

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

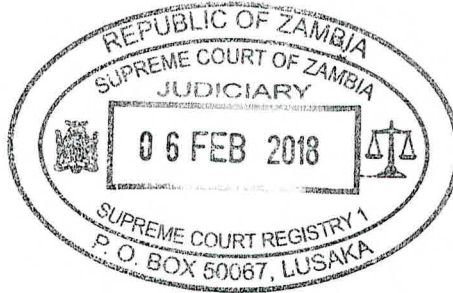
**Appeal No.166/2014**

**BETWEEN:**

**RAPHAEL MWALE**

**AND**

**CAROLINE DAKA**



**APPELLANT**

**RESPONDENT**

**CORAM: Mwanamwamba DCJ, Kajimanga and Kabuka JJS**

**On 6<sup>th</sup> February 2018**

**FOR THE APPELLANT:** In person

**FOR THE RESPONDENT:** Mr. Z. Musonda and Mrs. Natasha  
C. Zimba, National Legal Aid Clinic  
for Women

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**R U L I N G**

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**Kajimanga JS delivered the Ruling of the court.**

**Cases referred to:**

1. Caroline T. Daka v ZANACO Bank Plc - 2008/HP/0546 (unreported)
2. Attorney General v Million Juma (1984) ZR 1
3. Jane Mwenya and Jason Randee v Paul Kapinga (1998) ZR 17
4. Godfrey Miyanda v Attorney General (No.2) (1985) ZR 243
5. Trinity Engineering (Pvt) Limited v Zambia National Commercial Bank Limited (1995-1997) ZR 189

**6. Chibote Limited and 3 others v Meridien Biao Bank (Zambia) Limited (In Liquidation) (2003) ZR 76**

**Legislation referred to:**

- 1. The Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of Zambia, sections 26 and 14**
- 2. Supreme Court of Zambia Act, Chapter 25 of the Laws of Zambia, Rule 78**

By this motion, the applicant seeks an order to be reheard and/or to alter the terms of the judgment of this court delivered on 13<sup>th</sup> June 2017, dismissing the appellant's appeal against the judgment of the court below.

The background is that the appellant obtained a judgment against one Elifala Mtonga (deceased) under cause number 1993/HP/1538. On 13<sup>th</sup> May 1999, the appellant caused a writ of elegit to be issued and executed against the deceased's property situate at Plot No. 7428/378 (House No. 242/05) Kaunda Square Stage II in Lusaka. When the property was handed over to the appellant, he put tenants in occupation and began to recover the judgment debt from the rentals received. He later lodged the Sheriff's seizure notice at the Lusaka City Council Deeds Registry. On an unknown date, the appellant's tenants were evicted after a writ of

possession was obtained by the deceased. The eviction was, however, challenged by the appellant and by a court order dated 15<sup>th</sup> August 2001, the tenants were reinstated.

Meanwhile, on 3<sup>rd</sup> August 2000, the deceased offered the property to the respondent at the price of K22,000,000.00 (now K22,000.00). Following the offer, the respondent approached her erstwhile employer, ZANACO Bank, for a loan. A search was conducted by the Bank on the property which revealed that it was free from any encumbrances. A deposit in the sum of K5,500,000.00 (now K5,500.00) was then paid to the deceased and ownership of the property was subsequently transferred to the respondent. On 29<sup>th</sup> October 2000, a cheque in the sum of K16,500,000.00 (K16,500.00) was drawn in the deceased's name as final payment for the property. The respondent decided, however, to retain the cheque and deposited it in her account after the deceased failed to yield vacant possession of the property to her. The cheque was then encashed by the respondent and upon the Bank discovering the same, she was suspended and later dismissed from employment. On 16<sup>th</sup> October 2003, the deceased obtained another writ of possession resulting in



his re-occupation of the property. He remained in occupation until his death sometime in 2007. Following his demise, the respondent brought proceedings against the deceased's estate and obtained a judgment granting her vacant possession of the property.

