IN THE COURT APPEAL FOR ZAMBIA **APPEAL NO. 024/2017**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

IN THE MATTER OF:	**PLOT NO. 601/08 CHAWAMA IMPROVEMENT AREA SITUATE IN THE LUSAKA PROVINCE OF THE REPUBLIC OF ZAMBIA**
IN THE MATTER OF:	**AN APPLICATION UNDER ORDER 113 THE RULES OF THE SUPREME COURT 1999 EDITION**
BETWEEN:	
BLACKWELL SIMBEYE	**APPELLANT**
AND	
ALLAN NJOBVU	**1ST RESPONDENT**
UNKNOWN OCCUPIERS	**2ND RESPONDENTS**

CORAM: Chisanga JP, Chishimba and Sichinga, JCA

On 4th May, 2017.

For the Appellant: *Mr. S. Mweemba, Messrs Mumba Malila & Partners*
For the Respondent: *N/A*
T6

JUDGMENT

CHISANGA, JP delivered the Judgment of the Court

Cases referred to:

1. ***Zambia Revenue Authority vs Jayesh Shah (2001) Z.R. 60***
2. ***Gaedonic Automotive Limited & Patrick Chisenga Mundundu vs Citizens Empowerment Commission[2] (SCZ No. 39 of 2014)***
3. ***Greehalgh vs Mallard (1947) 2 All EL P 255***
4. ***Societe National Des Chemis De Pur Du Congo (SNCC) vs. Kakonde (SCZ Judgment No. 19 of 2013) P 51***
5. ***Zambia National Holdings Limited and United National Independence Party vs The Attorney General (1993/94) Z.R. 115***

Works Referred to:

1. ***Halsbury's Laws of England, Fourth Edition, paragraph 1528***
2. ***Halsbury's Laws of England Third Edition Volume 16 para 103.***

Legislation referred to:

1. ***Housing (Statutory and Improvement Area) Act Cap 194 of the Laws of Zambia***
2. ***Subordinate Act CAP 28***
3. ***Constitution***

This appeal is against the Order made by the learned judge in the court below on the 20th December 2016, wherein she stated as follows:

> Upon perusal of the occupancy licence relating to the title of the property in issue, the Applicant is notified that by virtue of section 2 of the **Housing (Statutory and Improvement Area) Act Cap 194 of the Laws of Zambia** the jurisdiction to hear and determine disputes relating to the property herein does not lie to the High Court. In this regard the Applicant is directed to commence a fresh action before the correct court, namely the subordinate court.

This order was made in the absence of the parties. Although the proceedings do not so show, the learned High Court Judge granted the applicant leave to appeal against the said Order dated 23rd January 2017. An order to that effect is on record.

The claim before the court below was one for summary possession of land pursuant to Order 113 of the Rules of the Supreme Court. The applicant's claim was that Plot No. 601/08 in the Chawama Improvement Area in Lusaka belonged to him. A contract of sale of the same to one John Poutides in 1982, had been reversed by the Administrator General, who was administrator of the estate of the said John Poutides, now deceased. This was on account of the failure by the estate to settle the full purchase price. Consequently, the applicant commenced an action for possession of the said land against the 1st defendant and other tenants for vacant possession, under cause number 1990/HP/808. He obtained judgment in his favour and executed it. However, the 1st defendant forcefully and illegally returned to the property, and the applicant has been denied access since.

Both files at the court and at the applicant's advocates went missing, despite the frantic efforts he has made towards location of the said files. Plot No 601/08 Chawama still belonged to him and he was desirous of obtaining vacant possession. That is the claim the court below declined to consider for lack of jurisdiction.

The appellant attacks the Order of the learned judge on three grounds, as follows:

1. The judge erred in law and fact when she directed that a fresh action should be commenced before the subordinate court when the matter was already decided upon by the High Court.
2. The judge misdirected herself in law and fact when she relied on a provision of law which did not have anything to do with the application that was made to the court.
3. The judge misdirected herself in law and fact when she directed in the absence of the parties that the matter be commenced afresh in a lower court when the application was actually interpartes.

