

**IN THE COURT OF APPEAL OF ZAMBIA**

**CAZ APPEAL NO. 137/2019**

**HOLDEN AT NDOLA**

(Civil Jurisdiction)

BETWEEN:

**BETTY CHIZYUKA**

**1<sup>ST</sup> APPELLANT**

**RICHARD CHIZYUKA**

**2<sup>ND</sup> APPELLANT**

**BETRICH INVESTMENTS LIMITED**

**3<sup>RD</sup> APPELLANT**

**HOTEL MACHA-LENI LIMITED**

**4<sup>TH</sup> APPELLANT**

AND

**FINANCE BANK ZAMBIA LIMITED**

**RESPONDENT**

**CORAM: KONDOLO SC, CHISHIMBA, MAJULA, JJA**

**On 11<sup>th</sup>, 19<sup>th</sup> November, 2020 and on 5<sup>th</sup> August, 2021**

*For the Appellant* : Ms. C.F. Ponda of Bemvi & Associates Legal Practitioners

*For the Respondent* : Mr. M. A. Mukupa of Messrs Isaac & Partners

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## **J U D G M E N T**

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**KONDOLO SC, JA** delivered the Judgment of the Court.

CASES REFERRED TO:

- 1. AS and C Enterprises and Others v Stanbic Bank (2012) ZR Vol. 1 p. 518.**
- 2. Indeni Petroleum Refinery Co. Limited v Kafco Oil Limited and Others Selected Judgment No. 29 of 2017 (Appeal No. 207 of 2017).**

3. **Kafamuyeke Mukelabai v Esther Nalwamba, Commissioner of Lands and Attorney General (2013) Vol. 2 ZR 312.**
4. **Societe Nationale Des Chemis De Pur Du Congo (SNCC) v Joseph Nonde Kakonde SCZ Appeal No. 183 of 2008.**
5. **Million Hamung'ande and Others v Mulopa SCZ Appeal No. 84 of 2019.**
6. **In The Matter of Protection of Fundamental Rights and Freedoms of the Individual and In The Matter Of Arts 20(6) And 29 of The Constitution of Zambia Mundia Sikatana v The Attorney-General (1982) Z.R. 109 (H.C.)**
7. **African Banking Corporation Zambia v Mubende Country lodge Limited SCZ Appeal No. 116/2016 (March, 2020)**

LEGISLATION REFERRED TO:

1. **The Rules of the Supreme Court 1965, 1999 Edition (White Book), Order 14 A and Order 33**
2. **The High Court Rules, High Court Act, Chapter 27, Laws of Zambia, Order 11 rule 1 and 4**

## **1.0 INTRODUCTION**

1.1 This is an appeal against the Ruling of the learned High Court Judge, Mrs. K. E. Mwenda-Zimba dated 30<sup>th</sup> January, 2020 in which she allowed the Respondent's application to dismiss the matter on a point of law pursuant to **Order 14A** as read with **Order 33/3** and **Order 18/19** of the **Rules of the Supreme Court 1999 Edition** (the "White Book").

## 2.0 BACKGROUND

- 2.1 The brief facts of this appeal are that through various credit facility letters, the 3<sup>rd</sup> Appellant obtained a loan from the Respondent but later defaulted. The loan was then restructured into a mortgage with Stand No. 896, Lusaka being the mortgaged property and personal guarantees executed by the 1<sup>st</sup> and 2<sup>nd</sup> Appellant. The mortgaged property was thus charged with the payment of not only the initial principal sum of US\$270, 000.00 plus interest, but also subsequent sums of US\$430, 000.00 and US\$243, 000.00 plus interest.
- 2.2 Over time, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants defaulted on the repayment plan resulting in the Respondent commencing mortgage proceedings under Cause No. 2012/HPC/0675. The parties in that cause were Finance Bank Zambia Limited as Plaintiff and Betrich Investments Limited, Betty Chizyuka and Richard Chizyuka as 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively. Judgment was subsequently rendered on 21<sup>st</sup> July, 2014 in favour of the Plaintiff. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants failed to settle the total Judgment debt of US\$809, 891.16 and interest within the moratorium of 90 days given by the Court below.

- 2.3 Before the Respondent took possession of the mortgaged property, the Appellants negotiated with the Development Bank of Zambia (herein after 'DBZ') who agreed to re-finance the mortgage. The Respondent accepted the refinancing proposal and executed an irrevocable letter stating that they would surrender the Certificate of Title to DBZ upon DBZ paying the monies due to the Respondent.
- 2.3 However, DBZ did nothing for a period of about 17 months and the Respondent executed a Writ of Possession without giving notice to the Appellants.
- 2.4 Thereafter the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants with the 4<sup>th</sup> Appellant as Claimant, applied to set aside the Writ of Possession and Execution and to discharge mortgage. In a Ruling dated 16<sup>th</sup> March, 2018, Judge Mwenda refused to set aside the Writ of Possession on the ground that it lacked merit. In another Ruling dated 23<sup>rd</sup> March, 2018, Judge Mwenda dealt with the interpleader summons brought by the 4<sup>th</sup> Appellant (as Claimant) and ordered, inter alia, that the 4<sup>th</sup> Appellant be at liberty to remove from the demised premises all chattels/fixtures as per the inventory provided.

