IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.182/2013**

HOLDEN AT LUSAKA **SCZ/33/2013**

(Civil Jurisdiction)

BETWEEN:

KIDINSON MWANDILA **APPELLANT**

AND

YOTAM PHIRI **RESPONDENT**

CORAM: WOOD, MUTUNA, CHISANGA, JJS,

On 4th May, 2021 and 26th May, 2022

For the Applicant:	*Mr. Chabu of Messrs Terence Chabu & Company*
For the Respondent:	*Mr. K. Kamfwa and Mr. G. Miti of Messrs Wilson & Cornhill Legal Practitioners*

JUDGMENT

CHISANGA, JS delivered the Judgment of the Court.

Cases referred to:

1. ***Mohammed v. Attorney General (1982) Z.R. 49***
2. ***Mazoka and Others vs L.P Mwanawasa and Attorney General (2005) Z.R. 138***
3. ***William David Carlisle wise vs E.F Harvey Ltd (1985) Z.R. 179***
4. ***Sablehand Zambia Ltd vs Zambia Revenue Authority (2005) Z.R. 109***
5. ***Karabasis and Another vs Mwale (Selected Judgement No 40 of 2020)***
6. ***Craig vs Kanssen (1943) K.B.D 256***
7. ***Smurthwaite vs Hannay (1994) A.C 494.***
8. ***Anlaby vs Praetorius (1888) 20 Q.B.764***

9. ***Hewitson vs Fabre (1888) 21 Q.B.D 6***
10. ***Hamp-Adams vs Hall (1911) 2 K.B. 942***
11. ***Fry vs Moore (1889) 23 Q.B.D 395***
12. ***Benjamin Leonard Macfoy and United Africa Company Ltd (1963) ALL ER 1169***
13. ***Pritchard, Decd. Pritchard vs Deacon and Others (1963) 1 Ch P 502***
14. ***Chikuta vs Chipata Rural Council 1974 Z.R. Reprint 303***
15. ***Harkness vs Bell's Asbestos and Engineering (1967) 2 Q.B. 729***
16. ***Leal vs Dunlop Bio-Processes International Limited (1984) 1 W.L.R. 874***
17. ***Westminster City Council vs Mohanan and Others (1981) 1 ALL ER 1050***
18. ***Re 9 Orpen Road, Stoke Newington (1971) 1 All ER 944***

Legislation referred to:

1. ***High Court Act, Cap 27 of the Laws of Zambia***
2. ***Lands and Deeds Registry Act Cap 185 of the Laws of Zambia***
3. ***The White Book 1999 Edition***

Other works referred to:

1. ***Halsbury's Laws of England, 4th Edition Volume 27 paragraph 256***

INTRODUCTION

1. The dispute between the parties to this appeal revolves around ownership of Farm No. F9484, Misenga, Chingola. Kidinson Mwandila, now deceased, invoked Order 113 RSC 1999, commencing the action by originating summons, for vacant possession, mesne profits and an injunction, against Yotam Phiri, who was respondent to the application.

BACKGROUND

2. The motivation for launching the application, as revealed in the affidavit in support of the application, was that Kidinson Mwandila (appellant) was offered the said farm by the Commissioner of Lands, on 13th October, 1997. He accepted the offer on 17th October 1997, by paying the requisite fees, in the sum of sixty nine thousand five hundred kwacha (K69, 500) old currency. He engaged a surveyor, and was eventually issued with a certificate of title, number 94064, for the subject land.

3. In 2006, he noticed that trees were being felled in the farm, and a year or so later, cultivation commenced. He remonstrated with the respondent, Mr. Phiri, warning him to desist from working the land. His protestation fell on deaf ears. In total defiance of the appellant's pleas, the respondent even proceeded to construct a mud house. Later, the respondent showed the appellant a letter of offer of land to a Mr. Davies L. Siwale, by the Chingola Municipal Council. He noticed that the offer was provisional, subject to confirmation by the Commissioner of Lands. The respondent also showed him a contract of sale of the

land by Davies L. Siwale to himself, insisting that the land he had purchased was not part of the appellant's land.

4. The letter of offer of the farm to the appellant, the survey authority, as well as the certificate of title were all exhibited to the affidavit in support of Originating Summons.

5. The respondent opposed the application, explaining how he came into possession of the land. He deposed that he purchased six hectares in the Luano/Misenga area, in the Chingola District of the Republic of Zambia, from Davies Siwale, and an additional four hectares from Francis Chanda. He asserted that before the purchase, he was shown a copy of the letter of offer from Chingola Municipal Council to Davies Siwale, dated 18th April, 2006. In addition to this, he was availed with a copy of the site plan on which demarcations of plots for small holdings were depicted. The site plan was later approved for numbering and survey.

6. The respondent went on to depose that the appellant's land only covered an area in extent of 21.9478 hectares, and was not part

of his land. He also asserted that the appellant was only issued with the Certificate of Title on 28th January, 2010.

