

IN THE SUPREME COURT OF ZAMBIA  
HOLDEN AT KABWE  
(Civil Jurisdiction)

SCZ/8/409/2010  
Appeal No. 44/2013

B E T W E E N :

AKREIL ZULU

APPELLANT

AND

ANNA ZULU

RESPONDENT

Coram: Phiri, Wood, and Malila JJS, on 11<sup>th</sup> August, 2015  
and 29<sup>th</sup> September, 2020

For the Appellant: Mr. F. M. Mudenda of Chonta, Musaila & Pindani  
Advocates

For the Respondent: Mr. W. Mutofwe of Messrs. Douglas Partners

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## J U D G M E N T

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Phiri JS, delivered the judgment of the court.

**Cases referred to:**

1. *Scott v. Scott* (2007) ZR 17
2. *The Registered Trustees of the Archdiocese of Lusaka v. Office Machines Services Limited* 133/2005(2007) ZMSC 18
3. *Development Bank of Zambia & Another v. Sunvest Limited and Another* (1995/97) ZR 187
4. *Beatrice Muimui v. Silvia Chanda* (SCZ Appeal No. 50/2002)
5. *Liamond Chooka v. Ivor Chilufya* (2002) ZR 33
6. *Lima Bank Limited (in liquidation) v. Douglas Chipango Shimishi* (SCZ Appeal No. 81/2004)
7. *Chilufya v. Kagunda* (1999) ZR 166

8. *Prisca Lubungu v. Obby Kapango & Others* (Appeal No. 216/2016)

**Legislation referred to:**

1. *Supreme Court Practice* (White Book 1999 edition)
2. *Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*
3. *Rules of the Supreme Court of England* (1999 Edition)

**Other works referred to:**

1. *Megarry's Manual of the Law of Property*, 6<sup>th</sup> edition
2. *Halsbury's Laws of England* 3<sup>rd</sup> Edition Vol 19 para 1372 (p.841)

This is a short appeal. It arises from a judgment of the High Court (Sharpe-Phiri J) given on 21<sup>st</sup> December, 2012 whereby the respondent, who was the applicant in that court, was given an order for vacant possession of the property known as Plot 424 Chongwe (the property).

The material facts were substantially undisputed. The appellant was the biological son of the respondent and the late Patson Zulu (the deceased). The appellant and the deceased had jointly owned the property under a Certificate of Title dated 20<sup>th</sup> August, 1992. The deceased died intestate on 18<sup>th</sup> June, 2000 whereupon the appellant was appointed by the Chelstone Local Court as the Administrator of the estate.

As the child of the deceased, the appellant had expectations. He believed that along with his siblings, he was entitled to a share of the deceased's estate which included the property in issue. Prior to the deceased's death, the deceased and the respondent underwent a divorce in a Local Court on 13<sup>th</sup> January, 1999 in the process of which the Local Court, according to the appellant, had adjusted the couple's property.

The property in dispute comprised a block of 3 shops one of which was occupied by the appellant while the appellant's mother, the respondent, also occupied one other shop with the third being occupied by one of the appellant's siblings.

Sometime following the deceased's death, the respondent demanded that the appellant vacates the shop he was occupying. That demand was resisted by the appellant on the ground that he was the personal representative of the estate of his deceased father and the property in issue formed part of the estate to which he was entitled an equitable share.

In order to compel the appellant to vacate the shop he was occupying, the respondent commenced proceedings against the

appellant in the High Court on the 30<sup>th</sup> March, 2010. Process was commenced by originating summons under Order 113 of the Supreme Court Practice (White Book 1999 edition). The relief sought in the summons was:

- (i) An order for possession of property known as plot No. 424 Chongwe;**
- (ii) Costs of the proceedings.**

In a short affidavit in support of the originating summons, the respondent averred that she was the registered owner of the property which the appellant had been allowed to occupy free of charge. However, when her own plans and circumstances changed, she sought to repossess the property for her own use. She instructed her lawyers to write a suitable letter to the appellant urging him to vacate the property. That letter was written on the 28<sup>th</sup> January, 2010. The appellant, however, declined to vacate, and hence the court action.

The appellant, in opposing the action, said he resisted the notice to quit principally because he believed he was entitled as a beneficiary of his father's estate and as Administrator of the estate, to a share of it. He also resisted the claim on grounds that he was not a squatter on the property and that there was indeed a real

dispute over the parties' rights over the property in issue which the respondent was fully aware of. To this end, he pointed out that there were other ongoing actions, notably Cause No. 2000/HP/1153 and as well as in the subordinate court.

