

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

2022/HP/1856

BETWEEN:

JOSEPH KAPAMBWE MULENGA
(T/A Cornerstone Properties
&Infrastructure Development)

**PLAINTIFF**

AND

MASTER BUTCHERIES LIMITED
ZAMBIA NATIONAL COMMERCIAL BANK PLC
C&S INVESTMENTS LIMITED

1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 28th
DAY OF JULY, 2023**

For the Plaintiff : Ms. Florence Kafwimbi – Messrs. M. C Mulenga and
Company

For the 1st Defendant : No appearance

For the 2nd Defendant : Mr. P. Chomba and Mr. O. Hasalama- Messrs. Mulenga
Mundashi Legal Practitioners

For the 3rd Defendant : Mr. Z. Sampa and Mr. C. Domingo – Messrs. Simeza
Sangwa Associates

RULING

CASES REFERRED TO:

1. *Henderson v Henderson (1843 to 1860) ALL ER, Reprint 378*
2. *Millington v Loring 1881 6 QBD 190*
3. *N.W Salt Co. Ltd v Electrolytic Alkali 1913 3 KB 422*
4. *Rex v General Medical Council Ex Parte Sparkman 1942 2 KB 261*
5. *Ang Lam v Rosillosa et al. 86 Phil 448 1950*
6. *Alfredo Ching v The Honourable Court of Appeals 7 Predo Asedillo
G.R No. L 59731*
7. *Mohandas Issardas v A.N Sattanathan AIR 1955 Bom 11*
8. *Letang v Cooper 1964 2 ALL ER*
9. *Wenlock v Maloney 1965 1 WLR 1238*

10. *Drummond-Jackson v British Medical Association* 1970 1 ALL ER 1094
11. *Mulenga v Mumbi ex parte Mhango* 1975 ZR 78.
12. *Goldup v John Manson Ltd and another* 1981 3 ALL ER 257
13. *Wise v E. F Harvey Limited* 1985 ZR 179
14. *Ashmore v British Coal Corporation* 1990 2 ALL E.R 990
15. *Jowell v Bramwell Jones* 1998 (1) SA 836 at 902J - 903B
16. *Attorney General and the Speaker v The People* 1999 ZR 186
17. *BP Zambia PLC v Interland and Motors Ltd* 2001 ZR 37
18. *Bank of Zambia v Jonas Tembo and others* 2002 ZR 103
19. *Mike Hamusonde v Kamfwa Kasongo and others* 2006 ZR 101
20. *Barclays Bank Zambia Plc v ERZ Holdings Limited and Others, Appeal Number 71 of 2007*
21. *Shenghai International Mining Limited v Component Centre Limited* SCZ Appeal No. 171/2008
22. *Edgar Hamuwele (Joint Liquidator of Lima Bank Limited (In Liquidation), Christopher Mulenga (Joint Liquidator of Lima Bank Limited (In Liquidation) v Ngenda Sipalo and Brenda Sipalo* SCZ Judgment No. 4 of 2010
23. *Amber Louise Guest and another v Makinga and another* 2011 Vol 1 ZR 370
24. *Mumba v Zambia Revenue Authority* Appeal No. 123 of 2013
25. *Hussein Safieddinne v Commissioner of Lands & Others* Appeal 142 of 2013
26. *Stanbic Bank and Micoquip Zambia Limited* Appeal No. 180 of 2015
27. *Nkana Alloy Company Limited v The Attorney General and Others* 2015/HP/0495
28. *Mpongwe Farms Limited v Dar Farms and Transport Limited* 2016 Vol 3 ZR
29. *Mpongwe Farms Limited v Dar Farms and Transport Limited* Selected Judgment No. 38 of 2016
30. *African Banking Corporation Zambia v Mubende Country Lodge Limited* SCZ Appeal No. 116/2016
31. *Hamalambo v Zambia National Building Society* Appeal N. 64 of 2013 [2016] ZMSC
32. *Indeni Petroleum Refinery Co. Ltd v Kafco Oil Limited, Andrew Bungoni, Silas Mumba and Emmanuel Shikaputo* Selected Judgment No. 29 of 2017
33. *Melissa Supermarket Limited vs Stanbic Bank Zambia* 2017/ HPC/ 0036 2018 ZMHC 447 (16th January 2018)
34. *Muvi TV Limited v Phiri & another* (Appeal No. 13 of 2015) [2018] ZMSC
35. *Million Hamung'ande & Others v Mulopa* Appeal No. 84 of 2019
36. *Betty Chizyuka v Finance Bank Zambia Limited* CAZ Appeal No. 137 of 2019

37. *Ward and Others v Savill*

LEGISLATION REFERRED TO:

1. ***The High Court Act, Chapter 27 of the Laws of Zambia***
2. ***The Rules of the Supreme Court of England, 1999 Edition***

OTHER WORKS REFERRED TO:

1. ***Atkins Court Forms, Vol 29***
2. ***Black 's Law's Dictionary, 8th Edition***
3. ***Black's Law Dictionary 9th Edition by Bryan A. Garner, Thomas Reuters, 2009***
4. ***Black's Law Dictionary, 10th Edition, by Bryan A. Garner***
5. ***Halsbury's Laws of England, Volume 30, 3rd Edition***
6. ***Halsbury's Laws of England, 4th Edition, Volume 16***
7. ***Halsbury's Laws of England, Volume 16, 4th Edition reissue***
8. ***Halsbury's Laws of England, 4th Edition, Vol 36***
9. ***Odgers Principles of Pleadings and Practice, 22nd Edition***
10. ***Strouds Dictionary***

1. INTRODUCTION

1.1 This Ruling is on Two (2) applications. The first application was filed on 10th January, 2023, by C & S Investments Limited, the 3rd Defendant herein, for an Order to strike out the statement of claim, and to dismiss the action. The application was made pursuant to ***Order 18 Rule 19 of the Rules of the Supreme Court of England 1965, (1999 Edition)***, and it is supported by Skeleton Arguments.

1.2 The Plaintiff, Joseph Kapambwe Mulenga, in opposition to the application, filed a List of Authorities and Skeleton Arguments in opposition on 20th February, 2023. Then on 14th March, 2023, C & S Investments Limited, filed Skeleton Arguments in reply to Joseph Kapambwe Mulenga's opposition.

1.3 The second application was filed by the 2nd Defendant, Zambia National Commercial Bank Plc, on 16th February, 2023, for

determination of questions of law and for Judgment, pursuant to ***Order 14A of the Rules of the Supreme Court of England, 1965 (1999 Edition)***, as read together with all the enabling law. In support of the application, Zambia National Commercial Bank Plc filed an affidavit and Skeleton Arguments.

1.4 On 14th March, 2023, C & S Investments Limited filed Skeleton Arguments in support of Zambia National Commercial Bank Plc's application. Joseph Kapambwe Mulenga filed an affidavit and Skeleton Arguments in opposition on 17th and 18th April, 2023 respectively.

2. BACKGROUND

2.1 The facts giving rise to the applications being filed, are that Joseph Kapambwe Mulenga trading as Corner stone Properties & Infrastructure Development, commenced these proceedings, by Writ of Summons accompanied by a statement of claim and the other requisite documents on 24th November, 2022, seeking the following reliefs;

- i. A declaration that the Plaintiff is a bona fide owner of a total of 69 acres of the land known as Subdivision P of the Remaining extent of Farm 411a, Lusaka for the valuable consideration of K3,170,000.0;*
- ii. A declaration that the Plaintiff holds an equitable interest, ranking in priority to the 3rd Defendant's charge over the Remaining Extent of Farm 411a, Lusaka;*

- iii. *An Order that the 3rd Defendant's assignment of debt is irregular in so far as it extends to 69 acres of the Plaintiff's interest over Subdivision P of Farm 411a, Lusaka;*
- iv. *An Order for quiet possession of 69 acres of Subdivision P of Farm 411a, Lusaka;*
- v. *An Order for the 1st, 2nd and/or 3rd Defendants' delivery up of the Certificate of Title to the Remaining Extent of Farm 411a, Lusaka, for the Plaintiff's marking off of 69 acres of the Plaintiff's interest and other acts incidental to the registration;*
- vi. *Alternative to the aforementioned reliefs and against the 1st and 2nd Defendants, an order for the recovery of the sum of K3,170,000.00 being the money paid for the purchase of a total of 69 acres of Farm 411a, Lusaka, in reliance on the said Defendant's warranties and representations.*
- vii. *Further to recovery of the purchase price of K3,170,000.00, as against the 1st, 2nd and 3rd Defendants, an order for special damages of K780,200.00 or alternatively, special damages to be assessed for the present and prospective incidental costs of subdivision, planning and re-planning, maintenance, valuation, numbering and survey.*
- viii. *Further to the recovery of the purchase price and incidental costs of purchase, as against the 1st, 2nd and 3rd Defendants, an order for special damages of K12,*

514, 425.00 or alternatively, damages to be assessed for the present and prospective loss of profits;

- ix. Against the 1st Defendant, general damages for breach of the implied term to produce and deliver the Certificate of Title for Remaining Extent of Farm 411a, Lusaka;
- x. Against the 2nd Defendant, general damages for breach of its' revised undertaking to release the Certificate of Title relating to the Remaining Extent of Farm 411a, Lusaka;
- xi. Against the 1st, 2nd and 3rd Defendants, punitive damages for the intentional and contumelious disregard of the Plaintiff's ownership interest of 69 acres of the Remaining Extent of Farm 411a, Lusaka;
- xii. Costs; and
- xiii. Such further or other relief as the Court deems fit.

2.2 On 15th December, 2022, Zambia National Commercial Bank Plc, filed Ex-parte summons for an Order to file its' defence during the Christmas vacation, pursuant to **Order II Rule 4 and XLIX Rule 3(1) of the High Court Rules Chapter 27 of the Laws of Zambia**. The application was accompanied by an affidavit and List of Authorities and Skeleton Arguments in support, and it was granted on 15th December, 2022.

2.3 On the Order being granted, Zambia National Commercial Bank Plc filed its' memorandum of appearance and defence and the other documents. Then on 16th January, 2023,

Joseph Kapambwe Muelnga replied to the Zambia National Commercial Bank Plc's defence.

2.4 Thereafter, as already seen, the applications which are the subject of this Ruling were filed.

3. SUMMONS TO STRIKE OUT STATEMENT OF CLAIM AND TO DISMISS ACTION

3.1 The grounds upon which the application has been made is that:

- i. It discloses no reasonable cause of action against C & S Investments Limited.
- ii. It is scandalous and tends to prejudice, embarrass and delay the fair trial of this action.

And that in the meantime, all further proceedings in this action be stayed.

4. SKELETON ARGUMENTS IN SUPPORT OF SUMMONS FOR AN ORDER TO STRIKE OUT STATEMENT OF CLAIM AND DISMISS ACTION

4.1 C & S Investments Limited argues that Joseph Kapambwe Mulenga's claims do not conform to the standard of a proper pleading, as they do not disclose any reasonable cause of action, against it. The argument is further that, the statement of claim offends the Rules on pleadings, as it is long winded, and is generally bad on account of prolixity. Further, the statement of claim adduces evidence besides material facts.

THE STATEMENT OF CLAIM DOES NOT DISCLOSE A REASONABLE CAUSE OF ACTION

- 4.2 In arguing that the statement of claim does not disclose a reasonable cause of action, C & S Investments Limited relies on **Order 18 Rule 19 (1) of the Rules of the Supreme Court of England**, stating that the said provision is clear, that the Court has power to strike out a statement of claim that does not disclose a reasonable cause of action against a Defendant. It is also argued that the Court, may in addition, strike out a pleading on the grounds that it may prejudice, embarrass or delay the fair trial of an action.
- 4.3 The submission is that **Order 18/19/10 of the Rules of the Supreme Court of England** defines what amounts to a “reasonable cause of action” as:
- “A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688; [1970] 1 All E.R. 1094, CA).”**
- 4.4 The argument is that a reasonable cause of action, is disclosed when there are allegations that are made against a party that show a chance of success, if such allegations are not traversed by the opposite party. Thus, in Order to establish whether the statement of claim discloses a reasonable cause of action against C & S Investments Limited, an examination of what Joseph Kapambwe Mulenga has pleaded against the said C & S Investments Limited, in the statement of claim, needs to be done.

4.5 The contention is that on a careful examination of the statement of claim, it reveals that the only paragraphs that speak to C & S Investments Limited are paragraphs 58 and 59. Those paragraphs read as follows:

“58. As a separate cause of action, the Plaintiff says that the Third Defendant has wrongfully acquired possession and control over and in 69 acres of the Plaintiff’s ownership interest and the 3rd Defendant knew or ought to have known that the Plaintiff holds a priority interest over the 3rd Defendant’s charge created by the assignment of 17th January, 2022.

59. From the 3rd Defendant’s assignment of 17th January, 2022, the Plaintiff has been greatly injured in his good name, credit, reputation, finances, and has suffered damage and in particular the damage mentioned in paragraphs 56 and 57 hereof.”

4.6 C&S Investments Limited, submits that Joseph Kapambwe Mulenga’s claim does not disclose a cause of action, against it. Further, the statement of claim does not disclose the wrong alleged to have been done by C & S Investments Limited, in acquiring the land from Zambia National Commercial Bank Plc, following an Order for foreclosure and sale which was made by the High Court in favor of Zambia National Commercial Bank Plc.

- 4.7 C & S Investments Limited states that Joseph Kapambwe Mulenga was never a title holder to the subject property in which he claims an equitable interest, and that Zambia National Commercial Bank Commercial Bank Plc, as Mortgagee, was entitled to sell the subject property, which it did.
- 4.8 The argument is further that, the allegation in paragraph 58 of the statement of claim, lacks merit in the face of the High Court Judgment, which granted the Order for foreclosure absolute in favour of Zambia National Commercial Bank Plc, in respect of the property. C & S Investments Limited contends that Joseph Kapambwe Mulenga's alleged interest through the assignment of 17th January, 2022, was never registered on the Lands Register, as required by **Section 4 (1) of the Lands & Deeds Registry Act Chapter 185 of the Laws of Zambia.**
- 4.9 Therefore, the said interest is null and void. Still in argument, C & S Investments Limited argues that in any event, Joseph Kapambwe Mulenga has not given the particulars of the facts on which he relies, to show how C & S Investments Limited knew or ought to have known that he holds priority interest in the land, when such interest was not registered on the Lands and Deeds Register, as required under the **Land and Deeds Registry Act.**
- 4.10 **Order 18 Rule 12/13 of the Rules of the Supreme Court of England** is referred to, stating that it provides that where a party alleges that a person had knowledge of some fact,

matter or thing, the particulars of such fact ought to be pleaded in the statement of claim. However, Joseph Kapambwe Mulenga has not done so.

