

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

2017/HPA/0031

BETWEEN:



DANIEL MUCHINDU

APPLICANT

AND

DANIEL SEYALA

RESPONDENT

***Before The Hon. Justice M. D. Bowa in Chambers on 12th of
December 2023.***

For the Applicant: Mr. L.C of P.M Kamanga Associates

For the Defendant: No appearance

JUDGMENT

Cases Referred to

1. NB Mbazima and Others Joint Liquidators of Zimco Limited in Liquidation vs Reuben Vera. SCZ No. 6 of 2001
2. Yabuka Falir Mulla & 2 others vs Muhammed Jabi selected judgment No. 1 of 2018
3. Phiri Chisanga Tembo vs Mpata Hill Mining Company Limited, Te hendellan Mining Company Limited and Micheal Misepa 2011/HK/SCA/48
4. Crossland Mutinta and Another vs Dononran Chipanda4 selected judgment No 53 of 2018

LEGISLATION REFERRED TO:

1. Subordinate Court Act, Cap 28 of the Laws of Zambia

1.Introduction

1.0 The Appellant appeals against the ruling of the Subordinate court of the first class dated 30th May 2014 by which the court upheld a preliminary issue raised by the Respondent that had contended that the matter was statute barred and dismissed the action with costs. The Appellant filed into court an amended notice of appeal dated 29th of October 2018 advancing grounds of appeal couched in the following terms.

1. *The Hon. Magistrate erred in law and fact when he held that he had jurisdiction to adjudicate on the action for possession of land on a point of law with the consent of Appellant having not been obtained in the matter involving ownership of title to land.*
2. *The Hon. Magistrate erred in law and fact by proceeding to hear the matter on an application that the matter was statute barred without first pronouncing itself on whether or not it had jurisdiction to hear the matter.*
3. *That the Hon Magistrate erred in law and fact when he dismissed the Appellants action for possession of stand L2419/ B/ M his late fathers land contrary to evidence on record showing that his*

father died in 2003 and that dispute to be caught up by statute of limitation only arose in 2013 when the Respondent refused to hand over the certificate of Title for stand L 2419/B/M. Lusaka.

4. The Hon. Magistrate further erred in law and fact by proceeding to hear the application on a point of law without first determining the question of jurisdiction thereby denying the Appellant the right to be heard on the preliminary issue.

2.0 Appellants heads of Argument

2.1 The Appellant's heads of argument were filed into court on the 29th of October 2018. In ground one, it was argued that at page 11-12 of the record of appeal are exhibited a State's consent to assign and properly transfer Tax certificate for registration of the property lodged in the Lands and Deeds Registry. That this shows that the land is subject of a certificate of title under the Lands and Deeds Registry Act.

2.2 It was argued that the jurisdiction over disputes relating to transfer of title for land is conferred in the High court as defined in section 2 of the Lands and Deeds Registry Act. Reference was made to the case of **N B Mbazima and Others Joint**

Liquidators of Zimco Limited in Liquidation vs Reuben

Vera¹ in which the Supreme Court held that:

“In these proceedings the Appellant was seeking to impugn a certificate of title issued to the 1st Respondent and under the Lands and Deeds Registry Act, Cap 185 of the Laws of Zambia only the High Court has jurisdiction to entertain such proceedings”.

2.3 Also relied upon was the case of **Yabuka Falir Mulla & 2 others vs Muhammed Jabi**² in further support of this proposition.

2.4 The Appellant further cited section 20 (1) (c) of the Subordinate Court Act to argue that the High Court also assumes jurisdiction based on the value of the land in dispute which exceeds ZMW200,000 in this case as it is based in Ibex Hill.

2.6 Further that in any event even if it could be argued that the Subordinate Court has jurisdiction, the consent of the parties is required by law for a magistrate to adjudicate on matters relating to ownership of land. The Appellant relied on section 23 of the Subordinate Court Act Cap 28 of the Laws of Zambia which provides:

“If in any civil case or matter before a Subordinate Court, the title to any land is disputed or the question of the ownership thereto arises, the court may adjudicate thereon if all parties interested consent but, if they do not consent, the presiding magistrate shall apply to the High Court to transfer such cause or matter to itself.”

2.7 Reference was made to a High court ruling in the case of **Phiri Chisanga Tembo vs Mpata Hill Mining Company Limited, Tendelland Mining Company Limited and Micheal Misepa³** in which the court held the following:

(1) According to section 23 of the Subordinate Court Act, where a matter involves a dispute to title or ownership to 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.

(2) There was no evidence on record that the consent of the parties was obtained before the magistrate proceeded to hear the matter.

(3) The proceedings were therefore a nullity.

2.8 The Appellant concluded that there is a requirement for the court to request for the consent of the parties. That in the affidavit in opposition at page 32 of the record of appeal is a letter from the Appellant's advocates sent to the Respondent's

lawyers in which a consent order to withdraw was mooted. The order was sent for execution with a view of discontinuing the action in the Subordinate court to facilitate mediation. However that the trial court did not consider the content of the letter.

2.9 It was argued that in terms of the Phiri case (supra) the court record must have shown that consent was obtained from the parties. However that no such consent was sought as seen in the ruling of the court below on page 32 and 40 of the record of appeal.

2.10 In advancing arguments in support of ground 2, it was argued that the court erred in proceeding to consider the preliminary issue on which it proceeded to dismiss the matter without first determining the question of whether it had the jurisdiction to hear the matter in the first place. That by doing so injustice was occasioned to the Appellant.

