

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

2020/HP/0615



BETWEEN:

LEWIS MALEMBEKA

PLAINTIFF

AND

CHRISTOPHER NTALASHA

1ST DEFENDANT

(sued in his capacity as Headman Mukwanka)

MONGWA MUTEMWA

2ND DEFENDANT

(sued in his capacity as Headman Mwakawe)

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, IN
CHAMBERS, ON THE 14TH DAY OF OCTOBER, 2022, AT 10:00
HOURS.**

*For the Plaintiff: Mrs A. Ngunga – Messrs. A. Mbambara Legal
Practitioners.*

*For the Defendant: Mr. L. Saboi – Messrs. Sinkamba Legal
Practitioners.*

RULING

CASES REFERRED TO:

1. *Development Bank of Zambia and KPMG Peat Marwick v Sunust Limited and Sun Pharmaceuticals Limited (1997) Z.R. 187 (S.C.);*
2. *Mukumbuta Mukumbuta and Another v Nkwilimba Choobana and Others – S.C.Z. Judgment No. of 2003;*
3. *Zambia Seed Company v Chartered International (PVT) Limited (1999) Z.R. 151;*

4. *Ashmore v British Coal Corporation* (1990) 2 All E.R. 981 C.A.;
5. *Hamalambo v Zambia National Building Society* – S.C.Z. Appeal No. 64 of 2013; and
6. *Registered Trustees of Archdiocese of Lusaka v Office Machine Services Limited* – S.C.Z. Judgment No. 18;

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court*, 1999 Edition, Volume 1, London Sweet & Maxwell; and
2. *The High Court Act*, Volume 3, Chapter 27 of the Laws of Zambia.

1 INTRODUCTION

- 1.1 This Ruling is in respect of an application by the 1st and 2nd Defendants, to dismiss the matter for abuse and multiplicity of Court process, made pursuant to **Order 18, Rule 19** of **The Supreme Court Rules**¹ and an application by the Plaintiff to consolidate matters pursuant to **Order III, Rules 5** and **2** of **The High Court Rules**².
- 1.2 For convenience, I shall determine both applications in this Ruling.

2 BACKGROUND

- 2.1 The background to these applications is that the Plaintiff herein commenced this action to set aside the Consent Judgment entered under cause No. 2020/HP/0321 between the 1st and 2nd Defendants, herein relating to a piece of land in dispute known as “Kafwente”.
- 2.2 However, unknown to the Plaintiff herein, the 1st Defendant had been sued by Third Parties, under cause No. 2020/HP/0776, in relation to the land in dispute and

they obtained a Judgment in their favour, in which they were awarded possession of the land in dispute. Upon discovering this, the Plaintiff herein applied to join the proceedings under Cause No. 2020/HP/0776 and was joined therein.

2.3 Further, the Plaintiff, on the advice of Honourable Justice S. Newa, as per her Order dated 26th January, 2022, under Cause No. 2020/HP/0776, has now applied to consolidate the proceedings herein to the said action on the basis that an application for consolidation ought to be made in the earlier cause, being this one.

2.4 The 1st Defendant herein having been the 1st Defendant under Cause No. 2020/HP/0776, has also applied to set aside the proceedings herein for abuse and multiplicity of Court Process.

3 1ST DEFENDANT'S AFFIDAVIT IN SUPPORT OF SUMMONS TO DISMISS ACTION FOR ABUSE AND MULTIPLICITY OF COURT PROCESS

3.1 By Affidavit in Support of the Application to dismiss the matter for abuse of Court process, filed on 6th August, 2021, deposed by **Christopher Ntalasha**, the 1st Defendant herein, it was averred, *inter alia*, that he had been sued by the Plaintiff in this cause and was also sued by Abiten Mulowa and Musa J. Kangu under Cause No.

2020/HP/0776, in which matter the Honourable Mrs. Justice S. Kaunda Newa delivered a Judgement against the 1st Defendant. A copy of the said Judgment was exhibited as "CN1".

3.2 The 1st Defendant deposed that the two cases in which he has been sued involve the same property and that if the said matter herein proceeds to its finality, there will or might be conflicting outcomes by two Judges of the same Court. He further deposed that the issues sought to be resolved in this matter have been overtaken by events resulting in the Judgement referred to above and that therefore, there is nothing to be adjudicated upon. Based on the foregoing, the Defendant urged the Court to dismiss this matter as the Plaintiff was forum shopping on issues that had been resolved under Cause No. 2020/HP/0776 and that the Plaintiffs therein had been awarded possession of the property in dispute herein.