### 3.0 PROCEEDINGS IN THE HIGH COURT

- 3.3 While the applications under Cause No. 2012/HPC/0675 were awaiting hearing, on 6<sup>th</sup> June, 2017, the Appellants commenced a fresh action via Writ of Summons under Cause No. 2017/HPC/0249 seeking multiple reliefs of compensation and damages following the execution of the Writ of Possession which they referred to as “the post judgement conduct of the Respondent”.
- 3.4 This was followed by a flurry of applications and consequent Rulings. Of particular significance was a Ruling dated 29<sup>th</sup> March, 2018 delivered by Justice Mweemba under Cause No. 2017/HPC/0249 which was in stark contrast to the earlier Rulings by Justice Mwenda dated 16<sup>th</sup> and 23<sup>rd</sup> March, 2018 under Cause No. 2012/HPC/0675.
- 3.5 The former arose from a preliminary application seeking to dismiss the fresh action *inter alia* that claims in relation to the irrevocable letter executed by the Respondent were *res judicata*. Mweemba J held that the claims were not *res judicata* because the irrevocable undertaking was made post Judgment.

3.6 On the other hand, the latter Ruling arose from an application by the Appellants to set aside the Writ of Possession and execution and to Discharge the Mortgage. In her Ruling, Justice Mwenda had determined the issue of the irrevocable letter stating that it placed no obligation on the Respondent and did not amount to waiver of its rights to issue a Writ of Possession.

3.7 After the matter was reallocated to Mrs. Justice Mwenda-Zimba under Cause No. 2017/HPC/0249, the Respondent filed a Notice of Motion to Raise Preliminary Issues pursuant to **Order 14A, Order 18 Rule 19** and **Order 33 Rule 3 RSC** asking the Court below to determine the following issues:

**1. Whether the Plaintiffs' (Appellants herein) amended Writ of Summons and Statement of Claim are competent as they amount to a multiplicity of actions and/or forum shopping over post-judgment claims emanating from Cause No. 2012/HPC/0675,**

**And if it is found that the Plaintiffs' amended Writ of Summons and Statement of Claim are not competent on grounds of multiplicity of action and/or forum**

shopping then the Defendant (Respondent herein) prays that this action should be dismissed with costs to the Defendant; and/or

2. Further or in the alternative, whether the Plaintiffs' amended Writ of Summons and Statement of Claim in their current form are in breach of section 13 of the High Court Act, Chapter 27 of the Laws of Zambia and as such constitute an abuse of court process and/or are misconceived at law and must be dismissed forthwith as the said process is scandalous, frivolous and vexatious; and/or

3. Further or in the alternative, whether the Honourable Court has the jurisdiction to hear and determine this matter and grant the Plaintiffs the reliefs on the ground that the claims made and the reliefs sought by the Plaintiffs are res judicata having already been adjudicated upon generally by another court of the same division under Cause Number 2012/HPC/0675 and also specifically dealt with under the Rulings of Honourable Madam Justice W. S. Mwenda dated 27<sup>th</sup>

(WHITE BOOK);

And if it is found that this Honourable Court does not have the jurisdiction on grounds of the wrong mode of commencement, then the Defendant humbly prays

**April, 2017, 16<sup>th</sup> March, 2018 and 23<sup>rd</sup> March, 2018, respectively;**

**And if it is found that this Honourable Court does not have the requisite jurisdiction, then the Defendant prays that this matter be dismissed with costs to the Defendant; and/or**

**4. Further or in the alternative, whether this Honourable Court has the jurisdiction to grant the reliefs claimed by the 4<sup>th</sup> Plaintiff in this action when such claims for loss of business, compensation and damages arising from the ejection of the mortgaged property by virtue of the enforcement of the judgment dated 21<sup>st</sup> July, 2014, ought to have been addressed through the relevant application under cause No. 2012/HPC.0675 pursuant to Order 45, Rule 11 of the Rules of the Supreme Court, 1965, (1999 Edition), Volume One (White Book);**

**And if it is found that this Honourable Court does not have the jurisdiction on grounds of the wrong mode of commencement, then the Defendant humbly prays**



