

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2019/HP/0862

BETWEEN:

**WINNIE MUMBA
THOMAS MUMBA
AND**

**REUBEN MAMBWE
TAYLOR KAKINDILA
MOSES MBEWE
BRIAN TAILOKA
KENAAN SAKALA
STEVEN NKOMBO
MISHECK KABWE
SIMON MUMBA
SAMBAMO KAMPAMBA**



**1ST PLAINTIFF
2ND PLAINTIFF**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT
5TH DEFENDANT
6TH DEFENDANT
7TH DEFENDANT
8TH DEFENDANT
9TH DEFENDANT**

BEFORE HON. JUSTICE ELITA PHIRI MWIKISA

**FOR THE PLAINTIFF: MR. K. LUANGA KASONDE OF MESSRS
KALOKONI AND COMPANY**

**FOR THE 1ST, 2ND, 4TH, 5TH, 6TH, 7TH & 8TH DEFENDANTS: H. M.
MULUNDA OF L. M. CHAMBERS**

**FOR THE 3RD DEFENDANT: MR. CLEMENT MWEEMBA OF AKM LEGAL
PRACTITIONERS**

RULING

Cases Referred To:

1. *Bank of Zambia v Tembo & Others* (2002) ZR 103.

2. *Guest and Another v Makinga and Another (2011) Vol. 1 ZR 370 389.*
3. *Societe Nationale Des Clemis De Pur Du Congo (SNCC) v Joseph Nonde Kakande SCZ Judgment No. 19 of 2013.*
4. *Chick Masters Limited and Another v Investrust Bank PLC Appeal No. 74 of 2014 (unreported)J16.*

This is an application by the 1st, 2nd, 4th, 5th, 6th, 7th, and 8th defendants to raise a preliminary issue on a point of law. The application does not state under which law it is made. Be that as it may, the issues are:

1. Whether or not the matter is res judicata the same subject matter of this case having been dealt with by this Court under cause number 2000/HP/0029 by Justice J.C Mutale;
2. Whether or not the action hereof is not an abuse of court process as it amounts to forum shopping the same subject matter having been dismissed for want of prosecution under cause number 2017/HP/2093; and
3. Whether or not the action of trespass is tenable against the 2nd, 4th, 5th, 6th, 7th and 8th defendants and can be sustained, the said defendants being persons in possession of occupancy licences and documents authorising them to

be on the subject land by the Lusaka City Council, agents of the Commissioner of Lands by virtue of the Lands Act.

The application is supported by an affidavit dated 8th August, 2019, and deposed to by one Kenaan Sakala, the 5th defendant herein. He deposed that he was aware that the 1st defendant was sued by Sanikonda Phiri under cause 2000/HP/0029 wherein the said Sanikonda Phiri was claiming possession of a portion of Lot F/687/A/1/B/24 and judgment was entered in favour of the said Sanikonda Phiri against the 1st defendant as evidenced by copies of the order for possession, certificate of title and a letter by the advocates enclosing the order marked "KS1-3".

It was also deposed that following the said Order, the Ward Development Committee for Kanyama Constituency was engaged which subsequently engaged the Lusaka City Council. The said Lusaka City Council then moved in and issued Occupancy Licences to persons in occupation of the said portion of land exhibited and marked as "KS4-7", are true copies of the Occupancy Licences and documents showing authorisation to occupy respective plots for the 2nd, 5th, 6th, and 4th defendants respectively. It was also deposed that the other occupants have been paying ground rates and are merely awaiting the release of the Occupancy licences.

The deponent further stated that the plaintiffs' land is subdivision 23 and not subdivision 24 the latter having been the subject of the aforesaid court process. That the Court having ordered under cause 2000/HP/0029 that the land belongs to one Sanikonda Phiri the administration of justice will be brought in disrepute if this Court finds to the contrary. It was also deposed that the named defendants are licensees of the Commissioner of Lands having had been issued with Occupancy Licenses by the agent of the Commissioner of Lands, Lusaka City Council and that the action against the named defendants is misconceived as they have authority to be on the said land by virtue of the Occupancy Licences.

The deponent stated that the action hereof is an abuse of court process the same having been dismissed for want of prosecution before Judge Banda-Bobo under cause number 2017/HP/2093 as shown at exhibit "KS8".

On the other hand, the plaintiff filed an affidavit in opposition dated 16th August, 2019, deposed to by one Winnie Mumba, the plaintiff herein. She deposed that contrary to the misleading information placed before the Court that the matter was decided in 2000 by the late Justice Mutale, the correct information is that the subject matter in cause number 2000/HP/0029 was plot

number 687/24 which belongs to Sophia Sanikonda whereas the property subject of this dispute is plot number 687/23.

That cause number 2017/HP/2093 was not determined on merit at all and does not bar the plaintiff, the Certificate of Title holder, to vindicate her title to the property her late father left for his children. It was deposed that this affidavit is supported by the unmarked exhibit in the affidavit of Kenan Sakala being the order from the late Justice J C Mutale to show that the two (2) properties are different.

The deponent further averred that the 1st defendant forged Judge Chanda's signature on a Consent Order for the property number 687/23 the property for the plaintiff for which he was imprisoned for three (3) months as can be seen from the exhibits collectively marked "WM1" and "WM2" being the contempt judgment and Order dismissing the 1st defendant's matter against the plaintiff.

When the matter came up for hearing on 1st August, 2019, Counsel for the 1st, 2nd, 4th, 5th, 6th, 7th and 8th defendants, Mr Mulunda, submitted that he filed a conditional memorandum of appearance on behalf of his clients as he noticed that there are legal issues to be raised before the application can be heard. Mr Mulunda argued that he would like to raise a preliminary issue

on a point of law and that he therefore, seeks an application to have the matter disposed of on a point of law.

