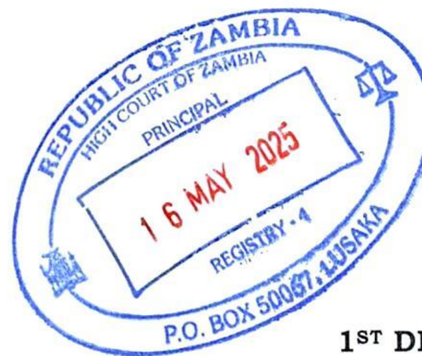
IN THE HIGH COURT FOR ZAMBIA **2018/HP/0619**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(CIVIL JURISDICTION)

BETWEEN:



MBITA CHITALA **PLAINTIFF**

AND

GEORGE MWAMBAZI **1ST DEFENDANT**

AFRICAN COMMERCIAL BANK LIMITED **THIRD PARTY**

Before the Hon. Mr. Justice M.D. Bowa on 16th of May . 2025

For the Plaintiff. Mr. N. Siwila of Mulungushi Chambers
For the Defendants: Miss. J.R. Mutemi of Theotis Mutemi Legal Practitioners

---

RULING

Cases Referred to:

1. *Kelvin Hangandu and Company v Webby Mulubisha (2008) ZR 282*
2. *Development Bank of Zambia & KPMG Peat Marwick v Sunvest Limited & Sun Pharmaceuticals Limited (1977) SJ 10 SC*
3. *AS&C Enterprises Ltd & Others vs Stanbic Bank Zambia Limited (2012) volume 1 518*
4. *Hussein Saffieddinne v the Commissioner of Lands and Others (1917) volume 2 page 360*
5. *Hendeson v Hendeson (1843) 3 Hare 100 67 ER 313*
6. *Zambia Seed company Limited v Chartered International (PVT) Limited (SCZ 20 OF 1999)*
7. *William David Carlisie Wise v E.F Harvey Limited (1985) ZR 179 SC*
8. *Standard Chartered Bank PLC v Chansa Kabwe (2012) ZR Vol 13*
9. *Maureen Simpamba v Abraham Kamalamba (2013) Vol 2 ZR 279*

10.Munster v Cox9 (1884-1885) 10 AC 680-691
11.Bank of Zambia vs. Tembo & others (2002) Z.R 103
12.ANZ Grindlays Bank (Z) Limited v Kaoma SCZ judgment no 12 of 1995
13.BP Zambia Plc vs. Interland Motors (2001) Z.R. 37

Other material referred to:

1. *Hasbury's Laws of England 23rd Edition volume 4*

1. Background

1.1 On the 10th July 2023, the Defendant filed into Court a Notice of motion to dispose action on points of law pursuant to Order 14A and 33 (7) of the RSC of England 1999 edition. The questions posed for determination were coached in the following terms:

1.Whether the Plaintiff's action to set aside the Consent Judgment on ground of mistake as to the extent of S/D No. 3 of Farm 298(a) and the endorsements on the Writ of Summons and Statement of Claim beseeching this Court to determine the extent of the Defendant's land can be entertained by this Honourable Court as the same is Res Judicata and an abuse of Court process:

1.1 In view of cause number 2012/HP/443 which culminated into a consent Judgment between the parties herein that the Defendants land was in extent 6.0705

hectares and under which the Plaintiff had the opportunity to raise the issues which he now seeks to raise under cause 2018/HP/0619 but did not; and

1.2 In view of the Judgment dated 8th August 1997 and the Ruling of the High Court dated 19th of April 2017 under cause number 2015/ HP/1083

2 Whether the Plaintiff can in an action seeking to set aside a Consent Judgment seek a variation of the terms of the Consent Order.

3 Whether the Plaintiff's pleadings disclose a cause of action against the Defendant in view of grounds pointed in grounds 3.1-3.3 in the notice of motion.

