

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

**APPEAL No.101/2021
CAZ/08/256/2022**



BETWEEN:

STEWART COWELL

APPELLANT

AND

PAMELA COWELL

RESPONDENT

CORAM: Kondolo, Makungu, Majula JJA

On, 18th May, 2023 and 18th August, 2023

For the appellant: Mr. Allan Samabi of Ferd Jere & Co

For the respondent: No appearance

JUDGMENT

Makungu J.A delivered the judgment of the court.

Cases Referred to:

1. *Zanetta Nyendwa v Kenneth Paul Spooner* (SCZ Judgment No. 20 of 2020, Appeal No. 21 of 2009)
2. *Sonny Paul Mulenga & Others v Investrust Merchant Bank Limited* (1999) Z.R 101 (S.C)

3. *John Kunda (Suing as Company Director of and on behalf of the Adventist Development and Relief Agency (ADRA) v Keren Motors (2012) vol.2 Z.R 228*
4. *Citibank Zambia Limited v Suhayl Didhia SCZ Appeal No. 6 of 2022*

Legislation Referred to:

1. *The Foreign Judgments (Reciprocal Enforcement) Act, Chapter 76 of Laws of Zambia*
2. *The English Limitation Act, 1939*
3. *The Rules of the Supreme Court, 1965 (White Book) 1999 Edition.*
4. *The Matrimonial Causes Act No.2 of 2007*

Other Works Referred to:

1. *Bryan A. Garner, Black's Law Dictionary (2004), 8th Edition, West Thompson.*

1.0 INTRODUCTION

- 1.1 This is an appeal against the judgment delivered on 18th September, 2020 by Mrs. Justice N.A. Sharpe-Phiri of the High Court, as she then was. The Judge rejected an application by the appellant herein who was the applicant in the court below, for registration of the Judgment of the Slough County Court in case no. SL05D00784.

2.0 BACKGROUND

2.1 On 4th October, 2019, the appellant instituted an action in the High Court by way of originating notice of motion and an affidavit in support. The appellant subsequently amended the originating process with leave of the Court and filed Summons for Registration of a Foreign Judgment together with an affidavit in support on 18th March, 2020 (2019/HP/FJ/0351). The same was filed pursuant to **section 4 of the Foreign Judgment (Reciprocal Enforcement) Act Chapter 76 of the Laws of Zambia.**

2.2 By the said summons, which appears to have been ex-parte, the appellant sought the following reliefs:

- 1. An order for leave to register the judgment of the Slough County Court, case number SL05D00784 dated 9th August, 2007.**
- 2. An order authorising the enforcement of the orders granted in the said judgment.**
- 3. Any other relief the court may deem fit to award in the circumstances.**

2.3 In the affidavit in support of the summons, the appellant deposed that he is a British national. That the respondent

herein had filed for divorce in the Slough County Court in England under case number SL05D00784. That, on 24th January, 2007, the Court issued orders directing that subject to the decree nisi being made absolute, the appellant would be entitled to a property known as 24 Twalilwisha Crescent, Riverside, Kitwe and the farm known as Lot 91 Mukulungwe, Ndola which is registered to Disa Farm Limited. The appellant exhibited a copy of the said Order which appears at page 30 of the record of appeal.

2.4 The appellant further averred that discussions were tabled with the respondent over the said properties but she has continued to occupy the same even though she has already registered in her name all the other properties granted to her by the said Court.

2.5 The appellant stated that the order of the Slough County Court must be registered in order for it to be executed in this jurisdiction as it is the only way he could benefit from the judgment.

3.0 DECISION OF THE LOWER COURT

3.1 After considering the application, the lower court found that the appellant's interest was in two properties, namely; Lot 91 Mukulungwe Ndola registered to Disa Farms Limited and 24 Twalilwisha Crescent, Kitwe. That the appellant's right to the said properties as per judgment of the Slough County Court accrued on the 9th August, 2007 when the decree nisi of divorce was made absolute.

3.2 The Court found that the judgment in issue is not registrable under the **Foreign Judgments (Reciprocal Enforcement) Act** because it is not for the payment of money to a judgment creditor. The court noted that section 3(2)(b) of the Act excludes judgments that are not for payment of money from being registered. In support of this, the case of **Zanetta Nyendwa v Kenneth Paul Spooner** was relied upon.

3.3 The court further found that the foreign judgment in issue could be recognised under **section 86(1)(a) of the Matrimonial Causes Act No. 20 of 2007**. That portion of the said orders which the applicant wished to register and enforce related to ancillary directives to the dissolution of marriage effected in relation to the parties. Since the

directives flow directly from the order for dissolution of marriage, they can be registered and enforced in this jurisdiction.