7. It was the respondent's further explanation that he had been developing the land since 2006, and erected temporary structures. He was growing bananas, and cultivating maize every farming season. He denied cutting trees on the appellant's land.

8. He went on to point out that the appellant had not undertaken any economic activities on the land, nor had he been denied access, occupation, enjoyment and use of the land. He accused him of obtaining the land fraudulently. Exhibited to the affidavit in opposition were contract of sale of plot number L/35727/M, the letter of offer of farm L/35727/M Luano Chingola to Siwale Davies, and the location map.

9. An interlocutory order of injunction restraining the respondent from entering the farm and continuing the activities he had commenced on the land was issued by the High Court. He was also stopped from undertaking activities detrimental or injurious the appellant's rights and title. The record reveals that

a bundle of documents was filed on 29th June, 2012 by Messrs. Freddie & Company, on behalf of the appellant. A notice to produce was similarly filed on behalf of the respondent on 13th July, 2012. Messrs. Freddie & Company equally filed a notice to produce on 3rd September, 2012.

THE HEARING IN THE HIGH COURT

10. On 7th September, 2011, the parties appeared before the learned Judge. Mr. Chalenga, the appellant's advocate then, intimated that learned counsel for both parties had agreed that the best way to proceed was by engaging a surveyor, who would verify the exact boundaries of the two farms, with the assistance of both parties. An adjournment was requested for on this basis. The learned judge granted the application.

11. When the case was called on the 28th October, 2011, Mr. Chalenga reported that his client was not agreeable to engaging a surveyor, because, according to him, the respondent was on his farm. It was not a case of encroachment, but rather, one of trespass. Mr. Cheelo, who appeared for the respondent, thought that it was necessary for the court to view the land in dispute.

He applied for an order that the site be surveyed by a competent and qualified surveyor, as he felt this would assist the Court to arrive at a just decision.

12. Mr. Chalenga's response was that as the farm allegedly belonging to the respondent had no survey diagram, he should be made responsible for the surveyor's fees.

13. The learned Judge ordered that the land be surveyed by an independent Government surveyor, and that the cost be borne by the respondent.

14. After several adjournments, trial commenced on 16th July, 2012. The appellant stated that he had sworn an affidavit on which he wished to rely. He proceeded to testify, and was cross examined. Similarly, the respondent testified and was cross examined. The Court relocated to the site on a subsequent date. A Mr. Kelvin Kajimo, an Agricultural Technical Officer, also testified on the respondent's behalf. The trial was concluded after this witness, and the parties filed submissions.

JUDGEMENT OF THE TRIAL JUDGE

15. The learned Judge delivered judgement in the matter. Agreeing with the arguments advanced on behalf of the respondent, she stated that it did not make sense that the Council, which had purportedly approved the applicant's (appellant's) plot in 1999, could approve the demarcations relating to the respondent's plot. She referred to the appellant's insistence that the plot was 75 hectares and his response in cross examination that it was both 75 and 21 hectares, and observed that when re-examined, he said the farm was 21 hectares. She finally noted that he had resisted to have the land surveyed by an independent Government surveyor.

16. These observations drove the Judge to conclude that the appellant's title was questionable, because unresolved questions lingered on the actual size of his land and the survey he claimed was approved by the council. Referring to ***Mohammed vs Attorney General***,[1] she reiterated that he who asserts must prove his case. She opined that it was incumbent on the applicant to prove the extent of his plot. Mere assertions

were insufficient, especially in the light of the conflicting evidence that the land was variously 21, and 75 hectares in extent. It was the learned judge's view that it was in the appellant's interest to have the land surveyed. He could alternatively, have called the surveyors who he claimed had surveyed the land.

17. The claim for mesne profit was refused because according to the learned judge, the case was not a proper one for recovery of mesne profit. This conclusion was premised on the statement in ***Halsbury's laws of England, volume 27, 4th Edition*** at paragraph 255:

> ***Mesne Profit - the landlord may recover in an action for mesne profit the damage which he has suffered through being out of possession of the land or if he can prove no actual damage caused to him by the defendant's trespass, the landlord may recover as mesne profits the amount of the open market value of the premises for the period of the defendant's wrongful occupation.***

18. Ultimately, the learned judge dismissed all the appellant's claims and discharged the injunction she had granted. The

appellant was aggrieved at this outcome, and appealed on two grounds:

1. ***The trial Judge erred in law and fact when she dismissed the applicant's claim for vacant possession on the ground that the respondent had never encroached a part of the applicant's farm No. 9445 Misenga, Chingola.***
2. ***The trial Judge erred in law and in fact when she adjudicated upon allegations of fraud in obtaining title to farm 9484 Chingola, which allegations were never pleaded.***

ARGUMENTS OF THE PARTIES

19. On behalf of the appellant, the first point learned counsel took was that Sections 33 and 34 of the Lands and Deeds Registry Act CAP 185 of the Laws of Zambia clearly and unambiguously stipulate that a certificate of title is conclusive evidence of ownership of land. The evidence led by the appellant revealed that he was given a 99 year lease, and issued with Certificate of Title No. 94064 on 28th January, 2010.

