

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)
BETWEEN:**

2023/HP/0933

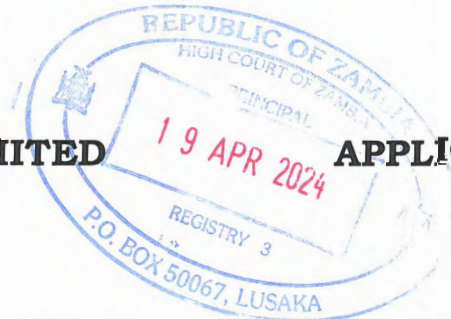
UNIVERSITY OF LUSAKA LIMITED

APPLICANT

AND

**ATTORNEY GENERAL AND OTHERS
CONSTATINE HANGALA CHIMUKA**

**1ST RESPONDENTS
2ND RESPONDENT**



Before:

The Hon. Mr. Justice Charles Zulu.

For the Applicant:

Ms. W.S. Kankondo of Mesdames Sil and Kay Advocates.

For the 1st Respondent:

Ms. N.K Chongo, Senior State Advocate.

For Mrs. Mwanawasa:

Mr. D. Jere, of Messrs Dickson Jere & Associates.

For the 2nd Respondent:

Mr. S. Lungu, SC., & Mrs C. Mwale, of Messrs Shamwana & Company.
Company.

R U L I N G

Cases referred to:

- 1. Payne v British Time Recorder Co. [1921] 2 K.B.***
- 2. Mukumbuta Mukumbuta Sam & Others v Nkwilimba Choobana & Other (SCZ/08/2003).***
- 3. Patersen v Stewart Title, Guaranty Company, 2020 ONSC 4609 (CanLII).***
- 4. Wood v Farr Ford Ltd 2008 CanLII 53848 (ONSC) at paras 24-26,***

Legislation referred to:

- 1. The High Court Rules Chapter 27 of the Laws of Zambia.***
- 2. The Rules of the Supreme Court (RSC) White Book 1999 Edition.***
- 3. The Benefits of Former Presidents Act Chapter 15 of the Laws of Zambia.***

1.0 INTRODUCTION

1.1 This ruling is at the instance of the Attorney General, for consolidation of actions, thus, the present cause number 2023/HP/0933 and two other matters under cause numbers 2023/HP/848 and 2023/HP/0928. The application was made pursuant to Order III rule 5 of the **High Court Rules Chapter 27 of the Laws of Zambia**, which provides:

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 direction that may be necessary as to the conduct of the consolidated actions.

2.0 BACKGROUND

- 2.1 On account of contextualizing so as to appreciate the tenability or otherwise of the present application, I will summarize the facts relating to each cause of action.
- 2.2 As regards the present action, cause number 2023/HP/0933, the Applicant, The University of Lusaka (UNILUS), took out an originating summons dated June 1, 2023 for summary possession of property known as Lot No. 24802/M situate in Chongwe District. The action was taken out pursuant to Order 113 of the **Rules of the Supreme Court (RSC) 1999 Edition of the White Book**.
- 2.3 The Applicant alleged that, it lawfully purchased the subject property from Esther Chipasi and Mustapha Kwabena Osuman at the price of USD\$2 Million; previously owned by Mrs.

Maureen Kakubo Mwanawasa. Additionally, it was averred that, consequently, the UNILUS was issued with a Certificate of Title dated February 27, 2023, but was unable to take possession on account that the first Respondent and others resisted to yield possession to the UNILUS.

- 2.4 In opposing the Applicant's claims, the Attorney General and Mrs. Mwanawasa, the widow to the late President Mr. Mwanawasa, argued that the Applicant and the vendors (Petitioners under cause No. 2023/HP/0928), can't take ownership or possession of the property because it was encumbered under the **Benefits of Former Presidents Act Chapter 15 of the Laws of Zambia**. According to the Attorney General, the Certificate of Title was erroneously issued to Mrs. Mwanawasa instead of being issued to the co-executors of the estate.
- 2.5 And by ruling dated January 31, 2024, the present action was deemed to have been commenced by way of writ of summons and the affidavits thereof were deemed to be pleadings.
- 2.6 Cause No 2023/HP/848, is equally before me. It involves a petition under the Bill of Rights of the Constitution of Zambia, taken out by Esther Chipasi and Mustapha Kwabena Osuman (hereinbefore mentioned) against the Attorney General and Maureen Kakubo Mwanawasa.
- 2.7 The Petitioners represented by Paul Norah Advocates, allege that they lawfully acquired the subject property from Mrs. Mwanawasa. And that the deployment of armed paramilitary officers at the subject property by the State, to prevent access

to the property by the Petitioners violates Article 16(1) of the **Constitution of Zambia**, which guarantees the right to protection from deprivation of property.

2.8 It was also alleged that the presence of armed paramilitary had prevented Esther Chipasi and Mustapha Kwabena Osuman from granting vacant possession to their buyer, the UNILUS. Accordingly, the Petitioners seek some declaratory reliefs in relation to the subject property, *inter alia* aimed at declaring Mrs. Mwanawasa's claims to the property legally unfounded.

2.9 Cause No. 2023/HP/0928, is before Judge Chibbabbuka. A matter commenced by way of originating summons by the UNILUS against the Attorney General, seeking removal of a caveat placed by the Attorney over the subject property.

3.0 THE PARTIES' AFFIDAVITS AND ARGUMENTS

3.1 Having given the background to the application, I will not labour to summarize the contents of the affidavits for and against the application.