4.11 In relation to paragraph 59 of the statement of claim, C & S Investments Limited states that although Joseph Kapambwe Mulenga claims that he has been injured in his good name, credit and reputation, this action is not for defamation, and that nothing has been pleaded in that regard.

4.12 It is therefore argued, that paragraph 59 is a standalone claim, with no related relief being sought, and that equally no particulars have been pleaded to support the claim that Joseph Kapambwe Mulenga has been injured in his good name, credit and reputation, as required by ***Order 18 Rule 12/24 of the Rules of the Supreme Court***.

THE STATEMENT OF CLAIM PLEADS OVER AND ABOVE MATERIAL FACTS

4.13 C & S Investments Limited also argues that the statement of claim goes over and above the material facts, and is instead flooded with evidence, subordinate facts and legal arguments. In support of this contention, reliance is placed on ***Order 18 Rule 7(1) of the Rules of the Supreme Court of England*** and the ***explanatory note in 18/7/9***. The provisions of ***Order 18 Rule 7 (1)*** is as follows:

“(1) Subject to the provisions of this rule, and rules 7A, 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading

relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.”

4.14 The explanatory notes in *Order 18/7/9* are:

“All facts which tend to prove the fact in issue will be relevant at the trial, but they are not "material facts" for pleading purposes. "It is an elementary rule in pleading that, when a statement of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of proving it, or the evidence sustaining the allegation"”

4.15 C & S Investments Limited states that the contrast between material facts and evidence is stated by the learned authors of *Halsbury's Laws of England, 4th Edition, Vol 36 in paragraph 15 at page 13*, who cite the exposition by Farewell, L.J in the case of *N. W Salt Co. Ltd v Electrolytic Alkali* ⁽³⁾ at page 425. He stated that:

“If a party relies on a fact, and will fail in his claim or defence unless, at the trial that fact is proved, that fact will be a material fact or factum probandum. However, where the fact relied on is such that if a party fails to prove it at trial he may nevertheless succeed in his claim or defence, that fact will in general not be a material fact, but only evidence of a material fact. Facts of this

kind are known as facta probanda, and should not be pleaded... so generally, when a statement of fact is relied on, it is enough to allege it without setting out the subordinate facts which are the means of proving it or the evidence sustaining the allegation.”

4.16 In line with the above, C & S Investments Limited argues that Joseph Kapambwe Mulenga has grossly violated the facts, and not the evidence rule. Enumerated, are some of the paragraphs containing the alleged violation, being paragraphs 10, 11, 25, 26, 28, 31, 32, 33, 35, 38, 42 and 47 of the statement of claim. It is thus submitted that the statement of claim clearly fails to appreciate the difference between material facts and evidence. Therefore, the statement of claim fails to satisfy the provisions of **Order 18/7/9 of the Rules of the Supreme Court of England.**

STATEMENT OF CLAIM IS BAD ON ACCOUNT OF PROLIXITY

4.17 On this ground, C & S Investments Limited argues that the statement of claim is bad on account of prolixity. In that regard, reliance is placed on **Practice Note 18/7/7 under Order 18 Rule 7 of the Rules of the Supreme Court of England**, and **explanatory note 18/7/11**, as well as the learned authors of **Atkins Court Forms.**

4.18 **Practice Note 18/7/7** is said to provide that relevant matters must be stated briefly, succinctly, and in strict chronological Order. Then **Practice Note 18/7/11** states that only material

facts should be contained in a pleading, and that statements of immaterial and unnecessary facts, may be struck out.

Atkins Court Forms on the other hand states that:

“Prolivity, that is the allegation of immaterial, unnecessary and long-winded statements, is not only embarrassing but objectionable and should be avoided as being the mark of a bad pleading.”

4.19 C & S Investments Limited further argues that it has observed that Joseph Kapambwe Mulenga’s statement of claim is characterized by confusingly lengthy, longwinded, repetitive and unnecessarily detailed paragraphs, with paragraphs 8 to 14 being cited as examples. It states that in those paragraphs, Joseph Kapambwe Mulenga alleges that he entered into an agreement with the Zambia National Commercial Bank Plc for the purchase of a parcel of land measuring approximately One Hundred (100) acres at a purchase price of Four Million Kwacha (K4,000,000.00).

4.20 However, the contention is that a perusal of the said paragraphs, shows that Joseph Kapambwe Mulenga’s narrative is soiled by a failure to succinctly and chronologically state the relevant matters in issue, and is also hampered by immaterial and unnecessary facts.

5. JOSEPH KAPAMBWE MULENGA’S LIST OF AUTHORITIES AND SKELETON ARGUMENTS IN OPPOSITION TO C&S INVESTMENTS LIMITED’S APPLICATION

5.1 In the Skeleton Arguments, Joseph Kapambwe Mulenga states that his pleadings conform to the requisite procedural

rules. He argues that he is competently guided by the legal principle that was enunciated in the case of ***Drummond-Jackson v British Medical Association***⁽¹⁰⁾, which is that; this Court's summary power to strike out pleadings for failure to disclose a reasonable cause of action, should only be exercised in plain and obvious cases.

5.2 He states that from consideration of the allegations in the pleadings, it is not certain, plain or obvious that his action against C & S Investments Limited is certain to fail. Joseph Kapambwe Mulenga argues that his pleadings disclose a substratum of facts, which raise questions that are fit to be decided at trial. He further argues that contrary to C & S Investments Limited's contention, his pleadings disclose factual wrongs, which are actionable at law, together with, recognizable claims.

5.3 Joseph Kapambwe Mulenga lists Eight (8) facts from his statement of claim, which he states disclose a reasonable cause of action against C & S Investments Limited. These are:

- i. The creation of a mortgage between Master Butcheries Limited and Zambia National Commercial Bank Plc which was secured by the remaining extent of Farm 411a Lusaka as stated in paragraphs 6-8 of the statement of claim.
- ii. With Zambia National Commercial Bank Plc's consent, Joseph Kapambwe Mulenga purchased Sixty-Nine(69) acres of Subdivision P of Farm 411a Lusaka from

Master Butcheries Limited at Three Million One Hundred and Seventy Thousand Kwacha (K3, 170, 000.00), as pleaded in paragraphs 31 and 41 of the statement of claim.

- iii. Joseph Kapambwe Mulenga or his privities, not being party to Zambia National Commercial Bank Plc's action against Master Butcheries Limited for foreclosure of the remaining extent of Farm 411a Lusaka, as stated in paragraph 45 of the statement of claim.
- iv. Zambia National Commercial Bank Plc's foreclosure of the remaining extent of Farm 411a Lusaka subject to Joseph Kapambwe Mulenga's equitable interest in Sixty-Nine (69) acres of Subdivision P of Farm 411a Lusaka, as pleaded in paragraph 48 of the statement of claim.
- v. Zambia National Commercial Bank Plc's subsequent assignment of the debt to C & S Investments Limited, which was secured by the total extent of Farm 411a Lusaka, inclusive of Joseph Kapambwe Mulenga's ownership interest of Sixty- Nine (69) acres of the same, as stated in paragraphs 49 and 58 of the statement of claim.
- vi. Zambia National Commercial Bank Plc's surrender of the subject certificate of title to C & S Investments Limited, as pleaded in paragraphs 49 and 52 of the statement of claim.

- vii. C & S Investments Limited's refusal to surrender the subject certificate of title for marking off, of Joseph Kapambwe Mulenga's interest in Sixty-Nine (69) acres of the subject property, as stated in paragraph 52 of the statement of claim.
- viii. Loss and injury occasioned by the refusal by C & S Investments Limited to furnish Joseph Kapambwe Mulenga with the subject certificate of title, such loss including injury to his good name, credit, and reputation, as pleaded in paragraphs 59, 56 and 57 of the statement of claim.

5.4 The argument is that the above facts show that Joseph Kapambwe Mulenga's cause of action is plain and obvious. He states that notwithstanding his purchase of Sixty-Nine (69) acres of Sub P of Farm 411a, Lusaka for a valuable consideration of Three Million One Hundred and Seventy Thousand Kwacha (K3,170,000.00), C & S Investments Limited has refused to surrender the mother title to him, for marking off and registration of title.

5.5 As a result, Joseph Kapambwe Mulenga contends that there has been failure to exercise his right to mark off, and register title to Sixty-Nine (69) acres of the subject property. He states that it is for this reason, that he seeks equitable recourse from this Court. He also argues that being guided by the Court's jurisdiction to administer law and equity concurrently, the equitable recourse includes C & S Investment Limited's delivery up of the mother title for

marking off, and registration of Sixty-Nine (69) acres for Joseph Kapambwe Mulenga's ownership.

- 5.6 Joseph Kapambwe Mulenga, still in argument, states that the Sixty-Nine (69) acres of his land is now encumbered with C & S Investments Limited's security interest over the entire remaining extent, which covers the entire subdivision P, and Joseph Kapambwe Mulenga's Sixty-Nine (69) acres, until marking off is affected. He states that the encumbrance was allegedly created by an assignment of debt, between Zambia National Commercial Bank Plc and C & S Investments Limited, dated 19th January, 2022.
- 5.7 Therefore, for that reason, Joseph Kapambwe Mulenga seeks this Court's equitable remedy. His submission is that guided by the Court's jurisdiction to administer law and equity, the equitable remedy, includes a declaration of priority equitable ownership, and a declaration that C & S Investment Limited's debt assignment is irregular, in so far as it covers Sixty-Nine (69) acres of Joseph Kapambwe Mulenga's land.
- 5.8 He goes on to argue, that this is a clear and obvious case for C & S Investments Limited to respond to, by way of defence. Joseph Kapambwe Mulenga states that he simply and clearly alleges that he owns Sixty-Nine (69) acres of subdivision P of Farm 411a by way of a bona fide purchase at Three Million One Hundred and Seventy Thousand Kwacha (K3,170,000.00), which was permitted by Zambia National Commercial Bank Plc.

- 5.9 Joseph Kapambwe Mulenga, also claims the need to mark off and register title to the subject Sixty-Nine (69) acres, by use of the mother title, which is allegedly in possession of C & S Investments Limited.
- 5.10 He further argues that he clearly and simply alleges, that by virtue of an assignment of debt dated 17th January, 2022, C & S Investments Limited now holds a charge over his priority to ownership interest in Sixty-Nine (69) acres of Subdivision P of the remaining extent of Farm 411a, Lusaka.
- 5.11 With regard to the purpose and effect of the High Court's Order for foreclosure in favour of the Zambia National Commercial Bank Plc, Joseph Kapambwe Mulenga contends that neither himself nor his privies, was a party to the mortgage action, that was instituted by Zambia National Commercial Bank Plc. He argues that on the face of it, these contentions are legally recognisable claims, that are fit for full and final determination by this Court.

**ARGUMENTS BY C & S INVESTMENTS LIMITED
TRAVERSING JOSEPH KAPAMBWE MULENGA'S
PLEADINGS**

- 5.12 Secondly, Joseph Kapambwe Mulenga argues that while C & S Investments Limited's claim is that his pleadings are void of a reasonable cause of action against it, their Skeleton Arguments suggest otherwise. He states that a reading of paragraphs 12 to 14 of C & S Investments Limited's Skeleton Arguments, appear to hint a number of

likely defences on their part, which Joseph Kapambwe Mulenga notes down as follows:

- i. What is wrong with the 3rd Defendant's acquisition of the land following a High Court Order allowing ZANACO to sell the property to recover monies owed to it by the 1st Defendant who owned the land and had pledged it as collateral for its borrowings from ZANACO;*
- ii. The Plaintiff was never a title holder to the subject land which he claims an equitable interest in;*
- iii. It is submitted that ZANACO as mortgagee was entitled to sell the subject property which it did;*
- iv. The Plaintiff's alleged interest vis the assignment of 17th January, 2022, was never registered on the lands register as required by Section 41 of the Lands and Deeds Registry Act CAP 185 and the said interest is therefore null and void;*
- v. Although the Plaintiff claims that he has been injured in his good name, credit and reputation, the action is not intended to repair the alleged good name, credit and reputation as the action is not for defamation.*

5.13 Joseph Kapambwe Mulenga argues that from these statements, it is rather confounding and undeniably contradictory for C & S Investments Limited to claim the absence of a reasonable cause of action, whilst asserting a number of likely defences in the same breath. He argues

that C & S Investments Limited, explicitly raises traversals that assert the absence of any wrong on their part, and this is fundamentally fitting of a defence.

- 5.14 It is also argued that C & S Investments Limited's ability to *'take matter by matter and traverse each of them separately'* confirms that Joseph Kapambwe Mulenga's pleadings are essentially not bad or egregious to warrant striking out.

ARGUMENT THAT JOSEPH KAPAMBWE MULENGA'S PLEADINGS PLEAD EVIDENCE CONTRARY TO ORDER 18 RULE 19 (2) OF THE RULES OF THE SUPREME COURT OF ENGLAND, 1999 EDITION

- 5.15 Thirdly, Joseph Kapambwe Mulenga in response to C & S Investment Limited's argument that his pleadings admit evidence contrary to ***Order 18 Rule 19(2) of the Rules of the Supreme Court of England 1965 (1999 Edition)***, quotes an extract from ***Volume 36 of the 4th Edition of Halsbury's Laws of England at page 33***, which is as follows:

"Although no evidence is admissible on an application invoking the Rule, if the summons additionally invokes the Court's inherent jurisdiction, evidence may be filed, and all the relevant facts considered."

- 5.16 The argument is that the above is instructive, on how the discretion under ***Order 18 Rule 19 of the Rules of the Supreme Court of England*** ought to be exercised. Further

reliance is placed on the guidance that was given in the case of **Wenlock v Maloney**⁽⁹⁾, where it was stated that:

“There is no doubt that the inherent power of the Court remains, but this summary jurisdiction of the Court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the Plaintiff really has a cause of action. To do that, would be to usurp the position of the trial Judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross examination in the ordinary way. This seems to me to be an abuse of the inherent power of the Court and not the exercise of power...”

5.17 Joseph Kapambwe Mulenga argues that the record shows that C & S Investments Limited took out the application pursuant to **Order 18 Rule 19 of the Rules of the Supreme Court of England**. He states that **paragraph 2 of Rule 19** clearly states that no evidence is admissible, where the only ground on which the application is made, is that the pleading discloses no reasonable cause of action. It is further argued that consistent with this, C & S Investment Limited’s application is not supported by an affidavit as to facts.

5.18 Joseph Kapambwe Mulenga contends that this positively affirms C & S Investment Limited’s intention to refrain from

admission of evidence, as required by **Order 18 Rule 19(a)**. It is also argued, that the face of C & S Investments Limited's summons, omits any statement invoking the Court's inherent jurisdiction to admit an affidavit as to facts or to examine all the relevant facts.