**that this action be dismissed with costs to the Defendant; and/or**

**5. Further or in the alternative, whether this Honourable Court has jurisdiction to hear and determine the 4<sup>th</sup> Plaintiff's claims in view of this Honourable Court having already made a final determination of the rights of the parties pursuant to inter alia the interpleader proceeding under Cause No. 2012/HPC/0675 and Order 17 Rule 11 of the Rules of the Supreme Court, 1965 (1999 Edition) Volume 1;**

**And if it is found that this Honourable Court does not have the jurisdiction to hear and determine this matter, then the Defendant humbly prays that this action be dismissed with costs.**

#### **4.0 DETERMINATION BY THE HIGH COURT**

4.3 The learned Judge in the Court below considered the application and formed the view that all the preliminary issues raised, except for the second issue, related to whether the claims made by the Appellants are *res judicata* or amount to a multiplicity of actions. She noted that Justice Mweemba dealt

with a similar application in his Ruling dated 29<sup>th</sup> March, 2018 and he held that there was no multiplicity of actions. She also found that in making the application, the Defendant relied on Justice Mwenda's Rulings of 16<sup>th</sup> and 23<sup>rd</sup> March, 2018.

4.4 The learned Judge observed that the two Rulings were at variance as regards the treatment of the alleged irrevocable undertaking given to DBZ by the Respondent, on the basis that Judge Mweemba had no notice of them at the time he heard the application in 2017 which emanated from the Ruling of 29<sup>th</sup> March, 2018, as they were not in contemplation.

4.5 With regard to the question whether the action was *res judicata*, Justice Mwenda-Zimba reasoned that the Respondent was at liberty to issue a writ of foreclosure on the basis of the Judgement that gave it the right to foreclose, possess and sale the mortgaged property. She further observed that any claims that accrued prior to the said Judgement cannot be brought in the action before her as the same are *res judicata* in that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants had the opportunity to litigate them in the mortgage action.

- 4.6 Justice Mwenda-Zimba found that the Writ of Possession was properly issued and the resultant possession was legal and that if there was any irregularity with the Writ, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants had recourse to the same Court, which opportunity was utilized through an application before Judge Mwenda, which failed. On the claims for compensation, Judge Mwenda-Zimba took the view that granting such would mean that the Writ of Possession was irregular. In any case, the Ruling of 16<sup>th</sup> March, 2018 has since been appealed against and a decision is being awaited.
- 4.7 With respect to the claims of the 4<sup>th</sup> Appellant, the Court below found that the claims for damages for trespass and wrongful seizure of goods were essentially an interpleader action and had been addressed by Justice Mwenda in her Ruling of 23<sup>rd</sup> March, 2018. The Court below thus found that the 4<sup>th</sup> Appellant had an opportunity to claim trespass and wrongful seizure in the earlier application for interpleader.
- 4.8 Consequently, the Court below found merit in the Respondent's Notice of Motion and held that the Appellants' action was *res*

*judicata* and a multiplicity of actions, and dismissed the same with costs.

## **5.0 GROUNDS OF APPEAL**

5.3 Disenchanted with the Ruling, the Appellants now seek to assail the said Ruling on seven grounds of appeal, as follows:

- 1. The learned trial Judge erred in law and in fact when she held that the Notice of Motion to raise preliminary issue was properly before her and in proceeding to hear it despite the fact that the Defendant had an opportunity to bring the said issues during the application to amend pleadings but failed to do so;**
- 2. The learned trial Judge erred in law and in fact when she dismissed the Plaintiffs' action on grounds that it was *res judicata* as she ignored an earlier Ruling delivered by the Honourable Justice W. Mweemba on the 29<sup>th</sup> March, 2018 in which a determination was made relating to similar issues;**
- 3. The learned trial Judge erred in law and fact when she dismissed the 4<sup>th</sup> Plaintiff's claim for damages for trespass and wrongful seizure of goods as she ignored**

the fact that the Writ of Possession was as against the 1<sup>st</sup> – 3<sup>rd</sup> Plaintiffs, and not the 4<sup>th</sup> Plaintiff who was not a party to the proceedings under Cause No. 2012/HPC/0675;

4. The learned trial Judge erred in law and in fact when she dismissed the 4<sup>th</sup> Plaintiff's claim for damages for trespass and wrongful seizure on the grounds that the latter had opportunity to claim the said in the earlier application for interpleader as she ignored the Ruling of the Honourable Justice Mweemba of 29<sup>th</sup> March, 2018 in which he found that the 4<sup>th</sup> Plaintiff was entitled to making the said claim as it was not *res judicata*;

5. The learned trial Judge erred in law in dismissing the 4<sup>th</sup> Plaintiff's claim on grounds of *res judicata* as she ignored claims 2 – 9 of the Writ of Summons which were clearly based on the Defendant's post judgment conduct and further ignored the fact that Judge Mweemba's Ruling of 29<sup>th</sup> March, 2018 that the

