

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

**2019/HP/0871**



BETWEEN:

**ALEX MUMBA  
APOSTOLIC REVIVAL EVANGELICAL MINISTRIES**

**1<sup>st</sup> PLAINTIFF  
2<sup>nd</sup> PLAINTIFF**

AND

**CHRISTOPHER SIKAPIZYE  
CHILANGA DISTRICT COUNCIL**

**DEFENDANT  
1<sup>st</sup> INTERESTED PARTY**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 29<sup>th</sup>  
DAY OF JANUARY, 2020**

*For the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs : in person*

*For the Defendant : Ms K. Chulu, Legal Aid Counsel, Legal Aid Board*

*For the interested party : no appearance*

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## **R U L I N G**

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CASES REFERRED TO:

- 1. *Walisuku Lisulo v Patricia Lisulo* 1998 ZR 75**
- 2. *Mukuka Winston Bwali Nkunde v Zambia Development Agency*  
Appeal No 170 of 2008**
- 3. *NFC Mining Limited v Techno Zambia Limited* 2009 ZR**

LEGISLATION REFERRED TO:

- 1. *The Land Survey Act, Chapter 188 of the Laws of Zambia***

This is a ruling on an application made by the plaintiffs for an order to stay execution of the order dated 26<sup>th</sup> July, 2019, and an application to set aside the said order for irregularity. The plaintiffs also raised a preliminary issue to the memorandum of appearance and defence that was filed by the defendant on 27<sup>th</sup> September, 2019, as they had been filed by Counsel without having filed a notice of appointment as advocates.

In making the applications, the 1<sup>st</sup> plaintiff submitted that they relied on the affidavit filed in support of the application, as well as the skeleton arguments. The 1<sup>st</sup> plaintiff asked that the memorandum of appearance and the defence be set aside, and they be granted leave to file a default judgment against the defendants.

In response, Counsel for the defendant submitted that they had not filed an affidavit in opposition to the preliminary issue that had been raised as the omission to file a notice of appointment as advocates is curable. That they had since filed one on 10<sup>th</sup> October, 2019, and the defect had thereby been cured. Thus, pursuant to Order 3 Rule 2 of the High Court Rules, they prayed in the interests of justice, that the memorandum of appearance and the defence be allowed.

As regards the application to stay execution of the order dated 27<sup>th</sup> July, 2019, Counsel again stated that they had not filed an affidavit in opposition to that application, but that she would make oral submissions. Counsel noted that the plaintiff was dissatisfied with the order 27<sup>th</sup> July, 2019 and had applied to set it aside for irregularity on the grounds advanced in the affidavit in support of the application.

It was Counsel's submission that they were at pains in finding the procedure that allowed the making of such an application. She noted that our rules of procedure as they stand, provide for two avenues for a party that is dissatisfied with a ruling, judgment or order of the court. These were named as proceeding by way of review pursuant to Order 39 of the High Court Rules, Chapter 27 of the Laws of Zambia or to appeal.

With regard to the avenue of review, Counsel relied on the case of **Walisuku Lisulo v Patricia Lisulo** <sup>(1)</sup> which held that the powers of review under Order 39 of the High Court Rules are discretionary, and there must be sufficient grounds to exercise such discretion.

As regards to the option to appeal, it was submitted that Order 47 of the High Court Rules provides for the same, and that in appealing, a dissatisfied party must show that the decision maker made a factual or legal error when making the decision. Counsel stated that in view of the options that are available to a dissatisfied party, the plaintiffs had applied to set aside the order for irregularity, which was irregular.

The case of **NFC Mining Limited v Techno Zambia Limited** <sup>(3)</sup> was relied on as authority, stating that it was held in that case that the rules of court are intended to assist in the proper and orderly administration of justice, and as such, they must be strictly followed. Counsel also submitted that Order 2 Rule 1 of the Rules of the Supreme Court of England, 1999 edition provides for the occasion where it can be said that irregularity exists.

That this provision is not available to a party that is dissatisfied with a court order. It was stated that in paragraph 4 of the affidavit in support of the summons to set aside the order, the plaintiffs state that the order

is not only ingenuine or irregular, but it also supports the intention of the 2<sup>nd</sup> interested party to grab the land from the plaintiffs through abuse of office, in order to alienate it to the defendant, contrary to procedure.

Counsel stated that these averments do not amount to an irregularity, but rather disclose that the plaintiffs are dissatisfied with the order, and they must use the avenues that are available. Therefore, the application to stay the order of the court is irregular, and further it is frivolous and vexatious. It was added that the application is an attack on the integrity of the court, and should be dismissed with costs to the defendant.

