**IN THE HIGH COURT FOR ZAMBIA** **2014/HP/0594**
**AT THE PRINCIPAL REGISTRY**
**HOLDEN AT LUSAKA**
(CIVIL JURISDICTION)


BETWEEN:

**VICTOR NONDE CHIBANGULA** **PLAINTIFF**

AND

**ZAMBIA RAILWAYS LIMITED** **1ST DEFENDANT**
**IGNATIUS CHELLA** **2ND DEFENDANT**

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

For the Plaintiff: Mr. W. Simutenda, Messrs T.M.B. Advocates.

For the first Defendant: Mr. N. Sampa, Messrs. Norah Sampa Advocates.

For the second Defendant: Mrs. D. Chabu, Lumangwe Chambers.

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# RULING

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*Cases referred to:*

1. ***Teklemicael Mengstab and Semhar Transport and Mechanical Limited v Ubuchinga Investments Limited (SCZ Appeal No. 215/2013).***
2. ***Concrete Pipes and Products Limited & Another (SCZ Appeal No. 014/2015).***
3. ***China Henan International Cooperation Group Company Limited v G and G Nation Wide (Z) Limited (SCZ Selected Judgment No. 8 of 2017).***
4. ***Zambia Seed Company Limited v Chartered International (Pvt) Limited [1999] ZR 151.***
5. ***Ashmore v British Coal Corporation (1990) 2 ALL E.R. 990.***

*Legislation & Others Works referred to:*

1. ***The Rules of the Supreme Court 1965 (RSC), White Book 1999 Edition.***
2. ***Halsbury's Laws of England 5th Edition (2009) Vol. 12 para 1166 and 1167.***

This ruling is in respect of a preliminary objection raised by the second Plaintiff. The matter was set down for trial, but the second Defendant, Ignatius Chella raised a preliminary objection via a notice to raise preliminary issue, dated September 13, 2019. The application was made pursuant to Order 14 A, and Order 33 of the ***Rules of the Supreme Court 1965 (RSC), White Book 1999 Edition.*** The issue raised by the second Defendant was couched as follows:

> ***That the Plaintiff's claim to be declared the bona fide and lawful purchaser for value of Subdivision A of Stand No. 2732, Ndola filed by the Plaintiff against the 1st Defendant on 17th April, 2014 is incompetent and ought to be set aside and/or dismissed with costs.***

A brief history of this matter is that, on April 17, 2014, the Plaintiff, a former employee of the first Defendant issued a writ of summons together with a statement of claim, in which it was alleged that by a contract of sale executed between the Plaintiff and the first Defendant, Zambia Railways Limited (ZRL), the latter sold Subdivision A of Stand No. 2732 Ndola to the Plaintiff, but ZRL failed to complete the transaction. Accordingly, the reliefs sought by the Plaintiff are:

> ***(i) An order and a declaration that the Plaintiff is a bona fide and legal purchaser for value of the property situate of and known as Subdivision A of Stand No. 2732, Ndola;***
> ***(ii) An order for specific performance of the property situate at and known as subdivision A of Stand No. 2732, Ndola;***
> ***(iii) Further or alternatively an Order for refund or reimbursement of the purchase price in full;***
> ***(iv) Further or alternatively an Order for payment by the Plaintiff to the 2nd Defendant of substantial***

***compensatory and exemplary damages for loss of opportunity by the 2nd Defendant to own land;***

***(v) An order for forthwith withdrawal of the Caveat on the property by the 2nd Defendant herein to facilitate the change of beneficial ownership of Subdivision A of Stand No. 2732, Ndola from the 1st Defendant to the Plaintiff;***

***(vi) Interest at current Bank of Zambia lending Rate on (iii) and (iv) above;***

***(vii) Costs of and incidental to this action; and***

***(viii) Further or other relief the court may deem fit and appropriate under the circumstances herein.***

It must be recorded that over the subject land or property, there was another action before the Ndola High Court, under Cause No. 2009/HN/319, filed earlier before the present one, wherein Ignatius Chella was the Plaintiff, on the one hand, and the ZRL was the first Defendant, and the Commissioner of Lands, was the second Defendant on the other hand. The said matter was referred to Court Annexed Mediation. The matter was mediated on and settled between Ignatius Chella and the ZRL. A Consent Settlement Order dated May 11, 2011 was settled as follows:

***CONSENT SETTLEMENT ORDER***

***By Consent of the Plaintiff and the 1st Defendant it hereby agreed as follows: -***

1. ***That the Plaintiff be allocated the land near the fly over bridge being half 2.73225 hectares of Stand No. 2732, Ndola***
2. ***That the Plaintiff be given first option of refusal to purchase the remaining 2.73225 of Stand no. 2732, Ndola at K52,000,000.00 full payment of which should be made on or before 31st August, 2011.***
3. ***That the Plaintiff will bear all the costs related to the subdivision.***
4. ***Each party to bear their own costs related to the matter.***

***Plaintiff:***
***Ignatius Chella 1st Defendant:*** ***ZAMBIA RAILWAYS***

***Signature: signed*** ***Signature: signed***
***Date: 05/05/11*** ***Date: 05/05/11***
***Mediator: signed Mwila Chitabo***

The piece of land for which the said Ignatius Chella was given the first option of refusal is what is in contention herein, which the Plaintiff alleges he duly purchased from the ZRL. Remarkably, the Plaintiff in his statement of claim admitted being aware of the said Consent Settlement Order.

Mrs. Chabu in support of the preliminary objection submitted that, Ignatius Chella, having favorably exercised the right to purchase the remainder of the land as stated in clause 3 of the Consent Settlement Order; and having paid the stated purchase price to the ZRL; and having taken possession of the property, the Plaintiff herein has no right to exercise the claim of right over the said land. According to her, the Plaintiff was claiming non-existent land, in the sense that it was not available vis-à-vis the Plaintiff's claim to be declared a bona fide purchaser over the same land. Counsel advised that the Plaintiff should direct his claim to the ZRL who sold him a non-existent plot. I was therefore urged to dismiss the action in so far as it relates to the land and second Defendant.

Counsel for the first Defendant Mr. Sampa supported the application by Mrs. Chabu.

Mr. Simutenda, the Plaintiff's Counsel strongly opposed the application by stating that procedurally the application was wrongly before the Court. He observed that Order 14A r. 2 and Order 33 r. 3 RSC under which the present application was instituted, provide the mode by which such an application may be made; that the same being by way of summons or motion or orally. In support of his argument, he referred to the case of ***Teklemicael Mengstab and Semhar Transport and Mechanical Limited v Ubuchinga Investments Limited (SCZAppeal No. 215/2013)*** wherein the Supreme Court *inter alia* made some

pronouncements regarding disposal of matters under Order 14A RSC, as follows:

> ***On 11th January, 2012, the respondent filed a notice to raise six preliminary issues pursuant to Order 14A of the Rules of the Supreme Court, 1999 Edition. The second preliminary issue had two sub issues raised. We must mention at this juncture that Order 14A Rule 2 of the Supreme Court specifically states that an application for disposal of a case on a point of law ... may be made by summons or motion or (notwithstanding Order 32, Rule 1) may be orally in the course of any interlocutory application to the court." Quite clearly the respondent had adopted the wrong procedure by issuing notice. The learned judge should on this ground alone have dismissed the application for being defective on grounds of no-compliance with Order14A.***

Mr. Simutenda thus submitted that since the preliminary objection was raised in breach of the mandatory statutory provision, this Court had no jurisdiction to entertain the application. He further contended that, it was the policy of the law to defer preliminary objections integrally linked to the main matter to the main matter itself, so that it is determined together with the main matter. In support of his argument, he relied on the case of ***Concrete Pipes and Products Limited & Another (SCZ Appeal No. 014/2015)*** wherein it was held:

> ***What the lower Court did is not to decline to hear the preliminary issue raised by the Appellant-rather it decided that as the preliminary issue was so integrally linked with the main question for determination in the complaint that issue could properly be raised in the main cause... in many cases that have come before this Court and where preliminary issues have been raised, we have deferred our ruling on such preliminary issues until after the main action was heard. This is the procedure that was followed in*** *Nyampala Safaris (Zambia) Limited v Zambia Widlife Authority and Shoprite Holdings Limited and Another v Lewis, Chisanga Mosho & another and in Nevers Sekwila Mumba v Muhabi Lungu.* ***In all these cases, preliminary issues were raised but their determination was deferred to the main matter.***

***In the present case, the preliminary issue was raised by the appellant at the commencement of the hearing. Although the Court indicated the passage that we quoted from in its ruling that the preliminary issue was dismissed, the context of that ruling is that the appellant was advised to make that preliminary issue part of its defence. We do not think that the Court did anything in the nature of a misdirection to warrant our overruling that decision. Had the Court declined to ever hear the preliminary issue in any format at a later stage or at all, the situation before us would no doubt have been different.***

***It is clear from what we have stated, therefore, that the appeal is without merit and it is bound to fail. We dismiss it accordingly. Costs shall abide the outcome of the main matter in the lower court.***

It was, therefore, suggested that the preliminary objection be deferred for determination in the main matter, and that the issue raised form part of the second Defendant's defence.