**Plaintiffs' were entitled to be heard under Cause No. 2017/HPC/0249;**

- 6. The learned trial Judge erred in law and in fact when she held that the 4<sup>th</sup> Plaintiff's rights as tenant were not binding on the Mortgagee (Defendant) as she contradicted Honourable Mwenda's earlier finding in her Ruling of 16<sup>th</sup> March, 2018 when she held that the Mortgagee takes on the role of landlord thereby settling the issue of the 4<sup>th</sup> Plaintiff's right as a tenant; and**
- 7. The learned trial Judge erred in law and in fact when she held that there was no evidence to show that the Defendant consented to the creation of the lease contrary to the pleadings under Cause No. 2017/HPC/0249 as she purported to make a finding of fact without conducting a trial to assess the evidence and testimony on the merits in relation to the pleadings.**

## 6.0 APPELLANTS' HEADS OF ARGUMENTS

- 6.3 The Appellant filed heads of argument on 4<sup>th</sup> August, 2020 in which all the grounds were argued separately save for grounds 3, 4 and 5 which were argued jointly.
- 6.4 Under ground one, it was contended that the record of appeal shows at page 1092 - 1093 that the Respondent did not object to the Appellants' application for leave to amend the Writ of Summons and Statement of Claim which were filed on 24<sup>th</sup> July, 2019 as ordered by the Court below. It is on these documents that the Notice of Motion to raise preliminary issues is based and on which the Court below was satisfied that the application before it was proper.
- 6.5 It was argued that the evidence on record showed that in the lower Court, the Respondent had an opportunity to be heard on the issues it raised in the Notice of Motion during the hearing of the Appellants application for leave to amend the Writ of Summons and Statement of Claim but neglected to do so. Therefore, the doctrine of *res judicata* applies in the circumstances. The case of **AS and C Enterprises and Others v Stanbic Bank** <sup>(1)</sup> was cited in support of this argument.

6.6 In ground 2, it was submitted that a perusal of the Respondent's summons to set aside originating process before Judge Mweemba as can be seen at pages 88 to 89 of the record of appeal, and the grounds in support of the Notice of Motion to raise preliminary issues before Judge Mwenda-Zimba appearing at pages 876 to 877 of the record of appeal, will clearly show that the grounds of both applications are substantially the same. However, the learned Judges came to different conclusions as to whether the proceedings before them were *res judicata*.

6.7 It was submitted that the Ruling of Judge Mweemba has never been appealed against by the Respondent and that both Judges are of similar jurisdiction. Therefore, Judge Mwenda-Zimba erred in law and in fact when she dismissed the Appellants' action on grounds of *res judicata* and multiplicity of actions as she contradicted the earlier decision of a Judge of similar and equal jurisdiction.

6.8 Grounds 3, 4 and 5 were argued together as they are similar. It was submitted that Mweemba J's Ruling of 29<sup>th</sup> March, 2018 in which he found that the matter before him was not *res judicata*



on the basis that the parties before him were not the same in that the 4<sup>th</sup> Appellant was not a party in Cause No. 2012/HPC/0675 which he found to be a mortgage action, was never appealed against and is still in force.

6.9 Therefore, the Ruling of Judge Mwenda-Zimba of 30<sup>th</sup> January, 2020 which contradicts the Ruling of Judge Mweemba to the extent that it purports to dismiss the Appellants' action on the grounds of *res judicata* is invalid and academic. This is because the latter has no jurisdiction to interfere with, quash, alter or even comment on the decision of a fellow High Court Judge. We were urged to set aside and quash the Ruling of Judge Mwenda-Zimba with costs in favour of Judge Mweemba's Ruling.

6.10 In ground 6, Judge Mwenda-Zimba's Ruling that the 4<sup>th</sup> Appellant's rights as a tenant were not binding on the mortgagee was attacked for contradicting Judge Mwenda's Ruling of 16<sup>th</sup> March, 2018 which held that the mortgagee takes on the role of landlord thereby settling the issue of the 4<sup>th</sup> Appellant's right as a tenant. It was submitted that pursuant to Judge Mwenda's Ruling, the Respondent complied and proceeded to give the 4<sup>th</sup> Appellant notice to terminate the

tenancy of a business premises as exhibited at page 668 of the record of appeal. This Ruling was never appealed against by the Respondent. Flowing from this it was argued that the issue of the 4<sup>th</sup> Appellant's rights as a tenant was settled.

6.11 Lastly, in ground 7, it was submitted that the 4<sup>th</sup> Appellant whose tenancy rights were affirmed by the Respondent has the right to take up an action where they are infringed. It was argued that infringement of the 4<sup>th</sup> Appellant's tenancy rights and any injury flowing as a consequence thereof is clearly a post-judgment occurrence which does not fall in the realm of *res judicata*.