2. Affidavit in Support

2.1 The affidavit in support of the notice of motion to dispose the action was sworn by Mr. George Mwambazi the Defendant. He deposed that on 26th April 2017, he commenced an action against the Plaintiff under cause No 2012/HP/0443 following what he contended was the Plaintiff's encroachment on his land. He sought an Order that the Plaintiff pulls down and removes the electric

fence and structure that he had been erecting on his land and declaration that he was the bonafide owner of Subdivision A of Subdivision 3 of farm No. 298(a); damages and other reliefs.

2.2 That in paragraph 3 of his claim he had pleaded that the Plaintiff had wrongfully erected an electric fence on his land which was in extent of 6.0705 hectares from the actual boundary with the Plaintiff's land and proceeded to erect a structure on the land.

2.3 He averred that the Plaintiff filed a defence and counterclaim in which he pleaded that his land was in extent of 10.0363 hectares which is contrary to his position in the present cause that the land is in extent of 12.0385 hectares.

2.4 He added that the Third party in that action filed a defence in which it denied the Plaintiff's claim that it. Illegally sold 6.0705 hectares of Subdivision No. 3 of Farm 298(a) to him or that it went against a purported agreement to only sell 2 hectares of the farm. The Third party further claimed it had acquired good title to the land as mortgagee in possession. Exhibited **"GM3"**was the Third party's defence.

2.5 He deposed further that his action under cause number 2012/HP/0443 was resolved by Consent Judgment dated 25th July 2014 which effectually resolved the dispute of the extent of the land encroached on as per clauses 3 and 7 that provided that the Plaintiff would transfer to him 2 acres of his land as compensation for the encroachment. In default, the Defendant was to take possession of the land encroached with the fence and structure mentioned earlier above. The Consent Judgment was exhibited **"GM4."**

2.6 It was averred further that at all material times, the parties were alive to the fact that the land which the Third party had acquired as mortgagee in possession was 10.0393 hectares pursuant to a Judgment of the High Court dated 8th August 1997 under cause number 1996/HP/3642, that granted the Third party the liberty to foreclose, possess and sell 10.0393 hectares more or less being subdivision No. 3 of Farm 298(2). That this was notwithstanding the Plaintiff's defense that he never signed the mortgage or memorandum of deposit of title. The Judgment and Lands Printout was exhibited **"GM5."**

2.7 It was the Defendant's further averment that he purchased the land in extent of 6.0705 hectares from the Third party on 30th November 2001 as per contract of sale exhibited **"GM6."**

2.8 It was his position that the Plaintiff had the opportunity to claim in both the 1996 and the 2012 actions for the relief now being sought which touch on what he is alleging to be the correct extent of subdivision No. 3 of Farm 298(a) Lusaka as opposed to 10.0363 hectares. That he did not do so and as such by this action is seeking a third bite at the cherry.

2.9 He averred further that the intention of the Plaintiff is to vary the terms of the Consent Judgment as opposed to setting it aside as evident from reliefs (b) and (c) in the Writ of Summons and Statement of claim by which he asks the Court to allocate the Plaintiff with 4.0705 hectares instead of 6.0705 hectares and for an order to demarcate the Defendant's land to exclude the developments made by the Plaintiff.

2.10 He believed based on advice from his lawyers that the Plaintiff cannot commence a fresh action to vary a Consent Judgment. It was the Defendant's further

averment that the Plaintiff defaulted in transferring the 2 acres of land to him in accordance with the Consent Judgment. That as a consequence, a Writ of Possession was issued on 4th December 2014 and execution was levied for the encroached piece of land.

2.11 He averred further that it was only after the Writ of Possession was executed that the Plaintiff woke up from his slumber and began to attempt to undo the execution of the Writ of Possession.