20. The second argument is that the respondent purported to prove ownership of the disputed land by offer letter from the local authority and the contract of sale, but conceded that he lacked

proof from the commissioner of lands that he owned Lot No.35727.

21. Learned counsel submitted that the trial Judge noted that the respondent's witness, Mr. Kelvin Kajimo, testified that the respondent had encroached on the appellant's land by about 2 hectares. In addition to this observation, the respondent's alleged Lot 35727/M was nonexistent in the Lands Register. It was therefore a gross error for the trial judge to elevate the respondent's purported rights over those of the appellant, who had a Certificate of Title.

22. The opposing arguments on ground one are that the claim that the appellant had 75 hectares was illusory. The appellant had refused to have the land surveyed, to determine the extent of the encroachment. It could thus not be concluded that the respondent had encroached on the appellant's land. Learned counsel explained that Mr. Kajimo's evidence was given in the context of the purported 75 hectares allegedly owned by the appellant. According to counsel, this witness was also not certain on the extent of the encroachment.

23. Turning to ground two of the appeal, learned counsel for the appellant grumbled that the learned judge adjudicated on an unpleaded allegation of fraud. This plea, it was argued, was only raised by the respondent's counsel in the submissions and quoted by the learned judge as follows:

> ***"Mr. Banda contended that the answer lay in the mix up of lies in the applicants assertion that he obtained title deeds to 21 hectares and yet the latest information on the print outs from lands showed 75 hectares which was non-existent. The applicant's title was obtained through fraud."***

24. Learned counsel observed that the trial judge concurred with those submissions, holding that the certificate of title was questionable, and dismissing the claim for vacant possession as a result.

25. As support for the contention that the allegation of fraud ought to have been pleaded, we were referred to ***Mazoka & Others vs L. P Mwanawasa & Attorney General***[2], where this court reiterated the function of pleadings:-

> ***"The function of pleadings is to give notice of the case which has to be met and define the issues on which the***

court will adjudicate in order to determine the issues in dispute between the parties. Once the pleadings are closed, the parties are bound by their pleadings and the court has to take them as such."

26. Reliance was also placed on the earlier case of ***William David Carlisle wise vs E.F Harvey Ltd***[3], where this court said:-

"Pleadings serve the useful purpose of defining the issues of fact and law to be decided, they give each party distinct notice of the case intended to be set up by the other, and they provide a brief summary of each party's case from which the nature of the claim and the defence may easily be apprehended."

27. Moreover, learned Counsel alluded to ***Sablehand (Z) Ltd vs Zambia Revenue Authority***,[4] where the requisites of a claim based on fraud were restated as follows:-

"...were fraud to be a ground in the proceedings, then the defendant or respondent wishing to rely on it must ensure that it is clearly and distinctly alleged. Further, at the trial of the case, the party alleging fraud must equally lead evidence so that the allegation is clearly and distinctly alleged...allegations of fraud must, once pleaded be proved on a higher standard of proof than on a mere balance of probability because they are criminal in nature."

28. Drawing on the principles in these authorities, learned counsel argued that the respondent made no allegations of fraud in his response, nor was evidence led to that effect. It was therefore a gross error for the trial Judge to rely on allegations of fraud that were raised in the submissions.

29. The respondent's opposing arguments on this ground are that the fraudulent activities undertaken by the appellant in acquiring his farm were that he applied for the land directly from the Commissioner of Lands, instead of applying to the Chingola Municipal Council. The Commissioner of Lands did not investigate the possible existence of other interests on the land. In addition to this, the appellant claimed his land was 75 hectares in extent, with the obvious intent of grabbing land that bordered his purported 21 hectares of land. This was a fraudulent act.

30. In addition to this, the appellant refused to engage a government surveyor to survey the portion, notwithstanding a Court Order to that effect. That refusal was in bad faith, as the

survey would have revealed that the certificate of title was obtained dubiously.

31. Furthermore, a private surveyor engaged by the appellant discovered that there was no record of the survey both at Ndola and Lusaka. The record would have revealed all the details, including the extent of the encroachment. The normal procedure for surveying land was not adhered to. Thus, the title deed was issued fraudulently. The elements of fraud were revealed on the evidence, and the court was required to examine those facts, even though fraud was not pleaded. As a result, the learned Judge in the court below was on firm ground.

THE APPEAL HEARING

32. The appellant met his demise before the appeal was heard, and was substituted by his personal representative. When the appeal was called for hearing, Mr. Chabu informed us that he would augment the arguments relating to ground one. The court asked him whether an order was made by the trial court that the matter would proceed as though commenced by writ of summons.

33. His response was that there was no specific order, though the learned judge heard viva voce evidence. When asked what the consequences of failing to make such an order were, his response was that the matter could be deemed to be defective, and sent back for retrial. When pressed further, he pointed out that no objection was raised to the improper procedure that was adopted. He referred to Order 2 of the RSC as legitimising the waiver by the opposing party.