5.19 The continued argument, is that contrary to the legal method, in the absence of an affidavit as to facts, and without invoking the Court's inherent jurisdiction, C & S Investments Limited, in the Skeleton Arguments, proffers certain facts to prove the lack of a reasonable cause of action. In particular, it is stated that C & S Investments Limited adduces the following:

- a. *The Plaintiff was never a title holder to the subject land which he claims an equitable interest in.*
- b. *The Plaintiff's alleged interest via assignment of 17th January, 2022, was never registered on the lands register as required by Section 4(1) of the Lands and Deeds Registry Act CAP 185, and the said interest is therefore null and void.*

5.20 It is submitted that this admission of facts in C & S Investments Limited's arguments, departs from the Court's present scope of enquiry, and at this stage, the concern of the Court is to assess, whether on the face of it, Joseph Kapambwe Mulenga's pleadings are manifestly groundless. The argument is that in the absence of C & S Investments Limited invoking the Court's inherent jurisdiction to admit affidavit evidence, the Court's enquiry does not extend to a

substantive review of the merits or a making of findings of fact.

5.21 It is added that at this stage, the Court's concern ought to be the narrow issue of glancing at whether Joseph Kapambwe Mulenga's pleadings, as they stand, disclose a reasonable cause of action, with some chance of success, which does not mean a strong chance of success. Further in argument, Joseph Kapambwe Mulenga states that he severely stresses that at this stage, that the Court need not delve into the merits of the facts of the case.

5.22 He goes on to argue, that contrary to C & S Investments Limited's scheme, this Court, at this stage, need not determine whether the Zambia National Commercial Bank Plc was wrong to foreclose on the remaining extent of Farm 411a. It is submitted that at this stage, the Court need not determine whether Joseph Kapambwe Mulenga's interest was registered by way of title, or notice on the Lands Register.

5.23 He argues that it is premature for this Court to make a finding on the nullity of his interest, and that it is equally premature for this Court to make a finding on whether Zambia National Commercial Bank Plc was wrong to assign its' debt to C & S Investments Limited. Joseph Kapambwe Mulenga in continued argument, states that for this Court to delve into the issues as argued by C & S Investments Limited, its' inherent jurisdiction ought to be invoked by the appropriate application available at law.

WANT OF PARTICULARS IS NOT A DEFECT WARRANTING STRIKING OUT OF THE PLEADINGS

5.24 Fourthly, Joseph Kapambwe Mulenga states outrightly, that the lack of particulars alone, is not a defect that warrants striking out of pleadings. For ease of reference, he reproduces the position as per the explanatory notes in ***Order 18 Rule 19/13 of the Rules of the Supreme Court of England***, which state that:

“Where a pleading is defective only in not containing particulars to which the other side is entitled, application should be made for particulars under r.12, and not for an order to strike out the pleading under this rule.”

5.25 Based on the above, Joseph Kapambwe Mulenga contends that the defect as to want of particulars, is curable by this Court ordering for further and better particulars, as opposed to striking out the pleadings. It is argued that C & S Investments Limited, is at large to request particulars as to the facts underpinning Joseph Kapambwe Mulenga’s propositions.

5.26 He states that, as is the practice, the Court in the case of ***Melissa Supermarket Limited v Stanbic Bank Zambia*** ⁽³²⁾ declined to strike out the pleadings for want of particularity. Further in argument, Joseph Kapambwe Mulenga calls to aid, the legal principle that was espoused in the case of ***Jowell v Bramwell Jones*** ⁽¹⁵⁾ as a persuasive authority. This was that:

“Pleadings must be read as a whole; no paragraph can be read in isolation.”

PLEADINGS MUST BE READ AS A WHOLE

- 5.27 It is further argued that a wholesome reading of the case, establishes a necessity for the matter to be reasonably pled by way of Fifty- Nine (59) material facts. Thus, firstly, Joseph Kapambwe Mulenga’s Writ of Summons is couched in Thirteen (13) claims. Secondly, the present action is laid against Three (3) parties, who are each answering issues of fact in separate capacities as vendor, mortgagor and debt assignee.
- 5.28 The argument is that thirdly, the matter is substantially founded on material documents, correspondence, conversations, representations and warranties emanating between the years 2018 and 2022, which materials were shared or relayed among or between Joseph Kapambwe Mulenga, Master Butcheries Limited, Zambia National Commercial Bank Plc and C & S Investments Limited.
- 5.29 Joseph Kapambwe Mulenga states that his pleadings retain the goal of formulating a complete cause of action against all Three (3) parties, and it is not the duty of C & S Investments Limited, to reform his pleading. Furthermore, C & S Investment Limited’s application does not in any way show how the alleged irrelevant issues may involve expense, trouble and delay on their part.
- 5.30 It is stated that this is particularly relevant, given the fact that the issues affecting, involving or dealing with C & S

Investment Limited are minimal, or are of a secondary nature in comparison to the other defendants. In that regard, reference is made to paragraphs 49, 52, 56, 57, 58 and 59 of the statement of claim, being the progress that outlines Joseph Kapambwe Mulenga's case against C & S Investments Limited.

JOSEPH KAPAMBWE MULENGA'S PLEADINGS DO NOT PLEAD EVIDENCE

5.31 It is argued that Joseph Kapambwe Mulenga's pleadings, do not plead evidence and reliance is placed on *Halsbury's Laws of England, 4th Edition Vol 36 at page 17* which states that:

“Where the effect of any document or the purport of any conversation referred to in the pleading is material, it must be briefly stated. The precise words of the document or conversation should not be stated, except in so far as those words are themselves material. If a party asserts that a document has a particular effect, he must set out in his pleadings, so much of the document as is necessary to show that it has that effect.”

5.32 The argument is that paragraphs 6, 7, 8, 14, 17, 24, 26, 32, 36, 37, 49 and 52 of the statement of claim, do not reproduce the precise content underlying the subject documents and conversations verbatim. That what is pleaded, is the gist of the documents and conversations.

THE PLEADINGS DO NOT CONTAIN LEGAL ARGUMENTS

5.33 As regards the contention that the pleadings do not contain legal arguments, ***Odgers Principles of Pleadings and Practice, 22nd Edition at page 94*** is called to aid as authority. It is stated that it provides that a Plaintiff must merely aver the facts which in his opinion, give him the right or impose a duty on the Defendant. Further, that it is a bad pleading to merely allege that a right or a duty or a liability exists, but rather, the facts must be set out, which give rise to such right, or create such duty or liability.

5.34 The argument is that Joseph Kapambwe Mulenga has pleaded in paragraph 42 of the statement of claim, that he became an equitable owner of Thirteen (13) acres of the property, having earlier in paragraphs 40 and 41, pleaded the material facts that gave rise to his status as an equitable owner. Thus, paragraph 42 begins with "*In doing so*". It is also argued that in paragraph 47 of the statement of claim, Joseph Kapambwe Mulenga states the fact of equitable interest of bonafide purchasers for value, having earlier pleaded in paragraph 43, the material facts, which give rise to the said facts.

MATERIAL FACTS ARE PLEADED

5.35 The Skeleton Arguments go on to state that material facts are pleaded, citing paragraphs 6-26 as pleading bona fide equitable ownership of Sixty-Nine (69) acres of Subdivision P of Farm 411a, then paragraphs 27- 31 plead frustration of the contract. Further, paragraphs 32, and 34-36 allege that

Joseph Kapambwe Mulenga purchased land under a second contract with Master Butcheries Limited.

5.36 Other facts stated are paragraphs 40-42, which allege frustration of the second contract, paragraphs 6-26 which contend that Joseph Kapambwe Mulenga is a bona fide purchaser of the Sixty-Nine (69) acres of land, and paragraphs 49 and 58 which plead C & S Investments Limited's assignment of the debt.

5.37 It is also stated that the other averments relate to quiet possession of the property, delivery up of the certificate of title and recovery of the purchase price from Master Butcheries Limited, special damages, general damages against Master Butcheries Limited in paragraphs 15, 33, 52 and 56, and general damages against Zambia National Commercial Bank Plc in paragraphs 14, 15, 37, 38, 39, 54 and 55. The contention is also that there is a claim for punitive damages, which is outlined in paragraphs 33, 39, 45, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58 and 59 of the statement of claim.

5.38 Reliance is placed on the case of *Millington v Loring* ⁽²⁾ and the argument is that, Joseph Kapambwe Mulenga's pleadings give fair notice to all the Three (3) defendants of the contentions against them.

PLEADINGS ARE NOT MERE PROLIXITY

5.39 In respect of the contention that the pleadings are mere prolixity, reliance is placed on *Order 18/19/7 of the Rules of the Supreme Court of England* which states that mere prolixity is not of itself embarrassment, and that the fact that

the statement of claim embraces many causes of action is not embarrassment, if they are distinctly pleaded. The argument is that the material in the pleadings, which affects C & S Investments Limited is minimal, and the length of Joseph Kapambwe Mulenga's pleadings is harmless to C & S Investments Limited defending the matter.

5.40 That in any event, the complaint as to prolixity, ought to have been raised by the primary parties, being Master Butcheries Limited and Zambia National Commercial Bank Plc. The contention is that the Zambia National Commercial Bank Plc has settled its' defence, and therefore, no prejudice will be occasioned to C & S Investments Limited to whom the particulars of the claims as a whole, and the facts of the matter, insignificantly relate to or address. Thus, the prayer is that the application be dismissed.

6. SKELETON ARGUMENTS IN REPLY BY C&S INVESTMENTS LIMITED

WHETHER A REASONABLE CAUSE OF ACTION IS DISCLOSED?

6.1 In relation to the question of whether Joseph Kapambwe Mulenga's action has disclosed a reasonable action against C & S Investments Limited, the argument is that Joseph Kapambwe Mulenga has failed to show from his pleadings, any wrong doing or culpability on the part of C & S Investments Limited.

6.2 It is argued that a perusal of the statement of claim suggests that Joseph Kapambwe Mulenga seems to have

taken issue with Master Butcheries Limited and Zambia National Commercial Bank Plc. In justifying this argument, C & S Investments Limited states that this is evident from the fact that it is only mentioned in paragraphs 58 and 59 of the statement of claim.

- 6.3 The contention is that in those paragraphs, Joseph Kapambwe Mulenga alleges that C & S Investments Limited wrongfully acquired the ownership and control of the property in question, and that Joseph Kapambwe Mulenga has suffered damage to his character, reputation and good name. However, C & S Investments Limited states that there are no particulars given, as to the wrong that it is supposed to have committed, in acquiring the property.
 - 6.4 Then with regard to the alleged damage to character, reputation and good name, Joseph Kapambwe Mulenga refers to paragraphs 56 and 57 as the basis for the claim. However, C & S Investments Limited argues that a perusal of the Two (2) paragraphs, does not reveal any wrong doing, on its' part, as the Two (2) paragraphs, specifically speak to Master Butcheries Limited and Zambia National Commercial Bank Plc, without mentioning it.
 - 6.5 It is also argued that Joseph Kapambwe Mulenga alleges that C & S Investments Limited's arguments traverse his pleadings, and this therefore shows likely defenses that presuppose the existence of a cause of action. C & S Investments Limited submits that this is a misconception of the application before the Court, which is whether Joseph
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Kapambwe Mulenga has disclosed a reasonable cause of action against it, and not whether there are likely defenses, that can be raised by C & S Investments Limited.

- 6.6 The argument is that a reasonable cause of action is disclosed when the allegations made against a party show that there is a chance of success, if such allegations are not traversed by the opposite party. Reliance is placed on the case of ***Wise v E.F Harvey Limited***⁽¹³⁾, arguing that the Supreme Court in that matter, gave further context to the duty to disclose a cause of action.
- 6.7 Therefore, it is argued that the statement of claim in this matter, fails to meet the threshold requirement set by ***Order 15/1/2A of the Rules of the Supreme Court of England*** as no actual wrong, allegedly committed by C & S Investments Limited has been disclosed, as can be seen from paragraphs 56 to 59 of the statement of claim. The contention is that Joseph Mulenga Kapambwe is clearly fishing for a cause of action against C & S Investments Limited.
- 6.8 The argument is also that Joseph Kapambwe Mulenga with regard to the claim for damages for defamation, in paragraph 59 of the statement of claim, claims that the want of particulars is not a defect warranting the striking out of pleadings. However, C & S Investments Limited states that the Supreme Court settled that position in the case of ***Muvi TV Limited v Phiri & another***⁽³³⁾.

6.9 It is argued that the purpose of particularity, is to alert the other party as to what case they will have to answer at Court. Further, where defamation is concerned, failing to disclose the facts upon which the damages for defamation are claimed is fatal, much like in the case at hand. This is because, Joseph Kapambwe Mulenga has failed to demonstrate how C & S Investments Limited is linked to, or liable for the alleged damage.

STATEMENT OF CLAIM PLEADS EVIDENCE, LEGAL ARGUMENTS AND IS BAD FOR PROLIXITY

6.10 With regard to the contention that the statement of claim pleads evidence, legal arguments and is bad for prolixity, C & S Investments Limited draws the Court's attention to paragraph 21 of its' arguments in support of the application. The argument is that it will be noted that despite reproducing the law that prohibits the same, Joseph Kapambwe Mulenga has failed to abide by the same rules in his pleadings, and the same is clearly set out.

6.11 C & S Investments Limited also states that the ***explanatory note 18/7/7 under Order 18 Rule 7 of the Rules of the Supreme Court of England*** emphasizes the need for pleadings to be produced in summary form; that is, to be as brief and succinct as possible. It is added that the statement of claim should be read as a whole, irrespective of the fact that only a small portion of it relates to C & S Investments Limited. Therefore, C & S Investments Limited

is not precluded from bringing the whole document's apparent frailties to the Court's attention.

7. AFFIDAVIT IN SUPPORT OF SUMMONS FOR DETERMINATION OF QUESTIONS OF LAW AND FOR JUDGMENT BY ZAMBIA NATIONAL COMMERCIAL BANK PLC

7.1 The affidavit in support of the application, is sworn by Museke Chilufya, a Credit Restructuring Senior Specialist in the Corporate Department of Zambia National Commercial Bank Plc. He deposes that, sometime in January, 2019, Master Butcheries Limited was offered a credit facility by Zambia National Commercial Bank Plc, in the sum of Two Million Kwacha (K2,000,000.00) renewed overdraft facility and One Million Two Hundred and Fifty-Nine Thousand Five Hundred and Seventy-Nine Kwacha and Sixty-Five Ngwee (K1,259,579.65) as Medium-Term Loan Facility, hereinafter referred to as the Credit Facility Letter.

7.2 It is also deposed, that it was an agreed term of the Credit Facility Letter, that the facility would be secured by, among other things, a First Legal Mortgage relating to Farm 411a, the subject property, situate in the Lusaka Province of Zambia, which property was then registered in the name of Master Butcheries Limited. The averment is that Master Butcheries Limited defaulted in making payments to Zambia National Commercial Bank Plc, as agreed under the Credit Facility Letter.

