

**IN THE HIGH COURT FOR ZAMBIA  
AT THE DISTRICT REGISTRY  
HOLDEN AT MONGU**  
*(Civil Jurisdiction)*



*BETWEEN:*

**MUBIANA NGENDA**

**APPELLANT**

**AND**

**LESA MPOMPOLA**

**1<sup>ST</sup> RESPONDENT**

**VASICO CHIFUNGO**

**2<sup>ND</sup> RESPONDENT**

**TAFULE NAHONGE**

**3<sup>RD</sup> RESPONDENT**

**PEPA NAHONGE**

**4<sup>TH</sup> RESPONDENT**

**BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA  
ON 16<sup>TH</sup> MARCH, 2021**

*For the Appellant : Mr. I. Yambwa - Legal Aid Board (In Brief for MAK Partners)*  
*For the Respondent : In Person*

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***JUDGMENT***

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**CASES REFERRED TO:**

1. *Phiri Chisenga Tembo v Mpata Hill Manning Company Limited and Michael Misepo (2012) Vol. 3 562*

**AUTHORITIES REFERRED TO:**

1. *Order 44 Rule 19 of Cap 28 of the Laws of Zambia*
2. *Section 8 & 12(1)(a) of the Local Court, Cap 29 of the Laws of Zambia*

This matter comes by way of appeal from the Subordinate Court by way of appeal. The appellant was the plaintiff in the courts below having had commenced this matter from the Local Court.

For ease of reference, I will refer to the appellant as the plaintiff, which he was in the courts below.

The plaintiff's claim was for vacant possession, stating the defendants had illegally encroached into plaintiff's land and were cultivating and allocating the same land to other people without the knowledge of the plaintiff; costs and any other relief the court may deem fit.

Judgment was delivered on the 17<sup>th</sup> of August, 2017, in which the court ruled that the defendants had not trespassed on the plaintiff's land as alleged. The plaintiff was condemned in costs.

The plaintiff being dissatisfied with the judgment of the Subordinate Court has appealed to this court. The plaintiff initially advanced four grounds of appeal. However, Counsel who has assumed conduct of this matter, has stated in the heads of argument that upon perusal of the record and reading the judgment of the Subordinate court has noticed that the case related to a dispute over title to land. The Magistrate did not seek the consent of the parties before proceeding with the trial as per requirements of section 23 of Cap 28 of the Laws of Zambia.

It was submitted that although the argument relating to the requirement for consent is not advanced as a ground of appeal, the High Court is clothed with powers under **Order 44 Rule 19 of Cap 28 of the Laws of Zambia** to adjudicate on the issue.

**Order 44 Rule 19** was quoted as providing the following:

*“The appellate court shall have power to give any judgment and make any order that ought to have been made and to make such further or other orders as the case may require including any order as to costs. These powers may be exercised by the appellate court, notwithstanding that the appellant may have asked that part only of a decision may be reversed or varied and may also be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have appealed from or complained of the decision.”*

It was submitted that the above provision of the law, the court can determine whether it was competent for the court below to proceed into trial without seeking the consent of the parties and consequently to determine the consequences of failure to abide by the provisions of **section 23 of Cap 28 of the Laws of Zambia**.

I was referred to the case of ***Phiri Chisenga Tembo v Mpata Hill Manning Company Limited and Michael Misepo (2012) Vol. 3 562***,<sup>1</sup> where it was held that:

***“According to section 23 of the Subordinate Court Act, where a matter involves a dispute to title or ownership of land, the Subordinate court can only hear the matter when all the parties consent otherwise the Magistrate is obliged to transfer the matter to the High Court.”***

It was submitted that in that case no consent was obtained from the parties before the Magistrate proceeded to hear the matter, consequently, the judge held that the proceedings in the Subordinate Court were a nullity.

I am in agreement with Counsel's approach because where the issue of jurisdiction arises, it has to be addressed before anything else. This is so because jurisdiction has an impact on the validity of proceedings before any court or tribunal.

I have perused through the file and I note that the appellant had exhibited a certificate of title from the Barotse Royal Establishment. This entails that the land in dispute is customary land. The proceedings before the Subordinate Court reveal that this matter is actually a land dispute. The defendant actually questioned the plaintiff's title to that land.

While I agree with Counsel that the Subordinate Court had no jurisdiction to hear this matter, I do not agree that the applicable law is **section 23** of the Subordinate court Act, which in my opinion envisages that the title or ownership in question is over State land. I say this because Section 23 of the Subordinate court obliges the Magistrate to transfer such a case where no consent has been obtained to the High Court. The jurisdiction to preside over customary law resides with the Local Court. **Section 12(1)(a) of the Local Court, Cap 29 of the Laws of Zambia** provides as follows:

12. (1) *"Subject to the provisions of this Act, a local court shall administer-*
- (a) *The African customary law applicable to any matter before it in so far as such law is not repugnant to natural justice or morality or incompatible with the provisions of any written law;"*

More specifically, **section 8 of the same Local Court Act**, provides that:



*“Subject to the provisions of this Act, a local court shall have and may exercise, within the territorial limits set out in its court warrant, such jurisdiction as may be prescribed for the grade of court to which it belongs, over the hearing, trial and determination of any civil cause or matter in which the defendant is ordinarily resident within the area of jurisdiction of such court or in which the cause of action has arisen within such area:*

*Provided that civil proceedings relating to real property shall be taken in the local court within the area of jurisdiction in which the property is situate. (underline mine for emphasis)”*

In view of the foregoing, the Subordinate Court had no jurisdiction to entertain this matter, unless it had come on appeal from the Local Court. The High Court has equally no jurisdiction to entertain a matter concerning a land dispute over customary land, as a court of first instance.

The appeal succeeds to the extent that the proceedings before the Subordinate court are a nullity for want of jurisdiction.

Leave to appeal against this judgment is granted.

**DELIVERED AT MONGU THIS 16<sup>TH</sup> DAY OF MARCH, 2021.**

  
**G.C. CHAWATAMA**  
**HIGH COURT JUDGE**