The 1<sup>st</sup> plaintiff in reply stated that the plaintiffs cannot be subjected to the pace of the defendants in prosecuting the matter. That there must be finality to litigation, and the case of ***Mukuka Winston Bwali Nkunde v Zambia Development Agency*** <sup>(2)</sup> was relied on, stating that it was stated in that case that once litigants move the courts of law, they subject themselves to the control of the court and the law.

I have considered the applications. I will start with the preliminary issue raised with regard to the memorandum of appearance and the defence that was filed by the defendant on 27<sup>th</sup> September, 2019. In raising the preliminary issue, the 1<sup>st</sup> plaintiff stated that the said documents had been filed without the Legal Aid Board filing a notice of appointment as advocates as required by the law. Therefore, the documents were filed without authority.

In admitting the default, Counsel for the defendant submitted that they had since cured the defendant by filing the said notice of appointment,

and as such the memorandum of appearance and defence should be allowed in the interests of justice.

Order XI Rule 4 of the High Court Rules, Chapter 27 of the Laws of Zambia provides that;

***“4. (1) The advocate of a defendant appearing by advocate shall state in the memorandum of appearance-***

***(a) his own place of business and the postal address thereof; and***

***(b) if his place of business and postal address or either of them be more than ten kilometres from the Registry in which the cause or matter is pending, a proper place and postal address or either of them, as the case may require, which shall be not more than ten kilometres from such Registry;***

***and either of the addresses which are not more than ten kilometres from such Registry shall be his address for service for the purposes of these Rules”.***

A perusal of the memorandum of appearance that was filed shows that the Legal Aid Board, as advocates for the defendant, complied with the above provisions, as they completed Part B of the memorandum of appearance which is completed where the defendant appears by advocate. Had the defendant appeared in person initially, and then engaged the Legal Aid Board as his advocates, then the Legal Aid Board would have been required to file a notice of appointment as advocates.

As it is, the Legal Aid Board indicated that it was representing the defendant on the memorandum of appearance, and it complied with the law. Therefore, there is nothing irregular in the memorandum of appearance that was filed, and the preliminary issue lacks merit and it fails.

As regards the application to stay execution of the order dated 26<sup>th</sup> July, and to set it set aside for irregularity, the background leading to the matter is that this action was commenced on 10<sup>th</sup> June, 2019 by writ of summons, which was amended on 11<sup>th</sup> September, 2019 in which the plaintiff seeks;

- i. *An order that the defendant immediately replaces seven (7) lawful boundary beacons which he deliberately removed from the property Stand No 1236 Chilanga. The replacement of the beacons to be witnessed by all the parties concerned including the 1<sup>st</sup> interested party.*
- ii. *An order that the defendant immediately removes the caveat which he had secretly placed on the property Stand No 1236 Chilanga for no genuine reason, so as to enable the plaintiffs to submit an application for consent for subdivision.*
- iii. *An order of injunction restraining the defendant from further developing, carrying out any activity and or occupying the plot namely, 1236 Chilanga AREM, until after the title deeds for this piece of land has been issued as other plots on the same parent stand.*
- iv. *Damages for delaying and frustrating the plaintiffs' development at the land in question by the defendant since September 2017 when*

*he deliberately removed boundary beacons from the land in issue, and has been refusing to replace them. (To be assessed by the honourable court).*

*v. Damages for delaying the process of obtaining individual title deeds for the subdivision of the property in issue since March 2019, when the defendant put a caveat for no genuine reason on the property. (To be assessed by the court).*

*vi. Costs*

*vii. Any other relief that the court may deem fit.*

When the matter came up for the hearing of the injunction on 26<sup>th</sup> July, 2019, I noted that exhibit 'AM4' to the affidavit in reply to the affidavit in opposition to the order of injunction, was a letter from the Office of the Commissioner of Lands dated 30<sup>th</sup> April, 2019, which requested the 1<sup>st</sup> plaintiff to surrender the original title deed to Lot 1236/M for correction, as it had been discovered that the subdivision was done using an erroneous lay out plan.

The letter further states that the rectification would benefit all those who bought portions of land from the plaintiff, as well as the adjacent land owners. The 1<sup>st</sup> plaintiff was requested to surrender the certificate of title and to execute a deed of surrender.

The statement of claim shows that the defendant bought a piece of land from the plaintiffs in September, 2017, and while he was grading the plot and two plots next to it, he removed seven (7) beacons which has resulted in confusion of the boundaries, and has delayed the plaintiffs' development of the land.

As can be seen from the affidavit in support of the summons for the order of injunction, the affidavit in opposition and the affidavit in reply, it is clear that the plaintiffs applied for the land from the Kafue District Council on which to build a church. The plaintiff sued a number of people among them, the Kafue District Council before the Lands Tribunal under cause number LAT/62/2013.