- 3.4 Nevertheless, the learned trial judge found that the appellant had sat on his rights until 4th October, 2019 when he commenced the proceedings for registration of the judgment. She referred to **section 4 (3) of the English Limitation Act, 1939** which is applicable in this jurisdiction by virtue of the **British Acts Extension Act, Chapter 10 of the Laws of Zambia²** which provides that:

“No action shall be brought by any other person to recover land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.”

- 3.4 Applying the above provisions, the judge opined that *“allowing the registration of the judgment of the Slough County Court would in effect be enforcing the right to recover land that accrued to the appellant on 9th August, 2007 and became enforceable on the 9th August, 2019.”*

In effect she held that the appellant's action was statute barred. For this reason, the application was denied.

4.0 GROUNDS OF APPEAL

4.1 The appeal is based on three grounds framed as follows:

- 1. That the court below erred in law and fact when it held that the Slough County Judgment of 9th August 2007 cannot be enforced in Zambia.*
- 2. That the court below erred in law and fact when it held that the applicant elected to sit on his rights until 4th October, 2019 before commencing proceedings before the court.*
- 3. The trial court erred in law and fact when it held that the applicant's right to recover the land that accrued to him had become unenforceable.*

5.0 APPELLANT'S HEADS OF ARGUMENT

5.1 The appellant relied on the heads of argument dated 14th May, 2021. In arguing ground one, counsel for the appellant relied on **Section 3 (1) and 2 (a) of the Foreign Judgments (Reciprocal Enforcement) Act¹**, in support of the submission that the foreign judgment by the Slough County

Court in case number SL05D00784 is final and can be registered and enforced. He also relied on **Section 86 (1) (a) of the Matrimonial Causes Act No.20 of 2007²**, to the effect that a dissolution of marriage in accordance with foreign law should be recognised in Zambia.

- 5.2 In support of ground 2, counsel submitted that a successful litigant should not be denied the immediate enjoyment of the fruits of their judgment. In support of this position, he cited the case of **Sonny Paul Mulenga & Others v Investrust Merchant Bank Limited¹**. He further cited the case of **John Kunda (suing as Company Director of and on behalf of the Adventist Development and Relief Agency (ADRA) v Keren Motors (z) Limited²**, where the Supreme Court stated in obiter dicta at page 12 that; ***“To say that there is no prejudice when a successful party holds on to unexecuted judgment is a statement made without conviction.”***

- 5.3 On the strength of the above authorities, counsel argued that the court below erred in law and fact when it held that the appellant elected to sit on his rights until 4th October, 2019 before commencing proceedings before court. That the

appellant herein still has the right to enforce the said judgment.

5.4 On the 3rd ground of appeal, counsel placed reliance on **order 45 rule 3 (1) (a), (2) and Order 46 rule 2 (1) (a) of the Rules of the Supreme Court (White Book) 1999 Edition³** in furtherance of the argument that a judgment is enforceable even after six years or more have elapsed since the date of its delivery.

5.5 Based on the above authorities, counsel submitted that the court below erred in law and fact when it held that the appellant's right to recover the land that accrued to him had become unenforceable.

6.0 HEARING OF THE APPEAL

6.1 The respondent did not appear before us on the date set for hearing of the appeal. Counsel for the appellant then informed us that the record of appeal was served on the respondent by substituted service as her whereabouts were unknown. There being no respondent's notice of address for service and no respondent's heads of argument on record and

seeing that the appeal concerns mainly questions of law, we decided to proceed to hear the appellant.

7.0 OUR ANALYSIS AND DECISION

7.1 We have considered the record of appeal and the appellant's heads of argument. We shall deal with all the grounds of appeal together as they are connected.

7.2 We take note that the judgment sought to be enforced is a final judgment of the Slough County Court of England, dated 9th August, 2007. In support of the contention that the Slough County Court judgment can be registered in Zambia, the appellant relied on **Section 3 (1) and (2) (a) of the Foreign Judgments (Reciprocal Enforcement) Act**, which provides for the benefits of **part II of the Act** being extended to judgments given in the superior courts of any foreign country and for issuance of statutory orders for such extensions to foreign countries giving reciprocal treatment.

7.3 In our view, this provision only applies to foreign judgments of the **superior courts**. According to **Black's Law Dictionary 8th Edition, at page 382¹**, a local court is defined as a court

whose jurisdiction is limited to a particular territory such as a state, municipal or **county court**.

7.4 Therefore, a county court can be equated to a local court in England and in this jurisdiction. For this reason, **section 3(1), (2)(a) of the Foreign Judgments (Reciprocal Enforcement) Act** does not apply to this case.

7.5 Further, the lower court was on firm ground in holding that the judgment in issue cannot be registered under the said Act following the case of **Zanetta Nyendwa v Kennth Paul Spooner²** as it is not a money judgment.

