

**IN THE COURT OF APPEAL OF ZAMBIA APPEAL No. 139/2023
HOLDEN AT KABWE**

(Civil Jurisdiction)

B E T W E E N:



CHRISTOPHER MWIINGA (Suing as
Administrator of the Estate of Isaac Nkhoma) **1ST APPELLANT**

DANA HOLDINGS LIMITED **2ND APPELLANT**

AND

ATTORNEY GENERAL **RESPONDENT**

CORAM: Chashi, Makungu and Sichinga, JJA

ON: 21st May and 19th June 2024

For the Appellants: W. Mwandila, Messrs OMM Banda & Co

*For the Respondent: N. K Chongo (Ms), Principal State
Advocate and B.M Kamuwanga, Senior
State Advocate, Attorney General's
Chambers*

JUDGMENT

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

- 1. William David Carlisle Wise v E.F. Harvey Limited (1985)
ZR, 179*
- 2. Daniel Mwale v Njolomole Mtonga (sued as Administrator of
the Estate of the late Gabriel Siwanamutenje Kapuma
Mtonga) and The Attorney General - SCZ Judgment No. 25 of
2015*

3. *Zambia Consolidated Copper Mines Ltd v John David Chileshe - SCZ Judgment No. 21 of 2002*

4. *Letang v Cooper [1965] 1 QB 232*

Legislation referred to:

1. *The Limitation Act, 1939*

Rules referred to:

1. *The Supreme Court Practice (White Book) 1999*

Other authorities referred to:

1. *Halsbury's Laws of England – 5th Edition, Vol 68*

1.0 INTRODUCTION

1.1 This is an appeal against the Judgment of Honourable Mr Justice C. Zulu, delivered on 17th September 2021. In the said Judgment, the learned Judge dismissed the Appellants' action for being statute barred.

2.0 BACKGROUND

2.1 The Appellants, who were the plaintiffs in the court below, commenced an action against the Respondent, defendant in the court below, by way of Writ of Summons on 9th December 2020, seeking the following reliefs:

- (i) An Order for immediate rectification of the Lands Register;**
- (ii) An Order reversing or cancellation of Subdivisions A, B, C, D and E wrongfully created from Farm 3796;**
- (iii) Alternatively, an Order that the Respondent do offer the 1st Appellant an alternative land for the pieces of land being Subdivisions A, B, C, D and E, that have been occupied by the said persons to whom the said wrongly created subdivisions were allocated by the Respondent/ or adequate compensation to the 1st Appellant for the losses of the pieces of land that the estate of the deceased and its beneficiaries have suffered and continue to suffer;**
- (iv) Damages for the inconvenience, anguish, and mental torture caused to the deceased's beneficiaries and dependents;**
- (v) Damages for loss of use of land;**
- (vi) Interest and**

(vii) Costs

- 2.2 According to the attendant Statement of Claim, Kingstone Issac Nkhoma (the deceased), was on 27th October 1988, the registered owner of Farm No. 3796, Kapiri Mposhi (the property) and was issued with a certificate of title No. L3336. The deceased accordingly developed the farm as per the lease, including erecting a family dwelling.
- 2.3 On 18th February 2003, the Commissioner of Lands, due to outstanding ground rent, issued a re-entry notice for the property, but the deceased due to his declining health, could not respond. Nonetheless, his advocates requested settlement of the outstanding ground rent in instalments. However, on 26th June 2003, the Commissioner of Lands re-entered the property. The Deceased died on 12th July 2003.
- 2.4 Unbeknownst to the 1st Appellant, on 3rd November 2003, the Commissioner of Lands subdivided the property into five subdivisions, offering them to various individuals. However, after further engagement, the Commissioner of Lands cancelled the certificate of re-

entry on 24th July 2008, reinstating the property to the deceased's estate and the notice was cancelled. This was confirmed in a letter dated 30th December 2008.

2.5 On 16th October 2009, without notice to the 1st Appellant, the Commissioner of Lands issued a "cancellation of cancellation of the certificate of re-entry," resulting in the estate losing the property. This prompted the Appellant to commence an action in 2011 against the Attorney General, which culminated in a Consent Judgment on 28th August 2012 in favour of the deceased's estate, reinstating the deceased as the owner of the property. This Judgment was registered at the Ministry of Lands on 19th September 2012 but was subsequently allegedly set aside.

