

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

(Civil Jurisdiction)



IN THE MATTER OF:

**AN APPLICATION FOR PROTECTION
FROM DEPRIVATION OF PROPERTY
UNDER ARTICLE 16(1) AND 16(2) OF
THE CONSTITUTION OF ZAMBIA CAP 1**

AND

IN THE MATTER OF:

**AN APPLICATION SEEKING
PROTECTION AGAINST ADVERSE
POSSESSION UNDER SECTION 35 AND
54 OF THE LANDS AND DEEDS
REGISTRY ACT CAP 185**

B E T W E E N :

MBITA CHITALA

PETITIONER

AND

ATTORNEY GENERAL

1ST RESPONDENT

GEORGE MWAMBAZI

2ND RESPONDENT

**Before Honorable Mrs. Justice M. Mapani-Kawimbe in Chambers on the
19th day of April, 2017**

<i>For the Petitioner</i>	:	<i>Mr. H. Silweya, Silweya & Co.</i>
<i>For the 1st Respondent</i>	:	<i>Ms. K. Akapelwa, Assistant Senior State Advocate</i>
<i>For the 2nd Respondent</i>	:	<i>Ms. V. Oputa, Theotis, Mataka & Sampa Legal Practitioners</i>

R U L I N G

Case Authorities Referred To:

1. *Chikuta v Chipata Rural Council* (1974) ZR 241
2. *New Plast Industries v The Commissioner of Lands and the Attorney General* SCZ Judgment No. 8 of 2000
3. *Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals* (1995-1997) Z.R 187
4. *BP Zambia Plc v Interland Motors Limited* SCZ Judgment No. 5 of 2001
5. *Societe Nationale des Chemis de Pur du Congo v Kakonde* SCZ Judgment No. 19 of 2013

Legislation Referred To:

1. *High Court Act, Chapter 27*

The Petitioner brings this interlocutory appeal against a Ruling delivered by the Learned Deputy Registrar dismissing his action on the grounds that it was wrongfully commenced and amounts to multiplicity of Court actions.

The facts leading to this appeal as discerned from the Petition are that the Petitioner was issued with Certificate of Title No. 9246 of the Remaining Extent of Subdivision No. 3 of Farm No. 298a, by the Registrar of Lands and Deeds on 13th November, 2001. The Certificate of Title was for the unexpired residue lease of a term of 99 years from 1st day of June, 1993.

By a Judgment against the Petitioner in a matter where the Petitioner was the Defendant under Cause No. 1996/HP/3642, the Petitioner was ordered to give up some land to offset a debt owed to the Plaintiff, the African Commercial Bank (in liquidation). A subdivision was created and out of 10.0363 hectares of land, the Petitioner remained with 9.9658 hectares.

In this action, the Petitioner averred that:

- “(a) *The 1st Respondent failed to provide the Petitioner a clear map as to the extent of 5.9658 hectares of land by way of placing beacons for the Remaining Extent of 5.9658 hectares of land.*
- (b) *The 1st Respondent provided a title deed on the Remaining Extent of 5.9658 hectares without the Petitioner being shown the actual measurement on the ground of the 5.9658 hectares of land resulting in the 2nd Respondent suing the Petitioner for encroachment on his land to the extent of 2 hectares of land which piece of land the Petitioner had put up structures to the value in investment to about K3 million.”*

The reliefs sought by the Petitioner are premised on the protection from deprivation of property in extent of 5.9658 hectares as stated under Certificate of Title No. 9246 dated 13th day of November, 2001. Further, protection against adverse possession of

his property believed to be part of the 5.9658 hectares on, which he built investment of K3 million.

In his ruling dated 29th March, 2016, the Learned Deputy Registrar held in principle that since the parties in this Petition were the same as those in Cause No. 2012/HP/0443; and the cause of litigation was on the same property, there was no need for the Petitioner to continue this action.

