

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

2014/HP/1747

BETWEEN:

MUTIMBI REAL ESTATES LIMITED

PLAINTIFF

AND

JIM BELEMU

DEFENDANT



Before: **The Hon. Mr. Justice Charles Zulu.**

For the Plaintiff: Mr. F. Besa, Messrs. Friday Besa & Associates,
and Mr. W. Shakalima of Messrs Mweemba &
Company.

For the Defendant: Mr. E. B. Mwansa SC, of Messrs. E.B.M.
Chambers.

RULING

Cases referred to:

- 1. Sonny Paul Mulenga & Others v. Investrust Merchant Bank (1999) Z.R. 101, SC**

Legislation referred to:

- 1. The High Court Rules (HCR) Chapter 27 of the Laws of Zambia.**
- 2. The Rules of the Supreme Court 1965 (RCS) England (White Book) 1999 Edition.**

This ruling is in respect of an appeal by the Plaintiff against the decision of the District Registrar to grant an *ex parte* order of leave to the Defendant to re-issue the writ of possession dated March 13, 2019. And the grounds of appeal advanced by the Plaintiff are:

Ground One

The learned Deputy Registrar erred in law and in fact when he granted an ex parte Order for Leave to file the reissued writ of possession dated 13th March, 2019 purportedly to enforce the Consent Judgment dated 23rd March, 2015 executed before the learned High Court Judge Mrs. F.M Chisanga when the terms of the said consent judgment did not provide for the Respondent expressly or by implication to take possession of Farm No. 350/a/D/4/A/11 Choma under any circumstances envisaged by the said consent judgment.

Ground Two

The learned Deputy Registrar erred in fact and in law when he granted an Order for leave to file the re-issued writ of possession dated 13th March 2019 when ex parte without affording the Appellant the Rules of Natural Justice by according the Appellant an opportunity to be heard by filing his opposition to the said application for leave to file writ of possession as the said application was highly contentious as the consent judgment the Respondent purported to enforce did not have a clause giving the Respondent the relief of possession of the property herein.

Ground Three

The learned Deputy Registrar grossly misdirected himself in law when he granted the Respondent an ex parte Order for leave to file the re-issued writ of possession purportedly to enforce the consent judgment of the High Court Judge as he did not have the jurisdiction to hear and grant such an order as the said application assuming it was tenable should have been made before the High Court Judge who signed the consent judgment dated 23rd March, 2015 as the Deputy Registrar could not usurp the High Court Judge's jurisdiction to interpret and enforce his/her judgment.

A brief background to this appeal is that, on November 3, 2014, the Plaintiff took out a writ of summons together with a statement of claim seeking the following reliefs:

- (i) specific performance of the contract of sale made between the parties dated 30th August 2014;**
- (ii) a declaration that the purported termination of the contract is null and void and of no legal consequence whatsoever;**
- (iii) an injunction restraining the Defendant from retaking the property herein known as F/350a/D/4/A/11 Choma;**
- (iv) any other reliefs the court may deem fit; and**
- (v) Costs.**

On March 23, 2015, the parties herein filed a consent judgment and the same was approved by the then presiding Judge. The agreed terms were couched as follows:

CONSENT JUDGMENT

BY CONSENT OF BOTH PARTIES,

IT IS HEREBY AGREED AND ADJUDGED as follows:'

- 1. The plaintiff will pay the Defendant the amount of one million eight hundred and fifty Thousand Kwacha (K1,850,000.00) as full and final settlement of the balance of the Purchase price upon execution of the Consent judgment.**
- 2. The Defendant shall by way of completion obtain Consent to Assign, execute Assignment Deeds and surrender such executed Assignments together with the Original Certificates of Title and any other document necessary to facilitate completion and transfer of the property known as F/350a/D/4/A/11, Choma, Southern Province from the Defendant to the Plaintiff.**
- 3. That the surrender of the Original Certificate of Title Number 203709 by the Defendant to the Plaintiff shall be subject to the Defendant retrieving the same from the third party currently in custody of it.**

- 4. The parties shall at a later date to be agreed meet to discuss profit sharing during the period prior to completion and property transfer tax payment.**
- 5. Upon the parties satisfying the terms referred to above, the Plaintiff shall obtain absolute vacant possession of the property known as F/350a/D/4/A/11, Choma, Southern Province and the parties shall have no further claims toand the property herein contracted to be sold by the Defendant to the Plaintiff shall be transferred to the Plaintiff free of any encumbrances whatsoever.**
- 6. Each party to bear it/his own Legal Costs.**

Dated at Lusaka this 23rd day of March 2015

Signed

**MRS JUSTICE F. M. CHISANGA
HIGH COURT JUSTICE**

The parties hereto filed another consent order dated June 29, 2017, approved by the Deputy Registrar, wherein it was acknowledged that upon the Plaintiff assuming legal ownership of the property, it was agreed the third party, the estate of Reeves Malambo was to release the Certificate of Title to the Plaintiff.

