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

(Civil Jurisdiction)

App No. 188 of 2019



BETWEEN:

**CHRISTIAN BRETHREN ALSO KNOWN AS
CHRISTIAN MISSION IN MANY CHURCHES**

APPELLANT

AND

**NATIONAL HERITAGE CONSERVATION
COMMISSION**

1ST RESPONDENT

LUSAKA CITY COUNCIL

2ND RESPONDENT

ATTORNEY GENERAL

3RD RESPONDENT

Coram: Mchenga DJP, Chishimba and Sichinga, JJA

***17th February, 2021, 24th March, 2021, 29th March, 2021
and 2nd February, 2022***

For the Appellant: Mr L. Munga'ambata of Messrs Jona Stimela and Partners

For the 1st Respondent: Mr Z. Phiri of Messrs Kaumbu Mondela Legal Practitioners

For the 2nd Respondent: Mrs Y. Mulenga-Muwowo and Mr S. Lungwe, In-house counsel

*For the 3rd Respondent: Ms. L.S. Chibowa, Principal State Advocate;
Mrs. K.M. Mundia, Principal State Advocate; and
Ms. J. M. Mazulanyika, Senior State Advocate*

JUDGMENT

Sichinga JA, delivered the judgment of the Court.

Cases referred to:

1. *Oscar Chinyanta and 31 others vs. Alisa Building Construction and Tap Zambia Limited, SCZ Appeal No. 158 of 2015*
2. *Liamond Choka v Ivor Chilufya SCZ Judgment No. 8 of 2002*
3. *Dulton and Others v Manchester Airport Plc 1999 2 ALL ER 675*
4. *Wiltshire CC v Frazer (No. 2) [1986] 1 WLR 109*

Legislation referred to:

1. *The Rules of the Supreme Court of 1965 (white book) 1999 Edition, Sweet and Maxwell*
2. *Statutory Instrument No. 50 of 2009, The Libala Limestone (Declaration) Order, 2009*
3. *National Heritage Conservation Commission Act, Chapter 173 of the Laws of Zambia*

1.0 Introduction

- 1.1 This is an appeal against the Judgment of the High Court (Bowa J) holden at Lusaka, dated 4th September, 2018 in which the court below held that the plaintiff, the National Heritage Conservation Commission (the 1st respondent in this appeal) had a superior claim to possession and control of the disputed land known as Lusaka Limestone National Monument. The lower court held that the 1st defendant, Christian Brethren Church also known as Christian Mission

in Many Lands (the appellant in this appeal) was in effect a squatter with no legal right to be on the disputed land. The lower court granted an Order of possession to the plaintiff pursuant to **Order 113 of the Rules of the Supreme Court (white book)**¹. The Lusaka City Council and the Attorney-General were the 2nd and 3rd defendants at trial (now the 2nd and 3rd respondents respectively). The matter borders on a land dispute between the 1st respondent, which has the statutory mandate to exercise control and authority over the Libala Limestone National Monument and the appellant, which asserts that it is the rightful occupant, having obtained the land after following the right procedures and is in the process of obtaining title.

2.0 Background

2.1 On 19th December 2016, the 1st respondent filed originating summons claiming possession of the property known as Libala Limestone National Monument (hereafter '*the subject land*'), which was gazetted and declared a national monument under the preservation of the National Heritage Conservation Commission by **Statutory Instrument No. 50 of 2009**².

2.2 It was contended that the appellant had, without leave or licence from the 1st respondent, occupied the premises where the monument is situated and started erecting a structure thereon. Having conducted a search at Ministry of Lands which revealed that the appellant had no Certificate of Title for the subject property, the 1st respondent wrote to the appellant, placing it on notice of encroachment upon the monument and demanding that they desist from carrying out further construction works and vacate the premises within 7 days, which ultimatum the appellant ignored. This prompted the 1st respondent to commence an action in the court below.