6.12 When we heard the appeal, learned Counsel for the Appellants, Mr. Jere relied on the Appellants Heads of Arguments and briefly highlighted ground two. He emphasised the issue of *res judicata* submitting that it was yet again heard and determined in the same cause of action under the same cause number and by the same High Court.

6.13 He contended that the learned Justice Mwenda-Zimba re-opened the issue of *res judicata* and made a finding which was different from that of my learned brother Justice Mweemba. He

reiterated that the issue of *res judicata* was already settled and should not have been entertained by Mwenda-Zimba J being a Judge of the same High Court. Counsel repeated the argument that the issues that were before Justice Mwenda were in relation to the mortgage, whereas in this particular matter, the issue was on a claim for post judgement damages that arose from activity that occurred after Judge Mwenda rendered her Ruling.

6.14 We were thus urged to set aside and quash the Ruling of 30<sup>th</sup> January, 2020 with costs so that the Appellants can proceed to be heard on the merits of their respective claims.

## **7.0 RESPONDENT'S HEADS OF ARGUMENTS**

7.1 The Respondent opposed the appeal by filing Heads of Argument dated 4<sup>th</sup> September, 2020.

7.2 In response to ground 1, it was submitted that the learned trial Judge was clothed with jurisdiction to entertain the Respondent's application to raise the preliminary issues on a point of law because **Order 14A RSC** states that such an application can be made at any stage of the proceedings before judgment. The case of **Indeni Petroleum Refinery Co. Limited**

**v Kafco Oil Limited and Others** <sup>(2)</sup> was cited where the Supreme Court held that:

***“Order 14A Rule 1 of the White Book permits a judge of the High Court to raise an issue on his own motion and to dismiss the substantive matter if the determination of the issue substantially disposes of the matter. The explanatory notes to the foregoing Order 14A rule 2 sub-rule 2 of the White Book indicate that ‘... the court may proceed to make such determination at any stage of the proceedings.’ ...”***

7.3 It was further submitted that **Order 14A** specifies that a Defendant can only utilise it after giving notice of intention to defend. The case of **Kafamuyeke Mukelabai v Esther Nalwamba, Commissioner of Lands and Attorney General** <sup>(3)</sup> was called in aid where it was held, inter alia, that the giving of notice of intention to defend, is a prerequisite to making an application under **Order 14A**. The Respondent pointed out that it was in no position to have filed its Notice of Motion to raise

preliminary issues during the Appellants' application to amend pleadings as the Respondent had not, at the time, given its notice of intention to defend through an amended defence.

7.4 Ground 2 was opposed on the basis that the argument advanced by the Appellants is misconceived as Judge Mweemba was not called upon to re-open and/or interfere with the issues which were already determined by another Judge of competent jurisdiction. It was submitted that the Notice of Motion dated 16<sup>th</sup> October, 2019 simply referred to Rulings by Judge Mwenda dated 16<sup>th</sup> and 23<sup>rd</sup> March, 2018 which were not brought to Judge Mweemba's attention. It was further contended that the pleadings dated 6<sup>th</sup> June, 2017 at pages 51 to 66 of Volume 1 of the record of appeal before Judge Mweemba were not the same as the claims in the amended pleadings before the trial Judge which appear at pages 586 to 604 of the record of appeal.

7.5 It was on that basis argued that the issues before the two courts were not the same and the issue of *res judicata* can therefore not arise. It was submitted that it was literally impossible for the Respondent to bring forward the issues dealt by the Rulings of Justice Mwenda dated 16<sup>th</sup> and 23<sup>rd</sup> March, 2018 in their

application made much earlier on 5<sup>th</sup> July, 2017. Reliance was placed on the case of **Société Nationale Des Chemis De Pur Du Congo (SNCC) v Joseph Nonde Kakonde** <sup>(4)</sup> where the Supreme Court held that:

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

7.6 Grounds 3, 4 and 5, which relate to the 4<sup>th</sup> Appellant, were argued together. It was submitted that the common thread running through these three (3) grounds of appeal, stem from the argument that the 4<sup>th</sup> Appellant was not a party to the proceedings under Cause No. 2012/HPC/0675. Consequently, the 4<sup>th</sup> Appellant lacked the requisite *locus standi* to claim for damages for trespass and wrongful seizure of goods against the Respondent.