Sharpe-Phiri J, head the matter and determined it in favour of the respondent. In doing so, she first considered whether the summary procedure for recovery of land under Order 113 of the White Book was the proper course to take in the circumstances. After reviewing the authorities on the issue, she came to the conclusion that the process was properly commenced since by demanding vacant possession, the respondent had effectively revoked or withdrawn the licence given to the appellant to occupy the property. She also found that as the land was jointly owned between the respondent and her late husband, full ownership of the property had devolved to the respondent through the right of survivorship. She relied in this regard on *Megarry's Manual of the Law of Property* (6<sup>th</sup> edition at page 299). She also relied on section 51 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia. She ordered

the appellant to vacate the property forthwith and pay the respondent's costs.

The appellant was unhappy with that judgment. He launched the present appeal premised on six grounds framed as follows:

- 1. The learned judge in the court below having been aware of prior actions under Cause Nos. 2000/HP/1153 and 1999/SPB/Misc/07 both commenced by the respondent herein in which the ownership of the property is in question misdirected herself in law and in fact when she entertained a subsequent action over the same subject matter instead of dismissing the subsequent action for being an abuse of court process.**
- 2. The learned judge in the court below erred in law and in fact when she held that there was no proof of adjustment of the property being made by the Local Court contrary to documentary evidence adduced in the respondent's (appellant herein) affidavit in opposition to the originating summons.**
- 3. The learned judge in the court below misdirected herself both in law and in fact when she wrongfully applied the principle of the right of survivorship following divorce and property adjustment.**
- 4. The learned judge in the court below misdirected herself both in law and in fact when she adjudicated over the matter under summary procedure pursuant to Order 113 of the Rules of the Supreme Court of England 1999 Edition contrary to settled law.**
- 5. The learned judge in the court below erred in law and in fact by misapprehending the Supreme Court decision in *Scott v. Scott*<sup>(1)</sup> (2007) ZR 17 thereby finding for the respondent.**

**6. The learned judge in the court below misdirected herself in finding for the respondent in view of the evidence on record.**

Heads of argument were filed in support of the grounds of appeal. It is on these heads that Mr. Mudenda, learned counsel for the appellant relied.

In relation to ground one of the appeal it was submitted that the High Court was wrong to have entertained the action when it was aware of prior actions under Cause Nos 2000/HP/1153 and 1999/SPB/Misc/07 both of which were commenced by the respondent in which the ownership of the property was contested. These facts were brought out in the appellant's affidavit in opposition.

The learned counsel identified a passage in the lower court's judgment indicating that the judge was fully aware of another action in which the issue of ownership of the property is in question. He submitted that this court has on a number of occasions expressed its displeasure and disapproval regarding multiplicity of actions.

The lower court should, according to counsel, have dismissed the action rather than entertain it, let alone allow it. The cases of *The Registered Trustees of the Archdiocese of Lusaka v. Office*

*Machines Services Limited*<sup>(2)</sup>, *Development Bank of Zambia & Another v. Sunvest Limited and Another*<sup>(3)</sup> and *Beatrice Muimui v. Silvia Chanda*<sup>(4)</sup>, were cited as authorities for the submissions.

Turning to ground two of the appeal, the appellant submitted that the lower court judge was wrong to have held that there was no evidence of property adjustment by the Local Court adduced in the appellant's affidavit in opposition to the originating summons. The simple point counsel made under this ground was that the conclusion of the court that there was no evidence flew into the teeth of the documentary evidence adduced before her. We were referred to the affidavit in support of the *Ex-parte* Summons for Stay of Execution to which is exhibited the Notice of Appeal in Civil Cases filed by the respondent against the Local Court judgment following the respondent and the deceased's divorce.

Under ground three, the appellant criticized the manner in which the court applied the principle of the right of survivorship following divorce and property adjustment in a Local Court. Citing the case of *Scott v. Scott*<sup>(1)</sup> and *Halsbury's Laws of England* (3<sup>rd</sup>



Edition Vol. 19 para 1372 p.841), counsel submitted that the respondent and the estate of her deceased husband are beneficiaries entitled in equal shares to the property. He contended that the issue as to how a jointly owned property is to be treated on dissolution of a marriage, is according to *Halsbury's Laws of England* as cited by counsel, in the absence of evidence to the contrary, the parties would be entitled to equal shares.

