

**IN THE COURT OF APPEAL OF ZAMBIA APPEAL NO. 70 OF 2021
HOLDEN AT LUSAKA**

(Civil Jurisdiction)

BETWEEN:

NKWAZI CHAMBERS *(Suing as a firm)*

APPELLANT

AND

**SATURNIA REGNA PENSION
TRUST LIMITED**

1ST RESPONDENT

**AFRICAN LIFE FINANCIAL
SERVICES (ZAMBIA) LIMITED**

2ND RESPONDENT

CORAM: Chashi, Makungu and Sharpe-Phiri, JJA

ON: 18th January and 4th February 2022

For the Appellant: N/A

For the 1st Respondent: N/A

J U D G M E N T

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. **Hamalambo v Zambia National Building Society – SCZ Appeal No. 64 of 2013**
2. **Bank of Zambia v Jonas Tembo and Others (2002) ZR, 103**
3. **Rosemary Bwalya and Two Others v Mwanamuto Investments Limited (2012) ZR, Vol 1,473**

Legislation referred to:

1. **The Landlord and Tenant (Business Premises) Act, Chapter 193 of the Laws of Zambia**

2. **The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia**
3. **The Legal Practitioners Act, Chapter 30 of the Laws of Zambia**

Rules referred to:

1. **The Supreme Court Practice (White Book) 1999**
2. **The High Court Act, Chapter 27 of the Laws of Zambia**

1.0 INTRODUCTION

1.1 This appeal arises from the Ruling of Honourable Lady Justice G. Milimo- Salasini, delivered on 24th June 2020.

In the said Ruling, the learned Judge dealt with an appeal by the 1st Respondent herein, in which it was challenging the decision of the Deputy Registrar to grant leave to the now Appellant, to amend the originating summons under cause number 2010/HP/721.

1.2 In her Ruling, the learned Judge upheld the appeal and set aside the decision of the Deputy Registrar on account of the matter being *res judicata* and an abuse of the court process.

2.0 BACKGROUND

2.1 The 1st Respondent as landlord, leased out its premises, namely plot no. 6392 Duduza Chisidza road, Lusaka (the property) to the Appellant, under **The Landlord and Tenant (Business Premises) Act¹** (the **Act**).

2.2 On 8th July, 2010, the Appellant commenced proceedings against the 1st Respondent by way of originating summons under cause number 2010/HP/721 claiming the following reliefs:

- (i) A declaration and an Order that the lease agreement between the parties was null and void for being in violation of Section 6 of **The Lands and Deeds Registry Act²** and that therefore the Respondent cannot rely on its provisions.
- (ii) A declaration and an Order that the notice to terminate the lease, giving three (3) months notice was null and void for being in breach and violation of Sections 3, 4 and 5 of the **Act**.

(iii) An Order that the Appellant is a protected tenant and is entitled to be protected from eviction.

(iv) An injunction from being evicted.

2.3 After considering the evidence, Honourable Lady Justice E.P Sunkutu, in her Judgment dated 12th January 2012 opined that the actual contention between the parties was the non payment of the agreed rentals. She therefore found it unnecessary to delve into the provisions of the **Act** and **The Lands and Deeds Registry Act¹**.

2.4 The learned Judge refused to grant all the reliefs which were being sought by the Appellant as the Appellant was in default in the payment of rentals and could not seek protection under the same lease agreement which it was claiming to be null and void.

2.5 The learned Judge instead ordered the Appellant to make immediate payment of all the rentals owing since September 2009 and discharged the injunction. She also discharged the order for stay of execution of warrant of distress which was granted on 2nd September 2011. We

note that after hearing the matter, whilst Judgment was pending, the 1st Respondent on 11th August 2011 issued a warrant of distress. The property was locked and the Appellant's goods, including clients files seized. The learned Judge granted the stay as the Appellant claimed that the warrant of distress went beyond execution of the warrant, by evicting the Appellant and locking up the furniture and client's files in a container which was moved to an undisclosed location.

3.0 APPEAL TO THE SUPREME COURT

3.1 Dissatisfied with the Judgment of Sunkutu J, the Appellant appealed to the Supreme Court advancing two grounds of appeal couched as follows:

- (i) That the court erred when it did not rule on the Appellant's contention in law that the notice to quit dated 14th April 2010 was not in breach of Section 4 of the **Act** because of the Appellant's failure to pay rent, as these are mandatory statutory provisions.

(ii) That the court fell into grave error when it ordered payment of rent arrears, when the amount due was seriously in dispute.

