

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2022/HP/1213



BETWEEN:

**ETHEL BROME
CHARMAINE BROME
TIONENJI BROME**

**1ST PLAINTIFF
2ND PLAINTIFF
3RD PLAINTIFF**

AND

FREDRICK CHITUTA**DEFENDANT**

**BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 10TH JUNE, 2024 - IN CHAMBERS**

For the Plaintiff : Mrs. W.S. Kakondo – Stasion Oliver & Kennedy Legal
Practitioners, Mesdames Sil & Kay Advocates
For the Defendant : Mr. T. Chali – Tresford Chali Legal Practitioners

RULING

CASES REFERRED TO:

1. *Mukubika Mukubika + Four Others V Nkwilimba Choobana Lubinda+ 5 Others* 2003 Z.R. 55
2. *Development Bank of Zambia and Another V Sunvest Limited and Another* 1995-1997 Z.R. 187
3. *BP Zambia PLC V interland Motors Limited* 2001 Z.R. 37
4. *Valetine Webster Chansa Kayope v The Attorney General* S.C.Z Judgment No. 18 of 2011
5. *Kelvin Hang'andu and Company (A firm) V Webby Mulubisha* 2008 Z.R. 82 Vol. 2 S.C.

AUTHORITIES & OTHER WORKS REFERRED TO:

1. *The Limitation Act of 1939*
2. *The Rules of the Supreme Court (White Book) 1999 Edition*
3. *The High Court Act Chapter 27 of the Laws of Zambia*
4. *Zambian Civil Procedure: Commentary and Cases*

This action was commenced by way of writ of summons accompanied by a statement of claim. The plaintiff's claim is for-

1. *A declaration that by reason of the breach by the defendant the plaintiffs are no longer bound to perform the contract;*
2. *A declaration that the deposit of K40,000.00 paid under the said agreement has become forfeited to the plaintiff;*
3. *An order that the defendant's do deliver up possession of the said property to the plaintiff forthwith;*
4. *A declaration that the plaintiff is entitled to resell the said property and recover any loss on such resale from the defendant;*
5. *Damages for breach of contract;*
6. *Interest on all sums found due;*
7. *Any other relief the court deems fit and*
8. *Costs.*

The memorandum of appearance of defence and counter claim were filed on the 2nd September, 2022.

On the 12th October, 2022 summons for consolidation of action pursuant to section 13 of the High Court Act Chapter 27 of the Laws of Zambia was filed. This was for the consolidation of cause number 2022/HP/1213 and cause 2022/HP/1211. The reasons for this position are as contained in the affidavit in support deposed to by the defendant Fredrick Chituta. On the 11th May,

2023 a notice of motion to raise a preliminary issue and to dismiss counter claim on a point of law pursuant to Order 14A Rule 1(a)(b) as read together with **Order 33 Rule 3 and 7 of the Supreme Court Rules of England 1965 (White Book 1999) Edition** was filed.

The reason for doing so is for the court to determine whether the defendant's counter claim is statute barred in light of the provisions of the Limitation Act of 1939. The plaintiff among others relied on the affidavit in support of notice of motion to raise a preliminary issue and to dismiss counter claim on a point of law deposed to by Ethel Brome.

It is a fact that the defendant among the claims in the counter claim included an order for payment of K40,000.00 being the value of the cattle, goats, sheep, fowls and pigs slaughtered by the plaintiff's dogs.

In paragraph 22 the defendant stated that according to his computation he had finished paying what he owed the plaintiff and had over paid the plaintiffs by K16,000.00.

Upon the defendant's own admission in paragraph six (6) of his affidavit in opposition to notice of motion to raise a preliminary issue and to dismiss counter claim on a point of law deposed that he has been advised by his lawyer and verily believe it to be true that his claim for twenty four thousand kwacha K24,000.00) is

statute barred. Further in paragraph seven (07) that he has been advised by his lawyer and verily believe it to be true that his claim for K16,000.00 is not statute barred.

The evidence before me which evidence was not disputed was that the incident for which the defendant was claiming K24,000.00 occurred some time in 2012. Meaning the incident occurred nine years after the date when the claim has been raised. The plaintiff was on firm ground when she relied on **section 2 of the Limitation Act of 1939** which provides that:

“2(1) The following actions shall not be brought after the expiration for six years from the date on which the cause of action occurred; that is to say-

(a) Actions founded on simple contract or tort.”