- 7.3 Thus, on 21st January, 2021, Zambia National Commercial Bank Plc commenced legal proceedings before this Court under cause No. 2019/HPC/0025 against, among others, Master Butcheries Limited, seeking an Order for payment of the sum, possession and foreclosure of the subject property. Exhibited as 'MC1' is a copy of the Originating Summons and supporting affidavit, which was filed in the mortgage action by Zambia National Commercial Bank Plc.
- 7.4 Museke Chilufya also states that on 1st March, 2021, Master Butcheries Limited filed its' affidavit in opposition to the Originating Summons, with exhibit 'MC2' being stated as being a copy of the affidavit in opposition. Also deposed, is that in the affidavit in opposition, Master Butcheries Limited averred that:

“that a third-party Joseph Kapambwe Mulenga with consent of the Plaintiff, purchased a portion of farm 411a Lusaka from the 1st Defendant...”

- 7.5 Then on 10th March, 2021, Zambia National Commercial Bank Plc filed an affidavit in reply, which is exhibited as 'MC3', wherein it was stated that:

“That while the Applicant does not dispute having consented to the Respondent's disposing of part of the mortgaged property for ZMW 4,000,000.00, it is clear that the transaction has not been concluded as the Respondent has neglected to liquidate its debt to the Applicant. The sum of ZMW 4,000,000.00 has never been

paid into the 1st Respondent's account as per the terms of the contract..."

- 7.6 He states that the mortgage action was allocated to, and was subsequently heard by his Lordship, Honourable Mr. Justice. B.C. Mbewe, who on 12th April, 2021 delivered a Judgment in favor of Zambia National Commercial Bank Plc. The averment is that the Judgment directed Master Butcherries Limited to settle the outstanding debt within One Hundred and Twenty (120) days from the date of the Judgment. That in default, Zambia National Commercial Bank Plc would be at liberty to possess, foreclose and sell the subject property. The said Judgment is exhibited as 'MC4'.
- 7.7 Further in averment, Museke Chilufya, deposes that Master Butcherries Limited failed to pay the outstanding debt owed to Zambia National Commercial Bank Plc within the One Hundred and Twenty (120) days, as Ordered by this Court, and the said Zambia National Commercial Bank Plc proceeded to possess and foreclose the subject property.
- 7.8 It is stated that from the time the Judgment was passed, there has been no appeal against the Judgment. The contention is that the Court at page J26 held that:

"It is not in dispute that the Respondents entered into an agreement to sell a portion of the secured property to Mr. Joseph Kapambwe Mulenga for ZMW 4,000,000.00 with consent of the Applicant which transaction has not been concluded

leading the 1st and 2nd Defendants to apply for an injunction under Cause Number 2019/ HPC/0605 to restrain the 4th Respondent John Steele from interfering with the process of disposal of subdivisions of Farm 411a Chilanga by their application made on 10th July, 2020...”

7.9 Further at page J35, the Court held that:

“...The Applicant is aware that Joseph Kapambwe is in possession of a portion of farm 411a, Lusaka, the said arguments do not hold water and are dismissed as I find that the evidence on record is that the Applicant and the 1st Respondent and its directors have been in discussion over the 1st Defendant’s default on the loan from as far back as the 2019, action or even earlier and as no evidence of payment has been adduced, I can therefore safely conclude that the 1st Respondent’s never paid the purchase price for the portion of land said to have been sold to Mr. Kapambwe which was never deposited in the 1st Respondent’s account with the Applicant, in accordance with the consent for the sale of this portion of land. As also deposed in the affidavit in the 2019 case, Mr. Steele, the 4th Respondent is said to have prevented access to the farm or any attempts to subdivide any portion of the mortgaged farm and Mr. Kapambwe therefore has

no legal interest in any of the portion of the mortgaged property and cannot be said to be in possession thereof for the lack of consideration.”

7.10 Museke Chilufya avers that the Court in the Judgment, held that Zambia National Commercial Bank Plc was entitled to foreclosure on the subject property, and the Order of this Court in that regard, is still in force. He goes on to depose that the record will show that on 24th December, 2022, Joseph Kapambwe Mulenga instituted these legal proceedings against Zambia National Commercial Bank Plc claiming, among other things, a declaration that he is a bona fide equitable owner of a total of Sixty-Nine(69) acres of the land known as Subdivision P of the Remaining Extent of Farm 411a, Lusaka, having been purchased for the valuable consideration of Three Million One Hundred and Seventy Thousand Kwacha (ZMW 3,170,000.00).

7.11 The averment is that Museke Chilufya has been reliably advised by Zambia National Commercial Bank Plc's advocates on record, and verily believes the same to be true, that the reliefs being sought by Joseph Kapambwe Mulenga in this action, if granted, will have the effect of varying the foreclosure Order that was made by this Court in the Judgment of 12th April, 2021.

7.12 He further states that he has also advised by Zambia National Commercial Bank Plc's advocates on record, and verily believes the same to be true, that the reliefs being

sought by Joseph Kapambwe Mulenga, in this action, have the potential to bringing embarrassment to the administration of justice, as conflicting Judgements may be rendered by this Court.

7.13 Further, he is advised by Zambia National Commercial Bank Plc's advocates on record, and verily believes the same to be true, that these proceedings are an abuse of the process of the Court process. This is because, there is a danger of this Court arriving at a conflicting finding or decision to the Judgment in the mortgage action.

8. SKELETON ARGUMENTS IN SUPPORT

8.1 In support of its' application, Zambia National Commercial Bank Plc relies on **Order 14A (1) of the Rules of the Supreme Court of England**. Further reliance is placed on the case of **Shenghai International Mining Limited v Component Centre Limited⁽²¹⁾**, stating that the Supreme Court in that matter, held that the application should finally determine all the issues, and not hinge on findings of fact.

8.2 Also called to aid as authority, is the case of **Indeni Petroleum Refinery Co. Ltd v Kafco Oil Limited, Andrew Bungoni, Silas Mumba and Emmanuel Shikaputo⁽³¹⁾**, the argument being that the Supreme Court in that case, summarized the conditions that are required to be satisfied, before employing **Order 14A of the Rules of the Supreme Court of England**.

8.3 The said conditions that must be met are stated as:

- i. *The Defendant must have given notice of intention to defend;*
- ii. *The question of law or construction is suitable for determination without a full trial of the action;*
- iii. *Such determination will be final as to the entire cause or matter or any claim or issue; and*
- iv. *The parties had an opportunity of being heard on the question of law or have consented to an Order or Judgment being made on such determination.*

8.4 It is argued that in relation to the notice of intention to defend, the Supreme Court in the case of ***African Banking Corporation Zambia v Mubende Country Lodge Limited*** ⁽²⁹⁾ guided as follows:

“In the view that we take, what constitutes a notice of intention to defend, in the context of our rules, is filing of a memorandum of appearance which is accompanied by a defence. It, therefore, follows that the filing of a memorandum of appearance with a defence is a prerequisite to launching an application under Order 14A, RSC.”

8.5 Also, relied on, are the learned authors of ***Atkins Court Forms Volume 29 at pages 252 to 253*** who have the following to say with regard to ***Order 14A***:

“The object of the order is that finality should be achieved at an interlocutory stage. It is therefore

fundamental to the question of whether or not an application under Order 14A is appropriate, that the determination of the question of law or matter of construction placed before the Court should terminate the whole action or some claim or issue contained in the action. The finality of any Order made is of course, subject to appeal.”

- 8.6 Zambia National Commercial Bank Plc, states that the record shows that it entered appearance and filed its’ defence in this matter, on 15th December, 2022. Therefore, it contends that it is entitled to make an application for the determination of this matter, based on the questions or issues of law that have been raised in the Summons that have been filed.

WHETHER ISSUES RELATING TO OWNERSHIP OF FARM NO 411a LUSAKA ARE RES JUDICATA?

- 8.7 With regard to whether the issues relating to the ownership of Farm 411a, the subject property, are res judicata, Zambia National Commercial Bank Plc, submits that the issues relating to the ownership of the subject property, were heard and determined on their merits, under Cause No. 2021/HP/0025, the mortgage action.
- 8.8 Reference is made to ***Black’s Law’s Dictionary, 8th Edition*** which defines ‘res judicata’ at page 4088 as follows:

“1. An issue that has been definitively settled by the judicial decision.

2. An affirmative defense 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 transactions and that could have been – but was not – raised in the first suit. The three essential elements are:

- (a) an earlier decision on the issue;**
- (b) a final Judgment on the merits, and**
- (c) the involvement of the same parties, or parties in privy with the original parties.”**

8.9 In further support of its’ submission, reliance is placed on the case of **Bank of Zambia v Jonas Tembo and Others (18)**. The argument is that the record shows that on 21st January, 2021, Zambia National Commercial Bank Plc commenced legal proceedings before this Court, under Cause No. 2019/HPC/0025 against, among others, Master Butchereries Limited, seeking an Order for the payment of the sum of One Million Seven Hundred Fifty-Three Thousand Seven Hundred and Three Kwacha and Fifty-Three Ngwee (ZMW 1,753,703.53) on the overdraft, and One Million Three Hundred and Nine Thousand and Fifty-Six Kwacha and Fifty-Three Ngwee (ZMW 1,309,056.53) on the medium-term loan as at 20th January, 2021.

8.10 It is further stated that in the alternative, an Order for possession and foreclosure of the property was claimed. The averment is that Zambia National Commercial Bank Plc further reiterated its’ statements in the affidavit, which

was filed in support of the action, and submits that the issues relating to ownership of the property by Joseph Kapambwe Mulenga, in this matter, were heard and determined by this Court.

- 8.11 Reference is made to the case of ***Hussein Safieddinne v Commissioner of Lands & others***⁽²⁵⁾, arguing that the Supreme Court in that matter, had the opportunity to pronounce itself on the rationale for the principle of res judicata. Other authorities relied on, are the cases of ***Million Hamung'ande & others v Mulopa***⁽³⁴⁾, ***Mpongwe Farms Limited v Dar Farms and Transport Limited***⁽²⁸⁾, and ***Amber Louise Guest and another v Makinga and another***⁽²³⁾.

WHETHER JOSEPH KAPAMBWE MULENGA'S ACTION IS AN ABUSE OF THE COURT PROCESS?

- 8.12 As to whether this action by Joseph Kapambwe Mulenga constitutes an abuse of the Court process, Zambia National Commercial Bank Plc submits that the claims do in fact amount to an abuse of the Court process. The basis for this position, is that the claims were determined by this Court in the mortgage action. Reliance is also placed on the cases of ***Ashmore v British Coal Corporation***⁽¹⁴⁾ and ***BP Zambia PLC v Interland and Motors Ltd***⁽¹⁷⁾.
- 8.13 Also quoted, is ***Order 18/19/18 of the Rules of the Supreme Court of England*** on what amounts to an abuse of the process of Court. Zambia National Commercial Bank Plc points out, that the Rule cites 're-litigation' as an

example of abuse of the Court process. It is further argued that under **Order 18 Rule 19 of the Rules of the Supreme Court of England**, the Court has the power to strike out and/or dismiss a matter, at any stage of the proceedings for abusing of the Court process.

- 8.14 Zambia National Commercial Bank Plc states that the plethora of authorities, that it has cited, illustrate that the Court generally discourages the commencement of a new matter which has already been heard and determined by the High Court. It submits that this Court should not entertain Joseph Kapambwe Mulenga's application to re-litigate the issues. Support is drawn from the decision in the cases of **Edgar Hamuwele (Joint Liquidator of Lima Bank Limited (In Liquidation))**, **Christopher Mulenga (Joint Liquidator of Lima Bank Limited (In Liquidation) v Ngenda Sipalo and Brenda Sipalo**⁽²²⁾ and **B.P Zambia v Interland Motors Limited**⁽¹⁷⁾.

9. SKELETON ARGUMENTS IN SUPPORT OF ZAMBIA NATIONAL COMMERCIAL BANK PLC'S APPLICATION BY C & S INVESTMENTS LIMITED

- 9.1 C & S Investments Limited argues that the Supreme Court explained the principle of *res judicata* in the case of **Hamalambo v Zambia National Building Society Appeal**⁽³⁰⁾. Other authorities cited in that regard, is the case of **Mumba v Zambia Revenue Authority**⁽²⁴⁾.
- 9.2 It is stated that all the reliefs that are being sought by Joseph Kapambwe Mulenga, hinge on whether he can

claim an interest in a portion of Farm 411a, the subject property, which was charged to Zambia National Commercial Bank Plc, as security for the monies that Master Butcheries Limited borrowed from the said Zambia National Commercial Bank Plc, and which property was foreclosed and sold to C & S Investments Limited, following a Judgment of this Court.

- 9.3 It is argued that at page J35 of the Judgment in the mortgage action, which has been exhibited by Zambia National Commercial Bank Plc to its' affidavit in support of the application, Judge B.C. Mbewe, not only determined the enforceability of the mortgage between Master Butcheries Limited and Zambia National Commercial Bank Plc, but also went on to determine Joseph Kapambwe Mulenga's purported interest in the property.
- 9.4 C & S Investments Limited submits that the merger or link between the Two (2) actions is apparent, and that the Court made a finding that Joseph Kapambwe Mulenga had no interest in the property, despite the contract of sale which was signed with Master Butcheries. The argument is also that the Court found that no money was deposited in Zambia National Commercial Bank Plc's account to discharge the mortgage which was registered against the property.
- 9.5 It is therefore contended that a Court of competent jurisdiction, already determined that Joseph Kapambwe Mulenga had no interest in the property, equitable or

otherwise, and that Zambia National Commercial Bank Plc was free to foreclose and sell the subject property, which it did.

- 9.6 Therefore, the view taken, is that Joseph Kapambwe Mulenga's action is a clear abuse of the Court process, as it amounts to re-litigation of the issues that have already been determined by another Court. To support this position, reliance is placed on the case of ***Betty Chizyuka v Finance Bank Zambia Limited***⁽³⁵⁾. Further reference is made to ***Section 4 of the High Court Act Chapter 27 of the Laws of Zambia***, stating that it provides that all Judges of the High Court enjoy equal power, authority and jurisdiction.
- 9.7 Therefore, this Court cannot deal with matters that have already been determined by another High Court Judge. The continued argument is that although Joseph Kapambwe Mulenga was not a party to the action, which was determined by Judge B.C Mbewe, the Supreme Court in the case of ***Barclays Bank v ERZ Holdings Ltd & others***⁽²⁰⁾ when faced with a matter strikingly similar to this matter, stated that:

“There are Three (3) essential elements for this doctrine to apply. These are (1) an earlier judicial decision on the issues (2) A final Judgment on the merits (3) the involvement of the same parties or other parties in privity to the original parties....