7.7 It was contended that the 4<sup>th</sup> Appellant, having initiated interpleader proceedings under Cause No. 2012/HPC/0675,

was entitled to make any claim relating to the goods which were the subject of the purported wrongful seizure. The Respondent cited **Order 17 Rule 11(2) RSC** which reads as follows;

***“The Court by whom an interpleader issue is tried may give such judgment or make such order as finally to dispose of all questions arising in the interpleader proceedings.”***

7.8 The argument was thus made that the 4<sup>th</sup> Appellant was at liberty to advance its claims for damages for trespass and wrongful seizure of goods during the interpleader proceedings under Cause No. 2012/HPC/0675, but neglected to do so. Therefore, the learned trial Judge was on firm ground in dismissing the 4<sup>th</sup> Appellant’s claims by denying the 4<sup>th</sup> Appellant a second bite at the cherry. The argument was fortified by reference to the case of **Million Hamung’ande and Others v Mulopa** <sup>(5)</sup> which held that:

***“Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their***

*whole case and will not, except in special circumstances, permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contention, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies except, in special cases, not only to points on which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”*

7.9 The sixth and seventh grounds were also argued together as they deal with the issue of the lease involving the 4<sup>th</sup> Appellant. It was argued that the court below did not contradict Justice Mwenda’s finding in her Ruling of 16<sup>th</sup> March, 2018 in which she held that the 4<sup>th</sup> Appellant’s rights as a tenant were not



binding on the Mortgagee. Rather, it was argued that Judge Mwenda-Zimba merely determined a question of law, which she was permitted to do even though the said question was not raised by the parties and did not require the determination of additional facts. It was submitted that the evidence clearly showed that a mortgage was created between the 1<sup>st</sup> Appellant and the Respondent prior to the creation of the lease between the 4<sup>th</sup> Appellant and the 1<sup>st</sup> Appellant.

7.10 The Respondent relied on the editorial note under **Order 14A/2/10 RSC** which provides as follows:

***“Upon making its determination of the question of law or construction, the Court may dismiss the action or make such order or judgment as it thinks just. In this way, the action will be finally disposed of without a full trial and the judgment or order will have the same force and effect as the judgment or order after a full trial of the action.”***

It was submitted that the finding of the Court below was therefore neither speculative nor perverse but was properly evaluated on the evidence on record.

7.11 Mr. Mukupa, learned Counsel for the Respondents, made oral submissions to augment ground2. Counsel argued that after the matter had been transferred to Judge Mwenda-Zimba, the Appellants applied to amend the pleadings by filing the amended Writ of Summons and Statement of Claim which, according to Counsel, brought in new reliefs which the Appellants were seeking from the Court. As a consequence of these amended pleadings, Judgement in default was entered on 30<sup>th</sup> August, 2020.

7.12 Counsel submitted that it could be discerned that the Appellants believed that the amended pleadings gave them a new cause of action. It was on that basis submitted that the Respondent was within its rights to take a 2<sup>nd</sup> bite at the cherry to raise a preliminary issue to dispose the matter on a point of law.

7.13 On the question of the matter being *res judicata*, Mr. Mukupa was of the considered view that the learned trial Judge was on *terra firma* when she dismissed the matter as she had properly analysed the issues, some of which were heard and determined

by the Court of Appeal in its Judgement under Appeal No. 195/2018.

7.14 In conclusion, learned Counsel submitted that the matter before Judge Mwenda was a mortgage action. However, after execution of the Writ of Possession, the Appellants, in this matter, made numerous applications before her which ought to have dealt with all these issues, which they now seek to re-litigate making this case a perfect example of *res judicata* and duplicity. He contended that the claim for damages should have been addressed through the interpleader proceedings.

7.15 We were thus urged to dismiss the entire appeal for want of merit and uphold the lower Court's Ruling dated 30<sup>th</sup> January, 2020.

## **8.0 CONSIDERATION OF THE APPEAL AND DECISION**

8.1 We have considered the record of appeal, the ruling appealed against, the Parties' heads of argument and authorities relied upon. We have also considered the brief oral arguments made by both Counsel at the hearing.

8.2 The Appellants' grievance in ground 1 is that it was a misdirection by the Court below to find that the Notice of

Motion to raise preliminary issue was properly before it when the Respondent had not opposed the application to amend the Writ of Summons and Statement of Claim. According to the Appellants, the Respondent ought to have raised its preliminary issues when the application to amend was heard.

8.3 The view taken by the Respondents is that an application to raise preliminary issues on a point of law may be determined by the Court at any stage of the proceedings and that it is a mandatory requirement for a defendant to give notice of intention to defend in order to qualify to make an application for determination of a question of law.