4 PLAINTIFF'S AFFIDAVIT IN OPPOSITION OF SUMMONS TO DISMISS ACTION FOR ABUSE AND MULTIPLICITY OF COURT PROCESS

4.1 By Affidavit in Opposition to the application to dismiss matter for abuse of Court process, filed on 18th July, 2022 and deposed by **Lewis Malembeka**, the Plaintiff herein, it was averred, *inter alia*, that the Plaintiff was joined to the proceedings under Cause No. 2020/HP/0776, after

Judgment was delivered and that the proceedings herein were the first to be launched, having been commenced on 20th May, 2020, in which the Plaintiff seeks to set aside the Consent Judgment on account of deceit and misrepresentation.

4.2 The Plaintiff deposed that while he was waiting for the matter to be determined, the 1st Defendant, in his ploy to deprive him of the disputed property, was sued by third parties under Cause No. 2020/HP/0776. In that cause, the 1st Defendant did not enter appearance or defence and Judgement was entered against him.

4.3 It was further deposed that on or before 30th July, 2021, the Plaintiff herein was shocked to see some people on the said "Kafwente" land, demarcating and developing the said property. On further inquiry, the Plaintiff discovered that Third Parties had obtained Judgment against the 1st Defendant regarding the land in dispute.

4.4 It was also deposed that the 1st Defendant has admitted in his Affidavit in Support of summons to dismiss matter for abuse of Court process, that the two cases involve the same subject matter. That the Defendants herein were using the Court's machinery to deprive him of the land in dispute and that these proceedings are the only option available for him to obtain justice. The Plaintiff averred that once the two matters are consolidated, on appeal, the

records of the proceedings will contain his evidence. The Plaintiff urged this Court to dismiss the 1st Defendant's application to dismiss the matter for abuse of Court process and allow this matter to be determined on merit.

5 SUBMISSIONS

5.1 By the Skeleton Arguments and list of Authorities in support of the Plaintiff's Affidavit in Opposition to the summons to dismiss matter for abuse of Court process filed on 18th July, 2022, Learned Counsel cited **Order 18, Rule 19 (1) (d)** and **Order 1, Rule 19 (1)** of **The Rules of the Supreme Court**¹ and submitted that the said provisions empower this Court to prevent the abuse of Court process by multiplicity of actions. It was submitted that the Plaintiff was joined to Cause No. 2020/HP/0776 after Judgment had been delivered and that the Plaintiff's interests in the matter were taken into consideration but unfortunately, he was never given an opportunity to be heard by the Court.

5.2 It was contended that appealing the matter Cause No. 2020/HP/0776 would not give him an opportunity to argue out his case as there is no evidence before the trial Court on which the Plaintiff could rely on in his appeal. Counsel further contended that these proceedings commenced earlier than that of Cause No. 2020/HP/0776 and that it is in fact the Defendants that have been

launching multiple actions regarding the said piece of land until they got their desired result of depriving the Plaintiff of the piece of land. The case of ***Development Bank of Zambia and KPMG Peat Marwick v Sunvst Limited and Sun Pharmaceuticals Limited***¹ was cited in support of the foregoing as follows: -

“We disapprove of parties commencing multiplicity of procedures and proceedings over the same subject matter.”

5.3 Counsel urged the Court to dismiss the 1st Defendant’s application and allow the main matter to be heard on its merits.

5.4 The 1st Defendant did not file any written submissions to augment his application to dismiss the action for abuse and multiplicity of Court process.

6 PLAINTIFF’S AFFIDAVIT IN SUPPORT OF SUMMONS FOR CONSOLIDATION OF MATTERS

6.1 By the Affidavit in Support of Summons for Consolidation of matters, filed on 21st March, 2022, deposed by **Anock Mbambara**, Counsel for the Plaintiff, it was averred, *inter alia*, that the Plaintiff commenced this action against the Defendants on 12th June, 2020, by way of Writ of Summons accompanied by Statement of Claim and applied for an interim injunction, which was granted on 26th November, 2020.

6.2 Counsel further averred that unknown to the Plaintiff, the 1st Defendant was sued under cause No. 2020/HP/0776 over a property called “Kafwente” which is the subject of litigation in this matter. The said matter commenced on 6th August, 2020 and the 1st Defendant did not enter appearance or defence in the said matter. Consequently, third parties obtained Judgment in their favour, which was delivered on 26th July, 2021. Copy of the Judgment was exhibited as “AM 1”.