2.11 In ground 3 it was submitted that in arriving at its conclusion that the matter was statute barred, the court did not consider the following:

- Ownership of property.

- When the Appellant was in occupation.
- When was the Appellant disposed.
- Evidence of title i.e. certificate of title, and
- When time accrued.

2.12 That the court did not consider these in the wake of evidence before it. Detailed arguments were then presented under each of these heads that I will not go into for reasons that will become apparent below.

2.13 The arguments in support of ground 4 in my view, are not any different from what was advanced in ground 2 above. The Appellant laments that the magistrate proceeded to make a pronouncement on the preliminary issue without first determining the question of jurisdiction raised in the Appellant's affidavit in opposition to the application.

2.14 That it was necessary for the court to firstly declare if it had the jurisdiction in the matter then allow the Appellant to be heard after properly advising the parties on the issue of consent. The Appellant prayed that the court allows the appeal and set aside the ruling of the court below on the preliminary issue . He

further prayed that the matter be transferred for hearing to the High Court.

3.0 **Court's consideration**

3.1 The Respondent neither filed heads of arguments nor did he ever make an appearance before the court. I was satisfied that he had been served with court process evidenced by the numerous affidavits of service on record. At a status conference held on the 1st of March 2021, I directed that the Respondent should file his of arguments within 10 days from date of order failure to which I would proceed to deliver the judgment based on the submissions on record. As there has been no compliance with such direction I proceed to I set out my decision below based on the documents on record.

3.2 The cardinal question in this appeal as I see it is whether it was competent for the trial court to proceed to entertain the preliminary issue when a jurisdictional question had been raised. The question of the merits or demerits of the actual decision of the preliminary issue that resulted in the dismissal of the matter only becomes a subject of consideration if I am

minded to find that the court did not err to proceed to entertain the preliminary issue.

3.3 The crux of the Appellant's position as argued in grounds 1, 2 and 4 is that the court did not have the jurisdiction to hear the matter as it disregarded section 23 of the Subordinate Court Act requiring the consent of the parties to have the matter determined before it. That this is a matter pertaining to ownership of land and a certificate of title and it is a mandatory requirement that the consent of the parties be sought. That no such consent was obtained.

3.4 Section 23 of the Subordinate Court Act was the subject of the Supreme Court's consideration in the matter of **Crossland Mutinta and Another vs Dononran Chipanda**⁴ wherein the court held that:

"The import of section 23 is that all interested parties to the matter must consent to the Subordinate court adjudicating on the matter. A perusal of the record in this case reveal that no such consent was obtained from the Appellants before the trial magistrate proceeded to hear the matter. The absence of this consent, in our view,

effectively means that the trial magistrate did not possess the requisite jurisdiction to determine the matter.”

The court went further to hold that

“The point should be made that where a statute sets out a condition precedent for court to acquire jurisdiction as is the case with section 23 of the Subordinate Court Act, it is incumbent upon the court, even if not moved by the parties to ensure that the condition precedent is satisfied before embarking on hearing the matter.”

3.5 A perusal of the writ of summons filed before the Subordinate Court at page 1 will show that the Plaintiffs claim was for the following reliefs:

1. *Vacant possession of subdivision No./ L2419/M/*
2. *An order that the Defendant surrenders the title deed pertaining to the aforesaid subdivision to the Plaintiff.*
3. *An order of interim injunction restraining the Defendant from interfering, trespassing and selling the said subdivision in the interest of Justice.*
4. *Any other relief the court may deem fit.*

3.6 Based on the above, there is no question that the issue of title or ownership of the property are at the heart of the dispute that was before the court. It was then mandatory on the court to inquire into the question of the consent of the parties. There is no indication that this was done. I do not agree with the submission that the consent must have been that of the Defendant and that the court could infer the Plaintiff's consent by the fact that he filed the action. The wording of section 23 of the Subordinate court Act states that:

“...The court may adjudicate thereon if all parties interested consent.”(emphasis added)

3.7 The Plaintiff clearly raised the jurisdictional question in the affidavit in opposition of the preliminary issue and at the hearing of the preliminary issue itself through counsel. A perusal of the record confirms the Court did not address the parties on the issue of consent or endorse their acceptance to proceed with the matter before he entertained the application for the preliminary issue. The learned Magistrate thus fell into grave error.

3.8 It is apparent from the court's ruling at p 40 of the record of appeal, that the court's focus was on the preliminary issue that is considered paramount rather than the jurisdictional issue raised by the Appellant. The court thus found that the Appellant did not sufficiently address the court on the preliminary issue. The court concluded that there was as such, no objection to the submission of the suit being statute barred and dismissed the matter on that premise.

3.9 Based on the Crossland Mutinta and Another vs Dononran Chipanda case cited above, I have no hesitation in finding that the court had no jurisdiction to consider the preliminary issue and ought to have strictly followed the provisions of section 23 of the Subordinate Court Act. I find that grounds 1, 2 and 4 have merit and I allow the appeal accordingly.

3.10 Granted the position I have taken, it becomes unnecessary for me to delve into the detailed arguments advanced in ground 3 of the appeal. I hold that the proceedings and ruling of the court below were a nullity and order that the matter be transferred to the High Court that has the jurisdiction to entertain the

preliminary issue if the Defendant is minded to raise it. I award the Appellant the costs for the appeal to be taxed in default of agreement.

Dated at Lusaka this.....^{12th}.....day of December.....2023



HON. JUSTICE M.D BOWA