8.4 The editorial note to **Order 14A/2/3 RSC** provides as follows:

***“Requirements of Order 14A***

***The requirements for employing the procedure under this Order are the following:***

***(a) the defendant must have given notice of intention to defend;***

***(b) the question of law or construction is suitable for determination without a full trial of the action (para. 1 (i)(a));***

- (c) such determination will be final as to the entire cause or matter or any claim or issue therein (para. 1 (i)(h)); and*
- (d) the parties had an opportunity of being heard on the question of law or have consented to an order or judgment being made on such determination (para. 1 (3)). (underlining ours)*

8.5 The Respondent's application to raise preliminary issues was brought pursuant to **Order 14A RSC**. These provisions demand that before making such an application, a defendant must have first given notice of its intention to defend the action. As rightly argued by the Respondents, the application to amend had just been made and granted by the Court and so it was not possible for the Respondent to make the application to raise preliminary issues until after filing their notice of intention to defend.

8.6 As to the timing of the application, **Order 33 Rule 3 of the RSC, 1999** is instructive as it directs that the court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether

raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter. Thus, the learned trial Judge was on firm ground in holding that the Notice of Motion to raise preliminary issue was properly before her.

8.7 We further wish to state that the Respondent's application was not *res judicata* despite them having raised no objection when the Appellants applied to amend their Writ of summons and Statement of claim. It must be appreciated that *res judicata* does not only seek to protect the parties but also seeks to protect the Court from delivering conflicting and embarrassing rulings, the natural consequence being that the Court will welcome its attention being drawn to that possibility at any point during the proceedings. To this end, ground 1 lacks merit.

8.8 The Appellants' complaint in ground 2 is that the learned Judge wrongly held their action to be *res judicata* because she ignored Justice Mweemba's Ruling of 29<sup>th</sup> March, 2018 which dealt with a similar application to set aside the Writ of Summons by the Respondent. The contention was that Judge Mwenda-Zimba and Judge Mweemba, being High Court

Judges, exercise equal jurisdiction and cannot reopen, reconsider, interfere with or comment upon a matter already determined by another Judge of equal jurisdiction.

8.9 In her Ruling, Judge Mwenda-Zimba addressed the issue of Judge Mweemba's Ruling and did find therein that it was at variance with Judge Mwenda's earlier Rulings on the treatment of the alleged irrevocable undertaking given to DBZ by the Respondent. She assumed that Judge Mweemba had no notice of Judge Mwenda's earlier Rulings which contradicted his Ruling.

8.10 In addressing this ground of appeal, the question to be resolved is: what is the effect of Judge Mweemba's Ruling in so far as it affects Judge Mwenda's earlier Rulings? The question is answered by the authority cited by Counsel for the Appellant, **In The Matter of Protection of Fundamental Rights and Freedoms of the Individual and In The Matter Of Arts 20(6) And 29 of The Constitution of Zambia Mundia Sikatana v The Attorney-General** <sup>(6)</sup> a High Court decision, which we affirm, held that:

**“A Judge of the High Court has no jurisdiction to reopen and reconsider and interfere with and comment upon a matter already determined by another Judge of equal jurisdiction.”**

Therefore, the second ground of appeal must fail on the basis that Judge Mweemba’s Ruling had no effect on the earlier Rulings of Judge Mwenda though the decisions contradict one another.

8.11 We shall address grounds 3, 4 and 5 together as they all relate to the 4<sup>th</sup> Appellant’s claims. The complaint is three-fold being: firstly, that the lower Court dismissed the 4<sup>th</sup> Appellant’s claims for damages and wrongful seizure without taking into account that it was not a party to the proceedings under Cause No. 2012/HPC/0675; secondly, that it had an opportunity to claim for damages at the earlier application for interpleader; and thirdly, that the claims were based on the post judgment conduct of the Respondent. On this basis, it was complained that the learned Judge in the Court below should not have found the Appellant’s action as being *res judicata*.



8.12 We have considered the Amended Writ of Summons and Statement of Claim under Cause No. 2017/HPC/0249 filed by the Appellants found at pages 586 to 604 of Volume II of the record of appeal and the endorsements therein. All the Parties, save for the 4<sup>th</sup> Appellant were Parties under Cause No. 2012/HPC/0675. Secondly, we note that the endorsement in Cause No. 2012/HPC/0675 was a mortgage action brought by the respondent while in Cause No. 2017/HPC/0249, the endorsements relate to compensation and damages for various losses.

8.13 With regard to the first and second limbs affecting the 4<sup>th</sup> Appellant, we are guided by the Supreme Court decision in **African Banking Corporation Zambia v Mubende Country Lodge Limited** <sup>(7)</sup> which dealt with a similar matter. In that matter, the Supreme Court addressed its mind to what interpleader proceedings are and stated, at J24, as follows:

***“We hasten to state that the 'subject matter in dispute' envisaged in Order 43 of the High Court Rules and Order 17 (5), RSC is the property seized in execution of a judgment. From the quotations in***

***the preceding paragraphs, there can be no doubt that interpleader proceedings are a mechanism employed by a disinterested stakeholder (the Sheriff of Zambia to be specific) to facilitate litigation of ownership of property seized by the Sheriff in execution of a judgment when an interested party lays a claim to such property. Therefore, the essence of interpleader proceedings is precisely that and no more.”***