3.2 In its Judgment delivered on 1st September 2016, the Supreme Court observed that, the learned Judge opted to ignore the main issues which were before her for determination. That she was not prepared to address the issues that were before her, simply because some rent was not allegedly paid. That by doing so, the learned Judge abdicated her duty and responsibility to adjudicate upon every aspect of the suit.

3.3 With respect to Sections 4 and 5 of the **Act**, the court observed that the notice to terminate dated 14th April 2010, lacked all the critical ingredients outlined in the **Act**; as it fell short of the statutory minimum period of six (6) months. That the Appellant was not given two (2) months within which to notify the Respondent in writing, whether or not on the date of termination, the Appellant would be willing to give up possession. The notice did also not state whether the Respondent would oppose an application to

court for the grant of a new tenancy, and if so, on what grounds.

3.4 Accordingly, non compliance with Sections 4 and 5 of the **Act** meant that, the notice was ineffective and could not be relied upon. The Supreme Court did not also accept the argument that the Appellant could not seek protection under the **Act**, because the lease agreement was not registered.

3.5 In allowing the appeal, this is what they said:

“It follows from what we have said that both grounds of appeal have merit, we allow the appeal and set aside the Judgment of the court below with costs to the Appellant as against the 1st Respondent only, both here and in the court below, to be agreed or taxed in default of agreement.”

4.0 APPLICATION BEFORE THE DEPUTY REGISTRAR

4.1 Three years after the Judgment of the Supreme Court, the Appellant on 19th February 2019 filed into court a notice of intention to proceed. On 3rd March 2019 the Appellant filed an application before the Deputy Registrar to amend

the originating summons; through an administrator of the late Bruce Munyama. The Deputy Registrar granted the Appellant leave to amend the originating summons. This is what led to the 1st Respondent appealing to Honourable Lady Justice Milimo-Salasini, who delivered the Ruling subject of this appeal.

5.0 DECISION OF THE COURT BELOW

5.1 After considering the affidavit evidence and the arguments, the learned Judge took into consideration Order 20/5 of **The Rules of The Supreme Court¹ (RSC)**, which permits amendment of pleadings at any stage of the proceedings before Judgment. The learned Judge noted that there was a Judgment of the High Court and that of the Supreme Court on appeal. The Judge opined that, the effect of the Supreme Court Judgment is that it was final and that the issues dealt therewith were final and therefore, concluded that they were *res judicata*; and it would be regarded as an abuse of the court process if the same parties relitigate the same subject matter from one action to another or from one Judge to another.

5.2 The learned Judge further observed that the Appellant had not adduced any authority to override the position as to what happens when the Supreme Court does not refer the matter back to the High Court for rehearing or continued hearing. In upholding the appeal, the Judge opined that there cannot be an amendment when Judgment has already been passed.

6.0 THE APPEAL

6.1 Disenchanted with the Ruling, the Appellant has appealed to this Court advancing the following three grounds:

- (i) The court below erred in law and fact by finding that the matter between the parties was *res judicata* in light of the overwhelming evidence on record and the Judgment of the Supreme Court which had the net effect of leaving some issues undetermined between the parties.
- (ii) The court below erred in both law and fact in holding that the deceased's executor as Appellant lacked authority to continue the action despite the clear

capacity under which he was doing so being indicated on record.

- (iii) The court below erred in law and fact by rolling up all the grounds of appeal into one, this being whether or not the learned Deputy Registrar was on *terra firma* in granting leave to amend his originating summons in light of the distinct issues raised in the grounds of appeal.

7.0 ARGUMENTS IN SUPPORT OF THE APPEAL

7.1 In arguing the first ground, the Appellant drew our attention to the case of **Hamalambo v Zambian National Building Society**¹ where the Supreme Court stated that:

“Res judicata means a matter that has been adjudicated upon. It is a matter that has been heard and determined between the same parties. The principle of res judicata states that once a matter has been heard between the same parties, by a court of competent jurisdiction, the same should not be re-opened.”

- 7.2 It was submitted that, the matter giving rise to this appeal was commenced in 2010 by the Appellant. That the issues for determination at the inception of the matter was the determination of the rights and liabilities of the parties arising from the lease agreement. It was submitted that in her Judgment, Sunkutu J, directed and ordered the Appellant to pay any and all rentals due to the Respondent without addressing the parties on the status of the Appellant's goods which were seized by the Respondent when it purported to distrain for alleged outstanding rentals.
- 7.3 It was contended that the Judgment of the Supreme Court did not resolve the issues between the parties on the merits as regards payment of outstanding rentals, if any; and the return of the seized goods when it set aside the Judgment of the High Court. That therefore, whereas the parties in the High Court and Supreme Court decisions are the same, the absence of a final decision on the merits as argued, entails that, the matter cannot be deemed to be *res judicata*.