Furthermore, as regards the Consent Settlement Order, he contended that the Consent Settlement Order was improper, given the fact that, the Plaintiff herein was not a party thereto and was not considered. He argued that at the time the Plaintiff herein bought the property from the ZRL, the second defendant had not yet purchased the property.

In concluding his argument, he urged the Court to dismiss the preliminary objection.

In reply Mrs. Chabu submitted that the dispute as regards the subject property was conclusively resolved by the Ndola High Court via the Consent Settlement Order resulting in the handing over of the whole property to the second Defendant as a bona fide purchaser. She added that the second Defendant was a wrong party to be sued in the present action. She also expressed surprise as to how the Plaintiff would have been a party to the Consent Settlement Order when he allegedly purchased the land way after execution of the said

Consent Settlement Order. She reiterated that the action against the second Defendant be dismissed.

I have carefully considered the arguments herein for and against the application. The starting point is to determine the issue raised by Mr. Simutenda: whether the preliminary objection was properly raised, thus via notice. Indeed, the preliminary objection was raised via notice. The determination of this issue calls for a clear elaboration as regard the distinct interface between the provisions of Order 14A r. 2 and Order 33. r. 3 RSC and how to customize them to our jurisdiction. It is therefore compelling to reproduce the said orders.

Order 14A rule 2 provides:

> ***2. Manner in which application under rule 1 may be made:***
>
> ***An application under rule 1 may be made by summons or motion or (notwithstanding Order 32, rule 1 (»»text)) may be made orally in the course of any interlocutory application to the Court.***

And Order 33 rule 3 provides:

> ***3. Time, etc. of trial of questions or issues:***
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> ***The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.***

Mr. Simutenda drew so much reliance on the case of ***Teklemicael Mengstab and Others v Ubuchinga Investments Limited***,(supra). It should, however, be noted that the case is quite distinguishable from the present case. The said case in particular with the passage cited there from; dealt with the mode of raising applications pursuant to Order 14A r. 2 RSC. It should be appreciated that in general, Order 14A is designed to deal with final disposal of cases on a point of law,

whereas the application herein is purely a preliminary objection within the context of Order 33 r. 3 RSC.

I rejoice that there is sufficient case law and guidance as to the distinction and interface between the Order 14A r. 2, and Order 33 r. 3, and how to apply them in Zambia. And Apart from the case of ***Ubuchinga Investments Limited*** relied on by Mr. Simutenda, the Supreme Court had yet another occasion to pronounce itself more eruditely on the issue as regards Order 14 A r.2 and Order 33 r.3 RSC in the case of ***China Henan International Cooperation group Company Limited v and Nationwide (Z) Limited (SCZ selected Judgment No. 8 of 2017)***, which to me is a panacea to the procedural issue raised by Mr. Simutenda, as it speaks directly to the issue raised. The Supreme Court had this to say:

> ***The preliminary issue that was before the court below was made by way of a notice to raise preliminary issue pursuant to Order 33 rule 7 of the White Book. The said Order is preceded by Order 33. Rule 3 which permits a court to determine a preliminary issue before, at or after the trail.***
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> ....
>
> ***Whilst the former gives the court jurisdiction to entertain a preliminary issue, the latter sets out what steps the court can take where there is merit in the preliminary issue raised and its determination substantially disposes of the matter.***
>
> ***In terms of how such preliminary issues should be laid before the court, which is in dispute underground 2, the explanatory notes to Order 33 rule 3 sub-rule 1 and Order 14A of the*** *White Book* ***are instructive. The former Order states that Order 33 rule 3 should be read with among other orders, Order 14A. While Order 14A(2) states that applications tabled before the court for determination of any question of law at preliminary stage may be made by summons or motion or orally in the course of any interlocutory application to the court. Therefore, the Respondent had a choice of***

***commencing the application for a preliminary issue either by summons or motion.***

***The finding we have made in the preceding paragraph brings us to the next question, which is on how motions are to be commenced. The answer to the said question lies in the practice and procedure both in this and other courts that motions are brought before the court by way of notice. There is no rule of law or practice, so far as we are aware, that requires commencement of motions by way of summons only. Consequently, we are of the considered view that the Respondent was on firm ground when it tabled the motion by way of a notice. Further, even though the learned High Court Judge did not pronounce himself on the issue we feel that this omission was not fatal nor did it prejudice the Appellant in view of our finding that the application was properly presented before the court.***

Having been well guided, it is without hesitation to state that the mode adopted to raise the preliminary objection via notice was legally correct; to that extent Mr. Simutenda's argument is untenable.

