavit of service dated 19<sup>th</sup> February, 2019, is deposed to by the applicant. He states therein that he served the judgment on the respondents and they refused to sign. These affidavits of service do not show service of the originating summons on Mwaka Njovu, but on the respondents in general. Thus, it is not known whether all or part of the respondents were served. Mwaka Njovu has therefore demonstrated that she was unaware of the originating summons and the judgment, hence her failure to apply for review within fourteen (14) days of the date of the judgment.

Having so found, and seeing that the affidavits on record have delved into the merits of why the judgment should be reviewed, I note that Mwaka Njovu has exhibited a certificate of title for Lot No 5702/M, which shows that Mumbwali Simunzigili was issued a certificate of title for the land on 31<sup>st</sup> October, 2006. Exhibited as 'MN1' to the said affidavit is a contract of sale between John Trimoro Phiri and Mwaka Njovu dated 26<sup>th</sup> October,

2017 for the sale of a one roomed house and two bedroomed house which were unfinished at roof level.

In that contract of sale, it is stated that copies of the certificate of title for the property known as Farm No 5702/M are attached. The applicant argues that the vendor John Trimoro Phiri who sold the land to Mwaka Njovu is not the registered owner of the property, as can be seen from the certificate of title exhibited as 'MN4' to the application. Indeed, that is the position, but Mwaka Njovu has also exhibited 'MN2' to the affidavit in support of the application, an offer of sale, which is dated 9<sup>th</sup> June, 2014 between Gwali Simunzigili on behalf of M. Simunzigili to John Trimoro Phiri for Farm No 5702/M.

Thus, while the owner of the land Mumbwali Simunzigili did not enter into a contract of sale with John Trimoro Phiri for the sale of the land, exhibit MN2' shows that Gwali Simunzigili did so on his behalf. The applicant has relied on ground rent bills exhibited as 'KK1' to the affidavit in opposition, to show that Maybin Mfumbe, whose estate he administers paid ground rent bills for the property.

The said ground rent bills show that the property is 179/28 Kanyama, and exhibit 'KK2' to the affidavit in support of the originating summons is an ownership form that was issued to Maybin Mfumbe by the Kanyama Constituency Residents Development Committee on 18<sup>th</sup> August, 2000. It shows that he acquired the property from Neddy Shatula.

It is trite that under Section 33 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia, a certificate of title is conclusive evidence of ownership of land. While the applicant argues that the

certificate of title that Mwaka Njovu has exhibited to the affidavit in support of the application relates to a different property, he deposes in the affidavit in opposition that when she entered onto the land, she found structures there, and she should have enquired from the sellers who owned the same.

Thus, while the certificate of title exhibited by Mwaka Njovu shows that the property number is 5702/M Lusaka, and the ground rent bills exhibited by the applicant show the property as 179/28 Kanyama, it is the same land that is in contention. These proceedings were commenced under Order 113 of the Rules of the Supreme Court of England, 1999 edition. Order 113/8/2 of the said Rules of the Supreme Court of England 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 but of course the Order will not apply before the licence has expired”.*

In this matter, the affidavit evidence establishes that there is contention over ownership of the property in dispute and Mwaka Njovu, one of the unknown respondents has shown that she acquired the land from a person who bought the land after the registered owner of the piece of



land gave authority that it be sold. This is not a matter that is fit to be heard under the summary procedure under Order 113 of the Rules of the Supreme Court of England, 1999 edition because of the contention of ownership of the land. Order 113/8 of the Rules of the Supreme Court of England provides that;

***“The court may, on such terms as it thinks just, set aside or vary any order made in proceedings under this Order”.***

While the applicant argues that no new evidence has surfaced that would warrant me to review my judgment, Order 39 of the High Court Rules is wide in its provision, and the court may review its judgment or decision on sufficient grounds being shown. New evidence having surfaced is one such ground.

On the basis of Order 113/8 of the Rules of the Supreme Court of England, and on sufficient grounds having been demonstrated warranting the review of my judgment, and I set aside the order for summary possession of the land, with costs to Mwaka Njovu. If the applicant wishes to pursue his claim for ownership to the land, he can commence an action using a writ of summons. The order for possession having been set aside, Mwaka Njovu can return to the property. Leave to appeal is granted.

**DATED AT LUSAKA THIS 9<sup>th</sup> DAY OF JULY, 2020**

                    Kaunda                      
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**