6.3 It was deposed that on or before 30th July, 2021, the Plaintiff was shocked and alarmed to see people demarcating and developing on the said Kafwente property and that on conducting inquiry, the Plaintiff discovered that Third Parties had obtained Judgment against the 1st Defendant regarding the said Kafwente property.

6.4 Furthermore, it was averred that the Plaintiff herein applied for joinder and was joined to the proceedings by the Court under Cause No. 2020/HP/0776, wherein he proceeded to move the Court to have the matter under Cause No. 2020/HP/0776 consolidated with this action. That Justice S.K. Newa, in her Ruling, agreed that there were similar facts in both matters and that in order to avoid having conflicting decision, the matters under Cause No. 2020/HP/0776 and this Cause No. 2020/HP/0615 should be consolidated. She then advised that the

application for consolidation be made in this Cause No. 2020/HP/0615. A copy of the said Ruling was exhibited as "AM 2".

6.5 Counsel also deposed that it would be appropriate and reasonable to have the two causes consolidated to avoid duplicity of actions and conflicting decisions by the Court and that this application would not prejudice any of the parties.

6.6 The application is unopposed by the Defendants.

7 SUBMISSIONS

7.1 By Skeleton Arguments in support of the application filed on 21st March, 2022, Counsel for the Plaintiff cited **Order III, Rule 5 of The High Court Rules²** and the case of ***Mukumbuta Mukumbuta and Another v Nkwilimba Choobana and Others²*** and submitted that there are common questions of law, rights and facts in the two matters, that is this Cause No. 2020/HP/0615 and Cause No. 2020/HP/0776. Counsel contends that to avoid conflicting decisions, multiplicity of actions and forum shopping, it would be prudent for this Court to grant the application for consolidation of matters as stated by the Supreme Court in the case cited above.

7.2 The Defendants did not file any written submissions.

8 CONSIDERATION AND DECISION OF THE COURT

8.1 I have considered the Affidavit evidence, the Skeleton Arguments and the authorities cited by Counsel in augmenting both applications, for which I am grateful. Having analysed both applications, the issues for determination are as follows: -

1. Whether this action should be dismissed for abuse of Court process; and
2. Whether this action should be consolidated with Cause No. 2020/HP/0776.

8.2 Before I consider the legal issues identified above, it is imperative that I examine the reliefs sought by the Plaintiff herein. Other than the relief of setting aside the Consent Judgment entered into under Cause No. 2020/HP/0321 on account of deceit and misrepresentation of facts, the Plaintiff herein further seeks a declaration that Cause No. 2020/HP/0321 is a clear abuse of Court process and an attempt to deceive the Court. The Plaintiff also seeks a declaration that in the absence of any appeal in the Lands Tribunal and/or competing interests, the said piece of land called Kafwente belongs to the Plaintiff within the traditional parameters as affirmed by the Lands Tribunal.

8.3 In exercising my powers under **Order III, Rule 2** of **The High Court Rules**², I have considered whether or not this Court can hear and determine these other declaratory

reliefs sought by the Plaintiff in this fresh action challenging a Consent Judgment entered by a Court of similar jurisdiction under a separate and different cause number.

8.4 The Consent Judgment, which is being assailed, was obtained under Cause No. 2020/HP/0321, being the action that was commenced by the 1st Defendant herein, Christopher Ntalasha, against the 2nd Defendant herein, Mongwa Mutemwa, wherein the Plaintiff herein, Lewis Malembeka, joined as an Intervenor. Christopher Ntalasha and Mongwa Mutemwa, who were the parties to that suit under Cause No. 2020/HP/0321, agreed to settle their dispute and their agreement was embodied in the said Consent Judgment on 20th May, 2020, which was endorsed by the Court presided over by Justice M. D. Bowa. In the said Consent Judgment, it was *inter alia* agreed that Christopher Ntalasha and his subjects are the rightful and legal owners of the land known as Kafwente. Subsequently, a dispute arose as to aspects of that Consent Judgment with the Plaintiff herein, Lewis Malembeka, whose rights to the same land was affirmed by the Lands Tribunal Judgment under Cause No. LAT/71/2014 and was joined to that suit under Cause No. 2020/HP/0321, for the purpose of setting aside the said Consent Judgment. The Plaintiff, Lewis Malembeka, thus commenced this fresh action, which aside from the claim

seeking to set aside the said Consent Order, is also endorsed with other claims arising from the property that was in dispute in the other action.