On March 13, 2019, a re-issued writ of possession arising from an order by the District Registrar granting leave to re-issue writ of possession was filed into court. The re-issued writ of possession was directing the Sheriff and his Bailiffs to enter on the subject property and cause the Defendant herein to have vacant possession. It was also endorsed in the said re-issued writ of possession that, the Plaintiff had breached the terms of the consent judgment dated 23rd March 2015, by failing to pay the full and final settlement of the purchase price, and profit sharing. It appears execution was effected on March 14, 2019, whereby the

Defendant retook possession of the property from the Plaintiff. Hence the present appeal by the Plaintiff challenging the District Registrar's decision to grant an *ex parte* order for leave to the Defendant to re-issue the writ of possession dated March 13, 2019.

In respect of ground one, the Plaintiff's Counsel argued that the express terms of the consent judgment herein had no clause whatsoever, express or implied, which allowed the Defendant to retake the property by writ of possession or under whatsoever circumstances. It was maintained that the said terms did not grant the Defendant the remedy of possession of the property other than recovery of money. That even assuming that the Plaintiff was in default on its obligations under the consent judgment, the mode of execution via a writ of possession was irregular unless via a writ of *feri facias*.

The Plaintiff's Counsel made reference to the case of **Sonny Paul Mulenga & Others v Investrust Merchant Bank (1999) Z.R. 101, SC** wherein it was held:

A consent order is complete and final when endorsed by the Court.

It was thus argued that the parties hereto could only enforce express clauses spelt out in the consent judgment.

In respect of ground two, it was argued that notice of the application for leave to re-issue writ of possession ought to have been given to the Plaintiff. Reference was made to **Order 45 rule 3 (2) Rules of the Supreme Court (RSC) (1999 Edition White Book)** which provides:

A writ of possession to enforce a judgment or order for giving of possession of any land shall not be issued without the leave of the Court except where the judgment or order was given in a mortgage action to which Order 88 applies.

It was submitted that the right to be heard was fundamental to litigation. It was, therefore, argued that leave to re-issue writ of possession was wrongfully granted.

And in respect of ground three, it was argued that the application for leave to re-issue writ of possession should have been made to the High Court Judge, because the learned District Registrar had no such jurisdiction, and that the District Registrar could not usurp the powers of the Judge in the process of enforcing the judgment.

Finally, I was urged to set aside the *ex parte* order for leave to re-issue writ of possession, and restore possession to the Plaintiff.

In response, and in his introduction, the Defendant's Counsel, acknowledged that the application for leave to re-issue writ of possession was granted on March 13, 2019. The Defendant's Counsel opted to start with ground two, three and ended with one.

In respect of ground two, it was argued that the District Registrar did not misdirect himself to entertain the application, because the District Registrar had jurisdiction under Order 45 r. 3 RSC. It was argued that the Plaintiff should have first applied to the District Registrar to have the order for leave set aside, before launching the appeal to a Judge at Chambers; this argument was anchored on Order 32 r. 6 RSC. According to State Counsel, the District Registrar was in this regard the only court vested with the jurisdiction to set aside the said *ex parte* order.

As regards ground one, it was repeated that the District Registrar had jurisdiction to hear and determine the application for leave, and that if the Plaintiff was not happy with the grant of the *ex parte* order for leave to re-issue writ of possession, the Plaintiff should have applied to have the same set aside. It was argued that an appeal could only have been permissible if the District Registrar had refused to set aside the *ex parte* order or refused to grant an *inter partes* hearing.

Furthermore, it was noted that the property in question was never assigned to the Plaintiff. And that the Plaintiff having failed to comply with the consent judgment, the Defendant retained the right to repossess the property.

