

**IN THE HIGH COURT OF ZAMBIA
AT THE DISTRICT REGISTRY
HOLDEN AT LIVINGSTONE**
(Civil Jurisdiction)



2014/HL/13

**IN THE MATTER OF: SECTION 81 (1) AND (2) OF THE LANDS
AND DEEDS REGISTRY ACT CAP 185 OF
THE LAWS OF ZAMBIA**

AND

**IN THE MATTER OF: APPLICATION FOR REMOVAL OF CAVEAT
FROM HOUSE NO. DNA 137, DAMBWA
NORTH, LIVINGSTONE**

BETWEEN:

QUEEN ELIZABETH MULENGA

APPLICANT

(Suing as administratrix for the Estate of the late Jennet Kawaya)

AND

ANTHONY MULENGA

1st RESPONDENT

JANET MULENGA

2ND RESPONDENT

*Before Honourable Mr. Justice M.L. ZULU, at Livingstone
the....day of March, 2020*

For the Applicant: Mr. Muntamfya- National Legal Aid Clinic

For Women

For the Respondent: Major H. Gondwe- Messrs. KBF & Partners

RULING

Cases referred to:

- 1. Twampane Mining Co-operative Society Limited v E AND M Storti Mining Limited S.C.Z. Judgment No. 20 of 2011.**
- 2. Mundia Sikatana v The Attorney General (1982) Z.R.**

Legislation referred to:

- 1. The High Court Rules Chapter 27 of the Laws of Zambia**
- 2. The Intestate Succession Act Chapter 59 of the Laws of Zambia**

This is a ruling following the respondent's application for an order to restore a caveat on house No. DNA 137, Dambwa North Livingstone.

The background of this application is that the applicant commenced an action by way of originating summons supported by an affidavit both dated 29th January, 2014, for an order for removal of caveat pursuant to Order 35 of the High Court Rules.

In the said affidavit in support the applicant deposed that prior to her mother's death, she and her siblings used to reside at house No. DNA 137 Dambwa which belonged to her mother. After their mother's demise she was appointed an administratrix of the estate of the late Jennet Kawayya. She exhibited an order of appointment marked "QEM2". She averred that on 27th June, 2013 the respondent who was the deceased's grandson placed a caveat on

house No. DNA 137, Dambwa North and the caveat was exhibited as "QEM3". She deposed that the respondent's conduct was illegal because he had no authority to do so on an estate which belonged to the late Jennet Kawayo as he was merely her grandson and not an administrator of the estate.

On 14th February 2014, the respondent was served with the originating summons and acknowledged receipt of the same. The respondent however, did not respond or file an affidavit opposing the application. On 17th February, 2014 Honourable Justice Salasini granted the application to remove caveat and proceeded to grant an ex-parte order on 24th March, 2014.

On 20th August, 2014 the applicant made an ex-parte application for an order of eviction supported by an affidavit and on 29th September, 2014 honourable Justice Salasini granted an ex-parte order for eviction.

On 28th May, 2019 Major Gondwe counsel for the respondent made an application to restore the caveat pursuant to **Order 35 Rule 5 of White Book**. The application was made on the basis that the respondents were not represented.

In response Mr. Muntamfya submitted that he was relying on **Order 35 Rule 5**. It was his submission that the respondents had not shown sufficient cause why this court would restore the caveat on house No. DNA 137, Dambwa North Livingstone. When granting the application the court relied on the affidavit in support of the application for an order of eviction and thus he urged this court to consider paragraphs 4, 8 and 9 of the said affidavit. He added that there was no affidavit in opposition on record.

It was further his submission that the applicant was the rightful appointed administratrix of the estate and therefore, it was his prayer that the application for an order of eviction be granted in order to enable her to carry out her duties provided under **Section 19 (1)(b) of the Intestate Succession Act**. The respondents ought to be evicted from the house so that the applicant is not prevented from distributing the estate of the Jenet Kawayo. It was his prayer that an order of eviction is granted for the benefit of all the beneficiaries.

In reply Mr. Gondwe submitted that pertaining to the issue of sufficient cause the respondents were not given an opportunity to be heard by the court.

I am grateful to counsel for both parties for their submissions which I have taken into consideration. A perusal of the record shows that the respondents were served with the originating summons on 14th February, 2014 and the 1st respondent actually acknowledged receipt. It is thus evident that the respondents were fully aware of these proceedings that had been instituted against them by the applicant. However, they sat on their rights when they opted not to file any response to both applications made by the applicant at their own peril. Therefore, the respondents cannot after a number of years have passed claim that they were not given an opportunity to be heard by the court. They cannot be allowed to benefit from their own laxity and disregard of the laid down rules of procedure. I am guided by the case of **Twampane Mining Co-operative Society Limited v E AND M Storti Mining Limited (1)** in which the Supreme Court held inter alia that;

“It is important to adhere to Rules of Court in order to ensure that matters are heard in an orderly and expeditious manner. Those who choose to ignore Rules of Court do so at their own peril.”

Furthermore, in resolving the respondents’ application to restore the caveat on house No. DNA 137 Dambwa North Livingstone, I will begin by stating that this matter was already adjudicated upon by my learned sister honourable Justice Salasini. It is established law pursuant to **Section 4 of the High Court Act** that this court has no power to review or set aside the decision of another High Court Judge because we are vested with equal jurisdiction, power and authority. Thus such an application is untenable and cannot be sustained as it is improperly before this court. The said Section 4 of the High Court Act states as follows;

“4. Subject to any express statutory provision to the contrary, all the Judges shall have and may exercise, in all respects, equal power, authority and jurisdiction, and, subject as aforesaid, any Judge may exercise all or any part of the jurisdiction by this Act or otherwise vested in the Court, and, for such purpose, shall be and form a Court.”

In the case of **Mundia Sikatana v The Attorney General (2)** Kakad J. stated that;

“....there can be no doubt that the jurisdiction, power and authority vested by the Constitution of Zambia, in my learned brother Chirwa J., is equal to the jurisdiction, power and authority vested in me by the Constitution of Zambia. Therefore, there is no question of me and this court having any different or dissimilar jurisdiction, power and authority to that vested in my brother Chirwa J., and the court presided over by him (see s. 4 of the High Court Act, Cap. 50).”

In view of the foregoing authorities it is my considered view that both parties are bound by the orders made by the High Court and as such this court is functus officio. Thus the only recourse available to the respondents is to appeal to the Court of Appeal. This application is accordingly dismissed with costs to the applicant.

Delivered at Livingstone, the ^{17th} day of ^{March} 2020

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MATHEW L. ZULU
HIGH COURT JUDGE