2.12 He added that on the 10th of July 2015, the Plaintiff commenced an action under cause 2015/HP/1065 seeking protection from deprivation of property and adverse possession of the same property which he is seeking before this Court; an Order of possession of 5.9656 hectares of the remaining extent of subdivision No. 3 of Farm 298 (a); and an Order for removal of any structure that was put on the land by the Defendant. A copy of that petition was exhibited **"GM8."**

2.13 That the said cause was dismissed by the High Court for being an abuse of Court process and on grounds of res Judicata. The ruling is exhibited **"GM9."**

2.14 It was averred further that the Consent Judgment sought to be impugned was perfected and that the Defendant has since subdivided and sold part of the property to one Davies Mwangulukulu and David Mulenga Chisanga who are the new owners of the property in extent of 2.8563 hectares of the remaining extent of subdivision A of subdivision 3 of Farm 298(a). That the certificate of title in this regard was exhibited **"GM10."**

2.15 That as the Plaintiff only brought this action 3 years after the Consent Judgment and the land had been subdivided into 8 potions 4 of which he has since sold. He believed that he has kept being hauled into court by the Plaintiff in piecemeal litigation and it is very frustrating for him who purchased the land as an innocent purchaser from a Mortgagee in possession.

3. Affidavit in opposition

3.1 The affidavit in opposition was sworn by Mbita Chitala the Plaintiff herein, dated 28th March 2024. He averred that contrary to the position stated by the Defendant, it was in fact the Defendant that had encroached on his land. That the record under cause 2012/HP/0443 will

show that he had filed a defence and counterclaim to that effect.

3.2 He added that the land in issue had 2 certificates of title, one being number 9243 in extent of 6.0706 hectares and the other 5.9 hectares which the Bank of Zambia released to him later. That this brought the total extent to 12.0358 hectares.

3.3 He averred that the land in extent 5.9650 hectares belongs to him and the 2.04 hectares in question that is currently registered in the Defendant's name forms part of that extent. That the Third party in paragraph 11 of their defence had acknowledged that the extent of certificate number 9256 was erroneously indicated as 5.9560 hectares which it contended was not tenable in light of the fact that 6.0705hectares was sold to the Plaintiff in a farm originally indicated to be 10.0393 hectares.

3.4 He contended that it was not the sale of the properties that was in dispute than it was the subdivisions. He maintained that the Consent Judgment dated 25th July 2014 was executed through a mistake. That the said Consent Judgment was executed without his knowledge

and participation and as such has been challenged on that basis. Further, that the Consent Judgment was executed when there was a caveat on the property subject to these proceedings placed by one Elizabeth Mwale.

3.5 The Plaintiff averred further that he and the Third party agreed through its liquidator Mr. George Sokota that 2 acres of his land would be sold in order to pay off the K25,000.00 owed to the Third party, and at no point was it stated that the extent of the land was 12.0393 hectares.

3.6 Further that contrary to the Defendant's averment, the challenge of the Consent Judgment in question could neither be done in the 1996 action nor the 2012 action as the Judgment was only entered on 25th July 2014.

3.7 Further, that the record will show that he commenced the action under cause 2018/HP/0619 to set aside the Consent Judgment and not to merely vary it as demonstrated under relief (a) of the Writ of Summons.

3.8 He believed based on advice from his lawyers that there is a plethora of authorities in our jurisdiction that settle the principle that the only way a Consent Judgment can be set aside is by commencing a fresh action.

3.9 He explained that the 2 acres could not be transferred as the Consent Judgment was being challenged through a petition and that the Court guided that the order could only be set aside by commencing a fresh action. This, as advised by his lawyers, was the basis of the action under cause 2018/HP/0619.

3.10 That contrary to the averment that the Defendant was being brought before different Courts in endless litigation over the same matter, it was actually the Defendant that commenced the first action against the Plaintiff under cause 2012/HP/0443 that led to the Consent Judgment dated 25th July 2014.Further, that all subsequent matters have been instigated in his quest to set aside the said Consent Judgment on the ground of mistake.

4. Affidavit in Reply

4.1 The Defendant filed into court an affidavit in reply dated 11th April 2024. He found intriguing to read that the Plaintiff alleged that he had encroached on his land when the Consent order which he voluntarily executed provided that it was the Plaintiff that had encroached on the Defendant's land.

4.2 He reiterated his earlier position that it was the Plaintiff who encroached on his land when he wrongfully erected a fence and a structure on his property. That this encroachment was even confirmed by the Surveyor General. He averred that the Plaintiff keeps changing his position on the purported extent of his land and now for first time alleges that the land in question has two certificates of title to make it 12.0358 hectares. However, that exhibit **"GM5"**of the Affidavit in Support and other exhibits will show that the extent of the land has always been 10.0393 hectares.