The Appellant bank claimed an interest through the mortgage agreements between it and the 1st Respondent. We hold therefore, that although it is common ground that the Appellant Bank was not a party to the proceedings before Kakusa J, that it was not represented, nonetheless, the issue of ownership of the three properties in question was decided and it was a final decision. That decision has not been impeached. So, the learned trial Judge was on firm ground to have invoked the doctrine of res judicata.”

9.8 The argument is that the import of the decision in the above case, is that even though Joseph Kapambwe Mulenga was not a party to the first action, he still cannot be allowed to commence an action to impugn the decision of a Court of equal jurisdiction, since the High Court has already determined that he has no interest in any portion of the property in dispute.

10. JOSEPH KAPAMBWE MULENGA’S AFFIDAVIT IN OPPOSITION TO ZAMBIA NATIONAL COMMERCIAL BANK PLC’S APPLICATION

10.1 The affidavit in opposition is deposed to by Joseph Kapambwe Mulenga, who states that it is entirely inappropriate that the action should be disposed of summarily, as there are disputes of facts between the parties which disclose new, bona fide and reasonable causes of action for this Court’s determination.

10.2 He names these are:

- i. *The fact that the action before his Lordship Justice B.C Mbewe was a mortgage action, against the 1st Defendant, relating to the 2nd Defendant's legal estate as security, whilst the present action hinges on specific performance of a contract for part of the said legal estate, whose value or consideration was prorated by the 1st Defendant and the Plaintiff, with the consent of the 2nd Defendant exhibited as 'JKM1a-c' is a copy of the initial contract of sale, the 2nd Defendant's notice of inspection of my equitable interest following proration and the 2nd Defendant's undertaking to release title marking off proration.*
- ii. *The fact that the Court only made a determination on the Plaintiff's lack of interest in the ascertained extent of 100 acres of the Remaining Extent of Farm 411a, Lusaka by the Plaintiff's default in payment of the initial contract price of ZMW4,000,000.00. Produced and marked 'JKM2' is a copy of the Judgment of Justice B. C. Mbewe dated 12th April, 2021.*
- iii. *The fact that his Justice B.C Mbewe only made determination on the Plaintiff's default in payment of the first consideration of ZMW4,000,000.00 and made no determination on*

Joseph Kapambwe Mulenga's default, or otherwise, payment of the prorated and revised considerations of ZMW2,150,000.00 and ZMW920,000.00. Reference is made to page J35 marked 'JKM2'.

- iv. The fact that Justice B.C Mbewe never made any determination on my first present relief, particularly, the Plaintiff's performance of the prorated and revised contracts which were accompanied with prorated and revised considerations of ZMW2, 150, 000.00 and ZMW 920,000.00 respectively. Reference is made to exhibit 'JKM2'.*
- v. The fact that Justice B. C Mbewe never made any determination on my first present relief, particularly, the Plaintiff's equitable interest in the ascertained extent of 69 acres of Subdivision P of the Remaining Extent of Farm 411a, Lusaka. Reference is made is to page 35 of exhibit marked 'JKM2'.*
- vi. The fact that Justice B. C Mbewe never made any determination on the 1st Defendant's breach of duty and the 2nd Defendant's breach of professional undertaking to release the subject Certificate of Title for the marking off of the Plaintiff's equitable interest of 69 acres. Produced and marked 'JKM1b-c' is the 2nd Defendant'*

notice of inspection of the equitable interest following proration and the 2nd Defendant's undertaking to release title for marking off following proration.

- vii. The fact that the Plaintiff was neither a party nor privy to the mortgage proceedings before the Court and he was neither informed nor aware of the very proceedings, and that the 2nd Defendant deliberately omitted to do so.*
 - viii. The fact that either action had no representative or agent of the Plaintiff to properly submit his case or cause, in so far as, it related to his equitable interest in the property.*
 - ix. The fact that the Court never made any finding on the Plaintiff's second, third and fourth reliefs which are strictly directed against the 3rd Defendant, namely, priority of equitable interest, quiet possession, and, irregularly of the assignment of debt. Reference is made to claims 2 – 4 of the Plaintiff's Writ.*
 - x. The fact that the Court never made any determination on the Plaintiff's present reliefs against the Defendants for delivery up of the Certificate of Title; recovery of the paid consideration of ZMW 3,170,000.00; special damages; general damages for breach of the implied term of a contract for the sale of land;*
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general damages for breach of its revised undertaking; and punitive damages. Reference is made to claims 5 – 11 of the Plaintiff's Writ.

xi. The fact that Justice B. C Mbewe's lacked jurisdiction to issue a personal Judgment in my absence.

- 10.3 Joseph Kapambwe Mulenga avers that the existence of these issues of fact, are well known to Master Butcheries Limited, Zambia National Commercial Bank Plc and C & S Investments Limited, since they were raised in various correspondence that passed between the parties on various dates. Exhibited as 'JKM3' is a bundle of the relevant correspondence.
- 10.4 In response to the affidavit in support, Joseph Kapambwe Mulenga states that irrespective of Zambia National Commercial Bank Plc's consent to the contract of sale between Master Butcheries Limited and himself, Zambia National Commercial Bank Plc did not disclose to him, that they had commenced an action for possession and foreclosure. Instead, it continued to beguile him into proceeding with the transaction, and continued to undertake to release the subject title for marking off. Exhibited as 'JKM1b-c' are e-mail correspondences to that effect.
- 10.5 It is also averred, that Zambia National Commercial Bank Plc's malicious, unfair and negligent conduct is yet to be adjudicated by any Court, and it is freshly and properly

before this Court, for final and conclusive determination. Joseph Kapambwe Mulenga deposes that he, with the consent of Zambia National Commercial Bank Plc, purchased a portion of the subject property from Master Butcheries Limited.

- 10.6 However, the claim that this was averred in Master Butcheries' affidavit in opposition, is said to be within the peculiar knowledge of Zambia National Commercial Bank Plc, as Joseph Kapambwe Mulenga was never joined to the mortgage action.
- 10.7 Joseph Kapambwe Mulenga admits that the Four Million Kwacha (ZMW4,000,000.00) has never been paid to Master Butcheries Limited, and that the precise figure that he paid was Three Million One Hundred and Seventy Thousand Kwacha (ZMW 3,170,000.00), save that the terms of the contract, which is exhibited as 'JK1a', at Special Condition No. 10, had a proration provision.
- 10.8 His position however, is that irrespective of that, the claim that this was averred in Zambia National Commercial Bank Plc's affidavit in reply, is within its' peculiar knowledge. Joseph Kapambwe Mulenga states that his performance and or default in performance of the revised and prorated consideration of Three Million One Hundred and Seventy Thousand Kwacha (ZMW 3, 170,000.00), is yet to be adjudicated by any Court, and that it is freshly and properly before this Court, for final and conclusive determination.

- 10.9 He deposes that the Judgment was passed without his ascertained interests being considered, and that the reliefs sought in this matter, are not the same as the reliefs that were sought in the mortgage action. Exhibited as 'JKM4a-b' are copies of the Writ of Summons and the Originating Summons.
- 10.10 Joseph Kapambwe Mulenga contends that Master Butcheries Limited and Zambia National Commercial Bank Plc engineered this outcome, as he paid Three Million One Hundred and Seventy Thousand Kwacha (ZMW 3,170,000.00), being an amount of money, which was sufficient to partially liquidate the debt, which was in Master Butcheries Limited's account, which is domiciled within Zambia National Commercial Bank Plc, as per the contract of sale that Zambia National Commercial Bank Plc consented to.
- 10.11 Joseph Kapambwe Mulenga states that he sees that the Court's holding is limited to the default payment of the initial contract value of Four Million Kwacha (ZMW 4,000,000.00), and not the revised or prorated contract value of Three Million One Hundred and Seventy Thousand Kwacha (ZMW3,170,000.00), which he now claims to have been duly deposited into Master Butcheries Limited's account, which is held with Zambia National Commercial Bank Plc, as per the conditions of the contract of sale for a portion of the land. Exhibited as 'JKM5', is a

copy of proof of the payments that were made towards the account.

10.12 Joseph Kapambwe Mulenga states that he verily believes the advice of his advocates, that the entitlement to have his interest adjudicated before this Court, arises wherein all the parties with a substantial interest in the subject property have been heard on the ascertained equitable interest of Sixty-Nine (69) acres.

10.13 He further avers that, this application will not have the effect of varying the foreclosure Order, which was issued by this Court, as his claim is not for One Hundred (100) acres as earlier adjudicated by the Court, as per the initial contract of sale. Joseph Kapambwe Mulenga deposes that his claim is for possession of the property, being Sixty-Nine (69) acres, which was subject to prorated contracts of sale, whose substance and effect was not heard by any Court.

10.14 It is also stated that this application will not result in conflicting Judgments being rendered, because he was not a party to the Judgment in question. He goes on to depose that, this is also because the said Judgment did not sincerely consider his interests, and that the reliefs that he seeks are different.

10.15 In continued averment, Joseph Kapambwe Mulenga deposes that he is advised by his advocates on record, and believes the same to be true, that these proceedings are not an abuse of process. He justifies this by stating that

the parties and the reliefs that are being sought in this matter are different.

10.16 It is his position, that arriving at a decision in favor of Zambia National Commercial Bank Plc in this matter, will result in embarrassment to the administration of justice, as Master Butcheries Limited, Zambia National Commercial Bank Plc and C & S Investments Limited, will effectively use this Court to circumvent their liability to him.

11. JOSEPH KAPAMBWE MULENGA'S SKELETON ARGUMENTS IN OPPOSITION

11.1 With regard to the defence of res judicata, Joseph Kapambwe Mulenga quotes the definition in ***Black's Law Dictionary, 10th Edition, by Bryan A. Garner at page 1336*** as follows:

'Latin 'a thing adjudicated'

"1 An issue that has been definitively settled by judicial decision.

2 An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or a series of transactions, and that could have been – but was not – raised in first suit."

11.2 He also quotes from ***Halsbury's Laws of England, 4th Edition, Volume 16, paragraph 1528*** which he states

outlines the conditions that need to be fulfilled for a plea or defence of res judicata to succeed, as follows:

“In order that a defence of res judicata may succeed, it is necessary to show that the cause of action was the same, and also that the Plaintiff had an opportunity of recovering but for his own fault might have recovered in the first action that which he seeks to recover in the second. A plea of res judicata must show either an actual merger or that the same point had actually been decided between the same parties.”

11.3 Joseph Kapambwe Mulenga also relies on the case of ***Henderson v Henderson***⁽¹⁾, stating that Wigram VC, in that matter observed at page 381, that:

“...the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances), permit the same parties to open the same subject of litigation in respect of that matter which might have been brought forward only because they have from negligence, inadvertence, or even accident omitted part of their case.

The plea of res judicata applies except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject matter of

litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.”

- 11.4 He further relies on the case of **Bank of Zambia v Jonas Tembo and others⁽¹⁸⁾**, arguing that the Supreme Court’s attention in that matter, was drawn to paragraph 1528 of the **Halsbury’s Law of England, 4th Edition, Volume 16**, which has been cited above. Joseph Kapambwe Mulenga further in argument, states that the Supreme Court upheld the preliminary objection that was raised by Counsel, and invoked the legal maxim: ‘interest republic caesut sit finislitium’ meaning that, it is in the public interest, that there should be an end to litigation.
- 11.5 He therefore states that the rationale behind res judicata, is that it is in the public interest, that there should be an end to litigation. Also relied on, are the cases of **Nkana Alloy Company Limited v The Attorney General and others⁽²⁷⁾** and **Barclays Bank Zambia Plc v ERZ Holdings Limited and others⁽²⁰⁾** on the principle of res judicata.
- 11.6 The argument is that from the authorities cited, the following propositions may be distilled:
- a. The plea of res judicata is a form of estoppel by which a party is prevented from re-litigating an issue of fact that has been judicially determined in a final manner between the parties by a tribunal having jurisdiction;

- b. In order that a defence of res judicata may succeed, it is necessary to show that cause of action was the same;
- c. That the parties or (their privies), are the same in both the previous, and present or current proceedings;
- d. The Plaintiff had opportunity of recovering, and but for his own fault, might have recovered in the first action, that which he seeks to recover in the second;
- e. The claim or issue in dispute in both actions is the same; and
- f. Once a matter has been heard between the same parties by a Court of competent jurisdiction, the same matter should not be reopened.

11.7 The continued argument, is that it is clear from the Skeleton Arguments that the parties to this action have filed, that they are agreed on the nature or essence of the plea or defence of res judicata. Joseph Kapambwe Mulenga however, states that the controversy, however, stems from the application of the same, to the present proceedings or dispute.

11.8 He contends that, in Order to resolve the present dispute, it is necessary to calibrate the preceding propositions, in light of the facts and the dispute at hand.

ARE THE PARTIES IN THE PRESENT PROCEEDINGS THE SAME AS IN THE PREVIOUS PROCEEDINGS?

11.9 Joseph Kapambwe Mulenga argues that the parties in the present action are not the same as in the previous proceedings, as in the said previous proceedings, the

parties were Zambia National Commercial Bank Plc as Applicant, while the Respondents were Master Butcheries Limited as borrower and mortgagor, and Jack Jere and Nelson Garnet as guarantors.

11.10 He states that C & S Investments Limited relies on the case of **Barclays Bank Zambia Plc v ERZ Holdings Limited and others**⁽²⁰⁾. His contention however, is that the said case is distinguishable from the present case. In arguing so, Joseph Kapambwe Mulenga states that in that case, as Counsel for C & S Investments Limited pointed out, in paragraph 14 of the Skeleton Arguments, the Supreme Court was satisfied that:

- (1) there was a definite judicial decision through a Consent Judgment on the ownership of the three properties in question;
- (2) the Consent Judgment was a final Judgment on merits, as the parties consented to that Judgment.
- (3) there was involvement of the 1st, 2nd, 3rd, 4th and 5th Respondents in the Consent Judgment.

11.11 Joseph Kapambwe Mulenga states that the point to note, is that a Consent Judgment is as good as a Judgment, that is decided on the merits. However, his contention is that in this case, the various claims and reliefs which he seeks, have never been heard and determined on their merits. To buttress this position, he relies on the case of **Betty Chizyuka v Finance Bank Limited**⁽³⁵⁾.

