

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

APPEAL 130/2020

BETWEEN:

KAYULA LESA

1ST APPELLANT

ANGEL MWAMBA KAUSENI (DECEASED)

2ND APPELLANT

AND

TRESPHOD KUNGU

1ST RESPONDENT

SABINA CHANDA NSOFWA

2ND RESPONDENT

BERNARDETTE KUNGU

3RD RESPONDENT



Coram: Makungu, Sichinga and Banda-Bobo, JJA

On the 17th day of June, 2021 and on the 3rd day of August, 2021

For the Appellant: Mr. K.M. Simbao with Ms. M. Nambao both of Mulungushi Chambers.

For the Respondent: No appearance

JUDGMENT

MAKUNGU, JA delivered the Judgment of the Court.

Cases referred to:

- Musakanya and Another v. Attorney General (1981) Z.R 221*
- Zamtel v. Aaron Mulwanda – SCZ 8/63/2009*

Legislation Referred to:

- Supreme Court Rules, 1999 Edition*

Other works referred to:

- Catriona Cook, Robin Creyke, Robert Geddes & David Hammer, Laying Down the Law 6th Edition, LexisNexis Butterworths, Australia 2005.*

1.0 INTRODUCTION

1.1 This appeal is against the decision of M.C. Mulanda J, of the High Court, in which she refused to review her decision dated 21st June, 2018. She adjudged that the matter was res judicata and declared that the 1st appellant owns the house on Lot No 11082/M, Kasama and that the rest of the land belongs to the estate of the late Abel Chanda Kungu.

2.0 BACKGROUND

2.1 The undisputed facts of the matter are as follows; Edson Mumbi who is not a party to this appeal, commenced an action in the Subordinate Court against Kayula Lesa by way of writ of summons claiming the following:

- a) A declaration that the plaintiff is the legal owner of Lot No. 11082/M Kasama.
- b) A perpetual injunction restraining the defendant from purporting to be the owner of the land in question and interfering with the plaintiff's quiet possession of the same.
- c) Damages and costs.

- 2.2 A summary of the evidence before the Subordinate Court is as follows:
- In the 1990s, before Abel Chanda Kungu died, he entrusted a piece of land on which he had constructed a house up to window level to his close friend Edson Mumbi to hold on behalf of his children. Abel Chanda Kungu's children enjoyed quiet possession of the land in question until 2007 when the Defendant Kayula Lesa completed building the house and claimed that he had purchased the property from Edson Mumbi.
- 2.3 The beneficiaries of the estate of the late Abel Chanda Kungu accused Edson Mumbi of selling the property without authority but he denied the accusation and proceeded to commence cause no.2012/SW/09 in Kasama Subordinate Court against Kayula Lesa.
- 2.4 The beneficiaries of the estate appeared as witnesses in the Subordinate Court instead of being joined to the action as plaintiffs.
- 2.5 The defendant Kayula Lesa, contended that he bought the property on which he built a house from Angel Mwamba whom

he called as a witness. His further testimony was that he lived in the house for 8 years without interference from the plaintiff.

2.6 After considering the evidence, the Subordinate Court found that Lot no.11082/M Kasama belonged to the defendant and dismissed the case.

2.7 Later, the beneficiaries of the estate of the late Abel Chanda Kungu namely; Tresphod Kungu, Sabina Chanda Nsofwa and the widow Bernadette Kungu commenced a fresh action in the Subordinate Court against Kayula Lesa and Angel Mwamba as 1st and 2nd defendant respectively over the same property. The matter was transferred to the High Court as the Subordinate Court had no jurisdiction.

2.8 When the matter came up before the High Court, counsel for the defendant raised a preliminary issue on a point of law as to whether the action was not res judicata considering the Subordinate Court's judgment in cause no.2012/SW/09.

3.0 DECISION OF THE HIGH COURT

3.1 The court below in its ruling dated 21st June, 2018 formulated the issue for determination as follows: whether the plaintiffs had an opportunity in the previous action under cause No.

2012/SW/09 to join the proceedings and claim ownership of the property in issue. She found that, the evidence before the Subordinate Court revealed that the plaintiffs had an opportunity to join the proceedings but they did not do so. Instead they opted to just stand as witnesses.

3.2 The Judge stated that, the remedy lay in the plaintiffs' requesting Edson Mumbi to appeal to the High Court against the decision of the Subordinate Court or joining the action after judgment and then appealing against the decision of the Subordinate Court.