Dissatisfied with the Learned Deputy Registrar's decision, the Petitioner brings this appeal fronting five grounds as follows:

- (i) *The Deputy Registrar erred at law and in facts and failed to decide that what followed the action having originally commenced with a cause number by the Petitioner, was administrative subject to applications amendments under Cap. 27 and never to be dismissed unheard:- A rule of natural Justice "audi partem..." Thou shall hear the other party " etc.*
- (ii) *The Learned Registrar erred and failed at law and facts and failed to re-align the matters of issues of causes of action with the matters of amendments with issues of the preliminary objection.*
- (iii) *The Learned Registrar erred and failed to see that a recorded Judgment by Consent or otherwise rests the causes of action unless appealed against.*

- (iv) *The Registrar erred at law in conceiving a multiplicity of actions and an abuse of Court in connecting none existing a Consent Judgment of the settled Consent Judgment.*
- (v) *The Learned Deputy Registrar erred at law and facts and failed to distinguish Constitutional Provisions from the Legislative Provisions. Legislative Provisions create Justiciable civil rights e.g. S.35 of the Lands and Deeds Act Cap. 185*

Only Learned Counsel for the Petitioner and 2nd Respondent filed written submissions in support of their respective positions, for which I am grateful. Learned Counsel for the Petitioner submitted that the 1st Respondent mixed the terminology of Petition “Commencement of Action, Matter, Suit, Petition with the reliefs relating to the Cause of Action for each of the later Court proceedings.”

He also submitted that a Cause, Suit, or Action and Petition is always shown in commencement as provided by the amended provision of Order VI Rule 2 of the High Court Rules. He argued that a relief to a claim commenced as a PETITION (AS AN APPLICATION) is always sought separately from commencement of action or suit and may be indicated in the subsequent pleadings if

not appearing in the Petition or the Writ and the same by interlocutory proceedings in the order for directions.

Counsel contended that the Petitioner did his best to inform the parties in advance of the relief he sought at the commencement of this action. As a result, his Petition was well commenced. He prayed to the Court to allow the Petition to proceed.

As for the allegation of multiplicity of actions, Counsel submitted that the 2nd Respondent was well aware that the Consent Judgment between the parties concluded the pleadings and facts by Court. Hence, the Petition which was a new action commenced after the Consent Judgment and was different from the old and concluded action. He prayed to the Court to hear the new parties, new facts, and issues in the interest of justice instead of being referred to the Consent Judgment as the matters in the Petition touched on issues of encroachment and boundaries, after the Consent Judgment.

In response, Learned Counsel for the 2nd Respondent submitted that the Petitioner's action under Article 16(1) and (2), Article 28 (1) of the Constitution and Rule 2 of the Protection of Fundamental Rights Rules was misconceived, because he failed to show in either his Petition or supporting affidavit any instance of threatened deprivation or adverse possession of property.

She contended that on 25th July, 2014, under Cause No. 2012/HP/443, the Petitioner and the 2nd Respondent executed a Consent Judgment on the property, which is the subject of this Petition. In the Consent Judgment, the parties agreed that the Petitioner would compensate the 2nd Respondent two acres of land from the remaining extent of Subdivision A of Farm No. 298a to atone for his encroachment.

On that basis, Counsel contended that the Consent Judgment which was the product of the parties should not have been subjected to this Petition given that there is no property that was either compulsorily acquired by the State or adversely possessed.

She cited the case of **Chikuta v Chipata Rural Council**¹ where the Supreme Court held that:

“ where any matter is brought to the High Court by means of an originating summons when it should have been commenced by writ, the Court has no jurisdiction to make any declarations.”

She also cited the case of **New Plast Industries v The Commissioner of Lands and The Attorney General**², where the Supreme Court held inter alia that:

“We therefore hold that this matter having been brought to the High Court by way of Judicial Review, when it should have been commenced by the way of an appeal, the Court had no jurisdiction to make the reliefs sought.”