The respondent's counter claim as far as the plaintiff is concerned is statute barred as it has been brought outside the six (6) year period prescribed by the Limitation Act of 1939. However, despite conceding that the refund of the twenty four thousand kwacha for the slaughter of his animals by the plaintiff's dogs the defendant has stood his ground that his claim for sixteen thousand kwacha being an over payment he claimed be paid on the purchase price for the sale of a five (5) acre plot the same is not statute barred.

I have observed that although the defendant's claim in part was for an order for payment of K40,000.00 being the value of the

cattle, goats, sheep, fowl and pigs slaughtered by the plaintiff's dogs. In his affidavit to notice of motion to raise a preliminary issue and to dismiss counter claim on a point of law he separated the amount into two. That is K24,000.00 for the slaughter of his animals and K16,000.00 being a claim for a refund he alleges is owed to him for an over payment. I note that in paragraph 21 and 22 of his defence he split the figures stating that the value of the animals slaughtered is K24,000.00 whilst the over payment was K16,000.00.

For this reason, although the claim for K24,000.00 the value of the animals slaughtered is statute barred the same cannot be said for the claim of K16,000.00. The court is of the view that on this amount the court ought to hear the parties and a decision rendered on merit. On the application for consolidation of actions that is cause 2022/HP/1213 and cause 2022/HP/1211. According to the defendant in both of land F/196a/F/4. That he is down as an unknown person. That he seeks to be granted F/196a/F/4 which the plaintiffs want to repossess in the action whose cause No. is 2022/HP/1211. That the defendant in cause 2022/HP/1211 is the seller to him of part of F/196a/F/4 after the land was given back to him in compliance with a judgment.

Produced was copies of the contract of sale agreement to return the land and the High Court ruling dated 3rd January, 1995 and marked FC1. That in both cases, the plaintiffs seek the possession

of the land known as F/196a/F/4. In his skeleton arguments the defendant referred the court to **section 13 of the High Court Act** states in part that:

“In every civil cause or matter which shall come in dependence in the court, law and equity shall be administered concurrently and the court, in the exercise of the jurisdiction vested in it, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.”

I was referred to the case of **Mukubika Mukubika + Four Others V Nkwilimba Choobana + 5 Others**¹ in which the court stated as follows:

“Both parties appear to us to be agreed on the principle governing consolidation namely; common question of law or facts and rights to relief arising out of the same transaction. The rationale for consolidation, namely saving of costs, is also agreed. What is in issue here is whether the facts raise the question of multiplicity or duplicity of actions. On behalf of the appellants the argument is that there were here two parallel, duplicate actions and therefore nothing to consolidate.”

I was also referred to the case of *Development Bank of Zambia and Another V Sunvest Limited and Another*² where it was stated that:

“We also disapprove of parties commencing a multiplicity of procedures and proceedings and indeed a multiplicity of actions over the same subject matter. The objection raised by the borrowers in this action to the Bank pursuing the remedy of self-redress in this action, that an action was pending, applies with equal force to the whole idea of the borrowers commencing a fresh action when there is already another one pending in the Court with the result that the various Courts may end up making various conflicting and contradictory decisions because the parties have started another action in the Courts.”

Other cases I was referred to included *BP Zambia PLC V Interland Motors Limited*³ in which it was held that:

“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 same opponent over the same matter before various Courts.”

In *Valetine Webster Chansa Kayope v The Attorney General*⁴ where it was held that:

“To achieve finality and avoid multiplicity of proceedings on these set of facts, the learned trial Judge should have determined the appellant’s counter-claim. He erred in law by refusing to determine it and advising the appellant to commence fresh proceedings on the general list. Commencing fresh proceedings would have amounted to multiplicity of actions and would be against section 13 of the High Court Rules and

Development Bank of Zambia and Another V Sunvest Limited and Another.”

Lastly, I was referred to the case of *Kelvin Hang'andu and Company (A firm) V Webby Mulubisha*⁵ where the Supreme Court held as follows:

“Once a matter is before court in whatever place, if that process is properly before it, the court should be the sole court to adjudicate all issues involved, all interested parties have an obligation to bring all issues in that matter before that particular court. Forum shopping is abuse of process which is unacceptable.”