2.3 The 1st respondent further applied for an interim injunction to restrain the appellant from continuing with the construction works. The learned Judge in the court below granted the application for an injunction in a ruling dated 27th October 2017 and also joined the 2nd and 3rd defendants to the proceedings.

2.4 The appellant stated in its affidavit in opposition that it only assumed possession of the subject land upon inquiry from

the 2nd and 3rd respondents, who advised that the land was not occupied and there was no Certificate of Title in respect of the portion occupied by the 1st respondent. The deponent stated further that the appellant had applied for allocation of the subject land and subsequently acquired a site plan and survey diagram.

2.5 Responding to the assertion that the subject land is a national monument, the appellant asserted that the 1st respondent earmarked the land for construction of a mixed use real estate and as such, it no longer considered the subject land as a national monument, having changed the use of the land. The appellant maintained that the 1st respondent has no legitimate right to evict it from the subject land as the said land does not belong to the 1st respondent and that in any event, the appellant's occupation does not in any way threaten the existence of the national monument.

3.0 Decision of the court below

3.1 The learned Judge in the court below summarized the appellant's arguments opposing the originating summons as follows:

1. They are in occupation by virtue of assurances given to them on the availability of the land by the 2nd and 3rd respondents.
2. The 1st respondent is not the legal owner of the land as the ***National Heritage Conservation Commission Act***³ (hereafter '*the Act*') only grants the 1st respondent authority to oversee the land, and not ownership.
3. The 1st respondent's objection to the appellant's presence is flawed as it is premised on the land being a heritage conservation site when in fact they have departed from such interest by turning it into a mixed use complex.
4. That in any event, the subject land does not fall within the heritage site.

3.2 The learned Judge then proceeded to consider each of these arguments and, in relation to the right of occupation, stated that the evidence of the 2nd and 3rd respondents rebutted the impression given by the appellant that the duo had given their blessing to the appellant to occupy the land and that the appellant was in the process of obtaining title.

3.3 The court below further referred to the acknowledgement of the 2nd and 3rd respondents that offers had initially be given to some parties which, upon realization that the land fell under the national monument, withdrew such offers and cancelled subsequent titles. In this regard, the Judge noted that the appellant was not among the names of the persons initially offered the land and that and subsequent offer made would be illegal and subject to cancellation as a consequence of the status of the subject land as a national monument.

3.4 As regards the argument that the appellant is not the legal owner of the subject land, the learned Judge noted that notwithstanding that a Certificate of Title is conclusive evidence of ownership of land, in the absence of proof of fraud in its acquisition, **section 8 of the National Heritage Conservation Act** *supra* as read with **Statutory Instrument No. 50 of 2009** grants control and authority over the land to the 1st respondent. In the opinion of the lower court, *Order 113 of the Rules of the Supreme Court supra* does not specifically require that ownership must be evidenced by title deed, but the order requires the

applicant to have a superior claim to the land or the right to possession. In this regard, the learned Judge cited the case of **Oscar Chinyanta and 31 others vs. Alisa Building Construction and Tap Zambia Limited**¹ and went on to state that absolute control and authority was placed on the 1st respondent once the land was gazetted a national monument by *Statutory Instrument No. 50 of 2009* which established a superior claim beyond all else.

3.5 The learned Judge then addressed the issue of the intention of the 1st respondent to change the usage of part of the heritage site, which it acknowledged as being within its statutory mandate. The Judge held that a party's ground to object ejection from land alleged to be illegally occupied under *Order 113 of the Rules of the Supreme Court supra* is not and cannot be based on what the owner professes to use the land for, as such objection must be anchored on such party's legal basis to be on land in the first place.

3.6 The argument that the subject land does not fall within the heritage site was not accepted by the lower court, as the

exhibits provided by the parties actually confirmed that it was within the national monument site.

- 3.7 Based on the position of the Judge on the various issues articulated above, the learned Judge found that this is a clear case of a squatter with no legal right on the land, and he went ahead to allow the application and to grant the 1st respondent immediate possession of the Libala Limestone National Monument.