Counsel argued that if the land over which the 2nd Respondent has conclusive title was assumingly adversely possessed, then the Petitioner should not have sought relief by way of Petition.

On the issue of objectionable affidavits filed in support of the Petitioner’s action, Counsel relied on the strength of Order 5, Rule 15 of the High Court Act which states:

“An Affidavit shall not contain extraneous matters by way of objection or prayer or legal argument or conclusion.”

She argued that the Petitioner's Affidavit in Support contained extensive prayers under paragraph 10, which amounted to a gross contradiction of the Rules of Court. Counsel further submitted that the Petition amounted to a multiplicity of actions and abuse of Court process because the Consent Judgment under Cause No. 2012/HP/0443 adjudged that the 2nd Respondent was the bona fide owner of the property in dispute. Counsel added that by this action, the Petitioner sought to avoid the provisions of the Consent Judgment on a matter that was res judicata. She called in aid the case of **Development Bank of Zambia and KPMG Peat Marwick v Sunvest Limited and Sun Pharmaceuticals**³ where the Supreme Court condemned the resort to a multiplicity of actions by litigants.

She further cited the case of **BP Zambia Plc v Interland Motors Limited**⁴, where the Supreme Court held that:

"a multiplicity of actions is one where the conflicting decisions which undermine each other from two or more different Judges over the same subject matter."

I have given anxious consideration to the grounds of appeal and the submissions filed by the respective parties herein. Although five grounds of appeal were canvassed by the Petitioner, the issues arising therefrom, can in my considered view, be safely clustered into two:

- (i) Grounds (i), (ii), (iii) and (iv) which raise issues on the mode of commencement and the propriety of this action.
- (ii) Ground (v) which assails the Learned Deputy Registrar's Ruling that the action is an abuse of Court process.

I shall therefore deal with these issues under the respective clusters. From the onset, I wish to state that I am in toto agreement with the provisions of Order VI Rule 2 of the High Court Rules as reprised by Learned Counsel for the Petitioner. For that reason, I will not say more as that is the position of the law.

The Petitioner seeks protection from deprivation of property and adverse possession, which are rights protected under the Republican Constitution. In this vien, a person who alleges the

violation of these rights under Article 16 of the Republican Constitution can move the High Court to hear and determine the matter under Article 28 of the Constitution.

In response, the 2nd Respondent contends that the Petitioner has no claim under Article 16 of the Constitution because his land has not been compulsorily acquired nor adversely possessed. Instead the Petitioner gave up his land to the 2nd Respondent vide the Consent Judgment that was executed by the parties. Thus, he has no cause of action in Court.

After carefully analysing the facts of this case, I have come to the inescapable conclusion that the Petitioner's action is wrongly before Court. The Petition does not disclose that the Petitioner's property was compulsorily acquired even though there is an averment in the caption. It does not also show that the Petitioner's land was adversely possessed by the 2nd Respondent. This being the case, I find that the Petition is incompetently before Court. In any event and as rightfully contended by Learned Counsel for the

2nd Respondent, if the Petitioner's land had been adversely possessed, then he should have commenced an action by Originating Summons and not this Petition.

In consequence, I am constrained to entertain this action, as the basis of the Petitioner's claim was already adjudicated on in Cause No. 2012/HP/0443 and by the Consent Order. In other words, I am of the firm view that this matter is res judicata.

I am fortified by the case of **Societe Nationale des Chemis de Pur du Congo v Kakonde**⁵ where the Supreme Court stated that:

"...Res judicata is not only confined to similarity or otherwise of the claims in the 1st case and 2nd one. It extends to the opportunity to claim matters which existed at the time of instituting the 1st action and giving the judgment."

Accordingly, I hold that this Petition amounts to a multiplicity of actions and is an abuse of Court process. It is dismissed forthwith. I award costs to the 2nd Respondent to be taxed in default.

Leave to appeal is granted.

Dated this 19th day of April, 2017


M. Mapani-Kawimbe
HIGH COURT JUDGE