

SCZ Judgment No. 18 of 2011
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IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT LUSAKA

(Civil Jurisdiction)

APPEAL NO.198/2007

SCZ/8/319/2007

BETWEEN :

VALENTINE WEBSTER
CHANSA KAYOPE

AND

ATTORNEY GENERAL

APPELLANT

RESPONDENT

CORAM: Chibesakunda, Silomba, and
Mwanamwambwa, J.J.S.,

On 18th June 2009 and 21st October 2011

For The Appellant: In person

*For the Respondent: Mr.D. Y. Sichinga, S.C., Solicitor
General and with him:
Mrs. M. C. Kombe, Acting Chief
State Advocate and;
Mrs. M.M. Chomba, Assistant
Senior State Advocate.*

JUDGMENT

Mwanamwambwa, J.S., delivered the Judgment of the Court.

Case referred to:

Development Bank of Zambia and another v Sunvest
Limited and another [199/1997] Z. R. 187.

Legislation referred to:

1. The High Court Act, CAP 27, Section 13.

The delay in delivering this judgment is deeply regretted.
It is due to heavy workload.

When we heard the appeal, Hon. Mr. Justice Silomba sat on the panel. He has since retired from the Bench. This Judgment is therefore, of the majority.

The appeal is against a Judgment of 7th November 2007. By that Judgment, the High Court entered judgment in favour of the respondent, against the appellant, for K98,000,000. The money was mesne profits, for his continued wrongful occupation of House No. 13, Suez Road, Rhodes Park, Lusaka, from 1st January 2002, to 30th November 2004, at the monthly rate of K2,800,000. The Judgment also dismissed the appellant's counter claim for general damages for wrongful eviction and damage to his personal property.

The brief facts of this matter are that the appellant was a Cabinet Minister in the Zambian Government. He occupied the house by virtue of his post. About October 2001, he ceased to be a Minister. So he was required to vacate the house and hand it over to the Government. At his request, he was allowed to stay in the house for one more month. But he remained in the house up to 30th November 2004, when he was evicted. After his eviction, the respondent sued him for mesne profits, at K2,800,000 per month. Before then, he sued the respondent for an Order that he be allowed to purchase the very house, under

the scheme for sale of Government pool houses to civil servants. The High Court dismissed his claim. He appealed to this Court

but his appeal was dismissed on the ground that he did not qualify to buy the house under the said scheme; because the scheme applied to civil servants and not politicians.

On the evidence, the learned trial Judge held that the appellant's legal right to occupy the house expired when he ceased to be a Minister. He dismissed the appellant's argument that he had a licence to continue living in the house for the period he was pursuing to purchase the house, as a sitting tenant. That the respondent was entitled to recover mesne profits, at open rental open market value of K2,800,000 per month, for the period the appellant wrongfully occupied it, less the grace period of one month.

The learned trial Judge refused to entertain the appellant's arguments on his entitlement to purchase the house. He pointed out that the issue had earlier been determined by the High Court and Supreme Court.

The matter was commenced in the Commercial Court. On the appellant's counter-claim, the learned trial Judge held that such counter claim did not merit the determination of the Commercial Court, since it did not qualify as a "*Commercial*

Action”, under the Rules of the Commercial Court. He advised the appellant, if he so desired, to commence a separate action on the general list, for damages in respect of his alleged damaged personal property and wrongful eviction.

There are three (3) grounds of appeal. These read as follows:-

“Ground 1

The learned Judge in the Court below misdirected himself by stating that the sale of Government Pool houses was “*confined to civil servants and did not apply to him as a politician*” when some constitutional holders of office such as Judges and politicians were allowed to purchase the houses provided the prospective purchasers met conditions applicable to the sale.

Ground 2

The Court below misdirected itself by holding that the defendant was only a licensee of the house up to 27th December 2001 when he ceased to be a political leader and yet the Court granted the defendant an Order to stay in the house up to 30th November 2004. The defendant was not a trespasser during the period 27th December 2001 and 30th November 2004.

Ground 3

The learned Judge misdirected himself by dismissing the defendant's counter-claim when the plaintiff did not file a defence to the counter-claim."

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On **ground one**, the appellant made very lengthy arguments. They cover 13 pages of his written heads of argument. These were supplemented by lengthy oral arguments.

The gist of his arguments is that he was entitled to purchase the house, as a sitting tenant.

On behalf of the respondent, Mr. Sichinga, then Solicitor General, points out that the issue as to whether the appellant, as a politician qualified to buy the house, was determined by this Court in Judiciary Review Appeal No. 8/195/2004, against the appellant. He argues that the issue is res judicata.