4.0 The appeal

4.1 Displeased with the Judgment of the lower court, the appellant lodged this appeal before us, citing the following grounds:

- i) The court below erred in law and fact when it granted immediate possession of the land in issue to the 1st Respondent in the absence of express statutory provisions granting ownership and possessory rights to the 1st Respondent.*
- ii) The court below erred in law and fact when it granted the immediate possession of the land in*

issue in the face of evidence on record that the 1st respondent does not possess a Certificate of Title in relation to the land in issue and therefore lacked capacity to avail itself of the procedure on summary possession for land.

5.0 Appellant's arguments

5.1 In support of the first ground of appeal, the appellant submitted that the lower court could only have been entitled to grant the 1st respondent possession of property if there were express statutory provisions granting ownership and possessory rights, but neither the *National Heritage Conservation Act supra* nor *Statutory Instrument No. 50 of 2009* have provisions which suggest that once a parcel of land has been declared a national monument, the 1st respondent becomes the owner or is entitled to exclusive possession.

5.2 It was the appellant's contention that in order for one to have recourse to the procedure under *Order 113*, they should have either title or possession of the subject land or a license from the holder of the title. The appellant made

several submissions emphasizing this issue, and we shall not venture to repeat the same.

- 5.3 Our attention was drawn to a portion of the Judgment that is the subject of this appeal, at page J21, where the lower court stated as follows:

“It is my considered opinion that Order 113 does not specifically require that ownership must be evidenced by a title deed. The order makes reference to an applicant having a superior claim to the land.”

- 5.4 Based on this excerpt, it was the submission of the appellant that in order to ascertain the superiority of the claims, the Court would inevitably have to consider who has good title to the land in question, hence the matter still boils down to the title, otherwise it may be considering claims of persons who may not even be entitled to the land in question.

6.0 Arguments in response

- 6.1 On 11th February, 2021, the 1st respondent filed heads of argument in response to this appeal. The case of **Liamond Choka v Ivor Chilufya**² was cited on the principle that the

summary procedure under *Order 113* can only be suitable for squatters and others without any genuine claim of right or who have since been transformed into squatters.

6.2 In response to the first ground of appeal, the 1st respondent submitted that the court below was on *terra firma* when it held that absolute control and authority was placed on the 1st respondent once the land was gazetted a national monument by the statutory instrument, which established a superior claim beyond all else. That absolute control, by implication, entails possession of the land notwithstanding the fact that ownership and possessory rights are not explicitly provided for in *the Act*, though it places the land under the care and control of the 1st respondent, which is mandated to manage and be seized with matters incidental to, *inter alia*, national heritage sites and national monuments.

6.3 The respondent made further submissions opposing this appeal, the summary of which were as follows:

- i. *Order 113* is the recourse available to a party claiming possession of land that has been occupied by squatters

and/or trespassers with no discernible interest in the land;

- ii. *Order 113* does not specifically make reference to a party claiming land under the said order to possess a Certificate of Title but instead provides that such party should state its interest in the land in dispute;
- iii. It is unlawful for a party with no discernible interest in land to be in occupation of it;
- iv. A party with a superior interest in land is in fact entitled to possession of said land under *Order 113*;
- v. *Statutory Instrument No. 50 of 2009*, in accordance with *section 27 of the Act*, firmly places control of the land in question under the wing of the 1st respondent whose mandate it is to '*conserve the historical, natural and cultural heritage of Zambia by preservation, restoration, rehabilitation, reconstruction, adaptive use, good management or any other means*'; and
- vi. The meaning of the word '*possession*' is not to be construed narrowly but should be ascertained from the type of conduct displayed by the party claiming interest in land.

6.4 Based on the issues raised above, it was submitted that allowing the second ground of this appeal would be contrary to national interest, based on the 1st respondent's mandate under *the Act*, as that would open the doors to numerous parties to take unlawful possession of the many sites under the 1st respondent's purview and care simply because it does not hold a Certificate of Title in respect of the same sites. That on the contrary, the 1st respondent's claim to those sites, and indeed the land in question, is anchored on the force of law.