Ground four of the appeal impeaches the procedure employed by the respondent to claim vacant possession. It was contended that the court below misdirected itself when it adjudicated over the matter under summary procedure pursuant to Order 113 of the Rules of the Supreme Court of England. The use of that procedure is discouraged where the plaintiff is aware of a real dispute with the occupier/defendant. This position is, according to counsel for the appellant clearly articulated in the White Book and is confirmed in the holding of the court in the case of *Liamond Chooka v. Ivor Chilufya*<sup>(5)</sup> where it was held that the summary procedure under Order 113 can only be suitable for squatters and others without any genuine claim of right or for persons who have since transformed into squatters.

In the present case, the respondent clearly knew of the existence of a real dispute with the appellant/occupier having earlier sued him in the High Court Case No. 2000/HP/1153. In spite of being aware of the pending action, the lower court judge wrongly concluded that there was:

**no real dispute between the applicant and the respondent to preclude the use of this procedure as the applicant is the sole registered owner of Plot 424 Chongwe, having the right of survivorship after the death of the deceased.**

The learned counsel referred us to our judgment in the case of *Lima Bank Limited (in liquidation) v. Douglas Chipango Shimishi*<sup>(6)</sup> where we stated, *inter alia*, as follows:

**...clearly, Order 113 can only be used to evict a trespasser and not a person who lawfully came into possession of the land. In this particular case, the defendant cannot be termed as a trespasser. The defendant lawfully occupied the house as an incident of his employment and later the house was offered to him to buy. The dispute now is as to whether the defendant can buy the house. The plaintiff could, therefore, not commence these proceedings under Order 113. These proceedings were, therefore, misconceived and a nullity.**

Counsel submitted that the appellant occupied one of the three shops on the property in issue before the death of his father. Under those circumstances, it was counsel's submission that proceedings

could not be taken out under Order 113 of the White Book. They were thus misconceived and a nullity.

With regard to ground five of the appeal, it was argued on behalf of the appellant that the lower court judge misapprehended the Supreme Court decision in *Scott v. Scott*<sup>(1)</sup>. The principle of law enunciated in that case was sound in law yet the lower court judge did not appropriately apply it.

Counsel contended that the lower court judge failed to address her mind to the critical issue before her which is and was what happens to a jointly owned property on divorce? Counsel submitted that in the *Scott*<sup>(1)</sup> case we held that (a) land held under joint tenancy is indivisible as between the joint holders and this is to be contrasted from land held in common and in distinct shares; (b) land held jointly is governed by the principle of *jus accrescendi*, which means the right of survivorship between joint tenants; (c) in view of the fact that the interest of the appellant and that of the respondent in the property is indivisible, it was wrong, in the absence of fraud or mistake, for the learned Deputy Registrar to award one or more structures to the

appellant. The appellant and the respondent are beneficially entitled to equal shares.

Counsel argued that the court below did not apply its mind to the fact that before the death of the respondent's husband (the deceased) the parties were divorced through a Local Court. The respondent and the deceased were beneficiaries entitled in equal share.

The grievance of the appellant under ground six was simply that the lower court glossed over the evidence that there was a divorce prior to the death of the deceased and, therefore, that the principle of *jus accrescendi* did not apply. We were urged to uphold the appeal.

In opposing the appeal Mr. Mutofwe, learned counsel for the respondent relied on the heads of argument filed on behalf of the respondent. The respondent maintained in those heads of argument that the lower court judge was correct in every sense and could not be faulted.

In regard to ground one of the appeal, it was contended that the High Court judge was right to entertain the respondent's action. Counsel submitted while admitting that this court takes a dim view

of multiplicity of actions as we have stated in cases such as *Development Bank of Zambia and Another v. Sunvest Limited and Another*<sup>(3)</sup>, that there was in the present case no multiplicity of actions as alleged.

Although it was conceded that another action by the respondent in which the ownership of the property in question was implicated existed, counsel submitted that the issue in that case was for a declaration that the respondent was the lawful owner of the property in question and for an order that the appellant should account for all monies and profits of the business.

He submitted that a matter can only constitute an abuse of process and multiplicity of actions if the course of action, the parties, the subject matter and the relief sought as well as the enabling provisions are the same. The earlier case was commenced by writ of summons pursuant to Order VI rule 1 of the High Court Rules. The present action was under Order 113 of the Rules of the Supreme Court (1999 edition). Although the parties to the two actions are the same and the subject matter are the same, the relief sought is different.