Our short answer to Ground One and the arguments thereon is that the issue raised is res judicata. The appellant did sue the respondent over the issue and lost the case both in the High Court and Supreme Court. It is improper for him to try to revive the issue in this matter. We uphold the argument of Mr. Sichinga on the issue. We find ground one totally without merits. It is hereby dismissed.

On **ground two**, the appellant made very lengthy submissions. The written ones cover 9½ pages. The gist of his argument is that he was granted an Order to stay in the house until 30th November 2004. Therefore, he was in lawful occupation of the house between 27th December 2001 and 30th

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November 2004. Therefore, the learned trial Judge was wrong in holding that the appellant had no licence to occupy the house up to 30th November 2004, and that his occupation of the house up to that date was unlawful.

We have considered the arguments in relation to the judgment appealed against. In deciding that the appellant should pay the respondent mesne profits, the learned trial Judge relied on the passage at paragraph 255 of Volume 27 of the 4th Edition of **Halsbury's Laws of England**. The passage reads as follows:

“Mesne Profits - The Landlord may recover in an action for mesne profits the damages which he has suffered through being out of possession of the Land or if he can prove no actual damage caused by 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. In most cases the rent paid under any expired tenancy will be strong evidence as to the open market value. Mesne profits being a type of damages for trespass can only be recovered in respect of the

Defendant's continued occupation after the expiry of his legal right to occupy the premises. The Landlord is not limited to a claim for the profits which the Defendant has received from the land or those which he himself has lost."

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We accept the foregoing as the correct law on mesne profits. And on the evidence on record, we uphold the learned trial Judge's finding of fact that the period 1st January 2002 to 30th November 2004, the appellant had no legal right to occupy the respondent's house. We would add that he kept the respondent out of the house, without lawful justification. In the premises, the law governing mesne profits states that he must pay the mesne profits to the respondent for his continued occupation of the house, after the expiry of his legal right to occupy it. The fact that he was granted a stay of execution against eviction, while he was pursuing his vain claim to purchase the house, did not confer on him a legal right to occupy it, free of charge.

For the foregoing reasons **ground two fails.**

On ground three, the appellant advanced lengthy submissions . And in the process, he brought in again the issue of entitlement to purchase the house. The gist of his

submissions is that his counter-claim arose from injury, humiliation and damage suffered from the case brought to the High Court for determination. That it could not be detached from the main case. He argues that the High Court, whatever its

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classification, specialization and its purpose, has original jurisdiction to hear and determine any matter before it.

We accept the appellant's submissions. The starting point is **Section 13** of the **High Court Act, CAP 27** of the Laws of Zambia. It provides as follows:

13. "In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict

or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.”

Then on the issue is **Development Bank of Zambia and another v Sunvest Limited and another (1)**. In that case, this Court disapproved of commencing of multiplicity of actions, between the same parties, over the same set of facts; and advised parties to raise whatever issues they wish to raise, between them, in one action.

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In the present case, the appellant’s counter claim arose out of a claim by the respondent, in relation to one and the same house. The learned trial Judge accepted the respondent’s claim as one arising out of a commercial transaction and adjudicated on it. On the facts of this matter, we hold that it was in order for the appellant to raise a counter claim, as he did. In our view, where there is a claim arising out of a commercial transaction, a defendant to such a claim, is entitled to raise any counter claim thereto, if such counter claim arises from the same set of facts or transaction. To achieve finality and avoid multiplicity of proceedings on these set of facts, the learned trial Judge should have determined the appellant’s counter-claim. He erred in law by refusing to determine it and advising the appellant to commence fresh proceedings on the general list. Commencing fresh proceedings would have amounted to multiplicity of actions

and would be against **Section 13** of the **High Court Rules** and **Development Bank of Zambia and another v Sunvest Limited and another** (1). For the foregoing reasons, we find merits in ground three. Accordingly, we allow it.

The appellant invited us to adjudicate on the counter-claim and award him appropriate reliefs. We decline the invitation. We are not in a position to determine the counter claim because we are an appellate Court and not a trial Court. Only a trial Court can make findings of fact on an issue like this, which was

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not determined. We are sending back the matter to the Commercial Court. We order that there be a retrial, on the counter claim only, before another Judge.

The appellant having lost two grounds of appeal and won one, we order that each party bears own costs of this appeal.

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L. P. CHIBESAKUNDA
SUPREME COURT JUDGE

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M. S. MWANAMWAMBWA
SUPREME COURT JUDGE