I have carefully considered the appeal. And I wish to note that, an appeal from the decision of the Registrar or District Registrar is a rehearing of the application. In the present case the issue is essentially whether or not it was proper to grant the order for leave to re-issue writ of possession *ex parte*. I will deal with the application/appeal in the manner the Plaintiff's Counsel has raised issues herein. However, I will combine ground two and three, and conclude with ground one, I find this approach convenient. And before I delve into the specific issues raised, I agree with Mr. Mwansa SC, that ordinarily the Plaintiff should have made an application to set aside the *ex parte* order to the District Registrar, as permitted by Order 32 r. 6 RSC, but in my Ruling dated February 7, 2020, I intimated that the Plaintiff was at liberty to appeal as provided by Order XXX r. 10 HRC, and I discern no prejudice was occasioned by this approach. In any event it is the Judge who has full control of the record.

Generally, an application for leave to issue writ of possession should derive its authority from enforcement of a judgment or an order granting possession of land.

The jurisdiction of the Registrar or the District Registrar is spelt out under Order III r 3, of the **High Court Rules (HRC) Chapter 27 of the Laws of Zambia** thus:

The Registrar may transact all such business and exercise all such authority and jurisdiction in respect of the same as under the Act or Rules may be transacted or exercised by a judge at chambers, except in respect of the following proceedings and matters, that is to say:

(a) All matters relating to criminal proceedings or to the liberty of the subject.

(b) Appeals from District Registrars.

(c) Injunctions;

(d) Receiving taxation of costs, save as provided in order XL, rule 3 and 4. (N.B, Order III r 3 is now amended by Statutory Instrument No. 58 of 2020, but the above was un-amended).

Under Rule 2 of High Court Rules, the word “Registrar”, means the Registrar of the High Court, and includes a District Registrar. A District Registrar is not excluded from hearing and determining an application for leave to issue or indeed re-issue a writ of possession (see also para. 32/6/5 of the White Book 1999 Edition). And I am not aware of any other written law that expressly divest the District Registrar of such jurisdiction.

I agree with the Defendant’s Counsel, Mr. Mwansa SC, that the District Registrar had jurisdiction to hear and determine an application for leave to issue or re-issue writ of possession. However, in the present case the question still remains to be resolved whether in the light of the consent judgment and the

circumstances of this case, the learned District Registrar competently granted an *ex parte* order for leave to re-issue the writ of possession dated March 13, 2019, and that takes me to ground two.

In ground two, it was contended that the District Registrar erred in fact and law when he granted the *ex parte* order without affording the Plaintiff notice of the application and an opportunity to be heard, to oppose the application, since the application was highly contentious. It is my considered opinion, and I agree with the Plaintiff's Counsel that the learned District Registrar misdirected himself to grant the application *ex parte*, without allowing the Plaintiff to have prior notice of the application as envisaged by Order 45 r. (3) sub r. 3 RSC, and without ascertaining whether or not, the Plaintiff had breached the terms of the consent judgment as alleged. The Defendant sought to retake possession by alleging that the Plaintiff had receded on the terms of the consent judgment, by failing to pay the full and final settlement of the purchase price and profit sharing. Given the Defendant's allegation and the circumstances of the case, the ends of procedural justice demanded that the Plaintiff ought to have been given notice and a chance to be heard, before leave to execute was issued. On this account the *ex parte* order is amenable to be set aside.

It is clear that had the learned District Registrar afforded the Plaintiff an opportunity to be heard, the issue that was inevitably going to arise was as stated in ground one, whether the said consent judgement made provisions either expressly or impliedly for the Defendant to retake possession of the subject property in

an event the Plaintiff defaulted. And since the application was not heard on its merits, this issue was not considered on its merits. It will be therefore inappropriate to determine the issue fully in this appeal, when the Defendant still has an opportunity to re-apply for leave to re-issue writ of possession after this Ruling, if he so wishes. And for the avoidance of doubt once filed, the application shall be heard *inter partes* before me. Accordingly, if the Defendant is desirous to re-apply for leave to re-issue the writ of possession, the application should be filed on or before the 14th of August, 2020.

All in all, on account of ground two (2) the *ex parte* order for leave to re-issue writ of possession together with the re-issued writ of possession dated March 13, 2019 is set aside.

Costs to be borne by the Defendant.

DATED THIS 7TH DAY OF AUGUST, 2020.



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THE HON. MR. JUSTICE CHARLES ZULU