The learned counsel referred us to Order 113 rule 8 sub-rule 2 of the Supreme Court Rules (White Book) which states that the application of that order is narrowly confined to the particular circumstances described in rule 1, that is to say, to a claim solely against a person or person who entered into or remain in occupation without the licence or consent of the person in possession or any predecessor of his. In the present case, the appellant remained in occupation of the premises without the consent of the respondent and hence the resort by the respondent to order 113 to obtain relief. According to counsel, the action was thus properly commenced and the arguments made on behalf of the appellant, were unfounded and unreasonable as the two cases are totally different.

We were thus urged to dismiss ground one of the appeal

Under ground two of the appeal counsel for the respondent supported the holding by the trial court that there was no proof of property adjustment by the Local Court following the divorce of the appellant and the deceased. Counsel submitted that the judgment of the Local Court does not show that the property in question was adjusted between the parties upon divorce. The certificate of title to

the property showed that the property was still jointly owned by the deceased and the appellant – even after his death.

Referring to the case of *Chilufya v. Kagunda*<sup>(7)</sup>, as authority counsel submitted that a certificate of title is conclusive evidence of ownership and shall be received in all courts of law as evidence of the particulars therein set forth or endorsed. As the surviving joint owner, the respondent was, according to counsel, entitled to hold the property as sole owner.

In regard to ground four it was submitted that there was no error on the part of the lower court judge in entertaining the summary procedure under Order 113 of the White Book. Counsel reproduced the explanatory notes in the White Book regarding Order 113 rule 8 sub-rule 2 and essentially repeated the arguments already made under ground two.

Under ground three, counsel contended that the lower court judge correctly applied the principle of survivorship as at the time of the deceased's death, he was still jointly the owner of the property with the respondent. Counsel quoted from the learned authors of *Megarry's Manual of the Law of Real Property* 6<sup>th</sup> edition page 299-

300 on the distinction between the right of survivorship and joint tenancy and what happens to a co-owner's right at death. We were urged to uphold ground three.

As regards the last ground of appeal, counsel submitted very simply that under a joint tenancy the interests of the joint holders is indivisible unlike in the case of a common tenancy. He cited the case of *Scott*<sup>(1)</sup> as authority.

Counsel prayed that we dismiss this ground of appeal and the whole appeal with costs.

We have carefully considered the judgment of the High Court and the rival submissions of the parties in the appeal. We think that the real issue for determination in this case revolves around the question whether the property in issue had vested in the respondent entirely at the time the demand that the appellant vacates the portion of the property which he was occupying, was made.

As we have pointed out at the beginning of this judgment, the events leading to the current dispute are uncontroverted. The property in issue was jointly owned. A divorce occurred between the joint owners and subsequently one of the joint owners died.



Following the divorce, the Local Court made an order of sorts regarding sharing of property. We propose to deal with the various issues as they are raised in the grounds of appeal.

The issue under ground one is whether the lower court should have entertained the respondent's action granted that there were other proceedings pending touching on the property. Those other proceedings were identified as being Cause No. 2000/HP/1153 – an action taken out by the respondent against the appellant, and Cause No. 1999/SPB/Misc/07 being an appeal by the respondent against the judgment of the Local Court against certain orders relating to property sharing and other provision for the deceased.

The contention of the appellant is that the respondent's action amounted to multiplicity of actions which the court should have frowned upon and refused to entertain.

The issue for determination as we see it is whether at the time the appellant was given notice to vacate the subject property the respondent was the owner of it.

The appellant has made the fairly decent argument that at the time he was asked to quit occupation of one of the shops, the Local

Court had already made an order of adjustment of property – meaning in effect that the property having been shared by the court between the deceased and the respondent, the deceased's share of the property was separated at that point and thus became part of the estate over which he was the Administrator.

The certificate of title issued for the property confirms joint ownership of the property. In other words, the deceased and the respondent were joint tenants. A joint tenancy is characterized by the four unities, namely, unity of title, unity of possession, unity of time and unity of interest. All this is underpinned by the right of survivorship.

The factual position, as we understand it, is that the Local Court, upon dissolution of the marriage of respondent and the deceased, made an order of sorts touching upon the same property. The appellant contends that the exhibit referred to in his affidavit is testimony to this. That exhibit is a notice of appeal against certain pronouncements of the Local Court regarding the sharing of property. The judgment was however, appealed against as the exhibit confirms.

The certificate of title subsisting in relation to the land still reflected joint ownership at the time of death.

