

IN THE HIGH COURT FOR ZAMBIA

2019/HP/1537

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



**IN THE MATTER OF: SECTIONS 81 AND 82 OF LANDS AND
DEEDS REGISTRY ACT CHAPTER
185 OF THE LAWS OF ZAMBIA**

**IN THE MATTER OF: REMOVAL OF CAVEAT ON PROPERTY
KNOWN AS L/12704/M/P**

BETWEEN:

GAWA TRUST LIMITED

APPLICANT

AND

MWANAWASA & COMPANY

1ST RESPONDENT

AHMED SIMWAYA

2ND RESPONDENT

**BEFORE THE HON. JUSTICE G. MILIMO - SALASINI IN
CHAMBERS ON THE 28TH DAY OF FEBRUARY, 2020.**

For the Applicant:

*Ms. Nambao and Mr. Mulilo - Messrs.
Mulungushi Chambers*

For the Respondents:

*Mr. S Milimo - Messrs. Levy Mwanawasa
& Company*

RULING

CASES REFERRED TO:

1. *Kamanga v Attorney General and Another* 2008 ZMSC 20.
2. *Construction and Investment Holdings Limited vs William Jacks and Company (Zambia) Limited* (1972) Z.R. 66, at P 68
3. *Lenton Holdings Limited vs Moyo* (1984) Z.R. 55.

LEGISLATION REFERRED WORK REFERRED TO:

1. *Order 14 Rule 5(2) of the High Court Rules Cap 27 of the Laws of Zambia*
2. *Sections 76 to 83 of the Lands and Deeds Registry Act, chapter 185 of the laws of Zambia.*

This is an application for Misjoinder brought by the 1st Respondent pursuant to **Order 14 Rule 5(2) of the High Court Rules Cap 27 of the Laws of Zambia**, stating that the outcome of the proceedings herein has no direct effect on them. This application was accompanied by an affidavit in Support of Summons for an Order of Misjoinder filed into court on 17th October 2019. The 1st Respondent's contention is that they were at all times a Law Firm representing the 2nd Respondent and the placing of the caveat was based on the instructions from the client. Therefore, the conduct of placing the caveat was a discharge of the 1st Respondent's duty.

At the hearing of the application on 7th November 2019, Counsel for the Respondent Mr. S Milimo submitted that it was a principle of professional ethics that a firm should represent its client and cited the case of ***Kamanga v Attorney General and Another***¹. Counsel concluded by praying that the court should strike out the inclusion of the 1st Respondent.

The Applicant's counsel, Mr. Nambao, opposed the application on grounds that the caveat should have been entered by Ahmed Simwaya and not Messrs. Levy Mwanawansa and Company therefore they Law Firm is properly before court as a party to the proceedings.

In reply, Counsel for the Respondent submitted that the Caveat is self-explanatory and it is normal practice that Legal Practitioners will give notice on behalf of their client. Counsel submit that the argument by the learned Applicant's counsel was untenable as it suggests taking away the responsibility of counsel in acting for their clients, therefore the caveat must be read as a whole and not in bits and pieces.

I have considered the affidavit evidence and the arguments by counsel. In determining this application, I will begin by determining the position of the 1st Respondent in matter.

It is not in dispute that the 1st Respondent was counsel for the First Respondent as purchaser in relation to the contract of sale. Further that, it was in pursuance of such capacity as counsel for the purchaser as the caveat was entered on behalf of the 2nd Respondent.

I will take some time to explain the nature and effect of a caveat to give a better understanding to the parties. The law relating to the administration of caveats is located in **Sections 76 to 83 of the Lands and Deeds Registry Act, chapter 185 of the laws of Zambia**. In so far as the instant case is concerned, the

pertinent section is **Section 76** and **77**. **Section 76** enacts as follows: -

“76 Any person_

(a) claiming to be entitled to or to be beneficially interested in any land or any estate or interest therein by virtue of any unregistered agreement or other instrument or transmission or of any trust expressed or implied, or otherwise howsoever; or

(b) transferring any estate or interest in land to any other person to be held in trust; or

(c) being an intending purchaser or mortgagee of any land: May at any time lodge with the Registrar a caveat in Form 8 in the Schedule.”