7.0 Our decision

7.1 Having considered the submissions by both parties and having examined the Judgment of the learned Judge in the court below, we will now proceed to determine the appeal.

7.2 Our understanding of the appellant's argument with respect to the first ground of appeal is that the lower court could only grant possession to the 1st respondent if *the Act* expressly stated that the effect of a gazette as national monument is to grant ownership and possessory rights to the 1st respondent. Under the second ground of appeal, the appellant seeks to assail the lower court's Judgment on the

premise that since a Certificate of Title is conclusive evidence of ownership of land in the absence of fraud, the 1st respondent lacked capacity to pursue this action under *Order 113*, as it could not demonstrate ownership or possession of the land in the circumstances.

7.3 The summary of the 1st respondent's response to this appeal is that it was in fact in possession of the subject land by virtue of *Statutory Instrument No. 50 of 2009* and its mandate under *the Act*. Further, unlike the appellant, which has no legal or equitable interest in the land and is therefore a trespasser or squatter, the 1st respondent has a clear and discernible legal interest and as such, was entitled to commence proceedings for summary possession as provided for under *Order 113*, notwithstanding that it does not have title to the land.

7.4 In our view, the issue we are confronted with is whether in the absence of express statutory provisions granting the 1st appellant possessory rights, the 1st appellant was entitled to bring an action for possession under *Order 113*.

7.5 In arriving at the conclusion that absolute control and authority was placed on the 1st respondent once the land was gazetted a national monument by *Statutory Instrument No. 50 of 2009*, the lower court cited the case of **Oscar Chinyanta and 31 others vs. Alisa Building Construction and Tap Zambia Limited**¹ where the Supreme Court quoted the case of **Dulton and Others v Manchester Airport Plc**³. Having studied the latter case ourselves, we are inclined to reproduce some of the pronouncements in this English case by which we are persuaded, which would aid our determination of the question before us.

7.6 Seeing as the facts are distinguishable *in casu*, we shall proceed to state the brief facts of the case in **Dulton and Others v Manchester Airport Plc**³ and thereafter place emphasis on the aspects of the Judgment that are relevant to the legal issue that we seek to resolve. In the said case, the respondent, an airport company, proposed to build a second runway at Manchester Airport. To this end, it needed to cut some trees in a nearby wood owned by the National Trust. In an effort to prevent the proposed works,

the appellant trespassers occupied the wood. The Trust then granted the respondent a license to occupy the wood for the purpose of carrying out the works.

7.7 The respondent subsequently commenced summary possession proceedings against the appellants under *Order 113* and the Judge duly granted a possession order. On appeal, the appellants argued that the respondent did not have a sufficient interest in the land to rely on the order. The primary issue was whether the respondent, a licensee, could rely on *Order 113* even though it was not in *de facto* occupation or possession of the land.

7.8 Laws, LJ had the following to say:

“...as regards the law of remedies, in the end I see no significance as a matter of principle between a plaintiff whose right to occupy the land in question arises from title and one whose right arises from contract. In every case the question must be, what is the reach of the right, and whether it is shown that the defendant’s acts violate its enjoyment. If they do, an order for possession is the only practical remedy, the remedy should be granted. Otherwise the law is powerless to

correct a proved or admitted wrongdoing; and that would be unjust and disreputable. The underlying principle is in the latin maxim 'ubi ius, ibi sit remedium' (where there is a wrong, there is a remedy)."

7.9 Kennedy, LJ made reference to the Judgment of Stephenson, LJ in the case of ***Wiltshire CC v Frazer*** where the requirements of *Order 113* were set out as follows:

"(1)of the Plaintiff, he should have a right to possession of the land in question and claim possession of land which he alleges to be occupied solely by the defendant. (2) That the defendant, whom he seeks to evict from his land, should be persons who have entered into or have remained in occupation of it without his licence or consent [or that of any predecessor in title of his]."