According to the heads of argument, learned counsel argues vehemently that the trial court fell into grave error when it ordered that a fresh action should be commenced before the subordinate court. This is because the matter was already concluded by the high court under cause number 1990/HP/808, and vacant possession given to the appellant.

In learned counsel's view, the high court being a superior court, it is not in order to refer a matter that begun in the high court to the subordinate court. Article 120(1) of the **Constitution** is cited for this view. In further argument, section 20 1(c) (iv) of the **Subordinate Act CAP 28**, which prescribes the limit of jurisdiction of a Principal Resident Magistrate in cases of recovery of land is cited. It was thus, according to learned counsel, disturbing for the judge to order that a fresh action be commenced in the subordinate court which had no jurisdiction whatsoever.

On ground two, it is contended that it was a misdirection to cite section 2 of the **Housing (Statutory Improvement Area) Act CAP 194**. This was because the application was for an order for vacant possession and the consistency or otherwise of some provisions of the law with the **Housing (Statutory and Improvements Area)** Act did not arise.

The arguments on ground three are that the learned judge did not determine the matter on the merits contrary to the guidance in ***Zambia Revenue Authority vs Jayesh Shah***[1] and ***Gaedonic Automotive Limited & Patrick Chisenga Mundundu vs Citizens Empowerment Commission***[2].

The arguments in opposition are that the learned judge was on firm ground in ordering as she did because the property subject of these proceedings falls under the **Housing (Statutory and Improvement Areas)** Act. Therefore, that Act is applicable.

According to learned counsel, the Ruling of the learned judge was legally sound, as the **Housing (Statutory and Improvement Areas)** Act defines court as "Subordinate Court." Therefore, the argument proceeds, the drafters of that piece of legislation clearly intended to vest exclusive jurisdiction in matters touching on property in statutory Improvement Areas in the Subordinate Court. The argument that the High Court is the appropriate forum is not tenable, in view of section 2 of the **Housing (Statutory and Improvement Areas)** Act.

It is learned counsel's further argument that the contention that the matter should be commenced in the High Court because it was once commenced in that court is untenable, as it is trite that a matter should be commenced before the correct court.

Turning to ground three, it is contended that the learned judge had no jurisdiction to entertain the matter before her, by virtue of the **Housing (Statutory and Improvement Areas)** Act. She was as a result right not to entertain the matter. It is further contended that while it is correct to state that matters must be tried on merit, those matters should be tried by a court of competent jurisdiction.

At the hearing, Mr. Mweemba stood in for Messrs Mumba Malila and Partners. He informed the court that he was relying on the heads of argument. We noted that the respondent had filed in heads of arguments, and reserved our judgment.

We have considered the arguments of both parties. The first ground raises issues of res judicata. Learned counsel's argument is to the effect that because the matter had earlier been tried by the high court and judgment rendered thereafter, a fresh action over the same subject matter and between the same parties can competently be commenced in that court. This argument is unsustainable because once a matter has been heard, it cannot be re-litigated. Res judicata would apply. That principle is a bar that prevents re-litigation of

issues. It applies where the cause of action is the same, between the same parties and their privies, and the plaintiff had opportunity of recovering the relief he craves in the second action, and would have done so, but for his negligence. See **Halsbury Laws of England, Fourth Edition, paragraph 1528, Greenhalgh vs Mallard (1947) 2 All ER P 255** and **Societe National Des Chemis De Pur Du Congo (SNCC) vs Kakonde (2013) Z.R. 51** where these principles are articulated.

We should state here that once an Order for possession has been executed, a party who reinstates himself into the property after eviction falls to be ejected from the property by writ of restitution. A plaintiff who is dispossessed of the property may also apply for a fresh writ of possession, or he may call upon the Sherriff to place him again in possession. See **Halsbury's Laws of England Third Edition Volume 16 para 103.**

It is thus misguided to argue that because the same matter was commenced in the High Court, it can be re-litigated in that court in the absence of special circumstances. Ground one is devoid of merit and is dismissed as a result.