3.3 In the circumstances, it was held that the matter was res judicata and the action was dismissed.

3.4 Further the lower court held that the land on which the house lies belongs to the 1st defendant, Kayula Lesa; and the proposed extension of Lot No 11082/M, Kasama, excluding the land on which the house of Kayula Lesa is situated, belongs to the estate of the late Abel Chanda Kungu.

3.5 The 1st defendant Kayula Lesa, applied for review of the said ruling. The lower court refused to exercise its discretion to

review in a ruling dated 1st February, 2019 on the basis that the matter was not suitable for review but appeal.

4.0 GROUNDS OF APPEAL AS AMENDED ON 11TH JUNE, 2021

4.1 Dissatisfied with the decision of the court below dated 21st June, 2018 as read together with the ruling dated 1st February, 2019, the appellants have appealed to this court on two grounds as follows:

- 1. The court erred in law and fact when it proceeded to determine and grant relief prayed in a matter which it had already found to be res judicata.*
- 2. The court misdirected itself when as a court of first instance, made its judgment solely on the judgment of the subordinate court when there was no appeal.*

5.0 APPELLANT'S ARGUMENTS

5.1 The appellant relied on the heads of argument filed on 30th July, 2020. In arguing ground one, reference was made to the case of **Musakanya and Another v. Attorney General**¹ where

Chirwa J (as he then was) stated the law on res judicata in the following terms:

“The law as I understand it is this; if a party brings an action against another for a particular cause and judgment is given on it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. Transit in res judicatam. But within one cause of action there maybe several issues raised which are necessary for the determination of the whole case, the rule is that once an issue has been raised and distinctly determined between the parties, then as a general rule neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them in the same or subsequent proceedings except in special circumstances. I agree with Denning M.R in (i) quoted above that this res judicata is a strict rule of law, and the parties are bound by any decision made by a competent court. I do not agree that courts have discretion on these issues.”

5.2 Counsel submitted that the Subordinate Court judgment should not have been put into consideration when determining the preliminary issue.

5.3 In support of the second ground of appeal, counsel drew our attention to **Cook, Creyke, Geddes and Hammer - Laying down the law** at pages 133, where it was stated as follows:

“Appellate courts have less of a role in fact-finding than trial courts; appeals are generally limited to matters of law. This reflects the view that, while the more elevated appellate court judges may be better qualified on legal matters, the trial court, having viewed and heard the witnesses, is in a better position to find the facts...in both civil and criminal matters, where the appellant has successfully challenged the facts at trial; the appellate court will most commonly order a retrial. The appellate court is rarely in a position to make its own findings of fact.”

5.4 It was submitted that this was a fresh action which was not supposed to be treated as an appeal. The evidence on record

clearly shows that the court below determined this matter solely on the basis of the judgment of the Subordinate Court.

5.5 During the hearing of the appeal, counsel for the appellant argued viva voce that in applying for review, the applicant had in mind that he had brought fresh evidence shown at page 104 of the record of appeal, which was that the High Court having given the land to the estate of the deceased Abel Chanda Kungu and the house to the appellant, meant that the appellant would have no access to the house as the customary land surrounds the house. Counsel's contention was that the court over extended the application of order 14 A of the **Rules of the Supreme Court, 1999 Edition** to determine issues on a point of law.

5.6 Counsel prayed that the decision of the court below be quashed and the matter be sent back for re-trial.

5.7 The respondents and their legal counsel did not appear before us and no heads of argument were filed on their behalf.

6.0 DECISION OF THIS COURT

- 6.1 We have considered the record of appeal and the arguments made on behalf of the appellants. We shall tackle the two grounds of appeal together as they are connected.
- 6.2 It is clear from the record that the court below proceeded to make pronouncements on the substantive issue after finding that the matter was *res judicata*. The principle of *res judicata* has been aptly explained in **Musakanya and Another v. Attorney General** *supra*.
- 6.3 The High Court therefore misdirected itself when it found the matter to be *res judicata* and yet proceeded to make a determination on ownership of the property because the court became *functus officio* the moment it found that the matter was *res judicata*.
- 6.4 For this reason, the refusal to review was unjustifiable and we hereby quash the part of the ruling dated 21st June, 2018 which comments on ownership of the property.

7.0 CONCLUSION

7.1 All in all, the appeal succeeds on a point of law. Costs shall follow the event.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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D.L.Y. SICHINGA
COURT OF APPEAL JUDGE

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A.M. BANDA-BOBO
COURT OF APPEAL JUDGE