Section 77 prescribes the manner of registering a caveat when it provides that: -

“Every caveat shall be signed by the caveator or by his attorney or agent, and shall state with sufficient certainty the nature of the estate or interest claimed by the caveator, with such other information and evidence as may be required by any regulations under this Act, and shall appoint a place or give an address within 4.83 kilometres of the Registry of or to which notices and proceedings relating to such caveat may be served or addressed.”

The nature and effect of a caveat may further be seen in the dictum of Scott J, in the case of ***Construction and Investment Holdings Limited vs William Jacks and Company Zambia Limited²*** which provides: -

“...if one looks at this Ordinance one observes that, where a person lodges a caveat under s. 49, the Registrar is forbidden to make any entry on the register having the effect of charging or transferring or otherwise affecting the estate or interest protected by a caveat. This means that the registered proprietor is prevented from showing a clear title and dealing with his property as he might wish to do and would be able to do but for the caveat.”

It seems to me to be necessary, therefore, to ask in what circumstances another person would have the right to prevent the registered proprietor dealing freely with the property registered in his name and to my mind the answer should be if that other person has or purports to have, an enforceable interest in the property in question. If that other person has not and does not even purport to have any such interest in the property, then he should not in my opinion be justified in interfering with the rights of the registered proprietor.

I would say that a caveator's cause for lodging a caveat is dependent upon his claim to be entitled to an interest in the land, and that “reasonable” in those circumstances must mean the same as “justifiable.” If he has not a justifiable claim, then he cannot be

said to have reasonable cause for lodging the caveat and if he is not able to justify his claim it must follow that his action in lodging a caveat was without reasonable cause. If his claim is not justifiable and he interferes with the rights of the registered proprietor so that the latter suffers damages it would appear to me that it is only right and proper that such damage should be laid at the door of the person who by his action, caused it. One might therefore say caveat caveator.”

Another case that is of assistance in explaining the nature and effect of a caveat is the case of **Lenton Holdings Limited vs Moyo**³. The Lenton Holding Limited case is directly in point because it considered **Sections, 76 and 77 of the Lands and Deeds Registry Act**. In the course of the judgment delivered by Ngulube D.C.J. it was observed that: -

“Although the terms of Section. 76 (a) would appear to be very wide indeed, as can be seen, yet they would not, in considered opinion go so far as to cover rights which are otherwise recognisable as being lawfully claimed or held. However, section 77 (1) which we have set out would appear to require that the caveat should disclose the interest claimed.”

Thus, the Supreme Court held after construing **Sections 76 and 77 of the Lands and Deeds Registry** that to be effective, a caveat should disclose the interest claimed.

In the instant case, the applicant contends that the 1st respondent has no enforceable interest in land to justify the

interference of the rights of the 2nd Respondent by lodging a caveat on its behalf. On the other hand, the 1st Respondent contends on the authority of ***Kamanga v Attorney General and Another***¹ as a principle of professional ethics, a firm should represent its client, therefore that is the interest claimed on behalf of their clients.

The question that however remains unsolved, on the facts of this case is whether or not the 1st respondent was justified in entering the caveat in issue. In answering this question, it is important to put into perspective not only the requirements for registration of a caveat, as provided for in ***Section 76 of the Lands and Deeds Registry Act***, but also what ***Section 77*** provides as stated above.

In view of the findings I have made in the preceding paragraphs I find that in order for there to be finality in the determination of this matter, the 1st Respondent in their capacity as Legal Practitioners for the 2nd respondents have a stake in this matter as they may likely to be affected by the result of their client's proceedings, therefore, they must remain as parties. I accordingly dismiss the application for misjoinder.

Leave to appeal is granted.

Delivered at Lusaka on 28th February, 2020



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**G. MILIMO - SALASINI
HIGH COURT JUDGE**