34. Mr. Chabu insisted that the Judge had jurisdiction to hear the matter in the manner she did because jurisdiction is derived from section 10 of the High Court Act and not Order 113 of the RCS 1999.

35. Responding to further questioning on the extent of the farm by the court, he explained that the deceased was initially allocated 75 hectares, but after the survey, it was discovered that part of this was on the airstrip. This led to the reduction of the land to 21.978 hectares. He however acknowledged that a surveyor was not called tothe site.

36. Mr. Miti, who appeared for the respondent also augmented the written arguments. He agreed with the court that the procedure adopted was contrary to that prescribed under Order 113 of the RSC. He referred to this court's decision in ***Karabasis and Another vs Mwale***[5], on the procedure to be followed in circumstances such as the present one.

37. Learned counsel argued that procedural lapses aside, the appeal lacked merit as the appellant failed to ascertain the extent of the encroachment in the court below. Whereas the survey diagram in the record showed four beacons, the appellant only identified two beacons. It was therefore unclear whether the respondent was within or outside the appellant's land.

CONSIDERATION

38. We have considered the arguments of both parties. The issues that arise in this appeal are:

    (i) Whether the trial court should have considered unpleaded allegations of fraud relating to the

appellant's certificate of title in determining the dispute between the parties, and

(ii) Whether the finding that the appellant had failed to prove that the respondent had encroached on farm No. 9445 Misenga, Chingola is sustainable.

39. However, whether we resolve these issues is dependent on the response to the question whether or not the learned trial judge was possessed of jurisdiction to hear and determine the matter as she did, in the form it was brought before her. The scope of Order 113 RSC compelled us to raise this question during the hearing.

40. Our High Court Rules make no provision for summary possession of land. It is the Rules of the Supreme Court of England that stipulate in Order 113 RSC how a person whose land has been occupied by trespassers can obtain an order for possession from the court. The procedure is a summary one. It is not designed for contentious claims of ownership, and should not be used in such instances.

41. Section 10 of the High Court Act enables an applicant to apply for summary possession of land under Order 113 RSC. It reads as follows:

> ***"The jurisdiction vested in the court shall, as regards practice and procedure be exercised in the manner provided by this Act and the Criminal Procedure Code, or by any other written law, or by such rules, order or direction of the court as may be made under this Act, or the said Code or such written law, and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High court of Justice."***

42. Thus, a person wishing to reclaim possession of land from a trespasser may invoke Order 113 RSC. Substantial conformity with the Order is required. We find Mr. Chabu's argument that the court's jurisdiction was derived from Section 10 of the High Court Act and not Order 113 RSC incomprehensible. Section 10 of the High Court Act enables one to utilize the procedure provided under Order 113 RSC. It is Order 113 RSC that stipulates how an applicant is to employ the remedy of summary possession under that Order. While Section 10 is enabling, Order 113 RSC must be substantially conformed with.

One cannot deploy Order 113 RSC in any manner they wish, merely because Section 10 of the Act has paved way to Order 113 RSC. An applicant must abide by the requirements of that rule, and any other rules that have a bearing on it.

43. As stated at paragraph 33 above, Mr. Chabu argues that the respondent's advocate did not object to the procedure employed by the appellant. Besides, he submits, Order 2 RSC legitimizes the waiver of the irregularities by the respondent.

44. It is correct to assert as done by Mr. Chabu, that Order 2 RSC is applicable to this matter. This is on account of the clear indication in that Order, that it is applicable to the Rules. We should reproduce it, seeing as reliance is placed on the rule, to legitimize the manner in which the matter was dealt with by the learned judge.

> *"2. (1) **Where in beginning or purporting to begin any proceedings or at any stage in the court of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content, or in any other respect, the failure shall be treated as an irregularity***

and shall not nullify the proceedings, any step taken in the proceedings or any document, judgement or order therein.

(2) ***Subject to paragraph (3) the court may, on the ground that there has been such a failure as is mentioned in paragraph (1) and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in these proceedings or any document, judgement or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.***

(3) ***The court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed."***

45. This rule replaced Order LXX r.1 RSC which provided as follows:

"Non-compliance with any of these rules or with any rule of practice for the time being in force, shall not render any proceedings void unless the court or a judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular or amended, or otherwise dealt with in such manner or upon such terms as the court or judge shall think fit."

46. It will be noticed that in the repealed Order LXX, the court or a judge could direct that non-compliance with the rules rendered a proceeding void, and could wholly set aside the proceedings. The court was equally possessed of discretion to set aside the proceedings in part or to amend them. The rule was construed by the courts in a number of cases.

47. ***Craig vs Kanssen***[6] is a case in which the effect of Order LXX was discussed. The facts were that the plaintiff was granted an Order for leave to proceed to enforce a judgement he had obtained three years before, against the defendant. In obtaining this Order, an affidavit of service on the defendant was relied upon, which stated that the defendant had been served with a true copy of a summons, which was posted in a pre-paid envelope to an address alleged to be the defendant's place of business and residence. This address was not the address for service given in the action, and the defendant did not reside, nor carry on business there.