4.3 He repeated his position about the Plaintiff having had the opportunity earlier to raise the allegation that the 2.04 hectares registered in his name forms part of his land and that the land is 12.0318 hectares under cause 1996/HP/3642 and cause 2012/HP/443 but did not.

4.4 That in fact, the Plaintiff claimed under cause 2012/HP/0443 that the land in question was in extent of 10.0363 hectares and that 5 acres was to be hived off. That he counter claimed 8.0363 hectares hence the Defendant's contention that the Plaintiff was shifting positions.

4.5 He contended that it was not correct that the Consent Judgment was executed by mistake as the Plaintiff who was represented knew what he was executing seeing as he had a counterclaim in that action. He added that the statement of claim is further devoid of any pleading suggesting the Consent Judgment was executed without The Plaintiff's knowledge and participation. It was also a first for the Plaintiff to contend the Judgment was executed when there was a caveat on the property.

4.6 He added that although the Plaintiff had referred to a purported agreement between him and the Third party through its liquidator, no evidence of this had been provided.

5. **Submissions**

Both parties filed submissions in support of their positions.

5.1 The Defendant's Submissions.

5.2 In filed submissions dated 10th July 2023, the Defendant submitted that he relied on order 14 A and Order 33 rule 7 to move the court in raising this application. It was argued that the present action is a multiplicity of actions and abuse of court process as the Plaintiff is seeking to

relitigate issues which he should have raised in earlier actions but failed to do so. Reference was made to Order 18 rule 19 (18) of the RSC of England which states of abuse of court process that:

".....The term connotes that the process of court must be used bonafide and properly and must not be abused. The court will prevent the improper use of its machinery from being used as means of vexation and oppression in the process of litigation."

5.3 Also relied upon was the case of **Kelvin Hangandu and Company v Webby Mulubisha**[1] to buttress the court's disapproval of multiplicity of action.

5.4 It was submitted that this is the second action that the Plaintiff is commencing over the same subject matter against the same parties. That the Plaintiff is raising issues which he ought to have done in the earlier actions, and as such through this action attempting to have a second bite at the cherry.

5.5 Further that the Plaintiff had commenced an action against the 1st Defendant under cause 2015/HP/1083 seeking protection from deprivation of property and an order for possession of 5.9658 hectares of remaining

extent of subdivision No. 3 of farm 298 which was dismissed by ruling marked **"GM9"** in the affidavit in support by Lady Judge Kawimbe for being res judicata.

5.6 That once again the Plaintiff has moved the High Court claiming 5.9688 hectares for the same piece of land as per endorsed reliefs (b) and (c) in the writ of summons when a similar claim was dismissed earlier. That this is tantamount to multiplicity of actions and abuse of court process. The court was urged to dismiss the action in line with the authority of **Development Bank of Zambia & KPMG Peat Marwick v Sunvest Limited & Sun Pharmaceuticals Limited**[2] wherein the Supreme Court guided as follows.

> ***"We also disapprove of parties commencing a multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter."***

5.7 It was argued further that the matter over the property was settled by consent judgment rendering the matter res judicata. Also relied upon was the case of **AS&C Enterprises Ltd & Others vs Stanbic Bank Zambia Limited**[3] in which the court held.

"A party cannot commerce an action in order to claim for an alleged omitted relief that was claimed in the first action but not granted."

5.8 The Defendant further relied on the case of **Hussein Saffieddinne v the Commissioner of Lands and Others**[4] in which the Supreme Court held.

"the rational for res judicata was that there must be an end to litigation in the interests of the good administration of justice, the public and the litigants by preventing abusive and duplicative litigation, and that it was unjust for a party to be vexed twice with litigation on the same subject matter. Res judicata was an affirmative defence, barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction, or series of transaction, and that could have been but was not raised in the first suit. The three essential elements were an earlier decision on the issue, a final judgment on the issue and the involvement of the same parties. Res judicata was not only confined to similarity or otherwise of the first and second claims, but extended to the opportunity to claim matters which existed at the time of instituting the first action."