2.6 In 2019, the Appellant took out another action against the people who were offered subdivisions and issued certificates of titles, but the case was dismissed due to non-attendance, prompting the present action. The Appellants maintain that to date, they continued to pay ground rent for the entire property.

3.0 JUDGMENT OF THE COURT BELOW

- 3.1 Upon reviewing the evidence, the learned Judge was of the view that the issue to be considered was whether the action before the court was statute barred.
- 3.2 The learned Judge relied on the cases of **William David Carlisle Wise v E.F. Harvey Limited¹**, **Daniel Mwale v Njolomole Mtonga (sued as Administrator of the Estate of the late Gabriel Siwanamutenje Kapuma Mtonga) and The Attorney General²**, **Zambia Consolidated Copper Mines Ltd v John David Chileshe³**, and Section 3 of **The Limitation Act¹**, and noted that actions for recovery of land must be commenced within twelve (12) years from the accrual of the cause of action.
- 3.3 In this instance, the learned Judge determined that the cause of action arose when the deceased discovered the creation of the subdivisions in 2003 after a re-entry of the land. However, the Appellants initiated their action on 9th December 2020, approximately 17 to 18 years after the cause of action arose. As a result, the Appellants' claims were

considered stale, leading to the dismissal of the case for being statute barred.

4.0 THE APPEAL

4.1 Dissatisfied with the decision of the lower court, the Appellant has appealed to this Court, advancing a sole ground of appeal couched as follows:

The learned Judge misdirected himself in law and fact when he held on page J7 to J8 that the cause of action arose in 2003 when the Commissioner of Lands re-entered Farm No. 3796 and created the subdivisions which were offered to six different individuals without taking into consideration that the Commissioner of Lands had in fact entered a certificate of cancellation of certificate of re-entry in 2008 which was later cancelled by entry on the Lands Register of the cancellation of the cancellation of certificate of re-entry in 2009 when the cause of action arose.

5.0 ARGUMENTS IN SUPPORT OF APPEAL

5.1 Mr Mwandila, Counsel for the Appellant relied on the filed heads of argument dated 1st July 2022. In support of the lone ground of appeal, Counsel asserted that the key issue for determination before this Court is when the cause of action crystallised. In answering the question, Counsel had recourse to the **William David Carlisle Wise**¹ case where it was held that:

“A cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other or upon which he can establish a right or entitlement to a judgment in his favour against the other.”

5.2 According to Counsel, the cause of action against the Respondent arose in 2009 when the Commissioner of Lands revoked the Cancellation of Certificate of re-entry. It was argued that the re-entry issued in 2003 was later cancelled in December 2008 by the Commissioner of Lands, thereby restoring the title to its original holder, the deceased.

- 5.3 It was argued that following this cancellation in 2008, the lands register was rectified and there existed no factual basis for the Appellants to hold the Respondent liable or establish a right or entitlement to a judgment in their favour. Therefore, the cause of action arose in 2009 when the cancellation was made on the Lands Register.
- 5.4 Regarding the **Zambia Consolidated Copper Mines Ltd³** case relied on by the learned Judge, Counsel acknowledged that negotiations do not stop time from running. However, it was argued that this principle did not apply to this case. It was pointed out that when the certificate of cancellation of re-entry was issued, it concluded the matter between the 1st Appellant and the Respondent, resulting in the 1st Appellant being reinstated as the rightful owner of the property.
- 5.5 In conclusion, it was argued that going by section 3 of **The Limitation Act¹**, the computation of time should have started from the occurrence of the cause of action on 16th October 2009, when the Cancellation of Certificate of Re-entry took place, to the

commencement of this action on 9th December 2020, amounting to approximately eleven (11) years. Therefore, the lower court erred by holding that the matter was statute barred. We were urged to uphold the appeal.

6.0 ARGUMENTS OPPOSING THE APPEAL

6.1 Ms Chongo, Counsel for the Respondent relied on the filed heads of argument dated 5th October 2022. She argued that the lower court correctly held that the matter was statute barred, as the cause of action accrued in 2003 and the Appellant did not commence this action until 9th December 2020, approximately 17 years later, thereby violating Section 4(3) of **The Limitation Act**¹.

6.2 According to Counsel, the record reveals that in 2003, the Commissioner of Lands issued a Certificate of Re-entry and created subdivisions offered to five individuals. This marked the accrual of the cause of action when the Appellants could have claimed liability against the Respondent. For this position, Counsel

relied on the **William David Carlise Wise**¹ and **Daniel Mwale**² cases.