While it is acknowledged that in certain instances it may be desirable to defer the determination of a preliminary objection to the main matter, and decided concurrently with the main matter, given the affinity of the issues thereof, I do not think that the preliminary objection raised herein deserves a deferment. I am mindful that every case in this regard must be determined on its own merits. And the balance of procedural justice in this case heavily tilts in declining to defer the issue. I shall justify this in the preceding paragraphs. And this takes me to the merits of the substantive application.

There is no doubt that there was a matter in the Ndola High Court involving the same subject property which is in contention in the present action. The matter before the Ndola High Court was resolved, and by resolved, I mean, it was heard via mediation, and determined via a Consent Settlement Order (hereinbefore mentioned). And in respect

thereof Mrs. Chabu argued that the property is now no longer available for litigation or re-litigation and determination in the manner the Plaintiff seeks herein.

It should be noted that Court Annexed Mediation is part and parcel of the court system insofar as adjudication of disputes is concerned. Therefore, a Consent Settlement Order duly reached as a result of mediation process is equivalent to a judgment of the Court, and can be enforced like any other judgment of the court. And if a party wishes to impugn a Consent Settlement Order, the procedure or mode available to such a party is to commence a fresh action to specifically set aside the order (see ***Zambia Seed Company Limited v Chartered International (Pvt) Limited [1999] ZR 151***).

As far as the subject property is concerned, the matter was definitively determined between the second Defendant and the ZRL via a Consent Settlement Order, wherein the second Defendant was declared to be the bona fide purchaser and owner of the subject land. The Consent Settlement Order equally affected third parties, including the Plaintiff, in the sense that no adverse claim or declaration can stand in the way of the said Consent Settlement Order, unless it was set aside via a mode spelt out in ***Zambia Seed Company Limited*** case (supra). It is for this reason I declare that the preliminary objection cannot be deferred. To allow the determination of the preliminary objection to be deferred to the main matter will certainly be prejudicial to the second Defendant, when he was already declared the rightful owner of the subject property.

In view of the foregoing, the application in respect of the preliminary objection succeeds to the extent that re-litigation as regards the Plaintiff's claims itemized under heads: (i), (ii), (iv) and (v) of his statement of claim are untenable under the present action. It is

compelling to have regard to ***Halsbury's Laws of England 5th Edition (2009) Vol. 12 para 1166 and 1167***, wherein it is recorded.

> ***The law discourages re-litigation of the same issues except by means of an appeal. It is not in the interest of justice that there should be re-trial of a case which has already been decided by another court, leading to the possibility of conflicting decisions ...The rule (relating to res judicata) provides that a claimant is barred from litigating a claim that has been adjudicated upon or which could or should have been brought before the court in earlier proceedings arising out of the same facts.***

Furthermore, the right to litigation is not absolute, but subject to certain conditions such as the ones listed in the case of ***Ashmore v British Coal Corporation (1990) 2 ALL E.R. 990***, wherein it was held:

> ***A litigant's right to have his claim litigated was subject to that claim not being frivolous, vexatious or an abuse of process. What constitute such conduct depended on all circumstances of the case. In particular abuse of process was not limited to sham claims and those that were not honest or bona fide: instead to public policy and interest of justice.***

Undoubtedly, re-litigation of the same issue or over the same subject matter can constitute abuse of court process, and should be curtailed once it is manifest that it will occasion a mockery of justice. Imagine the danger of having two conflicting declarations, whereby the Plaintiff is declared the rightful owner over the subject property, on the one hand, and on the other, the second Defendant has a Consent Settlement Order that so declared him to be the rightful owner.

Therefore, the claims in their present format partly constitute an abuse of the court process. This refers to claims under heads: (i), (ii), (iv) and (v). Accordingly, the said claims are dismissed. The only claims that survive against the first Defendant are those under heads (iii), (vi), (vii) and (viii). With the dismissal of the said claims in whole against the

second Defendant, it follows that the second Defendant should be struck out, and I so order.

Costs shall follow the event, to be taxed in default of agreement.

**DATED THIS 10th DAY OF FEBRUARY, 2020.**

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**THE HON. MR. JUSTICE CHARLES ZULU**