48. The defendant learnt that the order had been made, and a year later, applied that the order be set aside, on the ground that the

summons for leave had not been served on him as required by the Rules of the Supreme Court. The application was granted by the master. The plaintiff appealed to Broom-Johnson J. He took the view that in terms of Order LXX (1) RSC, the procedure adopted was incorrect, and that the only way of setting aside the order under that rule was by an appeal. Leave would have to be obtained to appeal out of time. The defendant appealed to the Court of Appeal. Lord Green MR delivered the judgement of the Court, Goddard L. J agreeing with him.

49. It was contended before that court, that the Order for leave to enforce the judgement obtained by the plaintiff was a nullity, and the defendant entitled to set it aside *ex debito justiciae,* irrespective of Order LXX r 1. Lord Green MR thought it desirable to examine the distinction between proceedings or orders which were nullities and those in respect of which there has been nothing worse than irregularity. In this quest, he referred to a number of authorities.

50. The first case he referred to was ***Smurthwaite vs Hannay***[7]. In that case a number of plaintiffs had been joined in the action.

The causes of action of the several plaintiffs were separate and distinct, and accordingly, there was no authority for the joinder. It was argued that the misjoinder was a mere irregularity. Dealing with that contention, Lord Herschell expressed the view that if the joinder was not warranted by any enaction or rule, this was much more than an irregularity. On his part, Lord Russell of Killowen rejected the argument, stating that the joinder of the plaintiff was more than an irregularity. This was because it was the constitution of a suit as to parties in a way not authorized by the law and rules applicable to procedure, and apart altogether from any express power given by the rules, it was fully within the competence of the Court to restrain and to prevent an abuse of its process.

51. ***Anlaby vs Praetorius***[8] was also referred to. In that case a judgement had been obtained in default of defence prematurely, before the stipulated number of days had elapsed after service. Responding to a contention that Order LXX rule 1 gave the court a discretion to uphold the default judgement, Fry L J said:

> ***"We were pressed with the argument that Od LXX, r.1 gives a discretion to the Court which applies here... But***

in the present case we are not concerned with an instance of non-compliance with a rule nor with an irregularity in acting under any rule. The irregular entry of judgement was made independently of any of the rules; the plaintiff had no right to obtain any judgement at all. I do not think, therefore, that the case comes within r1, and we must consider what is the right practice without reference to that rule. There is a strong distinction between setting aside a judgement for irregularity, in which case the court has no discretion to refuse to set it aside, and setting it aside where the judgement, though regular, has been obtained through some slip or error on the part of the defendant, in which case the court has a discretion to impose terms as a condition of granting the defendant relief."

52. Lopes L.J agreed with Fry J, stating his view in these terms:

"I entirely agree that Od LXX r1 does not apply here. It was meant to apply where a party had made some blunder in his proceedings as by delivering a pleading too late; but the present case seems to me altogether outside the operation of rule 1 because judgement was entered prematurely without any right whatsoever. To obtain that judgement was a wrongful act, and not an act done within any of the rules. The defendant is therefore, entitled ex debito justiciae to have it set aside".

53. ***Hewitson vs Fabre***[9] was equally adverted to. In that case, the defendant, who was not a British subject, had been served out of the jurisdiction with the writ instead of with notice of the writ as the rules provided, and it was held by Field and Wills JJ, that there was no service and the proceedings were *void ab initio*. ***Hamp-Adams vs Hall***[10], was similarly cited where the failure to endorse the date of service on the writ within three days as required by the rules was held not to be an irregularity that could be waived by the defendant. It was said it was impossible for the defendant to waive the defect, for the result of the non-compliance with the rule was that there was no writ on which the plaintiff was entitled to proceed.

54. Lastly, Lord Green M.R. alluded to ***Fry vs Moore***[11], where Lindley LJ had this to say on the distinction between an irregularity and a nullity.

> ***"But then arises the question, whether the order for substituted service was a nullity, rendering all that was done afterwards void or whether it was only an irregularity. If it was the latter, it could be waived by the defendant. I shall not attempt to draw the exact line between an irregularity and a nullity. It might be***

difficult to do so. But I think that in general one can easily see on which side of the line the particular case falls, and in the present case it appears to me that the proceeding was rather an irregularity than a nullity. The writ was properly issued, but it was improperly served, and I am not prepared to say that by no subsequent conduct of the defendant the irregularity could be waived."

55. Llopes L.J. on his part, said:

"It is said that the proceeding was a nullity, and no doubt the distinction between a nullity, and a mere irregularity in procedure is often a very nice one. But in the present case, I think there was only an irregularity."

56. Having examined these cases, Lord Greene M.R. concluded that the cases appeared to establish that a person who was affected by an order which could properly be described as a nullity was entitled *ex debito justiciae* to *'have it set aside'*. It was his opinion that an order obtained in circumstances where service of the application had not been made when this was required could not be treated as a mere irregularity, as it was affected by a fundamental vice.