6.3 Further reliance was placed on the learned authors of **Halsbury's Laws of England**¹ at paragraph 924, where it was stated that:

"Subject to certain exceptions set out below, time which has once begun to run will as a rule continue to do so, even though subsequent events occur which make it impossible that a claim should be brought; this rule holds good with respect to all Limitation Acts"

6.4 It was argued that once time starts to run, it continues even if subsequent events make a claim impossible. Therefore, since the Certificate of Re-entry was issued on 26th June 2003, time began to run and continued despite its cancellation in 2008 and the subsequent cancellation of that cancellation on 16th October 2009.

6.5 Counsel concluded by citing the **Daniel Mwale**² case to support the argument that the lower court was on firm ground in dismissing the action as statute barred, as it had no jurisdiction to hear the matter.

7.0 ANALYSIS AND DECISION OF THE COURT

7.1 We have considered the impugned Judgment and the arguments advanced by Counsel for both the Appellants and the Respondent. The key issue for determination, as correctly identified by both the learned Judge and the Appellants, is when the cause of action against the Respondent arose. This determination will dictate whether the Appellants' action is statute barred.

7.2 The landmark case defining a cause of action is the **William David Carlisle Wise**¹ case, which has been heavily relied upon by both parties. In that case, a cause of action was defined as follows:

"A cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other or upon which he can establish a right or entitlement to a judgment in his favour against the other."

7.3 Additionally, Diplock L.J. in **Letang v Cooper** further clarified a cause of action as:

"Simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person."

7.4 Additionally, according to Order 15/1/2 of **The Rules of the Supreme Court**¹, a cause of action encompasses:

"...every fact (though not every piece of evidence) which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the Court."

7.5 A review of the Lands register appearing on pages 44 – 46 of the record, indicates that a certificate of re-entry was issued on 26th June 2003. However, on 24th July 2008, this certificate was revoked through the issuance of a certificate of cancellation of the certificate of re-entry. This action was further substantiated by a letter dated 30th December 2008, addressed to the Appellants' advocates and appearing on page 43 of the record. The letter reads as follows:

**"RE: APPEAL AGAINST NOTICE OF INTENTION
TO RE-ENTER FARM 3796 KAPIRI-MPOSHI**

The above matter and your letter dated 25th April 2007 refers. This serves to inform you that the Commissioner of Lands has considered your appeal and the notice has been cancelled.

We therefore advise that the property be developed to avoid further re-entry.”

7.6 Subsequently, on 16th October 2009, the Commissioner of Lands reinstated the certificate of re-entry by cancelling the cancellation of certificate of re-entry previously entered in the Lands Register.

7.7 Based on the sequence of events highlighted above, we are inclined to agree with the Appellants' assertion that following the cancellation of the certificate of re-entry in 2008, the issues between them and the Respondent were effectively resolved. There was no factual basis for the Appellants to hold the Respondent liable or to establish a claim in their favour.

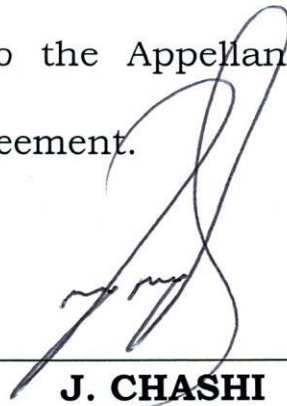
7.8 In our view, the cause of action materialized on 16th October 2009, when the Commissioner of Lands subsequently reversed the cancellation of the certificate of re-entry. It is at this juncture that a

factual basis for establishing a claim in their favour arose. The Appellants' action was therefore not statute barred and fell within the 12 year timeframe as provided in section 3 of **The Limitation Act**¹.

7.9 We find merit in the sole ground of appeal and we accordingly set aside the Judgment of the lower court. The matter is hereby referred back to the court below before another Judge to be heard *de novo* and make a determination on the issues before the court.

8.0 CONCLUSION

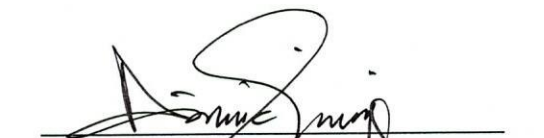
8.1 The appeal is meritorious and is accordingly allowed with costs to the Appellant. Same to be taxed in default of agreement.



J. CHASHI
COURT OF APPEAL JUDGE



C.K. MAKUNGU
COURT OF APPEAL JUDGE



D.L.Y. SICHINGA SC
COURT OF APPEAL JUDGE