In an affidavit in opposition to summons for consolidation of actions Ethel Brome the 1st plaintiff deposed as follows:

- 1. That in response to the contents of paragraph 3 to 8 of the affidavit in support she wishes to state that Cause No. 2022/HP/1213 was commenced against the defendant as a result of a breach of agreement by the defendant for the sale of a proposed subdivision on stand No. 196a/F/4/2 measuring in extent of 10 acres. There is now produced and shown to me marked **EB/1** true copy of the writ of summons and statement of claim.*
- 2. That further to paragraph 4 above, she wishes to state that Cause No. 2022/HP/1211 on the other hand is a separate and distinct issue of squatters who encroached on a portion of Stand No. 196a/F/4/legally owned by herself, the 2nd and 3rd plaintiff. There is now produced and show to me marked*

EWB/2 and **EB/3** true copy of the certificate of title and Originating Process for Summary Possession against the respondent, Timothy Mulenga alleged squatter.

3. That she wishes to state that that under cause no. 2022/HP/1211 the defendant and respondent are different and the causes of action are clearly distinct and not arising from the same transaction or series of transactions.
4. That she further wishes to state that the respondent, Timothy Mulenga under cause No. 2022/HP/1211 through his lawyers filed a notice of motion to raise preliminary issue and the said motion was argued and currently pending delivery of ruling before Hon. Justice G. Salasini. There is now produced and shown to me marked **EB/4** true copy of the said application filed by the respondent's lawyers in cause No. 2022/HP/1211.
5. That as regards paragraph 7 of the affidavit in opposition she wishes to state that the issues raised in the said paragraph are distinct from this cause currently pending ruling before Justice G. Salasini following hearing on a notice to raise preliminary issue filed by the respondent, Timothy Mulenga in the said matter as stated in paragraph 7 above.
6. That she was reliably informed by Counsel and verily believe the same to be true that the defendant's application for consolidation of actions is premised on a wrong legal provision.

7. That she deposes to this her affidavit verily believing that the same to be true and correct to the best of her knowledge.

In the skeleton arguments filed by the plaintiffs the court was referred to **Order 4 Rule 9(1) of the Rules of the Supreme Court (White Book) 1999 Edition** which states that:

“Where two or more causes or matters are pending in the same division and it appears to the court-

1. *That some common question of law or fact arises in both or all of them, or*
 - (b) That the right to relief claimed therein are in respect of or arise out of the same transaction or series of transactions,*
 - or*
 - (c) That for some reason it is desirable to make an order under this paragraph*

The Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after determination of any other of them.”

I was further referred to the **Zambian Civil Procedure: Commentary and Cases** by Dr. Patrick Matibini with respect to consolidation of matters where at page 323 he explains that:

“The primary purpose of consolidation is to have issues that are substantially similar, tried in a single hearing, in order to save time and costs that ensue from

a multiplicity of actions. Therefore, where there are two or more plaintiffs and two or more causes of action, they may be consolidated into a single action if the right to relief and the causes of action arises from the same act or transaction or there is 'some common question of law or fact bearing sufficient importance in proportion to the rest' of the subject matter of the actions 'to render it desirable that the whole should be disposed at the same time'

On whether or not the two actions have common questions of law or facts. It was submitted that the action was commenced against the defendant as a result of a breach of agreement by the defendant for the sale of a proposed subdivision on stand 196a/F/4/2 meaning in extent of 10 acres. That cause No. 2022/HP/1211 is a separate distinct issue of squatters who encroached on a portion of stand No. 196a/F/4 Lusaka. That cause 2022/HP/1211 **Order 113 of the Rules of the Supreme Court of England** provides for the procedure to be followed when dealing with squatters.

That **Order 113** provided as follows;

"Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order."

That it has been demonstrated that the actions do not have common questions of law and facts or the rights to relief being claimed.

On whether or not the same rights or relief are likely to arise out of the two actions, that under this action the plaintiff seeks damages for breach of contract and recovery of a proposed subdivision on stand No. F/196a/F/4. That the plaintiffs under cause No. 2022/HP/1211 seek an order for eviction of the respondents and other persons unknown occupying a portion of stand No. F/196a/F/4 and Order for possession of the said property. On the irregularity of the defendant's application to consolidate actions the court was referred to **Order 4 Rule 9(1) of the Rules of the Supreme Court**. That the defendant has cited **section 13 of the High Court**. It was submitted that the heading of the summons is highly misleading. That in terms of our rules and practice applications for consolidation of action are brought pursuant to **Order 4 Rule 9(1) of the Rules of the Supreme Court**.