5.9 **Hendeson v Hendeson**[5] was further relied upon to buttress the Defendant's position on the Res judicata principle. It was argued therefore in applying the stated

authorities, that it would be unjust for the Plaintiff to continue subjecting the Defendant to litigation over the same subject matter when three (3) earlier decisions of the High Court subsist over the same matter.

5.10 In answer to the question posed on whether the Plaintiff can in an action seeking to set aside a consent judgment seek a variation of the terms if the consent order, reliance was placed on **Halsbury's Laws of England 23rd Edition volume 4** wherein the authors state:

"A judgment given or an order made by consent may on fresh action brought for the purpose be set aside on any grounds that would invalidate a compromise not contained in a judgment or order. Compromises have been set aside on the ground that the agreement was illegal as against public policy or was obtained by fraud or misrepresentation or non-disclosure of a material fact which there was an obligation to disclose or by duress or was concluded under a mutual mistake of fact, ignorance of a material fact or without authority."

5.11 Further referred to was the case of **Zambia seed company Limited v Chartered International (PVT) Limited**[6] wherein the Supreme Court held that a consent judgment can be set aside though a fresh action to challenge such order.

5.12 It was submitted that the authorities therefore conclude that the result of a challenge to a consent order is to have it set aside and not its variation. However, that a read of the pleadings will show that the Plaintiff is seeking to have the terms of the Consent Judgment under cause 2012/HP/0443 on the extent of the land in issue varied on account of the alleged mistake. That this is a total misapprehension of the law on consent judgments.

5.13 It was further argued on authority of **William David Carlisie Wise v E.F Harvey Limited**[7] that the Plaintiff has not disclosed a cause of action granted his shift of position on what the extent of the land is from what he stated in the 2012/HP/443 matter to his contention now.

5.14 It was argued further that although the Plaintiff seeks to set aside the Consent Judgment on ground of mistake, the pleadings do not set out the particulars of the alleged mistake nor when he became aware of it so as to inform the other side the nature of the case they have to meet.

5.15 It was argued that there can be no mistake or misrepresentation claimed in this case as the parties were alive to the fact that the land which the Third party had acquired as mortgagee in possession was 10.0393

hectares. The lands print out obtaining at that material time was advanced to be exhibit **"GM4."**

5.16 Further that the Plaintiff filed a defence and counterclaim and in paragraph 3 pleaded that his land was in extent 10.0363 hectares contrary to his assertion that it was 12.0365 hectares. That the fact that the property was in extent of 10.0363 hectares at all material times was not disputed by the parties in the previous proceedings under cause number 2012/HP/0443 before the action was resolved by consent on the 25th of July 2014. That the Plaintiff had the opportunity to claim in the earlier action for the new relief being sought but did not.

5.17 Finally, in his last limb of the argument the Defendant asks whether the Plaintiff is guilty of inordinate delay in challenging the Consent Judgment warranting a bar to have it set aside. The Defendant relies on the case of **Standard Chartered Bank PLC v Chansa Kabwe**[7] wherein the High Court held :

"1. A consent order can be set aside on grounds of fraud or mistake (2) but special circumstances have to exist before a party can rely on mistake in order to escape liability under a consent (3) parties are expected to urgently apply to set aside

consent orders as time is a factor that needs to be considered."

5.18 It was pointed out there had been delay of well over 3 years for the Plaintiff to allege the issue he does. The Defendant prayed that the matter be dismissed for the failure to urgently apply to set the consent order aside within a reasonable time.

6. The Plaintiff's submissions

6.1 The Plaintiff filed arguments in opposition dated 28th March 2024. It was argued that consent judgments are governed by ordinary principles of the law of contract and as such can only be set aside in circumstances that would afford a ground for varying or rescinding a contract between the parties. These grounds include fraud, mistake, misrepresentation.