Counsel for the respondent has usefully referred to section 51 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia on the conclusiveness of the certificate of title. What emerges is that we have on one hand, a Local Court order which the appellant claims changed the ownership of the property from joint tenancy to something else. The mechanism envisaged to be used to achieve that does not appear obvious from the record of appeal. The Local Court judgment is furthermore a subject of appeal. Meanwhile, the legal status of the ownership of the property as confirmed by the certificate of title still reposed jointly in the deceased and the respondent. At the time of the regrettable demise of the deceased, the property was in law still jointly owned.

In the circumstances as we have narrated them above, it is quite obvious to us that without in the least impeaching the Local Court order as regards property sharing, one thing is certain: at the time of the deceased's death, the property was owned jointly with the respondent. The right of survivorship as explained by the lower court

judge clearly took effect. The deceased's share of the property devolved to the respondent who henceforth became the sole owner of it. The judge could thus not be faulted for proceeding in the manner she did not withstanding the existence of other causes. Ground one has no merit it is hereby dismissed.

Being the sole owner of it, she had the right to deal with the property as she desired. As we observed in *Prisca Lubungu v. Obby Kapango & Others*<sup>(8)</sup> an owner of land under a certificate of title has bestowed upon him/her a bundle of legal rights. Those rights include the right to quiet and exclusive possession, the power of control of use, enjoyment of land and the unfettered power of disposition of the land.

We have perused the High Court judgment being assailed. The court found that there was no proof of adjustment of the property by the Local Court. We agree with the finding which is of both fact and law. The document that has been referred to by the appellant as constituting proof is merely a notice of appeal from a Local Court to

a Subordinate Court. It purports to set out three grounds of appeal as follows:

- (i) The court below misdirected itself in rewarding the defendants as above without taking into account his own wealth/assets.**
- (ii) That in leaving the defendants assets the court below could not have arrived at a fair decision.**
- (iii) Other such grounds to be furnished on the hearing of the appeal.**

The nature of the order of the Local Court which was appealed against is set out in paragraph 6 of the Notice of Appeal in Civil Cases and its attachment as:

- 1. The Plaintiff should build a grocery for Defendant within 6 months and stock the same with items worth K30 million for him to sell. Plaintiff to build a two-bedroomed house for the Defendant including dining room and kitchen with effect from 30<sup>th</sup> January, 1999 while Plaintiff to pay the Defendant K100,000.00 per month during the period of building with effect from 30<sup>th</sup> January, 1999.**
- 2. Plaintiff to surrender one vehicle to the Defendant and both to report to court on 13<sup>th</sup> July, 1999.**

Our reading of the substance of the order made by the Local Court as deciphered from the Notice of Appeal in Civil Cases does not show any property adjustment in respect of Plot No. 424, Chongwe.

We agree that there was no evidence produced of such property adjustment. Ground two of the appeal is without merit and it is dismissed.

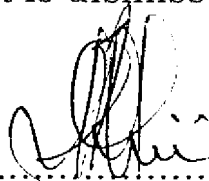
We have already explained that at the time of the deceased's death the subject property was still jointly held in the names of the deceased and the respondent. The judge was thus right to hold that through the right of survivorship the ownership of the property in issue devolved entirely to the respondent. We must stress that the devolution of the ownership in the property occurred independently of the divorce and any consequent order that may have been made.

Ground three of the appeal is equally bereft of merit. It is dismissed accordingly.

As regards the use of Order 113 of the Rules of the Supreme Court of England (1999 edition) our view is that as owner of the property in issue, the respondent was perfectly entitled to give, refuse or withdraw any permission or licence to anyone to be on her premises. In this particular case, the appellant was given notice to vacate. He had been in free occupation of the property – not as a

tenant. On withdrawing the licence to remain on the property, it follows that the appellant was placed in the same position as a trespasser. Resort to Order 113 of the Supreme Court Rules of England to take possession of the property was, therefore, warranted. The lower court judge can thus not be faulted. There is no merit in ground four. It is hereby dismissed.

Arising from what we have stated in this judgment, it should follow that the criticism of the lower court judge under grounds five and six are equally without justification. Those grounds are unmeritorious and are accordingly dismissed. The result is that the whole appeal has no merit and it is dismissed. The respondent shall have her costs.



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G.S. Phiri  
**SUPREME COURT JUDGE**



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A. M. Wood  
**SUPREME COURT JUDGE**



.....  
M. Malila  
**SUPREME COURT JUDGE**