It was further submitted that it is always necessary, on the making of applications for the summons or notice of application to contain a reference to the order or rule number or other authority under such relief is sought.

I have taken into consideration the contents of the affidavit in support of summons for consolidation of action, the exhibits, filed as well as the defendant's skeleton arguments.

I have also taken into consideration the affidavit in opposition to summons for consolidation of actions, the exhibits filed as well as the plaintiff's skeleton arguments in opposition.

THE LAW

The basis for this application is as provided for under **Order 4 Rule 9(1) of the Rules of the Supreme Court (White Book) 1999 Edition** in which it is stated that:

“Where two or more causes or matters are pending in the same division and it appears to the court-

2. That some common question of law or fact arises in both or all of them, or

(d) That the right to relief claimed therein are in respect of or arise out of the same transaction or series of transactions, or

(e) That for some reason it is desirable to make an order under this paragraph

The Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after determination of any other of them.”

It is a fact that there are two matters before the High Court General list cause 2022/HP/1211 before Judge Salasini and 2022/HP/1213 before this court.

According to the defendant the plaintiffs commenced this action on the 9th August, 2022 against the defendant's claiming among other issues, possession of stand No. F/196a/F/4. That on the same day the plaintiff commenced an action under cause 2022/HP/1211 against Timothy Mulenga claiming possession of the same stand No. F/196a/F/4).

Exhibit is a sale agreement between Ethel Brome Mbaya the seller and Fredrick Chituta the buyer. The seller agreed to sale farm number 196a sub 4 and the buyer agreed to buy the said property on the 11th September, 2011. The terms and conditions were specified in the agreement.

According to the plaintiff cause No. 2022/HP/1213 was commenced against the defendant as a result of a breach of agreement by the defendant for the sale of a proposed subdivision on stand No. 196a/F/4/2 measuring in extent of 10 acres. That cause No. 2022/HP/1211 is a separate and distinct issue of squatters who encroached on a portion of stand No. 196a/F/4 legally owned by the 1st, 2nd and 3rd plaintiff. That under cause 2022/HP/1211 the defendant and respondent are different and the causes of action are clearly distinct and lot arising from the

same transaction or series of transactions. That what is pending before Judge Salasini under cause 2022/HP/1211 is an application to raise a preliminary issue by the respondent Timothy Mulenga. Further that there is a ruling that is pending.

From the evidence before me it is my considered view that the two actions, actions do not have common questions of law and facts.

In the matter before me the plaintiff's claim is clear the declaration sought is for a breach of contract which may or may not result in the forfeiture of the amount paid, possible delivery of possession for the said property the possible entitlement to resell the property and the possible entitlement to resell the property and the possible damages for breach of contract.

Exhibit **EB13** the affidavit in support of originating summons where the applicants are the same as the same plaintiffs before me but where the respondents in EB13 are Timothy Mulenga and Other persons unknown whilst in the matter before me the defendant is Fredrick Chituta. Mr. Chituta wants the court to term him as one of the unknown persons. If this is so then he should join the proceedings before Judge Salasini as a known person.

It is clear that cause No. 2022/HP/1211 was occasioned as a result of an alleged encroachment. It follows that reliefs sought out of the two actions are not the same.

It is my considered view that it will not be just for me to order the consolidation of these two matters. The primary purpose of consolidation is to have issues that are substantially similar; tried at a single hearing. I can understand the logic behind this as it is done to save time and costs and ensure that we avoid multiplicity of actions. However, as stated the right to relief and the causes of action do not arise from the same act or transaction nor is there is a common question of law or fact bearing sufficient importance in proportion to the rest of the subject matter of actions to render it desirable that the whole should be disposed at the same time.

The application is dismissed with costs to the plaintiff to be assessed if not in agreement.

Leave to appeal to the Court of Appeal is hereby granted.

DELIVERED AT LUSAKA THIS 10TH DAY OF JUNE, 2024.


G.C. CHAWATAMA
HIGH COURT JUDGE