7.6 Section 2(2) of the **Foreign Judgment (Reciprocal Enforcement) Act** provides that:

“For the purposes of the Act, the expression action *in personam* shall not be deemed to include any matrimonial cases or any proceedings in connection with any of the following matters, that is to say, matrimonial matters.....”

It is therefore clear that judgments in matrimonial cases or orders incidental to dissolution of marriage cannot be registered under the Act.

7.6 **Section 86 (1) (a) of the Matrimonial Causes Act No. 2 of 2007** provides that:

“A dissolution of marriage effected in accordance with the law of a foreign country shall be recognised as valid in Zambia where, at the date of institution of the proceedings that resulted in the dissolution or annulment of the marriage, the party at whose instance the dissolution or annulment was effected, or it was effected at the instance of both parties was;

(a) In the case of the dissolution of a marriage or the annulment of a voidable marriage, domiciled in that foreign country.”

7.7 The above provision is mandatory and there is no restriction as to whether the dissolution of marriage was made by a foreign superior or inferior court. The circumstances of this case fall squarely within the purview of the above section. Therefore, we hereby recognise the judgment in issue.

7.8 The facts on record are that after obtaining the said judgment, the appellant waited for 12 years and 2 months

before applying for registration of the judgment in Zambia. Hence the lower Court took the view that since the applicant commenced the action 12 years later, he had lost the right to recover the land under the subject judgment because **Section 4(3) of the English Limitation Act, 1939** was invoked under which actions for recovery of land have a limitation period of 12 years.

- 7.9 In the case of **CitiBank Zambia Limited v. Suhayl Dudhia**⁴, the Supreme Court guided on the rules of statutory interpretation when they stated as follows:

“Broadly speaking, where the literal rule of interpretation creates an absurdity, the golden rule maybe invoked to modify the reading of the words to avoid an offensive situation. Likewise, the mischief rule allows judges to consider the gap of the mischief which the statute intended to address. The purposive approach requires that judges look beyond contents of the statute and discover the original purpose for the enactment of the legislation and its meaning should be defined from that purpose.”

7.11 On the basis of the preceding authority, we take the view that the purpose of **section 4 (3) of the Limitation Act, 1939²** was to set a limit on the time frame within which to **commence** actions for recovery of land. In the present case, however, the appellant has already obtained a foreign judgment concerning property situated in Zambia and he merely seeks to register that Judgment so that he may execute it. For this reason, we hold that the lower Court misapplied **section 4 (3) of the Limitation Act, 1939²** as it is inapplicable to this case.

7.12 Counsel for the appellant referred us to **Order 46 rule 2 (1) of the Rules of the Supreme Court of England 1999 Edition (RSC)³** which states that:

“A writ of execution to enforce a judgment or order may not issue without the leave of court in the following cases that is to say-

(a) where six years or more have elapsed since the date of the judgment or order.”

7.13 Our view is that the appellant is required to apply to the lower court for leave to execute the judgment pursuant to the said

rule because more than six years have elapsed since the judgment. Reasons for the delay should be given in the affidavit in support of the application.

7.14 It is imperative for us at this point to clarify that although the lower court held that the appellant is entitled to two properties namely Lot 91 Mukulungwe Ndola and 24 Twalilwisha Crescent, Riverside, Kitwe, paragraph 3 of the Order of the Slough County Court at page 30 of the record of appeal reads as follows:

“Upon the parties agreeing to take all necessary steps to ensure that the farm known as Lot 91 Munkulungwe, Ndola registered to Disa Farm Limited is both legally and beneficially recorded as being the Respondent’s asset and that the property known as 24 Twalilwisha Crescent, Riverside, Kitwe is the sole legal and beneficial asset of the Applicant. It is reordered that the farm includes the equipment and the fixtures and fittings set out in the valuation dated 23rd January, 2007.”

7.15 It is crystal clear that 24 Twalilwisha Crescent, Riverside, Kitwe was granted to the respondent Pamela Cowell. We

therefore set aside the lower court's finding that the same belongs to the appellant as that finding was not in accordance with the said court order. In fact, there are conditions precedent to the acquisition of the farm by the appellant.

8.0 CONCLUSION

8.1 All in all, the appeal is allowed and the judgment of the lower Court is hereby partly set aside as regards limitation of action and ownership of 24 Twalilwisha Cresent Riverside, Kitwe.

8.2 We recognise the validity of the Slough County Court Judgment in case No. SL05D00784 and the orders made incidental to it. We order that the appellant reverts to the lower court for the determination of any issues of execution of the judgment. Under the circumstances, the appellant will bear his own costs.

.....
M.M. KONDOLO, SC
COURT OF APPEAL JUDGE

.....
C.K. MAKUNGU
COURT OF APPEAL JUDGE

.....
B.M. MAJULA
COURT OF APPEAL JUDGE