7.10 Based on the aforesaid, in upholding the order of possession, Kennedy LJ stated:

"In my judgment those requirements are met in this case. The plaintiff does have a right to possession of the land granted to it by the licence. It is entitled to enter and occupy the land in question. The fact that it has only been granted the right to enter and occupy

for a limited purpose and that, as I would accept, the grant does not create an estate in land giving the plaintiff a right to exclusive possession does not seem to me to be critical. What matters, in my judgment, is that the plaintiff has a right to possession which meets the first of the requirements set out by Stephenson LJ, and the defendants have no right which they can pray in aid to justify their continued possession (emphasis ours).

7.11 Notwithstanding that this matter does not border on a right of occupation arising out of a licence, our application of this English case, is based on the principles of law expounded therein, and it shall soon become apparent how the said principles are applicable to address the question with which we are confronted. We are of the view that a claimant's entitlement to an order of possession under *Order 113* is not dependent on proof of an estate in the subject land, but rather on a demonstration of a right to possession, and that the defendant is interfering with that right.

7.12 The effect of *the Act* and Statutory Instrument is to grant the 1st respondent 'control and authority' over the subject

land. The question is - *Does the appellant's continued occupation of the subject land interfere with the 1st respondent's statutory mandate to exercise such control and authority?* We would answer this question in the affirmative.

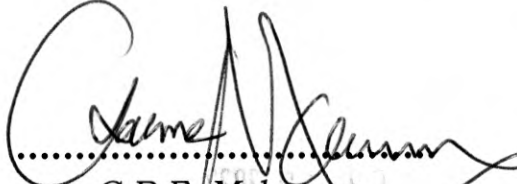
7.13 The 1st respondent's statutory mandate over national monuments and in particular the subject land is not in question. What is in question is the nature of the interest held by the 1st respondent, to the extent that, according to the appellant, in the absence of a Certificate of Title, or express statutory provisions granting it possessory and ownership rights, it is not entitled to take out an action for an order of possession. It is quite obvious by now that we do not subscribe to this rather narrow construction of the law, as adopting such a position would entail that any person may occupy land that is subject to the control and authority of the 1st respondent without the possibility of eviction. Surely, this would not only be absurd, but would effectively defeat the very purpose of the 1st respondent's statutory mandate.

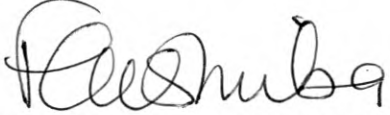
7.14 In the circumstances, we are satisfied that the order of possession granted by the lower court was necessary to vindicate and give effect to the 1st respondent's statutory right to exercise control and authority over the subject land. In any event, assuming that the 1st respondent did have title relating to the subject land, the appellant's claim would not have been any better, as the 1st respondent successfully demonstrated that the appellant has no legal or equitable basis upon which it is in occupation of the land, in light of the evidence of the 2nd and 3rd respondents rebutting the impression given by the appellant that the duo had given their blessing to the appellant to occupy the land and that the appellant was in the process of obtaining title.


7.15 Ultimately, our determination of this appeal is premised on the question we earlier asked ourselves and that is - *whether despite the absence of express statutory provisions granting the 1st appellant possessory and ownership rights, the 1st respondent was entitled to bring an action for possession under Order 113.* Considering our interpretation of the legal principles raised by this issue and our application of the import of *Order 113*, we are inclined to

answer this question in the positive, and we accordingly uphold the order of possession granted by the court below. We therefore find that the appellant's continued occupation of the subject land is not legally justifiable at all and it interferes with the 1st respondent's statutory mandate.

7.16 The effect of the position we have taken, seeing as the lone question for determination has a significant bearing on the fate of both grounds of appeal, is that both grounds of appeal fail for lack of merit. Effectively, we dismiss this appeal with costs to the 1st respondent.


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C.R.F. Mchenga
DEPUTY JUDGE PRESIDENT


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F.M. Chishimba
COURT OF APPEAL JUDGE


.....
D. L. Y. Sichinga, SC
COURT OF APPEAL JUDGE