8.14 From the above, it can be seen that when the 4<sup>th</sup> Appellant, as Claimant, launched interpleader proceedings under Cause No. 2012/HPC/0675, it was restricted to only laying a claim to property that had been seized. This is because interpleader proceedings do not extend to the claiming of other reliefs such as compensation or damages arising from a wrongful execution of a Writ of Possession. Therefore, there were no other means available to the 4<sup>th</sup> Appellant to seek relief for whatever damages it may have suffered under the interpleader proceedings other than to launch a separate action as its *locus standi* in the earlier cause was restricted to filing a notice of

claim for the sole purpose of triggering interpleader proceedings.

8.15 However, we have taken note that there was an appeal against the Ruling of Judge Mwenda dated 23<sup>rd</sup> March, 2018 between the 4<sup>th</sup> Appellant and the Respondent, which appeal was dismissed.

8.16 In this regard, the Court below misdirected itself in finding that the claims of the 4<sup>th</sup> Appellant were *res judicata*. In any case, the 4<sup>th</sup> Appellant was not a party under Cause No. 2012/HPC/0675.

8.17 As regards the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants, we hold the view that there was nothing to prevent them from bringing an action under Cause No. 2012/HPC/0675 to seek the reliefs they now bring under Cause No. 2017/HPC/0249 relating to the execution of the Writ of Possession on the subject property. All the issues that they raise in the current proceedings could have been raised in the previous proceedings.

8.18 Further, we note that the fresh proceedings sought to impugn the irrevocable letter issued by the Respondent and the efficacy of the Writ of Possession which issues had been determined in

the Ruling issued by Judge Mwenda-Zimba. Therefore, we agree with the learned Judge that proceeding to hear the action would have resulted in conflicting decisions.

8.19 In view of the foregoing grounds 3, 4 and 5 succeed to the extent that the claims endorsed in the Writ of Summons in Cause No. 2017/HPC/0249 are not *res judicata* in as far as they relate to the 4<sup>th</sup> Appellant.

8.20 The contention in ground 6 relates to the 4<sup>th</sup> Appellant's rights as a tenant in view of the mortgage. The Appellants are of the view that the trial Judge, by holding that whatever rights the 4<sup>th</sup> Appellant had as a tenant (of the 3<sup>rd</sup> Appellant) were not binding on the mortgagee, contradicted the Ruling of Judge Mwenda when she held that the Mortgagee took over the role of landlord.

8.21 Our view is that the Ruling of the Court below raises no contradiction at all. We say so because the trial Judge did not state that the mortgagee did not take over the tenancy as mortgagee in possession but just addressed the rights of the Parties to the new tenancy in reference to **Order 88/5/8 RSC** and **section 5 of the Landlord & Tenants Business Premises**

**Act.** The lease, having been created after the mortgage and without the consent of the Respondent as Mortgagee, means that the rights of the 4<sup>th</sup> Appellant as tenant, are not binding on the Respondent as Mortgagee. The fact that the Respondent as Mortgagee in possession, in compliance with the order of Judge Mwenda, proceeded to give the 4<sup>th</sup> Appellant Notice to Terminate Tenancy, does not and should not be taken to mean that the Respondent as Mortgagee was now bound by the tenancy executed between the 1<sup>st</sup> and 4<sup>th</sup> Appellants.

8.22 We thus find no merit in the sixth ground of appeal.

8.23 Lastly, we now address ground seven. The Appellant takes issue with the Judge's comment that:

***“There is no evidence to show that the Defendant herein consented to the creation of the mortgage”.***


Our view is that the Court below noted that this issue was not raised by the Parties and as such, whatever comments it made were made in *obiter* and arise from the premise that the mortgage was amongst the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants and the Respondent. Further, the relationship between the Respondent and the 4<sup>th</sup> Appellant only came into existence by virtue of the


Respondent becoming a mortgagee in possession. To this extent, ground seven must fail and is dismissed.

## 9 CONCLUSION

9.1 We have said that grounds 3, 4 and 5 succeed to the extent that the claims endorsed in the Writ of Summons in Cause No. 2017/HPC/0249 are not *res judicata* in as far as they relate to the 4<sup>th</sup> Appellant. Grounds 1, 2, 6 and 7 are dismissed. The Appeal having succeeded in part, we order each party to bear their own costs.

  
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**M. M. KONDOLO SC**  
**COURT OF APPEAL JUDGE**

  
.....  
**F. M. CHISHIMBA**  
**COURT OF APPEAL JUDGE**

  
.....  
**B. M. MAJULA**  
**COURT OF APPEAL JUDGE**