57. The effect of a proceeding which was a nullity, and one which was an irregularity was discussed in ***Benjamin Leonard Macfoy and United Africa Company***[12], by Lord Denning as follows:

> ***"The defendant here sought to say, that the delivery of the statement of claim was a nullity and not a mere irregularity. This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad, but incurably bad.....And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgement collapse if the statement of claim was a nullity. But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an Order of the Court setting it aside; and the Court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it."***

58. One year after this decision, the court of appeal was confronted with in ***re Pritchard, Decd. Pritchard vs Deacon and Others*** [13] in which the question whether the proceedings were merely

irregular or a nullity altogether arose. In that case, on October 6, 1961, proceedings seeking for reasonable provision to be made for the widow of a testator out of his estate under the Inheritance (Family Provision) Act 1938 were, as required by the applicable rule, R.S.C Ord 54 F, r 1 begun by the preparation of an originating summons. This summons was accepted and sealed by the district registrar, on October 9, which was a day before the 6 month limitation period expired. The district registrar even made directions and the parties took further steps in accordance with those directions. In January 1962 however, the district registrar informed the parties that having regard to the terms of R.S.C. Ord 54 r 4B, he doubted whether he had power to proceed with the matter.

59. It was too late to commence proceedings afresh in the central office, so an application was made to the registrar, asking why the cause, having irregularly issued from the district registry instead of the central office, should not be removed to the central office. The registrar refused the application. He held that the originating summons was a nullity and all subsequent steps

taken by the parties or by the court were *ultra vires*. The widow took out a summons in the Chancery Division, asking that the proceedings be transferred to London. Wilberforce J held that the originating summons was a nullity and all steps taken under it were void.

60. On appeal to the Court of Appeal, it was held that the originating summons had never been issued and was a nullity *ab initio*, for where an action was commenced by an originating summons which was purely a creature of the Rules of the Supreme Court, and that summons was not issued in accordance with the only relevant rule, Order 54, r 4B, that constituted a fundamental failure to comply with the requirements of Section 225, relating to the issue of civil proceedings, and the court had no power under RSC Order 70 r 1 to cure proceedings which were a nullity. Accordingly, as the limitation period under the Act of 1938 had expired, the widow had no remedy.

61. Lord Denning dissented from this view. He thought that the non-compliance with Rules of the Supreme Court Order 54 r 4B

was in this case a mere irregularity and as the widow had commenced a known genuine case, but containing technical defects, before the period of limitation expired, the Court had power under RSC Order 70 r 1 to amend the irregularity and should exercise that power by allowing the cause to be transferred to the central office; a *fortiori*, where the original error in issuing an originating summons in a district registry had been made by an officer of the court and where, owing to the statutory limitation period, the widow would otherwise be wholly deprived of her cause of action.

62 Upjohn L. J, on his part, observed that a review of the authorities on nullities and irregularities established as classes of nullity (1) proceedings which ought to have been served but had never come to the notice of the defendant at all; (2) proceedings which had never started at all owing to some fundamental defect in issuing them; and (3) proceedings which appeared to be duly issued but failed to comply with a statutory requirement.

77. It is notable that in the instant case, a serious dispute relating to ownership of the land in issue was revealed before the action was commenced. This dispute took the case outside the ambit of Order 113 RSC. In fact, the notes to Order 113, at 113/8/3 state that where the existence of a serious dispute is apparent to a plaintiff, he should not use this procedure.

78. In ***Westminster City Council vs Mohanan and Others***[17], Lawson L.J articulated the manner in which Order 113 operates, at page 1054. He said:

> ***"The course of events as I indicated at the beginning of my judgement, reveals a certain confusion of thought about the way in which RSC Ord 113 operates. It is now necessary for me to examine Ord 113 in some detail. The jurisdiction given by Order 113 came into existence in 1970 as a result of the gap in the law which was revealed by a series of squatter cases which had occurred in the two or three years before 1970. These cases had shown that there was difficulty in getting speedy possession of property when it had been occupied by trespassers. The objects of Order 113 were twofold. The first was to provide a procedure whereby an Order for possession could be obtained even though the property owner did not know the names of trespassers; and the second was so that the time lag between starting proceedings and***

non-compliance with the rules is an irregularity. However, whether or not the courts will exercise discretion in favour of the erring party to correct matters is dependent on the rule that has been breached, and whether or not the justice of the case resides in applying order 2 RSC in favour of the party who has failed to comply with the rule.

76. We now turn to the present case. This matter was commenced by ex parte originating summons under Order 113 RSC. It is noteworthy that under the Rules of the Supreme Court of England, specifically Order 5 rule 4, some matters may be begun either by writ or originating summons. This election however does not apply to matters that are specifically required to be commenced by either mode of commencement; or by originating motion or petition. Order 113 RSC expressly stipulates procedure for summary recovery of land in cases of trespass. An applicant has no choice in the matter. They should employ Order 113 if they crave summary possession of land. They cannot obtain summary possession of land by writ.

serve out of the jurisdiction, and by virtue of Order 2 r 1 non-compliance with those requirements was an irregularity.