**ARE THE ISSUES IN THE PREVIOUS PROCEEDINGS
THE SAME AS IN THESE PROCEEDINGS?**

- 11.12 It is further argued that the issues that were raised in the previous proceedings, are not the same as in the present proceedings. In that respect, Joseph Kapambwe Mulenga reproduces the reliefs in both actions, as well as the decision of the Court in the previous matter, as found at pages J36- J39 of the Judgment. He points out that it does not require close reasoning to discern that the claims and reliefs in the Two (2) actions are distinct.
- 11.13 Joseph Kapambwe Mulenga's continued argument, is that to be sure, all the claims in the present proceedings were not adjudicated in the previous action. He argues that C & S Investments Limited in paragraph 8 at page 3 of its' Skeleton Arguments, quotes excerpts of the Judgment in the previous action, being pages J34-J35, in justifying its' claims that the Court in the first action determined his interest in the property.
- 11.14 Joseph Kapambwe Mulenga however, contends that the passage in question, is not part of the decision of the Court at pages J36-J39, and that it is in fact obiter dictum, quoting from the Indian case of *Mohandas Issardas v A.N Sattanathan*⁽⁷⁾ which distinguished ratio decidendi and obiter dictum. He argues that the Court of Appeal of England in the case of *Goldup v John Manson Ltd and another* ⁽¹²⁾ further elucidated the rationale for obiter dicta.

- 11.15 The argument is that in this case, the Court in the previous action, need not have made any comprehensive statements of principles or statements of fact, regarding the tripartite agreement between Joseph Kapambwe Mulenga and Zambia National Commercial Bank Plc and Master Butcheries Limited, and the consideration submitted under it. He argues so, on the basis that what was before that Court, was purely a mortgage action relating to the unsold piece of land, and to which Joseph Kapambwe Mulenga was not party nor privy.
- 11.16 Secondly, Joseph Kapambwe Mulenga argues that the Court in the first or previous action, was not invited by the parties to the action to determine whether or not he had any interest in the subject property. He states that he has demonstrated that he was not part of the action, and that the causes of action in the first and present action are distinct.
- 11.17 The third limb of argument on this ground, is that in the event that the parties had invited the Court to determine whether or not Joseph Kapambwe Mulenga had any interest in the subject matter, he should have been joined to that action, in order to avoid a multiplicity of proceedings. He states that the position of law as regards joinder is very clear. Reliance is placed on the case of ***Mike Hamusonde v Kamfwa Kasongo and others***⁽¹⁹⁾ as authority.

11.18 Fourthly, Joseph Kapambwe Mulenga states that with due respect, the Court in the first action misdirected itself, by purporting to determine his ad personam interest in the property, in his absence. This is clarified as, doing so without joining him to the proceedings. It is contended that this amounted to breaching the rules of natural justice, and was contrary to the holding in the case of ***Mulenga v Mumbi ex parte Mhango***⁽¹¹⁾.

11.19 Further reliance is placed on paragraph 1368 of the ***Halsbury's Laws of England, Volume 30, 3rd Edition*** which provides that:

“All persons exercising judicial or quasi-judicial functions must have due regard to the dictates of natural justice. These require that the parties to the proceedings shall be duly notified when and where they may be heard and shall then be given full opportunity of stating their views, the matters in dispute being decided honestly, impartially and without bias by a tribunal, no member of which has any interest, either pecuniary or otherwise in the matter.”

11.20 The case of ***Rex v General Medical Council Ex Parte Sparkman***⁽⁴⁾ is also called to aid as authority, where *Lord Wright* stated that:

“If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would

have been arrived at in the absence of departure from the essential principles of justice. The decision must be declared to be no decision.”

11.21 It is further submitted that as Joseph Kapambwe Mulenga was not joined to the previous proceedings, and neither was he heard, the decision of the Court cannot be said to be final and binding, as regards his personal interest under the tripartite contract between himself on the one hand, and Master Butcheries Limited and Zambia National Commercial Bank Limited on the other.

11.22 He goes on to state that in the words of *Lord Wright* which have been seen above, any purported decision must be declared to be no decision. The argument is that this principle is internationally recognized, and reliance is also placed on the persuasive guidance of the Supreme Court of the Philippines, in the case of ***Alfredo Ching v The Honourable Court of Appeals***⁽⁶⁾ quoting ***Ang Lam v Rosillosa et al.*** ⁽⁵⁾ who stated that:

“An action to redeem or to recover title or possession of real property is not an action in rem, or an action against the whole world, like a land registration proceeding, or the probate of a will; it is an action in personam, so much so that a judgment therein is binding only upon the parties properly impleaded and duly heard, or even given opportunity to be heard...”

11.23 The fifth limb of argument, is that Joseph Kapambwe Mulenga presently has no recourse against the Court's Judgment, dated 12th April, 2021, as that Court is functus officio. His contention is that any application for joinder should have been in that cause, where Judgment was delivered. However, he states that any application for joinder by him, would be incompetent and void ab initio, as he was a non-party to that action.

11.24 He draws strength in that submission, from the Supreme Court's position in the case of ***Stanbic Bank and Micoquip Zambia Limited***⁽²⁶⁾. Joseph Kapambwe Mulenga thus contends that his interest in the property has not yet been judicially determined or indeed decided on its merits.

DID JOSEPH KAPAMBWE MULENGA HAVE OPPORTUNITY TO PUT FORTH HIS CLAIM IN THE FIRST ACTION?

11.25 On the question of whether Joseph Kapambwe Mulenga, had an opportunity to put forth his claim in the first action, he states that he had no such opportunity, as he was not made a party to those proceedings. Joseph Kapambwe Mulenga contends states that although Master Butcherries Limited and Zambia National Commercial Bank Plc, in that matter, knew that at some point antecedent date, they dealt with Joseph Kapambwe Mulenga over the subject property, they denied him an opportunity to be heard.

11.26 He argues that this is not surprising, because the action had to do with a mortgage, and the accompanying guarantees. Joseph Kapambwe Mulenga states that the rights which he derived from Master Butcheries were from totally different facts, contractual relationship and legal circumstances; a sale free of Zambia National Commercial Bank Plc's encumbrances, as affirmed by the said Zambia National Commercial Bank Plc's consent for his purchase.

11.27 Joseph Kapambwe Mulenga argues that in short, the purchase of the property which is subject of this action, was done by him with the consent of Zambia National Commercial Bank Plc, as will be demonstrated at trial. He states that following the preceding tripartite agreement, the land in question ceased to form part of the security that was subject of the first action, as will be demonstrated at trial.

11.28 To buttress the position that there was no mutuality of interest, and that Joseph Kapambwe Mulenga was not privy to the previous action, reliance is placed on the definition of *privity* in ***Black's Law Dictionary***, which is:

“The connection or relationship between two parties, each having a legally recognised interest in the subject matter (such as a transaction, proceeding or piece of property); mutuality of interest.”

12. SUBMISSIONS AT THE HEARING

SUMBISSIONS BY COUNSEL FOR ZAMBIA NATIONAL COMMERCIAL BANK PLC,

- 12.1 When the matter came up for hearing on 20th April, 2023, Counsel for Zambia National Commercial Bank Plc relied on the documents, which were filed in support of the application. He briefly augmented, stating that the nature of the application, was to challenge the jurisdiction of this Court to hear Joseph Kapambwe Mulenga's case as pleaded, on the basis that; firstly, the issues in his case are res judicata, having been heard and determined by this Court on the merits, under Cause number 2019/ HPC/0025.
- 12.2 Counsel submitted that secondly, he argued that Joseph Kapambwe Mulenga's second action is an abuse of the Court process, as it is likely to result in this Court rendering a Judgement, that will either conflict with the holding in the mortgage action, or will result in this Court awarding conflicting decisions regarding the same issues.
- 12.3 With regard to the principle of res judicata, Counsel submitted that the principle arises, where a party seeks to set up in a further action, issues that have been subject of judicial determination. He stated that the record showed that the statement of claim, which was filed by Joseph Kapambwe Mulenga on 24th November, 2022, hinges on simply one issue, being his interest in the subject property.
- 12.4 The further submission was that a review of the reliefs that are being sought, showed that they are either connected to

Joseph Kapambwe Mulenga's claim for an interest in the property, or emanate from the property that was subject of the mortgage action. On that basis, Counsel submitted that the Court has no jurisdiction to try the issues as pleaded by Joseph Kapambwe Mulenga.

12.5 It was stated that the proper recourse available to Joseph Kapambwe Mulenga was not to try the matter in a separate action, as had been done, but to apply to be joined to the mortgage action, and thereafter, Joseph Kapambwe Mulenga would be at liberty to vent his grievances in that matter. Still in submission, Counsel stated that the institution of a fresh action, inviting the Court to determine the issues was simply an abuse of the court process.

12.6 The prayer was that the action in its' entirety be dismissed with costs to Zambia National Commercial Bank Plc.

SUBMISSIONS BY COUNSEL FOR C&S INVESTMENTS LIMITED

12.7 Counsel for C & S Investments Limited stated that they supported the application that had been made by Zambia National Commercial Bank Plc. He submitted that they had filed Skeleton Arguments in support of the said application. By way of augmenting, Counsel noted that Joseph Kapambwe Mulenga had primarily raised Four (4) issues in a bid to assail the application.

12.8 These were stated as being firstly; that Joseph Kapambwe Mulenga was not a party to the mortgage action. Therefore, the matter is not res judicata. Counsel

however, took the position that the application by Zambia National Commercial Bank Plc had raised a two-prong assault on Joseph Kapambwe Mulenga's action; the first being *res judicata*, and the second being abuse of the Court process.

12.9 Counsel stated that the Two (2) issues equally raised the issue of estoppel, which entailed that a party would be precluded from raising another issue before the Court, which had already been resolved by a Court of equal jurisdiction. He added that to satisfy the principle of estoppel, what needs to be shown are Three (3) primary things namely;

- i. that the same question has been decided in a previous action;*
- ii. final decision; and*
- iii. the parties to the judicial decision or their privies are the same, as the persons in which the estoppel is raised.*

12.10 It was also Counsel's submission that notwithstanding this, the principles of *res judicata* and estoppel captured parties in privity to the original action. In that regard, he stated that in the first action, the issue raised was whether Joseph Kapambwe Mulenga had an interest in the property, stemming from a contract of sale between himself and Zambia National Commercial Bank Plc.

- 12.11 It was stated that the principle of privity of parties, entails that the parties share an interest arising from the same transaction.
- 12.12 Counsel told the Court, that Master Butcheries Limited already raised the issue of the contract of sale with Joseph Kapambwe Mulenga, and the Court held that the particular agreement was of no effect on Zambia National Commercial Bank Plc, for lack of consideration. Therefore, Counsel contended that Joseph Kapambwe Mulenga was attempting to reassert that interest on the same issue in this action, which was equally covered under the principles of *res judicata* and *issue estoppel*, notwithstanding that he was not a party to the very action.
- 12.13 The second limb of submission, was that Joseph Kapambwe Mulenga had raised the issue of the claims in this action, being different from those in the mortgage action. However, the view that Counsel took, was that *estoppel* is not only limited to claims or similarity, but whether the same question has been decided.
- 12.14 He stated that in this case, Joseph Kapambwe Mulenga's interest in the property in dispute, had already been decided, and could not be re-litigated in a fresh action.
- 12.15 Lastly, in submission, Counsel stated that Joseph Kapambwe Mulenga had argued that the decision of the Court in the mortgage action as regards his interest in the property, was mere *obiter dicta*. Therefore, it did not

constitute a decision of the Court. It was however, submitted that obiter dicta, as pointed out by Joseph Kapambwe Mulenga is an expression of a statement or opinion of the Court, that is not necessarily crucial to the determination of the issues that are raised.

12.16 Counsel's view was that the decision regarding Joseph Kapambwe Mulenga's interest in the property was a significant point, that was raised by Master Butcheries Limited in the mortgage action, as seen at page J13 of the Judgement, which is exhibited to Zambia National Commercial Bank Plc's affidavit, where the Court produced verbatim Master Butcheries Limited's arguments.

12.17 His submission was also that a reading of the said Judgment, showed that the determination of Joseph Kapambwe Mulenga's interest was a cardinal point for the Court. Therefore, it could not pass for obiter dicta. Therefore, Counsel for C & S Investments Limited submitted that the matter is indeed res judicata, and an abuse of the Court process, as it was inviting the Court to redetermine the issues that had already been determined, and for which there was a final Judgement, which had not been impeached.

12.18 Based on that, Counsel's prayer was that Joseph Kapambwe Mulenga's action be dismissed with costs.

**RESPONSE BY COUNSEL FOR JOSEPH KAPAMBWE
MULENGA**

- 12.19 Counsel for Joseph Kapambwe Mulenga in response, stated that they relied on the documents that had been filed in opposition to Zambia National Commercial Bank Plc's application. She stated that her colleagues had gone to great lengths to explain the principle of *res judicata*, suffice to state that the said principle has several components, which must all be fulfilled in Order for the defence to apply.
- 12.20 Counsel went on to submit, that it was not enough that the parties had to be the same or their privies, but that the cause of action in both matters had to be the same. It was also Counsel's submission that Joseph Kapambwe Mulenga must have had opportunity to recover the relief sought, but neglected to do the same.
- 12.21 With regard to the principle of estoppel, Counsel stated that it does not apply in a vacuum, because all the elements have to be present. Her submission was that Joseph Kapambwe Mulenga, firstly contended that he was not a party to the mortgage action, and neither was he privy to it, as it was purely a foreclosure proceeding. Therefore, his interest did not arise, nor were they in any way related to the rights of either the mortgagee, mortgagor and guarantors, who were the parties in those proceedings.

- 12.22 The submission was that Joseph Kapambwe Mulenga's interest which had been referred to by Counsel, arose out of a tripartite agreement, to which the said Joseph Kapambwe Mulenga, Master Butcheries Limited and Zambia National Commercial Bank Plc were party. She added that it was out of that action, that the birth of this action could be seen.
- 12.23 Still in submission, Counsel stated that a perusal of paragraph 4 of Joseph Kapambwe Mulenga's affidavit in opposition to Zambia National Commercial Bank Plc's application, showed the detailed differences of the issues for determination in this matter, which were different from those that arose in the pleadings, under the mortgage action.
- 12.24 She added that the determination of the Court through obiter dicta, as regards Joseph Kapambwe Mulenga's interest, was made outside the opportunity of him having been heard. Counsel submitted that in any event, the record showed that there are Two (2) contracts under consideration in this matter.
- 12.25 Further in submission, the Court was referred to the persuasive case of *Ward and Others v Savill*⁽³⁶⁾, which cited *Strouds Dictionary*, on a Judgement in personum. It was stated that Joseph Kapambwe Mulenga's interest could not have been determined by the Court under the mortgage action, in the absence of a joint application or Order stemming from the parties or the Court. Counsel

also submitted, that this principle is well enshrined, as a principle of natural justice, as outlined in the Skeleton Arguments.