The appellant was aggrieved by the turn of events and commenced an action in the court below in which he sought, among other things, a declaration that the change of title of the property to the respondent from the deceased was fraudulent and, therefore, null and void. In response, the respondent counterclaimed for a declaration that she was the bonafide purchaser for value. The learned trial judge considered the evidence and arguments by the parties and held that the lodging of a caveat was the prescribed mode for registering an interest in the disputed property which fell under the Housing (Statutory and Improvement Areas) Act, Chapter 194 of the Laws of Zambia (the Act). He found that the appellant did not comply with the Act, and in particular, section 26 when he purported to have his interest in the property registered by way of lodging the Sheriff's seizure notice at the Council Deeds Registry. He concluded that since the procedure was not complied with, no notice was given

to the respondent of the appellant's interest in the property and the registration of the transfer of property from the deceased to the respondent could not be held to be fraudulent.

He further found that under section 14 of the Act, priority in interest in a property is dependent on the date of registration and since the appellant's interest was never registered, the writ of elegit had no priority over the sale transaction between the deceased and the respondent. The appellant's claims were accordingly dismissed. The appellant appealed to this court against the said judgment on the following grounds:

- 1. The learned trial judge erred in fact and law by not determining fraud in the face of overwhelming documentary and oral evidence before him, including criminal prosecution of the respondent.**
- 2. The learned trial judge misdirected himself in fact and law by not addressing himself to the plaintiff's interest and benefit duly issued out of court namely, the writ of elegit which remains unextinguished.**
- 3. The learned trial judge misdirected himself in fact and law by addressing himself to normal conveyancing under the Act.**

On 13<sup>th</sup> June 2017, we delivered our judgment substantially dismissing the appeal. We found that the court below was on firm ground in rejecting the appellant's claims. We took the position that

any shortcomings in the sale transaction relating to Plot No. 7428/378 should have been the concern of the deceased and not the appellant. Secondly, that the appellant's interest in the property was solely to collect rentals pursuant to a writ of elegit the appellant obtained under cause number 1993/HP/1586, in which the respondent was not a party. We stated that to secure that interest, the appellant was required to lodge a caveat pursuant to section 26(a) of the Act, as found by the court below. That the fact that ownership of the property was transferred to the respondent by the deceased before the judgment debt had been settled, did not in any way suggest or prove that the transfer was fraudulent.

The appellant is unhappy with our decision and he has issued this notice of motion on the ground that we slipped and misdirected ourselves in dismissing the appeal.

In his heads of argument, the appellant submitted that the purchase of Plot No. 7428/378 Lusaka by the respondent was tainted with fraud and that her employer, ZANACO, also found her guilty of the same resulting in her dismissal. In the circumstances, his claims

in the court below were well grounded. He relied on the High Court case of **Caroline T. Daka v ZANACO**<sup>1</sup> to support this argument.

The appellant contended that the title was changed by fraud and conspiracy before he had received the judgment debt to deprive him of any right on the house. He drew our attention to section 8 of the Act which reads:

**"The council certificate of title issued by the registrar to any transferee of land shall not be subject to challenge, except on the ground of fraud, misrepresentation or mistake."**

It was his contention that fraud had been established in the present case and the act was explicit. The appellant argued that it is trite law that when interpreting statutes, the courts firstly use the literal rule of interpretation and only refers to the other modes of interpreting statutes when the same gives rise to absurdity or ambiguity. Further, that courts expound the words in their natural and ordinary sense in order to give effect to the intention of parliament. The case of **Attorney General v Million Juma**<sup>2</sup> was called in aid to support this argument.



The appellant also submitted that the position taken by this court in its judgment, specifically page J21 lines 6 – 20, was unjustified. That it is undisputed that he was in possession of the property to recover the judgment debt pursuant to the writ of elegit. Clandestinely, he contended, the respondent obtained a title fraudulently and could not account to him for the same. Further, that the assignment was signed one year earlier than the cheque dated 29<sup>th</sup> October 2001, thereby constituting a fraudulent act as envisaged in the Act. He referred us to his testimony at page 10 lines 5 - 15 and the respondent's testimony at page 13 lines 3 – 16 of the notice of motion. Our attention was also drawn to the case of **Jane Mwenya and Jason Randee v Paul Kapinga**,<sup>3</sup> where this court held as follows:

**“It means that if a purchaser has notice that the vendor is not in possession of the property he must make inquiries of the person in possession – of the tenant who is in possession – and find out from him what his rights are, and, if he does not choose to do that then whatever title he acquires as purchaser will be subject to the title or rights of the tenant in possession.”**

The appellant, therefore, contended that the respondent had constructive notice of his possession of the house and was also



informed of the same by him at the site. That she declined to give him the employers loan cheque and instead converted it. Further, that in the premises, his motion must succeed. He also submitted that it was a common law principle that there must be an offer, acceptance and consideration for a contract to be binding which elements are incomplete in this case as the facts are all shrewd in fraud and conspiracy. Accordingly, he prayed that this court amends its judgment.