6.2 Reliance was placed on the case of **Maureen Simpamba v Abraham Kamalamba**[9] in which Chisanga J sitting as High Court Judge cited the case of **Munster v Cox**[10] wherein Lord Fitzgerald stated the following:

"I have always understood it as a settled rule that where parties withdraw the answers from the jurisdiction and do not seek to obtain a judgment according to law but substitute

for it a judgment by their own consent, the court has no power to alter that consent. If the consent has been obtained by fraud or surprise, it may set it aside and if the proceedings upon it have been improvident, it may vacate the proceedings."

6.3 Also relied upon is the case of *Zambia Seed Company Limited V Chartered International Private Limited* (supra) in which the Supreme Court held that by law, the only way to challenge a consent judgment would be to start an action specifically to challenge the consent judgment. Therefore, that challenging a consent order by commencing a fresh action to set it aside is the correct approach and the authorities cited support the principle that a court can set aside a consent judgment on any grounds that can invalidate an agreement or contract between parties.

6.4 It was submitted that the Plaintiff correctly followed procedure required to set aside the Consent Judgment dated 25th July 2014 by commencing a separate action on the ground of mistake.

6.5 In response to the Defendant's argument that the matter is res judicata, it was submitted that the principle is

intended to prevent parties from having to relitigate issues that have already been determined by a court of law. **Paragraph 1166 of Halsbury's laws of England 5th ed vol 11** was cited in aid in which the doctrine is explained thus that:

"...The law discourages litigation of the same issues except by means of an appeal. It is not in the interest of justice that there should be a retrial of a case which has already been decided by another court, leading to the possibilities of conflicting judicial decision or that there should be collateral challenge to judicial decisions."

6.6 It was argued that in order for the principle of res judicata to hold, it is necessary to show that the cause of action was the same and that the same point has been actually decided between the same parties.

6.7 The Plaintiff went on to rely on the learned authors of **Halsbury's laws of England 4th edition (reissue) vol 16 (2)** wherein they observe:

"If however, there is a matter subsequent which could not be brought before the court at the time, the party is not stopped from raising it."

6.8 It was submitted as not in dispute that the Plaintiff has commenced a fresh action to set aside the Consent

Judgment and that this court has not yet pronounced itself on the matter. Therefore that the principle of res judicata does not arise and the notion that the Plaintiff is relitigating the matter is misplaced.

6.9 In responding to the argument that no cause of action is disclosed, it was the Plaintiff's submission that he has sufficiently disclosed such cause in his statement of claim by outlining the following factual issues in paragraph 4 (1) (ii) and (iii) wherein he has pleaded that:

(i) mistakenly, it was thought and believed and reflected in the consent judgment that the Plaintiffs land was in extent 12.0358 hectares when in fact it is only 10.0393 hectares.

(ii) There was in the consent order no particularization of the piece of land to be given to the Defendant resulting into the Defendant claiming the Plaintiff's already developed land wherein the development goes to the tune of three million Kwacha (3,000,000) *and (iii) Further mistakenly the Defendant was given 6.07 hectares instead of 4.07 hectares.*

6.10 It was argued that the foregoing extract of the Plaintiff's pleadings clearly brings out a cause of action through factual issues on which this court should make a determination. The Plaintiff prayed that the Defendant's preliminary issue be dismissed accordingly.

7. Hearing.

7.1 At the hearing held on 25th April 2024, Counsel for the Defendant relied on the documents filed in support of the application which she augmented with oral submissions. The oral arguments were in essence a repeat with emphasis of what were the filed arguments. Learned counsel Mutemi however also informed the Court that the Defendant would be abandoning the last limb of the questions raised relating to the alleged delay in raising the challenge of the Consent Judgment in issue.

7.2 She summed up her arguments by submitting that the Defendant had demonstrated that the land in dispute had always been 10.0393 hectares a fact confirmed by the Plaintiff in his pleadings before this Court. That 2 courts have made a determination on the question of the extent of the Plaintiff's land and the Plaintiff had an opportunity to raise these issues which he did not. She prayed that the matter be dismissed accordingly.