74. It was further held that Order 6 r 8 gave power to the court to cure the irregularity by renewing the writ or extending its validity even retroactively, but that the Court would not exercise its discretion under general principles or under Order 2, r 1 where it would have the effect of depriving the defendant of a defence under the statute of limitations unless there were exceptional circumstances. That furthermore, although Order 6, r 8, gave the court the power to make good the service out of the jurisdiction and to grant leave retroactively, the restraint exercisable by the Court was an important restriction on the misuse of the procedure.

75. We have referred to English authorities extensively. This has been necessitated by the fact that we are here concerned with a rule on which Order 2 RSC has a bearing. It became necessary to establish the effect of Order 2 RSC on the Rules of the Supreme Court, and how it has been applied by the courts. The cited authorities indicate that the effect of Order 2 RSC is that

injuries allegedly caused by the defendant's negligence without obtaining leave of the Court pursuant to RSC, Order 6 r. 7 to issue a writ which was to be served out of the jurisdiction. A day before the writ expired, the plaintiff purported to serve the writ on the defendants in Jersey without obtaining leave under RSC, Order 11, r 1. The defendants took out a summons under Order 12, r 8, to have that service set aside and the action dismissed on the ground that the plaintiff had failed to obtain leave to serve the writ out of the jurisdiction. The plaintiff, by a cross summons, applied for the renewal of the writ under Order 6 r 8(2) and for leave under Order 11, r 1 to serve the renewed writ out of the jurisdiction. The district registrar dismissed the defendant's summons. Neill J allowed the defendant's appeal and set aside the purported service of the writ and dismissed the plaintiff's summons.

73. On appeal to the Court of Appeal, the appeal was dismissed, the Court holding that where a writ was to be served out of the jurisdiction leave was required under Rules of the Supreme Court Order 6 r.7 to issue the writ and under Order 11 r 1, to

accordingly the plaintiff would be granted leave for the purposes of section 1 of the Act of 1963.

71. Lord Denning explained the effect of Order 2 r 1 RSC. He stated that it does away with the old distinction between nullities and irregularities and should be construed widely and generously to give effect to its manifest intention. Every omission or mistake in practice or procedure is to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice.

72. Other cases decided after Order LXX RSC had been replaced by Order 2 RCS indicate that non-compliance with the rules is considered as an irregularity by the Courts. However, whether or not the failure to comply is countenanced depends on a particular case and the applicable rules. For instance, in ***Leal vs Dunlop Bio-Processes International Limited***[16], the Court of Appeal was seized with an appeal that dealt with the question whether or not Order 2 RSC could reprieve a matter in which the provisions of Order 6 were not followed by the plaintiff. There, the plaintiff issued a writ for damages for personal

make it, and that any order should have been for leave to proceed for the purposes of section 1 of the Act of 1963. BJ held that the registrar's order was a nullity, and made no order on the application.

69. An application to rectify the registrar's order and treat it as valid was made pursuant to Order 2 rule 1 RSC. It too fell on hard ground. The plaintiff appealed, contending that the case came within RSC Order 2 rule 1, and that the form of the registrar's order was an accidental slip or omission within RSC Order 20 r.11. The defendant contended that at the time the registrar made the order, there were no "proceedings" because no writ had been issued, and further that the Act of 1963 required that the application be made to 'the court' which did not include the district registrar.

70. The court of appeal allowed the appeal, holding that the application to the district registrar constituted *'proceedings'* in the High Court within RSC Order 2 r 1 under which the court had power to correct the errors made as irregularities and that

This resulted in the rule being substantially recast by the end of 1964.

67. One of the early cases in which Order 2 Rules of the Supreme Court was applied after the amendment was ***Harkness vs Bell's Asbestos and Engineering***[15]. In that case, the plaintiff was found to have developed asbestosis after leaving employment. He claimed that it was caused by his employer's failure to provide protective clothing while in contact with asbestos. His claim would have been barred by the Limitation Acts of 1939 and 1954. His solicitor therefore, before issuing the writ, applied ex parte under section 1 of the Limitation Act 1963 to the District Registrar for leave, as provided by the Acts. The district Registrar accordingly ordered that section 2(1) of the 1939 Limitation Act should not afford a defence to the plaintiff's proposed action. A writ was issued as a result.

68. By RSC Order 128 r 1(1), the jurisdiction to grant leave for the purposes of section 1 of the 1963 Act was vested in the judge in chambers. The defendants applied to set aside the district registrar's order on the ground that he had no jurisdiction to

63. Under section 255 of the Supreme Court of Judicature (Consolidated) Act 1925, an action *"means a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of court but does not include a criminal proceeding by the Crown."* This is the provision the Court of Appeal referred to in *re Pritchard.*

64. This provision is replicated in Section 2(1) of our High Court Act Cap 27 of the Laws of Zambia as follows: *"Action means a civil proceeding commenced by writ in such other manner as may be prescribed by rules of court but does not include a criminal proceeding by the people".*

65. The decision in ***Chikuta vs Chipata Rural Council***[14] appears to have aligned with the jurisprudence obtaining in England before Order LXX RSC was amended.