- 8.5 The Supreme Court gave guidance on setting aside a Consent Judgment in the case of ***Zambia Seed Company v Chartered International (PVT) Limited***³, as follows: -

“By law the only way to challenge a judgment by consent would be to start an action specifically to challenge that consent judgment.” (Court’s emphasis)

- 8.6 As can be seen from the above cited authority, the use of the word ‘specifically’ entails that no other reliefs should be entertained apart from setting aside the Consent Judgment. The rationale for this is that once a Consent Judgment is set aside, the other matter in which the Consent Judgment was obtained remains open for litigation, where conveniently, all other claims arising out of the property in dispute should be pursued. If the Consent Judgment is set aside herein, the parties herein will be put back in the position they were in immediately before the Consent Judgment. This means that if the Plaintiff herein has an argument or defence against the Consent Judgment, which he did not get a chance to raise in the earlier action, he will have a second chance to do so.

8.7 Accordingly, the additional claims sought by the Plaintiff herein do not fall within the parameters for an action challenging a Consent Judgment. These claims are incompetently, improperly and inconveniently before this Court. Accordingly, these declaratory reliefs are hereby struck out.

8.8 I will now proceed to consider the first issue identified above of whether this action should be dismissed for abuse and multiplicity of Court process. The 1st Defendant submitted that Cause No. 2020/HP/0776, in which he had been sued and Judgment entered against him, involved the same property in dispute herein. He contends that if this matter proceeds to its finality, there will or might be conflicting outcomes by two Judges of the same Court. He further contends that the issues sought to be resolved in this matter have been overtaken by events resulting in the Judgement under Cause No. 2020/HP/0776 and that therefore, there is nothing to be adjudicated upon herein.

8.9 The Plaintiff on the other hand contends that the proceedings herein commenced earlier than that of Cause No. 2020/HP/0776 and that it is in fact, the Defendants that have been launching multiple actions regarding the said piece of land.

8.10 In determining this application, I must consider whether in the circumstances, proceeding to determine this case

would amount to an abuse and a multiplicity of Court process. The term “*Abuse of Court Process*” has been described as follows under **Order 18, Rule 19 (15)** of **The Rules of the Supreme Court**¹: -

“This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation.”

8.11 Additionally, in the case of **Ashmore v British Coal Corporation**⁴, Stuart LJ., stated as follows regarding abuse of Court Process: -

“The words ‘frivolous’ or ‘vexatious’ generally refer to a groundless action with no prospect of success, often raised to embarrass or annoy the other party to the action.”

8.12 Further, multiplicity of actions was described as follows, in the case of **Hamalambo v Zambia National Building Society**⁵: -

“Multiplicity of actions refers to the commencement of more than one action on the same facts or transaction. Piece meal litigation is the same as multiplicity of action; it is litigation that is split and instituted in chapters.”

8.13 Additionally, in the case of *Registered Trustees of Archdiocese of Lusaka v Office Machine Services Limited*⁶, the Court stated as follows: -

“...Indeed, this Court has on many occasions expressed its displeasure on multiplicity of actions over the same subject matter.”

8.14 On my analysis of the evidence on record and authorities cited above, I find that the Plaintiff began this action on 12th June, 2020, seeking to set aside a Consent Judgment, in order to assert his alleged rights to the property in dispute and that the action under Cause No. 2020/HP/0776 commenced on 6th August, 2020. Therefore, as this action commenced before the action under Cause No. 2020/HP/0776, the Plaintiff herein cannot be said to have commenced more than one action on the same facts or transaction.

8.15 I note further, that the 1st Defendant has not shown in his Affidavit evidence that before the Judgment under Cause No. 2020/HP/0776 was entered, the Plaintiff herein was aware or ought to have been aware that the 1st Defendant had also been sued in relation to the same property in dispute. Therefore, the 1st Defendant has not shown that the Plaintiff in commencing this action did so in an effort to vex or oppress the Defendants herein. It follows therefore, that the 1st Defendant's contentions that this

action should be dismissed on the basis that it is an abuse of Court process and is a case of multiplicity of action, lack merit and is accordingly dismissed.

8.16 This now brings me to the second legal issue of whether this action should be consolidated with Cause No. 2020/HP/0776. In an effort to pursue his alleged interests in the property in dispute, the Plaintiff herein has applied to consolidate this cause with Cause No. 2020/HP/0776. The Plaintiff contends by his Skeleton Arguments in support of the application for consolidation that it is appropriate and reasonable to have the two causes consolidated because both actions relate to the same land and to avoid duplicity of causes and conflicting decisions by the Court.