- 7.4 According to the Appellant, the Judgments aforesated failed to resolve the matter on its merits. That therefore, the learned Judge in the court below, in her ruling ought not to have found the matter *res judicata*. That the outstanding matters can only be settled once there is a Judgment on the merits.
- 7.5 As regards the second ground of appeal, it was submitted that a matter, does not abate by reason of death of a litigant. Reliance in that respect was placed on Order 16/5 of **The High Court Rules² (HCR)** and Order 15/7 of **The Rules of The Supreme Court¹ (RSC)** and it was submitted that the deceased's personal representative is not assuming any responsibility for the Appellant as a firm, but is continuing and opting to bring to finality a claim commenced by the Appellant through its sole proprietor. That the provisions of **The Legal practitioners Act³** should not therefore come into contemplation.
- 7.6 In arguing the third ground, the Appellant submitted that the learned Judge in considering the three grounds of appeal which were before her, stated in her ruling that all

the grounds raised culminated into one ground of appeal being whether or not the Deputy Registrar was on firm ground in granting the Appellant leave to amend the originating summons.

- 7.7 It was submitted that given the gravity of the issues raised, the learned Judge erred in not addressing each ground of appeal as it arose, as there were distinct legal questions raised in each ground, with different effects on the entire matter.

8.0 ARGUMENTS IN OPPOSING THE APPEAL

- 8.1 In response to the first ground, the Respondent submitted that the Appellant intended to introduce new claims which were not before Sunkutu, J at the time she delivered her final Judgment. As regards the Supreme Court Judgment, our attention was drawn to the two grounds of appeal which were before the Supreme Court for determination. It was submitted that there is nowhere on the record where the claims that were intended to be introduced by amendment were ever before Sunkutu, J or indeed subject of the appeal before the Supreme Court.

8.2 It was the Respondent's further submission that when the Supreme Court delivered its Judgment, the same was final and binding on all parties concerned including all courts subordinate to the Supreme Court. According to the Respondent, if the Appellant had any other grievance, apart from what was endorsed on the originating summons, it should have applied before Sunkutu, J to amend the process. That likewise, if the Appellant felt that the claims that it had intended to introduce by way of amendment were already before the court, but were deliberately not adjudicated upon, then it should have included such grievances in its grounds of appeal to the Supreme Court.

8.3 According to the Respondent, the attempt to introduce fresh claims after the final Judgments by the High Court and Supreme Court was clearly caught up by the principle of *resjudicata*, because the Appellant had every opportunity at an earlier stage to amend the pleadings, but due to its own fault, did not do so. Our attention in this

respect was drawn to the case of **Bank of Zambia v Jonas Tembo and Others**², where the Supreme Court held that:

“In order that the defence of res judicata may succeed, it is necessary to show that not only the cause of action was the same, but also that the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that which he seeks to recover in the second.”

8.4 In response to the second ground, Counsel submitted that, it is firmly an established position in Zambia, that law firms exist and are recognized by virtue of their proprietors being qualified persons as defined by Section 41 of **The Legal Practitioners Act**³; that is being a person called to the Zambian bar and holds a valid practicing certificate.

8.5 The Respondent submitted that upon the demise of the qualified person, his place at the bar and his practicing certificate does not devolve upon his estate, to be carried on by the personal representative in the name of an administrator or executor. That in the case of a sole proprietorship, The Law Association of Zambia appoints

another qualified person to act as caretaker, separate from the duties of person/s that may be appointed as personal representative of the deceased's estate.

- 8.6 In response to the third ground, Counsel submitted that the three grounds of appeal all raise an issue with the grant of an Order for leave to amend originating summons granted by the Deputy Registrar. It was submitted that it is not unusual for an appellate court to summarize the issues and formulate one or a few questions for determination in dealing with the appeal. According to Counsel, the Appellant has not referred the Court to any provision of the law, whether common law or statutory, that proscribes the practice that was adopted by the Judge in the court below.

9.0 CONSIDERATION AND DECISION OF THIS COURT

- 9.1 At the hearing of the appeal, none of the parties nor their Advocates were before Court. We decided to proceed with the appeal upon being satisfied that both law firms representing the parties were served with the notices of hearing. The parties were therefore, aware of the appeal

coming up and as such they will not be prejudiced by our having proceeded to hear the appeal in their absence. We were also comforted in that the parties had filed their respective heads of argument.