- 12.26 The continued submission was that Counsel for Zambia National Commercial Bank Plc had alluded to the fact that the matter before this Court could be better determined by the Court that dealt with the mortgage action, through an application for joinder. The case of ***Stanbic Zambia v Micoquip Zambia Limited Supreme Court*** ⁽²⁶⁾ which had been cited in the Skeleton Arguments was referred to, with Counsel stating that it clarified the position on joinder of parties after Judgement.
- 12.27 It was contended that in doing so, the Supreme Court stated that in the absence of an application for review or a pending appeal, the Court becomes functus officio, and cannot entertain any application for joinder.
- 12.28 Therefore, Joseph Kapambwe Mulenga could not apply for joinder, as the said Judgement was passed in 2021, and there was no appeal, or an application for review. Therefore, the Court that passed the Judgment was functus officio.
- 12.29 The submission in conclusion was that Joseph Kapambwe Mulenga not having commenced any other litigation in this Court, and not being heard in any Court of competent jurisdiction, could not be said to be abusing the Court's process or wasting its' time. It was

therefore submitted that the matter is properly before this Court, and that the issues raised are not res judicata.

REPLY BY COUNSEL FOR ZAMBIA NATIONAL COMMERCIAL BANK PLC

- 12.30 In reply, Counsel for Zambia National Commercial Bank Plc stated that Joseph Kapambwe Mulenga had argued that the nature of his claims in this Court, are different from the issues that were raised in the mortgage action. Counsel's position was however that, the issues listed by Joseph Kapambwe Mulenga as being fit for this Court's determination, were simply grievances that were aimed at assailing the Judgement of Justice B.C Mbewe.
- 12.31 He stated that the purported invitation to the Court to review or redetermine the issues that were determined in the mortgage action, was flawed and should be dismissed with the contempt that it deserved. The continued submission in reply, was that it is well settled, that all Judges of the High Court have equal jurisdiction. Therefore, Joseph Kapambwe Mulenga's submission that this Court could try facts that had already been the subject of judicial determination by a Court of equal jurisdiction, lacked merit and should be dismissed.
- 12.32 Counsel went on to submit that the second issue that had been raised by Joseph Kapambwe Mulenga was that the action was in respect of Two (2) contracts. His view, was that it was immaterial the number of contracts that the parties had entered into, as what was critical, were the

issues that had been raised and had been pleaded by Joseph Kapambwe Mulenga.

- 12.33 It was also stated that the grievance in this action, is to assert Joseph Kapambwe Mulenga's purported rights in the subject property. However, that issue had already been the subject of judicial determination, and it would have been different if Joseph Kapambwe Mulenga's claim had been restricted to the recovery of the moneys that were paid to Master Butcheries Limited.
- 12.34 On the question of joinder, the submission was that the case of ***Stanbic Zambia v Micoquip Zambia Limited***⁽²⁶⁾ was entirely distinguishable from this matter, as in that case, the issue was whether a party could apply for joinder of another party, for the sole purpose of that other party being liable for a Judgement that had already been delivered by the Court.
- 12.35 Counsel stated that for that reason, the Court held that there had to either be an appeal, or an application for review for a party to be joined, after Judgement. Continuing with the reply, Counsel's submission was that Joseph Kapambwe Mulenga, as far as it was understood, is aggrieved with a decision in the mortgage action. He stated that this was demonstrated in paragraph 4 of the affidavit in opposition, and he appeared to submit that other issues were not considered by his Lordship B.C Mbewe.

12.36 Further, that had those issues been raised at that time, perhaps the Judge would have arrived at a different conclusion. Counsel however, posited that the said assertion in itself, should have formed a basis for an application for review of the Judgement, as opposed to commencing a fresh action before this Court. He reiterated the prayer that the action be dismissed with costs.

REPLY BY COUNSEL FOR C&S INVESTMENTS LIMITED

12.37 Counsel for C & S Investments Limited's reply was that Counsel for Joseph Kapambwe Mulenga had submitted that the cause of action in the mortgage action, and in this matter were different, and that the issue of estoppel could not apply. However, his submission was that the principle of estoppel does not require that the causes of action are the same. In that regard, he stated that ***Halsbury's Laws of England, Volume 16, 4th Edition reissue in paragraph 977*** referred.

12.38 Counsel submitted that secondly, it was inconsequential that in the mortgage action, Joseph Kapambwe Mulenga was not a party, as both the principles of estoppel and res judicata, not only cover the parties, but their privies as well. It was noted that parties in privity, entail that the parties share the same interests, and consequently a decision binding one party, will bind the other party as

well, notwithstanding that they were not parties to the first proceedings.

12.39 Counsel reiterated that Master Butcheries Limited and Joseph Kapambwe Mulenga shared the same interest by virtue of the contract of sale, which gave birth to Joseph Kapambwe Mulenga's interest in the subject property. The submission was that the import of this, was that a binding decision on Master Butcheries Limited with respect to the contract with Zambia National Commercial Bank Plc as determined in the first action, was binding on Joseph Kapambwe Mulenga, being Master Butcheries Limited's privity.

12.40 Counsel also submitted that to allow this action, would be tantamount to allowing Master Butcheries Limited and Joseph Kapambwe Mulenga a second bite at the cherry. This he stated, went against the very matters of the principles of res judicata and issue estoppel.

APPLICATION BY C&S INVESTMENTS LIMITED TO STRIKE OUT THE STATEMENT OF CLAIM

12.41 Counsel for C & S Investments Limited, in making the application, relied on the documents that had been filed in support of the application.

SUBMISSION BY COUNSEL FOR ZAMBIA NATIONAL COMMERCIAL BANK PLC

12.42 Counsel for Zambia National Commercial Bank Plc, submitted that they supported the application. He prayed that the application be granted.

**RESPONSE BY COUNSEL FOR JOSEPH KAPAMBWE
MULENGA**

- 12.43 Counsel for Joseph Kapambwe Mulenga relied on the Skeleton Arguments, that had been filed in opposition to the application. She contended that C & S Investments Limited had filed a wrong application, as it should have applied for further and better particulars.
- 12.44 Counsel also submitted that additionally, with regard to the assertion that Joseph Kapambwe Mulenga's pleadings had pleaded evidence, that this was not the position, as they merely reproduced in chronological Order, the action, representations, warranties and documents that the parties exchanged during the period leading up to the action.
- 12.45 The submission was further that Joseph Kapambwe Mulenga's pleadings, do not contain legal arguments, but merely set out the facts, which gave rise to the position that he holds. Lastly, Counsel stated that Joseph Kapambwe Mulenga's Thirteen (13) causes of action had been distinctly pleaded, as required by law, with the requirement to show the allegations claimed. Therefore, it was prayed that the application be dismissed with costs.

**REPLY BY COUNSEL FOR COUNSEL FOR C & S
INVESTMENTS LIMITED**

- 12.46 Counsel had nothing to say in reply.

**REPLY BY COUNSEL FOR ZAMBIA NATIONAL
COMMERCIAL BANK PLC**

12.47 In reply, Counsel for Zambia National Commercial Bank Plc stated that **Order 18 Rule 19 of the Rules of the Supreme Court of England** does not make it a condition that a party needs to apply for further and better particulars, before applying to strike out a statement of claim, as argued by Counsel for Joseph Kapambwe Mulenga. His submission was that the argument should be dismissed, as it was misleading, and that the application be granted.

13. DECISION OF THIS COURT

13.1 I have considered the applications. The first application has been made by C & S Investments Limited to strike out Joseph Kapambwe Mulenga's statement of claim, and to dismiss the action. The application has been made pursuant to **Order 18 Rule 19 of the Rules of the Supreme Court of England 1965, (1999 Edition)**. That Order provides that:

"19. - Striking out pleadings and indorsements

The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court; and may order the action to be stayed or dismissed or Judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.”

13.2 The basis of the application is that Joseph Kapambwe Mulenga’s statement of claim does not disclose a reasonable cause of action, against C & S Investments Limited, and it is scandalous, and tends to prejudice, embarrass and delay the fair trial of this action. The basis of the application, is also that Joseph Kapambwe Mulenga’s statement of claim offends the Rules on pleadings, as it is long winded and generally bad on account of prolixity, and adduces evidence besides material facts.

DOES THE STATEMENT OF CLAIM DISCLOSE A REASONABLE CAUSE OF ACTION?

13.3 C & S Investments Limited in arguing that no cause of action has been revealed against it, has relied on the *Rules of the Supreme Court of England* and the case of *Drummond-Jackson v British Medical Association*⁽¹⁰⁾ stating that it

defined what amounts to a '*reasonable cause of action*'. The argument is that an examination of the pleadings in the statement of claim, which relate to C & S Investments Limited are only paragraphs 58 and 59, which said paragraphs do not disclose any wrong that was committed by the said C & S Investments Limited.

13.4 It has been further argued that C & S Investments Limited acquired the land from Zambia National Commercial Bank Plc, following an Order for foreclosure and sale, which was made by the High Court in favour of Zambia National Commercial Bank Plc. C & S Investments Limited's contention is that paragraph 59 of the statement of claim, is a standalone claim, with no related relief being sought, and no particulars have been pleaded to support the claim that Joseph Kapambwe Mulenga has been injured in his good name, credit and reputation, as required by ***Order 18 Rule 12/24 of the Rules of the Supreme Court.***

13.5 C & S Investments Limited has further argued that Joseph Kapambwe Mulenga, was never a title holder to the land in question, and he did not register his interest in the land, as required by the law. It is also stated that there are no facts to support the allegation that C & S Investments Limited, knew or ought to have known that Joseph Kapambwe Mulenga had priority interest on the land.

13.6 Also argued, is that the statement of claim is also flooded with evidence, legal arguments and subordinate facts,

contrary to **Order 18 of the Rules of the Supreme Court of England**, and that it is bad on account of prolixity.

13.7 In opposition, Joseph Kapambwe Mulenga has stated that he has complied with the procedural rules, as they relate to pleadings. His contention is that the pleadings disclose a reasonable cause of action, and that the statement of claim has pleaded the material facts which form the basis of his claims. Further, in line with the case of **Drummond-Jackson v British Medical Association**⁽¹⁰⁾ his argument is that this is not a plain or obvious case that his action will fail.

13.8 Joseph Kapambwe Mulenga has listed eight (8) substratum of facts which he contends, disclose an action against C & S Investments Limited. His argument is that he purchased a portion of the land in question, at a valuable consideration and C & S Investments Limited has refused to surrender the mother title for marking off.

13.9 With regard to the foreclosure in the proceedings before Mr Justice B.C Mbewe, Joseph Kapambwe Mulenga has stated that he was not party or privy to the mortgage action, and that on the face of it, his claims are fit for full and final determination by this Court. He has also argued that C & S Investments Limited has asserted a number of likely defences, which is contradictory to its' assertion that no reasonable cause of action is disclosed against it. Joseph Kapambwe Mulenga has further contended that C & S Investments Limited's argument, admits evidence contrary to **Order 18 Rule 19 (2) of the Rules of the Supreme Court of England**.

13.10 In relation to the allegation contending lack of particulars, Joseph Kapambwe Mulenga has stated that the lack of particulars alone, is not a defect, that warrants striking out of the pleadings. This is because, this is curable by this Court ordering for further and better particulars, as opposed to striking out the pleadings. Reference has been made to the explanatory note, **Order 18/19/13 of the Rules of the Supreme Court of England**, and the case of **Melissa supermarket Limited vs Stanbic Bank Zambia**⁽³²⁾ in support of the argument.

13.11 It has also been contended by Joseph Kapambwe Mulenga, that a wholesome reading of his case, establishes a necessity for the matter to be reasonably pled, by way of Fifty-Nine (59) material facts. In justifying this, he states that he is fortified by the case of **Jowell v Bramwell Jones**⁽¹⁵⁾. The further argument is that the pleading retains the goal of formulating a complete cause of action against all Three (3) parties, and the application by C & S Investments Limited, does not in any way show how the alleged irrelevant issues may involve expense, trouble and delay on its' part.

13.12 C & S Investments Limited in its' reply, has maintained that Joseph Kapambwe Mulenga has not particularized the wrong that is alleged to have been committed by the said C & S Investments Limited in acquiring the property. The argument by C & S Investments Limited is that the issue for determination, is whether Joseph Kapambwe Mulenga has

disclosed a reasonable cause of action against it, and not whether there are likely defenses that it can raise.

13.13 To further this position, C & S Investments Limited has relied on the case of ***Wise v E.F Harvey Limited***⁽¹³⁾, as well as ***Order 15/1/2A of the Rules of the Supreme of England***. As regards the particulars for the claim for damages for defamation, C & S Investments Limited places reliance on the case of ***Muvi TV Limited v Phiri & another***⁽³³⁾. It has stated that the purpose of particularity, is to alert the other party, as to what case they will have to answer at Court, and where defamation is concerned, failure to disclose the facts upon which damages for defamation are claimed, is fatal.

13.14 In relation to the statement of claim containing legal arguments, and that it is bad for prolixity, the argument is that Joseph Kapambwe Mulenga, has failed to abide by the same rules in his pleading. It has been stated that pleadings have to be produced in summary form, as provided in the ***explanatory note 18/7/7 under Order 18 Rule 7 of the Rules of the Supreme Court of England***.

13.15 At the hearing, Counsel for Joseph Kapambwe Mulenga submitted that C & S Investments Limited had filed the wrong application, as it should have applied for further and better particulars. Counsel also maintained that Joseph Kapambwe Mulenga's pleadings are in accordance with the law. Counsel for Zambia National Commercial Bank Plc in supporting C & S Investments Limited's position, stated that Joseph Kapambwe Mulenga's argument that C & S Investments

Limited should have filed for further and better particulars, should be dismissed, as **Order 18 Rule 19 of the Rules of the Supreme Court of England** does not make it a condition precedent, that a party must file for further and better particulars before, applying to strike out a statement of claim.

13.16 A reading of **Order 18 Rule 19 of the Rules of the Supreme Court of England**, reveals that it gives the Court authority to strike out a pleading at any stage of the proceedings if, among other things, such pleading does not disclose a reasonable cause of action or is scandalous, frivolous or vexatious.

13.17 **Order 15/1/2 of The Rules of the Supreme Court of England** defines **a cause of action** as follows:

“The words "cause of action" comprise 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...The words have been defined as meaning "simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person”

13.18 That definition was also restated in the case of **Letang v Cooper**⁽⁸⁾. **Black’s Law Dictionary 10th Edition, by Bryan A. Garner, Thomas Reuters, 2009 at page 266** defines ‘cause of action’ as:

“A group of operative facts giving rise to one or more bases for suing: a factual situation that entitles one person to obtain remedy in Court from another person.”

13.19 In this matter, it has been seen that C & S Investments Limited’s argument is that Joseph Kapambwe Mulenga’s statement of claim has not disclosed any reasonable cause of action against it. Two (2) paragraphs of the statement of claim, being paragraphs 58 and 59, have been identified as being those that are supposed to allege facts against it. However, the contention is that those Two (2) paragraphs do not state the wrong that C & S Investments Limited has committed in acquiring the property.