8.17 **Order III, Rule 5 of The High Court Rules²**, on which the application for consolidation is premised, is framed in the following manner: -

“Consolidation of causes or matters

Causes or matters pending in the Court may, by order of the Court or a Judge, be consolidated, and the Court or a Judge shall give any directions that may be necessary as to the conduct of the consolidated actions.” (Court’s emphasis)

8.18 Further, **Order 4, Rule 9 of The Rules of the Supreme Court¹** provides as follows: -

“Consolidation, etc., of causes or matters

- (1) Where two or more causes or matters are pending in the same Division and it appears to the Court -***
 - (a) that some common question of law or fact arises in both or all of them, or***
 - (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or***
 - (c) that for some other reason it is desirable to make an order under this paragraph the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.***
- (2) Where the Court makes an order under paragraph (1) that two or more causes or matters are to be tried at the same time but no order is made for those causes or matters to be consolidated, then, a party to one of those causes or matters may be treated as if he were a party to any other of those causes or matters for the purpose of making an order for costs against him or in his favour.” (Court’s emphasis)***

8.19 It is clear from the foregoing orders that this Court has jurisdiction to order the consolidation of actions as long as

the requirements set out by **Order III, Rule 5** of **The High Court Rules**² and **Order 4, Rule 9** of **The Rules of the Supreme Court**¹ are met. I will now determine whether or not the Plaintiff's application herein has satisfied the requirements set out in the said provisions to enable me to grant the Order as prayed or not.

8.20 From my analysis of the forestated provisions and the evidence adduced in support of this application for consolidation of actions, I find that a pre-condition to matters being consolidated is that the matters should be pending determination in the same division of the Court. Both cited provisions of the law are presumptive that none of the matters proposed to be consolidated have concluded. In this case, despite Cause No. 2020/HP/0776 being in the same division as this matter, the said matter is not pending as Judgement has already been entered therein. Therefore, consolidating this matter to a matter that has already been determined is not tenable.

8.21 Consequently, it follows that this Court cannot grant the application for consolidation as the application does not satisfy the requirement that a matter to which one is sought to be joined to should be pending as set out under **Order III, Rule 5** of **The High Court Rules**² and **Order 4, Rule 9** of **The Rules of the Supreme Court**¹ cited above.

Accordingly, the Plaintiff's application for consolidation of matters is also dismissed.

8.22 I note that the Plaintiff by his Affidavit in Opposition to summons to dismiss matter for abuse and multiplicity of actions stated that he applied to join and was in fact joined to the action under Cause No. 2020/HP/0776 after the Judgement. Further he indicated that once Cause No. 2020/HP/0776 and this action are consolidated, on appeal, the record of proceedings would contain his evidence and consequently, he could pursue his alleged interests in the property in dispute.

8.23 Based on my findings above, the declaratory reliefs that the Plaintiff sought herein and which have now been struck out, had been overtaken by events, as the rights to the land, which is the subject of these proceedings, had been determined by another Court of the similar jurisdiction. Therefore, this Court could not have proceeded to hear and determine the declaratory reliefs as that may have resulted in a decision that may have conflicted with the decision under Cause No. 2020/HP/0776 and thus bringing the administration of justice into disrepute, which situation is frowned upon.

8.24 It is my view, however, that since the Plaintiff has been joined to the action under Cause No. 2020/HP/0776 after Judgment, the Plaintiff may apply for a review of the

Judgment therein, albeit out of time and if the application is granted, he can present these declaratory claims under Cause No. 2020/HP/0776. My view is fortified by **Section 13 of The High Court Act**² which provides as follows: -

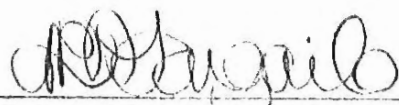
“In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.” (Court’s emphasis)

8.25 Therefore, the Plaintiff herein may make the necessary application under Cause No. 2020/HP/0776 and pursue his declaratory claims therein.

9 CONCLUSION

- 9.1 The declaratory reliefs sought under item (b) and (c) on the Writ of Summons are struck out.
- 9.2 The 1st Defendant's contentions that this action should be dismissed on the basis that it is an abuse of court process and is a case of multiplicity of action, lack merit and is accordingly dismissed.
- 9.3 The Plaintiff's application for consolidation of matters is dismissed, as the other matter under Cause No. 2020/HP/0776 has concluded.
- 9.4 The Plaintiff herein may make the necessary application under Cause No. 2020/HP/0776, in which he was joined as a party.
- 9.5 The costs are in the cause.
- 9.6 Leave to Appeal is granted.

**SIGNED, SEALED AND DELIVERED AT LUSAKA, THIS 14TH DAY
OF OCTOBER, 2022.**



**P. K. YANGAILO
HIGH COURT JUDGE**