On the other hand, Counsel for the plaintiff, Mr Luanga, submitted that he was ready to proceed as the defendants had time to file in their memorandum of appearance as time within which they should have done so expired.

In reply, Mr Mulunda argued that the plaintiffs have not taken any steps on their matter and that there are no orders for directions. That what is being raised is a point of law which can be raised at any time. Mr Mulunda submitted that if his clients proceed to file an affidavit in opposition, they would be waiving their right to raise a preliminary issue. Counsel prayed that the Court allows him file the application and to proceed by way of skeleton arguments.

I have taken note that both parties have not filed in their skeleton arguments.

I have carefully considered the affidavit evidence herein. I do take note that the application herein does not state which law the application is made and further that no skeleton arguments have been filed in support of the same. Be that as it may, the first issue raised is whether or not the matter is res judicata the said

subject matter having been dealt with by this Court under cause number 2000/HP/0029 by Justice J.C Mutale.

In the case of **Bank of Zambia v Tembo & Others (2002) ZR 103¹**, the Supreme Court held that:

“in order that a plea or defence of res judicata may succeed, it is necessary to show that not only is the cause of action the same, but also that the plaintiff had an opportunity of recovering, and, but for his own fault, might have recovered that which he seeks to recover in the second. Thus, a plea of res judicata must show either an actual merger or that the same point had been actually decided between the same parties.”

Further, in the case of **Guest and Another v Makinga and Another (2011) Vol. 1 ZR 370 389²**, the court adopted the definition:

“The phrase res judicata is used to include two separate state of things. One is where a judgment has been pronounced between parties and findings of fact are involved as a basis for that judgment. All the parties affected by the judgment are then precluded from disputing those facts as facts in any 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 was already been adjudicated, but it is convenient to use the phrase res judicata as relating to that position.”

In the case of **Societe Nationale Des Clemis De Pur Du Congo (SNCC) v Joseph Nonde Kakande SCZ Judgment No. 19 of 2013³**, the Supreme Court opined as follows:

“Res Judicata is not only captioned to similarity or otherwise of the claims in the 1st case and the 2nd one. It extends to the opportunity to claim matters which existed at the time of instituting the 1st action and giving the judgment.”

In the case in casu, as can be seen from exhibit “KS3” the order that was made in July, 2000, was in relation to subdivision No. 24 of subdivision B of subdivision 1 of subdivision a of farm No. 687 Lusaka (F/687/A/1/B/24). As correctly put by the deponent in the affidavit in support at paragraph 7, the plaintiff’s land is subdivision 23 and not 24 which was the subject matter of the other court process. The plaintiffs in this case claim that they are the legal owners of Subdivision C of subdivision No. 23 of subdivision ‘B’ of subdivision No. 1 of subdivision ‘A’ of farm 687, Mandevu, Lusaka which land has been encroached by the 1st, 3rd

and 4th defendants who have erected incomplete structures without the plaintiffs' consent.

I therefore, find that the subject matter in the two Court processes was different as the land in dispute in the two matters was different. The sum and substance of the plea of Res judicata is that a matter once adjudicated upon is finally decided and since it was not decided, the first issue raised therefore fails.

The second issue raised was whether or not the action hereof is not an abuse of court process as it amounts to forum shopping the same subject matter having been dismissed for want of prosecution under cause number 2017/HP/2093. A perusal of the said Ruling dated 15th May, 2019, exhibited in the affidavit in support shows that the parties indeed had instituted proceedings in relation to this matter and the same was dismissed.

The phrase 'abuse of the court process' was explained in the case of **Chick Masters Limited and Another v Investrust Bank PLC Appeal No. 74 of 2014 (unreported)J16⁴** as follows:

“Abuse of court process can arise where the claim is vexations, scurrilous or obviously ill-founded such as where proceedings are started to pursue a claim which has already been dealt with by way of full and final settlement between parties.

Of course, an action tainted by abuse of process is likely to compromise the integrity of the court's procedures. It might do so if it wastefully occupies the time and resources of the court in a claim that is obviously without merit. The court will prevent the improper use of its machinery and will not allow it to be used as a means of vexations and oppressive behaviour in the process of litigation."

I agree with the deponent in the affidavit in opposition that this matter was not heard on its merits and therefore not conclusively determined. I find that the matter was not dealt with and further that there is indeed merit in the matter. The second issue therefore also fails.

The third issue raised was whether or not the action of trespass is tenable against the 2nd, 4th, 5th, 6th, 7th and 8th defendants and whether it can be sustained, the said defendants being persons in possession of occupancy licences and documents authorising them to be on the subject land by the Lusaka City Council, agents of the Commissioner of Lands by virtue of the Lands Act.

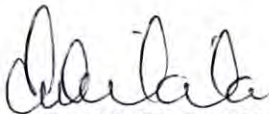
A perusal of the occupancy licenses exhibited in the affidavit in support, particularly "KS5" shows that it relates to Stand No.24 and not Stand No. 23 which land is in contention herein. It is therefore imperative that this matter goes to trial in order to

ascertain whether the defendants have indeed encroached on the plaintiffs' land or not. In light of the above the third issue also fails.

I accordingly find that this application has no merit and therefore dismiss it with costs to the plaintiff to be taxed in default of agreement.

Leave to appeal is granted.

Delivered in Chambers at Lusaka this 27th day of Feb 2020



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**ELITA PHIRI MWIKISA
HIGH COURT JUDGE**