We move to consider ground two. We agree that the provision relied upon by the learned judge had nothing to do with the matter before her. Section 2 of the Housing (Statutory and Improvement Areas) Act must be understood in its proper context. That provision reads:

2. *Notwithstanding anything to the contrary contained in any written law, the provisions of any such law, in so far as they are inconsistent with the provisions of this Act, shall not apply to any land comprised in a Statutory Housing Area or in an Improvement Area.*

Section 3 of the said Act as amended reads:

3. *In this Act, unless the context otherwise requires –*

.....

"Court" means the Lands Tribunal.

The preamble to the Act states that:

> **An Act to provide for the control and improvement of housing in certain areas; and to provide for matters connected with or incidental thereto.**

The Act confers power on the Minister to declare any area of land within the jurisdiction of a council as a Statutory Housing Area or Improvement Area. It also states the powers that may be exercised by a council in such an area relating to alienation of such areas, as well as issuance of Council Certificates of Title. The Act provides for a Register of Titles in a council where there is a Statutory Housing Area or Improvement Area. It outlines when documents are deemed to be registered, and how priority of documents on the register is to be determined. The Act states the effect of an unregistered document. It confers power on the Registrar to refuse to register a document where the document is not in accordance with provisions of the Act. The Act also provides for official

searches on the register and how these are to be effected. It goes on to prescribe the form of document a person must complete in order to transfer land, and the form of document to be filled in to create a mortgage. The Act also makes provision for entry of a caveat. Of particular importance to the appeal before us is section 33(1) which relates to removal of a caveat. That section reads:

> 1. *Such transferee or other interested person may, if he thinks fit, summon the caveator, or the person on whose behalf such caveat has been lodged, to attend before the court to show cause why such caveat should not be removed.*
>
> 3. *The court, upon proof that such person has been summoned, may make such order as seems just.*

In light of section 2 and the definition of court referred to above, a person wishing to summon the caveator must do so before the Lands Tribunal and not the subordinate court, as wrongly indicated by the trial judge. The judge was obviously unaware that section 3 had been amended as stated above.

Section 33 of the Act confers power on the registrar to order a person in possession of a certificate of title which contains errors to deliver up the same for purposes of rectification. The section provides for a person aggrieved with such an order to appeal to the court within 30 days of receipt of a copy of the order. Here again, the court is the Lands Tribunal.

Further, the Council Registrar may submit for the decision of the court any question arising under the Act. Clearly, such a question may only be referred to the Lands Tribunal.

It should be borne in mind that the questions that would arise under the Act relate to administration of **Housing (Statutory and Improvement) Areas,** pertaining to issuance of documents of Title, maintenance of the Titles Register, entry of caveats and such like. The Act in question makes no prescription as to how squatters are to be dealt with, and before which court such matters are to be brought where the subject matter is situated in an area governed by the Act.

That being the case, the instances in which a matter may only be determined by the Lands Tribunal are those specifically prescribed by the Act as highlighted above. The jurisdiction of the high court is unlimited, as held by the Supreme Court in ***Zambia National Holdings Limited and United National Independence Party vs The Attorney General***[5]

We recognize that it is to be exercised within the confines of the law, but are unable to discern any restriction on that court in matters of possession of land situated in Statutory and Improvement Areas from squatters. Clearly the learned trial judge fell into error in declining to consider a matter that was properly before her.

Ground two of the appeal having succeeded, it is unnecessary to address the third ground. We should state however that triable issues are disclosed on the affidavits on record. Oral evidence should therefore be received and a determination of the matter made thereafter. The matter should thus proceed as though commenced by writ of summons, and directions made accordingly. We thus allow the appeal and remit this case back to the high court for hearing and determination before another judge. Each party will bear own costs.

.....

F. M. CHISANGA
JUDGE PRESIDENT
COURT OF APPEAL

.....

F. M. CHISHIMBA
COURT OF APPEAL JUDGE

.....

D. L. Y. SICHINGA
COURT OF APPEAL JUDGE