The judgment of the Lands Tribunal dated 24<sup>th</sup> March, 2014, which is exhibited as 'AM6' to the affidavit in support of summons for the order of injunction, was that the plaintiffs were the rightful owners of Stand No 1236 Chilanga, having followed the right procedure in acquiring the same. On 27<sup>th</sup> October, 2016, as shown on exhibit 'AM13' to the affidavit in support of summons for the order of injunction, the plaintiffs applied to subdivide the land, which was approved on 27<sup>th</sup> October, 2016, by the Lusaka Province Planning Authority. Thereafter, the plaintiffs sold a subdivision of the land to the defendant.

Exhibited as 'AM6' to the affidavit in reply to the affidavit in opposition for the order of injunction is a ruling for joinder of Kafue District Council and the Commissioner of Lands under cause number 2014/HP/A0020 following an appeal against the judgment of the Lands Tribunal to the High Court. The outcome of that appeal is not on the court record.

When the parties appeared before me for hearing of the application for the order of injunction on 26<sup>th</sup> July, 2019, I noted that the office of the Commissioner of Lands, on 30<sup>th</sup> April, 2019 wrote to the 1<sup>st</sup> plaintiff advising that the subdivision of his land was done on an erroneous site plan, and there was need to rectify the same, in order that those who bought properties from him, as well as the adjacent plots could benefit.



In my understanding, the letter from the Office of the Commissioner of Lands does not relate to the piece of land that the plaintiffs were given which had lay out plans that were initially approved when the certificate of title was issued on 18<sup>th</sup> November, 2013. Rather, the issue relates to the lay out plans for the sub divisions to the land that were done after the land was alienated to the plaintiff, which are shown on exhibit 'AM3' to the affidavit in reply.

The plaintiff in the affidavit in opposition to the summons for misjoinder of the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties dated 30<sup>th</sup> October, 2019 states that the Office of the Surveyor General approved the site plan or lay out plan for the plaintiff to subdivide the land.

A perusal of exhibit 'AM3' to the affidavit in reply shows that Lusaka Province Planning Authority approved the proposed subdivision of Stand No 1236 Chilanga, being the plaintiff's property. This document which is also exhibited as 'AM11' to the affidavit in support of the summons for the order of injunction has some writings at the bottom hand corner that the proposed sub divisions are approved for numbering as bordered in red with the date 8<sup>th</sup> May, 2017.

Sections 20 and 21 of the Land Survey Act, Chapter 188 of the Laws of Zambia provides as follows;

***“20. No diagram of any portion of a registered unsurveyed parcel of land shall be approved until a survey has been made of the whole of such parcel of land and a diagram has been registered on the basis of such survey.*”**

**21. When submitting to the Surveyor-General for approval the records of a subdivisional survey, the land surveyor concerned shall deliver, in addition to any other records-**

**(a) a plan showing the proposed subdivision or subdivisions approved by the appropriate authority constituted under the Town and Country Planning Act when the land is subject to the provisions of that Act;**

**(b) in the case of land leased from the President, a plan of the proposed subdivision or subdivisions approved by the Commissioner of Lands”.**

While the plaintiffs in paragraph 6 of the affidavit in opposition to the summons for misjoinder of the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties, alleges that the Surveyor General used the lay out plan exhibited as ‘AM3’ to the affidavit in reply, to the affidavit in opposition to the summons for an order of injunction, he has not produced the approved survey of the subdivision by the Surveyor General.

Section 22 of the Land Survey Act provides that;

**“22. (1) Whenever the owner of a surveyed parcel of land desires to subdivide the same and to effect separate registration of one or more portions of such land, each of the portions to be so registered shall be surveyed and a diagram thereof, prepared in accordance with this Act, shall be submitted to the Surveyor-General for approval:**

**Provided that, if it is desired to effect a separate registration of the remaining extent of such parcel of land, no diagram of such remaining extent shall be submitted to the Surveyor-**

***General or approved unless it be designated as a subdivision of the parcel of land”.***

Therefore, it is premature to allege that there is an approved subdivision, and that the defendant has removed the lawfully placed beacons in the absence of approved survey diagrams for the subdivision. To that end, while the plaintiffs invoked a wrong procedure in moving me to review my ruling dated 26<sup>th</sup> July, 2019, by virtue of the powers vested in me in Order 39 and Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia, I direct that the plaintiffs proceed to obtain the approved survey diagrams before any order can issue against the defendant in these proceedings.

This shall be done within ninety (90) days from today, failure to which the matter shall be dismissed for want of prosecution. The order of 26<sup>th</sup> July, 2019 directing the surrender of the plaintiff's title deed and the execution of a deed of surrender is accordingly set aside. The matter shall come up on 20<sup>th</sup> May, 2020 at 08:30 hours for a status conference. Costs shall be in the cause and leave to appeal is granted.

**DATED AT LUSAKA THIS 29<sup>th</sup> DAY OF JANUARY, 2020**

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