66. Order LXX Rules of the Supreme Court was replaced by what is now known as Order 2 RSC in the 1999 White Book edition. It is explained in the Editorial introduction that the decision of the Court of Appeal in *Re Pritchard,* cited above, aroused criticism.

getting an order for possession could be very considerably shortened. The intention was that the new procedure should be used in a particular type of case. That type of case is defined in r.1, which is in these terms:

> ***'where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order'***

As I understand that rule, it means this, that a property owner faced with squatters can decide for himself whether he wishes to proceed for recovery of his property by writ in the ordinary way or whether he wishes to proceed by way of the summary proceedings described in rule 1. The summary proceedings described in rule 1 are, however, confined to a particular type of case and if a property owner decides to use the procedure prescribed by rule 1 he has to comply with the other provisions of the order."

79. The special nature of the remedy of summary possession of land was considered and upheld by Pennycuick V-C in ***re 9 Orpen Road, Stoke Newington.***[18] The applicant was the owner of

certain freehold property which he wished to sell. He discovered, however, that the premises had been occupied by certain persons whose identity was unknown to him. The applicant made enquiries of the occupiers to gain entry to the premises. On the second occasion, according to his affidavit, the applicant *'...saw a man who answered the door to me...I believe he mentioned his name but I have no recollection what it was.'* The applicant then took out an originating summons in the non-inter-parties form provided for by RSC Ord 113, r 2(2), which dispensed with the need to name the occupiers in cases where *'the person claiming possession is unable, after taking reasonable steps, to identify every person occupying the land...'*

80. It was held that the applicant had not taken reasonable steps to identify the person occupying the land; the special procedure enabling a person claiming possession to proceed on a summons not naming the alleged occupant must be strictly complied with; accordingly the proceedings were defective from the start and the summons would be dismissed.

81. The rationale for the introduction of Order 113 admits of no doubt concerning the circumstances in which it is to be deployed. The objective is to dispossess squatters of land, and that, speedily. This procedure avoids the length of time it takes to dispose of a matter commenced by writ, due to the steps that must be taken for a matter to come to trial. And it is confined to cases where a person is occupying land belonging to another without colour of right. Where, therefore it transpires that a person occupying land is also claiming ownership and pointing to what may appear to be a legitimate source of ownership, it is inappropriate to apply for summary possession, as the claims of both parties require interrogation. That being so, the appellant ought not to have commenced this matter under Order 113.

82. Being minded to hear and determine the matter, the learned judge should not have entertained the application as presented, without referring to Order 28. The explanatory notes at Order 113/8/13 read as follows:

> ***"If, on the hearing of the summons, it should appear that the claim of the plaintiff is not within the ambit of this***

Order or that claims for relief or remedy have been joined with the claim for possession of land which could not or ought not to have been so joined or that the supporting affidavit is defective or that for some other reason the proceedings are irregular, the court may dismiss the summons or give leave to amend to correct any irregularity on such terms as it thinks fit.

Moreover, if the court should hold that there is some issue or question that requires to be tried, or that for some other reason there ought to be a trial...it may give directions as to the further conduct of the proceedings under Order 28 r 4, or may order the proceedings to continue as if begun by writ under Order 28 r 8."

83. Order 28 r 8 provides:

"8. – (1) Where, in the case of a cause or matter begun by Originating summons, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the case or matter had been begun by writ, it may order for the proceedings to continue as if the cause or matter had been so begun, and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof."

84. It is clear that on reading the respondent's affidavit, the learned judge perceived the dispute between the parties. This should

have prompted her to order the proceedings to continue as if the matter had been begun by writ, in terms of order 28 RSC. She however did not do so. The end result is that on an application for summary possession, a clearly contentious matter was considered, tried, and a determination of the dispute made. This was a misdirection.

CONCLUSION

85. As explained in ***Harkness vs Bell's Asbestos and Engineering Ltd***[15] non-compliance with the rules of the Supreme Court is an irregularity. Whether or not we condone it depends on the circumstances. We have stated the purpose of Order 113 RSC in paragraph 78. Given that purpose, we do not think it appropriate for us to exercise our discretion in the appellant's favour. Doing so would negate the purpose of Order 113 RSC. What then is the fate of this case? The answer is to be found in Order 2 RSC, which enjoins the court not to wholly set aside any proceedings on account of the wrong mode of commencement.

86. We thus, in terms or Order 2 RSC set aside the judgement, as well as the trial proceedings. We remit the matter to the High Court before another judge, to be dealt with as stipulated in Order 28 rule 8 RSC. We award costs to the respondent in this court. Costs in the court below will abide the outcome in that court. The costs awarded in this court will be agreed, and in default taxed.

.....

A.M. WOOD
SUPREME COURT JUSTICE

.....

N. K. MUTUNA
SUPREME COURT JUDGE

.....

F. M. CHISANGA
SUPREME COURT JUDGE