7.3 Learned Counsel Siwila on behalf of the Plaintiff equally relied on documents filed in opposition to the application which he supplemented with oral arguments. He insisted as submitted in written arguments that the issue before

this Court has not been determined by any Court. That the 1996 action was a mortgage action and had nothing to do with the Defendant. That the Defendant was only a part of the 2012 matter hence the issue of the extent of the land could not have been raised at that point. Therefore, that re-judicata cannot apply.

7.4 He argued further that sufficient particularity has been provided under paragraph 4 of the statement of claim disclosing a cause of action. Further that contrary to the Defendant's submission, the Plaintiff seeks to set aside the Consent Judgment and not to vary it.

7.5 In reply Miss Mutemi submitted that whilst it was true that the Defendant was not a party to the 1996 action, the Third party and the Plaintiff were and the extent of the land foreclosed was 10 hectares. That the record would show that it was from this 10 hectares that the 6-7 hectares was sold by the Third party to the Defendant.

7.6 She submitted that the Plaintiff did not in his counterclaim challenge the extent apportioned to the Defendant in the 2012 matter when he had the opportunity to do so. She reiterated her position that no cause of action had been disclosed because what the

Plaintiff alleges as being factual in paragraph 4 of the statement of claim does not exist.

8. Court's consideration

8.1 I have carefully considered the parties affidavits and respective arguments. The undisputed facts discerned from the documents before me is that subdivision 3 of Farm No. 298a Lusaka was the subject of a mortgage action under cause 1996/HP/3642. African Commercial Bank (in liquidation) commenced this action against the Plaintiff Mr. Derrick Chitala, to recover an unpaid mortgage in which the property was offered as security.

8.2 Judgment was delivered in favour of the Bank. Also discernable from the affidavits is that African Commercial Bank Limited (in liquidation) then sold a portion of that property to the Defendant in this present action. It is contended by the Defendant that the extent sold to him was 6.075 hectares.

8.3 The Defendant as new owner then commenced an action against the Plaintiff contending that he had encroached on what was a part of the 6.075 hectares that he had bought. That action culminated into a consent judgment dated 25th July 2014. A subsequent petition filed by the

Plaintiff over the subject piece of land was dismissed under cause 2015/HP/1083 for being an abuse of court process. The Plaintiff in the present action seeks to challenge the Consent Judgment entered on 25th July 2011 on the ground of mistake.

8.4 The preliminary issue raises a number of questions hinging on whether or not the matter is res judicata; whether a cause of action is disclosed, and a party can through a fresh action, seek to vary as opposed to set aside a consent order.

8.5 In dealing with the first question which in my view determines the whole preliminary issue if successful, I find that the parties aptly cite the relevant authorities on the doctrine of res-judicata, its value and when it applies. I find the summation by the Supreme Court in **Bank of Zambia vs. Tembo & others**[11] particularly useful in which the courts observes 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 the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that he seeks to recover in the second. A plea

of res judicata must show either an actual merger or that the same points had been actually decided between the same parties. Where the former judgment has been for the defendant, the conditions necessary to exclude the plaintiff are not less stringent. It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue."

The court concluded that res judicata is a strict rule of law and that parties are bound by any decision made by a competent court.

8.6 In **ANZ Grindlays Bank (Z) Limited v Kaoma**[12] the Supreme Court held that in order for the defence of res judicata to succeed, it is necessary to show not only that the cause of action was the same, but also that the plaintiff has had no opportunity of recovering in the first action that which he hopes to recover in the second.

8.7 Further, in the case of **BP Zambia Plc vs. Interland Motors Limited**[13], the Supreme Court elaborated the undesirability of multiplicity of actions that may result when it observed that:

8.8 "in terms of section 13 of the High Court Act, as well as in conformity with the Court's inherent power to prevent abuse

of its processes, a party in dispute with another over a particular subject should not be allowed to deploy his grievances piecemeal in scattered litigation and keep on hauling the opponent over the same matter before various Courts. The concern of the Court in parties re-litigating matters, is that the administration of justice would be brought into disrepute if parties managed to get conflicting decisions which undermined each other from two or more different judges over the same subject matter"

In the *Bank of Zambia vs Tembo* matter(supra) the Supreme court aptly concluded the essence of the plea of res judicata in the following terms:

" We would uphold the preliminary objection raised by the counsel for the respondent and in conclusion we would invoke the legal maxim interest republican us sit finis litium, meaning that it is in the public interest that there should be an end of litigation".