3.2 Likewise, I will not extensively summarize the arguments thereof seriatim, particularly the elaborate submissions of the Applicant's Counsel, Mrs. Kankondo. Suffice to state that the Attorney General argued that the three actions relate to the same piece of land, and as such a consolidation of the matter was desirable. Mr. Jere representing Mrs. Mwanawasa supported the application, and added that consolidation was necessary to avoid a multiplicity of actions.

3.3 However, the Applicant's Counsel took a contra view, arguing that commonality of a subject matter was not a factor, but factors stated under Order 4 rule 9(1) RSC (adumbrated in my determination below). According to Counsel, the criteria were not met by the Applicant, and that the matters are distinct, including the modes of commencement; thus militating against the grant of the application.

4.0 **DETERMINATION**

4.1 I have carefully considered the affidavit evidence adduced and the skeleton arguments for and against the application. As to what the Court ought to consider in an application of this sort, Order 4 rule 9(1) of the RSC is significantly instructive, and the same provides:

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.

4.2 The rationale for consolidation of actions was well articulated in the English case of **Payne v British Time Recorder Co.**⁽¹⁾, wherein the House of Lords stated:

The main purpose of consolidation is to serve costs and time and therefore it will not usually be ordered unless there is some common question of law or fact bearing sufficient importance in proportion to the rest of the subject matter of the action to render it desirable that the whole matter should be disposed of at the same time.

- 4.3 The above principle was reaffirmed by our Supreme Court in the case of **Mukumbuta Mukumbuta Sam & Others v. Nkwilimba Choobana & Other⁽²⁾**.
- 4.4 The question for determination is whether an order for consolidation is proper and fitting under the present circumstances.
- 4.5 It is clear to me, cause number 2023/HP/0933, now deemed to have been commenced by writ of summons, and the petition under cause number 2023/HP/848, substantially relate to the same facts and with common questions of laws, notwithstanding the mode of commencements are different. And a determination in either one has the effect of essentially or substantially resolving the other matter.
- 4.6 The resolution of either cause number 2023/HP/0933, or 2023/HP/848, has a material bearing on cause number. 2023/HP/0928, than *vice versa*.
- 4.7 In a Canadian case of **Patersen v Stewart Title, Guaranty Company⁽³⁾**, cited by the Applicant's Counsel, the legal ramifications of a consolidation order was said to have the effect of making the consolidated matters to be one action, thus: *one*

set of pleadings, one set of discoveries, one judgment and one bill of costs.

4.8 Notably, the Applicant's Counsel pointed to one of the principles that militate against an order of consolidation, stated in paragraph 4/9/2 of the **White Book 1999 Edition** to the effect that:

There may, however, be further circumstances which will militate against an order being made...it is generally impossible to consolidate actions in which different solicitors have been instructed.

4.9 The effect of the above principle *mutatis mutandis* cannot be glossed over in the present case. The Applicant herein and the Petitioners are respectively the primary movers of the three main actions against their main adversaries, the Attorney General and Mrs. Mwanawasa, albeit represented by two different law firms, with no undertaking from them, or their clients to co-jointly represent the two parties if consolidated, or co-jointly prosecute their interests.

4.10 Having conduct of both cause number 2023/HP/0933 and 2023/HP/0848, and having regard to the circumstances disclosed herein, I am disinclined to allow the consolidation of three matters into one single action. I do not consider it desirable to try the three matters as one single action, which matters have distinct and irreconcilable modes of commencement.

4.11 Mrs. Kankondo postulated an alternative course in her argument; in the event her opposition to the application was discounted. It was suggested that the Court do direct and order

that the matters be tried at the same time. And as to the practical effect of this suggestion or order, a valuable explanation of precedential value was given in the case of ***Patersen***⁽³⁾ (supra). In that case, the Canadian Court cited another Canadian case of ***Wood v Farr Ford Ltd***⁽⁴⁾, wherein Judge Quinn gave this elucidation:

Where two actions are consolidated, they become, and proceed as, one action. Thus, there is one set of pleadings, one set of discoveries, one judgment, and one bill of costs.

4.12 And as regard the common phrase: “to be tried at the same time”, the Judge went on to amplify by stating that:

If two actions are ordered to be tried together, the actions maintain their separate identity and there are separate pleadings, discoveries, judgments, and bill of costs. But the actions are set down on the list one after the other to be tried in such a manner as the court directs. Usually, the trial judge will order that the evidence in one action is to be taken as evidence in the other action or actions. In this way both or all of the actions are tried together by the same judge or jury.

Although it has been said that the difference between consolidation and an order directing the trial of the actions together is more technical than real, I think the difference can be quite real if the matter is addressed promptly.

4.13 Notwithstanding the dismissal of the application for consolidation, what I consider desirable in lieu thereof is that, having conduct of both cause numbers 2023/HP/0933 and 2023/HP/0848, it is expedient to direct that these actions shall be tried together, starting with cause number 2023/HP/0933 and thereafter cause 2023/HP/0848.

4.14 The above directive conforms to the practice direction stated under paragraph 4/9/2 of the White Book to the effect that:

Where consolidation must be refused for one reason or another an order will often be made that one action shall follow the other in the same list and be heard before the same judge. In this way, common witnesses are saved the expense of two attendances and the judge will be in a position to try the actions in such order as may be convenient or even at the same.

5.0 CONCLUSION

5.1 In the light of the foregoing, the application for consolidation of the three actions is dismissed with costs. Costs for the Applicant (UNLUS). However, in the alternative, it is hereby directed that cause number 2023/HP/0933 and 2023/HP/0848 shall be tried together, starting with cause number 2023/HP/0933 and thereafter cause 2023/HP/0848, subject to further direction.

5.2 Leave to appeal is granted.

DATED THE 19TH DAY OF APRIL, 2024.


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THE HON. MR. JUSTICE CHARLES ZULU