9.2 We have considered the arguments by the parties and the Ruling being impugned. We will deal with the third ground first and thereafter the first and second grounds.

9.3 The third ground attacks the learned Judge for collapsing the three grounds of appeal before her into one issue for determination. In collapsing the three grounds of appeal, this is what the learned Judge stated at page 20 of the record of appeal.

“There are three grounds of appeal filed and I intend to resolve all the grounds of appeal together as they raise one major question and this is whether in the circumstances of this case, it was proper for the Deputy Registrar to allow the Respondent to amend the originating summons”

9.4 A glean of the grounds of appeal clearly shows that the grounds are entwined as they all speak to the manner the

Registrar dealt with the application for leave to amend the originating summons. Furthermore, what gave rise to the appeal before the learned Judge was the ruling of the Deputy Registrar to grant leave to the Appellant to amend the originating process. Therefore in the circumstances of this case, nothing proscribes an appellate court from formulating or identifying the real issue or questions for determination from several grounds of appeal. In the process, the court can deal with the grounds separately or in whatever combination it deems appropriate, depending on how they are related.

9.5 As earlier alluded to, the grounds were entwined and we cannot therefore fault the learned Judge for formulating what she termed as the major question for determination. In any case, we note from the Ruling that all the issues raised in the three grounds were addressed by the learned Judge, in upholding the appeal. In the view we have taken, the third ground of appeal has no merit.

9.6 We now turn to the first ground. This ground attacks the finding by the learned Judge that the matter was *res*

judicata, when according to the Appellant, there was overwhelming evidence on record and from the Judgment of the Supreme Court, which had the net effect of leaving some issues between the parties undetermined.

9.7 We note that, the Appellant commenced proceedings in the High Court by way of originating summons, seeking protection under the **Act**. Although this was not granted by the High Court, it was eventually granted by the Supreme Court in its Judgment when it ruled that the notice to quit was ineffectual, as it did not comply with the provisions of the **Act**. The Supreme Court found that the amount of rentals owing was not ascertained. They further did not accept the argument by the Respondent that the Appellant cannot seek protection of the **Act** because the lease agreement was not registered.

9.8 From the aforestated, it is clear that all the issues arising from the originating summons, in relation to the provisions of the **Act**, **The Lands and Deeds Registry Act** were fully determined by the Supreme court. In our view,

the Supreme Court did not leave out any issue subject of the claims in the High Court.

9.9 The issue of the return of the goods which were seized under the warrant of distress was neither before the High Court nor the Supreme Court, and could therefore not be subject of determinations. The Judgment of the Supreme Court was final and binding on the parties. They did not remit the matter back to the High Court for any issues as to entitle the Appellant to go back and resuscitate the originating summons. Therefore, the Appellant could not after the Judgment of the Supreme Court, which was final, revert to the High Court and apply for amendment of the originating summons. In the case of **Rosemary Bwalya and Two Others v Mwanamuto Investments Limited**³, the Supreme Court held that originating summons may be amended pursuant to Order 20/5 **RSC** at any stage of the proceedings so long as it is before Judgment.

9.10 As regards the issue on the unascertained amount of rent, the Supreme Court made a determination when it stated that there was a dispute as to the exact amount. We do

not find this as a basis upon which the Appellant would want to amend the originating process. What was basically left was for any of the parties to apply before the Deputy Registrar for assessment of the rent due.

9.11 In the view that we have taken, we agree with the learned Judge that the action taken by the Appellant in seeking leave of the court to amend the originating summons by bringing fresh claims in a cause which was fully determined on the merits, was an abuse of the court process and *res judicata*. Therefore the first ground equally fails.

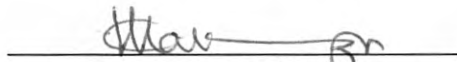
9.12 The second ground deals with the issue of the administrator lacking authority to continue with the matter. In view of what we have said as regards the first ground, this ground becomes *otiose*, save to mention that, the record does not show any application or proceedings in respect to the executor being joined to the proceedings by way of substitution. In our view, it is on that application this issue could have been ably considered and determined.

10.0 CONCLUSION

10.1 All the three grounds of appeal having failed, the appeal is dismissed with costs to the 1st Respondent. Same are to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



C.K. MAKUNGU
COURT OF APPEAL JUDGE



N.A. SHARPE-PHIRI
COURT OF APPEAL JUDGE