8.9 There is no question that the Defendant was not a party to the 1996 action. He and the Plaintiff were however parties to the 2012 action, the 2015 petition, and the present action. The question of the setting aside of a Consent Judgment I agree, was never a subject of determination before any of the courts that deliberated on the cases before them. However undisputable is that at

the center of the dispute was the land in issue that was the subject of the Consent Judgment now sought to be set aside.

8.10 I agree with the Defendant that the original property was always presented to be 10.0363 hectares. This is indeed the extent that the Plaintiff refers to in his statement of claim filed into court in the present cause 2018/HP/0819. He did not in the 2012 case in which he was sued for encroachment raise any issue about the extent of the land nor did he do so earlier in the mortgage action.

8.11 The extent of the property in the 1999 mortgage action is as set described in the title deed and considered in the judgment by Mambilima J sitting as a High Court Judge as she was then, was presented as being 10.0393 hectares. The change of position and insistence that he mistakenly believed the property was actually 12.0358 hectares is the basis of the Defendant's contention that what is presented as factual in paragraph 4 of the statement of claim is in fact nonexistent and hence disclosing no cause of action against him.

8.12 However, focusing on the argument of res judicata, I would agree that the Plaintiff did have the opportunity to raise this issue in the 1999 and 2012 matters. He did not in his counterclaim in the 2012 matter state anything about his belief that the land was 12.0358 hectares and presents nothing before the court to confirm such position. The Consent Judgment itself makes no such mention.

8.13 In the 2015 Petition commenced by the Plaintiff, Lady Justice Kawimbe sitting as a High Court Judge as she was then considered the issues relating to the land in issue were already the subject of determination and dismissed the matter for being res judicata and an abuse of court process on that premise

8.14 I further find as unquestionable that the Plaintiff does in essence through this action seek not only to set aside the consent Judgment but to vary it. Under paragraphs "b" and "c" of the endorsement in the statement of claim he prays for:

"(b) An order allocating the Defendant with 4.07.05 hectares from the 10.0393 hectares on stand No. 293a/3 instead of 6.07 hectares.

(c) An order demarcating, particularizing and or describing the 4.0705 hectares from the 10.0393 hectares on stand No 298a 13 allocated to the Defendant which piece of land must exclude the land already developed by the Plaintiff which the Defendant is claiming is part of his."

8.15 Without a doubt the Plaintiff's action is not solely based on his desire to set aside the Consent Judgment but to vary it entirely. The court has no jurisdiction to do so. Only the parties themselves can vary a consent order. All that a court can do when a fresh action is commenced to set aside a consent order is precisely that- set it aside if satisfied that a case of fraud, misrepresentation or common mistake has been made out by the party seeking to set it aside.

8.16 The inclusion of the other prayers is an invitation to consider what in essence was settled by the Consent Judgment. It is on that premise and indeed based on my acceptance of the argument that the Plaintiff had an opportunity to raise the issues he seeks to in the earlier actions that I find that the matter is res judicata.

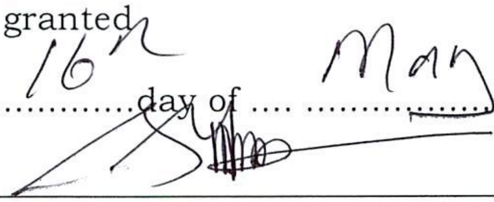
8.17 The effect of this finding is that the entire matter is then determined and there is no need for me to consider the

arguments on whether or not a cause of action has been disclosed. The preliminary issue succeeds and this matter stands dismissed with costs to be taxed in default of agreement.

8.18 Granted the position I have taken, it also becomes unnecessary for me to consider the application for an injunction filed by the Plaintiff on the 5th March 2025 whilst I was writing this ruling as it quite clearly cannot be entertained.

8.19 Leave to appeal is granted.

Dated at Lusaka the ....16th....day of ....May.........2025



JUDGE