The appellant brought this motion alleging that this court slipped and misdirected itself in its judgment of 13<sup>th</sup> June 2017 when it dismissed the appeal and also contends that this was inconsistent with the law established in **Caroline T. Daka v ZANACO<sup>1</sup>; Attorney General v Million Juma<sup>2</sup>; Jane Mwenya and Jason Randee v Paul Kapinga<sup>3</sup>**; and the **Common Law**. On account of the purported slip, the appellant seeks to be reheard and/or that this court alters the terms of its judgment.

The powers of this Court to correct a judgment arising from accidental slips or omissions is found in rule 78 of the Supreme Court

Rules, Supreme Court of Zambia Act, Chapter 25 of the Laws of Zambia which provides that:

**“Clerical errors by the Court or a judge thereof in documents or process, or in any judgment, or errors therein arising from any accidental slip or omission, may at any time be corrected by the Court or a judge thereof.”**

The starting point is whether this motion competently falls under the slip rule. In the heads of argument filed in support of the motion the appellant argues that the transfer of ownership of Plot No. 7428/378 Lusaka from the deceased to the respondent before the settlement of the judgment debt was fraudulent. This issue was, however, canvassed and given due consideration in our judgment of 13<sup>th</sup> June 2017, resulting in our finding that the allegation of fraud was not proved by the appellant.

In the case of **Godfrey Miyanda v Attorney General**<sup>4</sup>, we held as follows:

**“A perusal of our judgment shows that all these issues were canvassed and given due consideration. There is nothing accidental about the determination and the position is simply that the applicant is dissatisfied with an award of damages and would have us vary our decision so as to bring about a result more acceptable to him. We are**

satisfied that the appellant has not been able to show this court that this application comes within the rule. We are quite satisfied that there is no rule which allows this court generally to amend or alter its final judgment in the manner suggested by the application.”

Further, in **Trinity Engineering (Pvt) Limited v Zambia National Commercial Bank Limited**<sup>5</sup>, we held that:

“The slip rule was meant for the court to correct clerical mistakes or errors in a judgment arising from accidental slips or omissions. In the present case, the applicant was effectively seeking the reviewing and setting aside of the previous judgment which was not permissible.”

It is evident from the foregoing excerpts that in appropriate circumstances, this Court has power to correct any accidental slip or omission in expressing its manifest intention. In the present case, the appellant brought a motion colourably under the slip rule when for all intents and purposes, he is seeking a review of our judgment and a re-opening of the appeal. In the case of **Chibote Limited and Others v Meridien Biao Bank (Zambia) Limited**<sup>6</sup> we held that:

“An appeal determined by the Supreme Court will only be re-opened where a party, through no fault of its own has been subjected to an unfair procedure and will not be varied or rescinded merely because a decision is subsequently thought to be wrong.”

In the **Trinity Engineering**<sup>5</sup> case cited above, we also held as follows:

**“Quite clearly, therefore, this court has no jurisdiction to review its judgment or set it aside and re-open the appeal. If it were not so then there would be no finality in dealing with appeals.”**

In our view, the appellant has failed to show that this motion comes within the slip rule. He has not disclosed any error, omission or slip in our judgment warranting correction as envisaged under rule 78 of the Supreme Court Rules. The appellant is clearly dissatisfied with our judgment and is seeking to vary it so as to bring about a result more acceptable to him which we cannot do.

For these reasons, we find that this motion lacks merit. It is accordingly dismissed with costs.



**M. S. MWANAMWAMBWA**  
**DEPUTY CHIEF JUSTICE**



**C. KAJIMANGA**  
**SUPREME COURT JUDGE**



**J. K. KABUKA**  
**SUPREME COURT JUDGE**