13.20 Reliance has been placed on the case of ***Drummond-Jackson v British Medical Association and others***⁽¹⁰⁾ arguing that a reasonable cause of action is disclosed when the allegations made against a party, show that there is a chance of success if not traversed by the opposite party. Joseph Kapambwe Mulenga placing reliance on the same case, has however argued, that it is only in plain and obvious cases that the claims will fail, and may be struck out for not disclosing a reasonable cause of action.

13.21 His contention is that his case does not meet that threshold, as it reveals a cause of action, as C & S Investments Limited, has refused to surrender the mother title to him, for purposes of marking off the piece of land that he purchased in the transaction.

13.22 A perusal of Joseph Kapambwe Mulenga's statement of claim, reveals that C & S Investments Limited has been mentioned in paragraphs 49, 52, 54 (V-VI), 55(V), 58 and 59 of the statement of claim. In those paragraphs, Joseph Kapambwe Mulenga alleges firstly, that Zambia National Commercial Bank Plc, assigned its' Judgment debt of Three Million Nine Hundred and Forty Thousand Kwacha (K3,940,000.00) plus interest to C & S Investments Limited, without Joseph Kapambwe Mulenga's knowledge or consent, while it knew well of his equitable interest in the property.

13.23 Secondly, that Master Butcherries Limited and Zambia National Commercial Bank Plc, inclusive of C & S Investments Limited have refused and or neglected to release the Certificate of Title for marking off, in spite of the various letters, emails and telephone conversations demanding the same.

13.24 Thirdly, the contention is that C & S Investments Limited wrongfully acquired possession and control over the Sixty-Nine (69) acres which Joseph Kapambwe Mulenga has an interest in, and that it knew or ought to have known of his priority interest.

13.25 Finally, the assertion is that from C & S Investment Limited's assignment, Joseph Kapambwe Mulenga has been greatly injured in his good name, credit, reputation, finances and has suffered damage.

13.26 In the case of ***Drummond-Jackson v British Medical Association and others***⁽¹⁰⁾, *Pearson LJ*, stated that a

reasonable cause of action, is a cause of action which has some chance of success, in light of the pleadings. This entails that when only the allegations in the pleadings are considered, and there is an issue or question that could be determined at trial, a reasonable cause of action is disclosed. It is noteworthy that C & S Investments Limited had the liberty to apply for further and better particulars, in accordance with **Order 15 Rule 1 of the High Court Rules Chapter 27 of the laws of Zambia** and **Order 18 Rule 12 of the Rules of the Supreme Court of England**.

13.27 **Order 15 Rule 1 of the High Court Rules** states that:

“1. The Court or a Judge may, on the application of the Defendant, order further or better particulars.”

13.28 The provisions of **Order 18 Rule 12 (3) of the Rules of the Supreme Court of England**, on the other hand are:

“(3) The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or in any affidavit of his ordered to stand as a pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just.”

13.29 A careful reading of statement of claim that Joseph Kapambwe Mulenga has filed, reveals that it raises issues in relation to C & S Investments Limited, which the said C & S Investments Limited has responded to in its’ reply to Joseph Kapambwe Mulenga’s opposition to the application. Joseph

Kapambwe Mulenga has alleged that C & S Investments Limited wrongfully acquired possession and control of the subject property, and holds title to the property.

13.30 The definition of a cause of action in **Order 15/1/2 of the Rules of the Supreme Court of England**, is 'a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person.'

13.31 Having seen that Joseph Kapambwe Mulenga alleges that C & S Investments Limited, wrongfully acquired the property, and holds the Certificate of Title to the land, these allegations ought to be defended by C & S Investments Limited. Further, when one considers the claims that Joseph Kapambwe Mulenga has made in this matter, and if the Court were to agree with him, ultimately the Judgment that will be passed, may have an effect on C & S Investments Limited.

13.32 Therefore, for that reason, C & S Investments should be a party to the proceedings. All in all, based on the assertions that have been made in the statement of claim, a reasonable cause of action has been revealed against C & S Investments Limited.

WHETHER THE STATEMENT OF CLAIM IS CONTRARY TO THE RULES ON PLEADINGS?

13.33 As regards C & S Investments Limited's argument that Joseph Kapambwe Mulenga's statement of claim is contrary to the requirements on pleadings, **Order 18 Rule 17(1) of the Rules of the Supreme Court of England**, has been cited as authority. That Order states that:

“Subject to the provisions of this rule, and rules 7A, 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.”

13.35 The argument is that Joseph Kapambwe Mulenga has violated the above provision of the law, in his pleadings, and C & S Investments Limited, has pointed out a number of paragraphs, being paragraphs 10, 11, 25, 26, 28, 31, 32, 33, 35, 38, 42, and 47, alleging that they plead evidence or legal arguments, instead of material facts. It has also been argued that the statement of claim is characterized by confusingly lengthy, long winded, repetitive and unnecessarily detailed paragraphs, with paragraphs 8 to 14 being cited as examples.

13.36 At the hearing of the application, Counsel for Joseph Kapambwe Mulenga argued, reiterating the opposition, that Joseph Kapambwe Mulenga’s pleadings do not contain legal arguments, but merely set out the facts which give rise to the position that he holds. As rightly pointed out by C & S Investments Limited, **Order 18 Rule 7(1) of the Rules of the Supreme Court of England**, requires that a statement of claim has to be in summary form, stating the

material facts on which a party relies, and not the evidence by which those facts are to be proved.

13.37 A reading of the statement of claim, and in particular the paragraphs pointed out by C & S Investments Limited in its' Skeleton Arguments in support of the application, shows that paragraphs 31, 42 and 47 do in fact contain legal arguments. This is because paragraph 31 alleges that Joseph Kapambwe Mulenga became an equitable owner of Fifty-Six (56) acres of the land, which assertion is repeated in paragraph 42.

13.38 Paragraph 47 on the other hand, alleges that Zambia National Commercial Bank Plc became aware of Joseph Kapambwe Mulenga's equitable interest in the property through occupancy and construction on the property. Joseph Kapambwe Mulenga also argues that C & S Investments Limited's Skeleton Arguments admit evidence contrary to **Order 18 Rule 19 (2) of the Rules of the Supreme Court of England.**

13.39 That Rule provides that:

“(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that- it discloses no reasonable cause of action or defence, as the case may be; or

a. ...

(2) No evidence shall be admissible on an application under paragraph (1)(a)."

13.40 Joseph Kapambwe Mulenga has argued that C & S Investments Limited in its' Skeleton Arguments, has proffered certain facts to prove the lack of a reasonable cause of action against it. As rightly pointed out by Joseph Kapambwe Mulenga, no evidence is admissible where the only ground upon on which the application is made, is for non-disclosure of a reasonable cause of action.

13.41 In that regard, ***Order 18/19/5 of the Rules of the Supreme Court of England*** provides that:

"Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence, no evidence is admitted...and where the only ground on which the statement of claim can be said to disclose no reasonable cause of action is that the action is unlikely to succeed, affidavit evidence is equally inadmissible."

13.42 A reading of the statements which are quoted in C & S Investment Limited's Skeleton Arguments attacking Joseph Kapambwe Mulenga's statement of claim, show that there is an attempt by C & S Investments Limited to admit evidence. This is because C & S Investments Limited's allegation that Joseph Kapambwe Mulenga's alleged interest, vis the assignment of 17th January, 2022, was never registered on the Lands Register, as required by the

Lands and Deeds Registry Chapter 185 of the Laws of Zambia. This is contrary to the law that has been cited above.

WHETHER JOSEPH KAPAMBWE MULENGA'S PLEADINGS ARE LONG WINDED AND BAD FOR PROLIXITY?

- 13.43 As to whether Joseph Kapambwe Mulenga's pleadings are long-winded and generally bad for prolixity, C & S Investments Limited has referred to ***Practice Note 18/7/7 of the Rules of the Supreme Court of England***, stating that relevant matters must be succinctly stated briefly, and in a chronological manner. Further reference has been made to ***Practice Note 18/7/11*** stating that it provides that only material facts should be pleaded.
- 13.44 Citing ***Atkins Forms***, the argument has been that prolixity is the stating of immaterial, unnecessary and long-winded statements. C & S Investments Limited's argument is that Joseph Mulenga Kapambwe's statement of claim as a whole, is characterised by confusingly long-winded, repetitive, and unnecessarily detailed paragraphs, which are not chronological. Paragraphs 8-14 of the said statement of claim have been cited as examples.
- 13.45 Joseph Kapambwe Mulenga in response has argued, citing the explanatory notes in ***Order 18/19/17 of the Rules of the Supreme Court of England***, which state that mere prolixity is not of itself embarrassing. Further, he argues that if the statement of claim contains several causes of

action, it is not embarrassing, if they are distinctly pleaded. The contention is that Joseph Kapambwe Mulenga has Thirteen (13) causes of action which have been distinctly pleaded.

13.46 Solace has been sought in the explanatory notes again in **Order 18/19/17** which state as follows:

“The mere fact that an opponent's pleading contains some unnecessary matter is not sufficient ground for an application under this rule. A statement will not be struck out merely because it is unnecessary, so long as it is otherwise harmless.

It is no part of the Defendant's duty to reform the Plaintiff's pleading; but if wholly immaterial matter be set out in such a way that the applicant must plead to it, and so raise irrelevant issues which may involve expense, trouble, and delay, then the irrelevant matter will be struck out, as it will prejudice the fair trial of the action.”

13.47 Premised on the above, it has been contended that C & S Investments Limited needs to show that it has been prejudiced by the embarrassing pleading, which it has not done.

13.48 The explanatory notes in **Order 18/7/7** state that:

“It cannot be too often stated that the relevant matters must be stated briefly, succinctly, and in

strict chronological order. Pleadings should be as brief as the nature of the case will admit. The Court has inherent jurisdiction to deal with prolix documents. But no document is prolix which merely states facts that are material, however numerous. The same person or thing should be called by the same name throughout the pleading.

13.49 The explanatory notes in ***Order 18/7/10*** provide that:

“The words "contain only" emphasise that only facts which are material should be stated in a pleading. Accordingly, statements of immaterial and unnecessary facts may be struck out.”

13.50 A perusal of the statement of claim shows that it contains Fifty-Nine paragraphs. Those paragraphs cannot be said to be very lengthy or that they plead unnecessary facts. However, some paragraphs, such as paragraphs 18 and 20 use the words “for the avoidance of doubt” repeatedly, while paragraphs 42 and 47 refer to Joseph Kapambwe Mulenga’s equitable interest in the property.

13.51 The contention is that the statement of claim has been pleaded in that manner, as a way of setting out the material facts. Indeed C & S Investments Limited has not demonstrated the prejudice that it will suffer as a result of the manner, in which the statement of claim has been couched. Premised on that, it cannot be said that the statement of claim is bad for prolixity.

**ZAMBIA NATIONAL COMMERCIAL BANK PLC'S
APPLICATION FOR DETERMINATION OF QUESTIONS
OF LAW AND FOR JUDGMENT**

13.52 Zambia National Commercial Bank Plc has brought this application pursuant to *Order 14A of the Rules of the Supreme Court of England 1965 (1999 Edition)* which provides that:

“1. The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such Order or Judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have either -

(i) had an opportunity of being heard on the question, or

(ii) consented to an Order or Judgment on such determination.”

- 13.53 The basis for Zambia National Commercial Bank Plc's application, is that the issues relating to ownership of the subject property, are res judicata, having been heard on the merits, and determined under Cause No. 2021/HPC/0025 (the mortgage action), and that this action is also an abuse of the court process.
- 13.54 It has been argued that under the mortgage action, Zambia National Commercial Bank Plc sought an Order against Master Butcheries Limited and others, for payment of One Million Seven Hundred and Fifty-Three Thousand Seven Hundred and Three Kwacha and Fifty-Three Ngwee (ZMW1,753,703.53) on an overdraft facility, and One Million Three Hundred and Nine Thousand and Fifty-Six Kwacha and Fifty-Three Ngwee (ZMW 1,309,056.53) on the medium-term loan, as at 20th January, 2021.
- 13.55 In the alternative, an Order for possession and foreclosure of the property was claimed. Zambia National Commercial Bank Plc states that Master Butcheries Limited in its' affidavit in opposition in that matter, averred that the Joseph Kapambwe Mulenga, with the consent of Zambia National Commercial Bank Plc, purchased a portion of the subject property.
- 13.56 Further, in its' reply, Zambia National Commercial Bank Plc did not deny the averment, but contended that it was clear that the transaction had not been concluded, as Master Butcheries Limited neglected to liquidate its' debt to Zambia National Commercial Bank Plc, and the sum was

never paid into Master Butcheries Limited's account, as agreed in the contract which was executed between the parties.

13.57 Zambia National Commercial Bank Plc in making the application, has quoted portions from the Court's Judgment at pages J26 and J35, stating that the Court heard and determined Joseph Kapambwe Mulenga's interest in the property. Therefore, to that extent, his claim is res judicata.

13.58 C & S Investments Limited has supported Zambia National Commercial Bank Plc's application. It has argued in its' Skeleton Arguments, that in the mortgage action, not only did the Court determine the enforceability of the mortgage between the Master Butcheries Limited and Zambia National Commercial Bank Plc, but also went on to determine Joseph Kapambwe Mulenga's purported interest in the property.

13.59 C & S Investments Limited's argument is that the Court made a finding that Joseph Kapambwe Mulenga had no interest in the property, despite the contract of sale that was signed with Master Butcheries Limited. It has also been stated that the Court found that no money was deposited in Zambia National Commercial Bank Plc's account to discharge the mortgage that was registered against the property.

13.60 A perusal of the Judgment which was delivered in the mortgage action, which has been referred to by the parties,

shows that it was a legal mortgage relating to the subject property for foreclosure and possession. The matter was instituted by Zambia National Commercial Bank Plc against Master Butcheries Limited (sued as Borrower and Mortgagor), Jack Jere (sued as Guarantor) as 2nd Respondent and Nelson Garnett (sued as Guarantor) as 3rd Respondent.

13.61 The Court in that matter, narrowed down the issues for determination at page J24 as follows:

- i. *Whether this is an appropriate case for me to enter Judgment in favour of the Applicant owing to default by the 1st Respondent in respect of meeting its obligations in repaying the credit facility it obtained from the Applicant;*
- ii. *Whether this is an appropriate case for me to order the 2nd, 3rd and 4th Respondents to honour their guarantees in the event that the 1st Respondent fails to settle the debt in full; and*
- iii. *Whether the Applicant charged the Respondent penalty interest and compound interest in breach of the law on the matter.*

13.62 As rightly pointed out by Zambia National Commercial Bank Plc, Joseph Kapambwe Mulenga's interest in the subject property was mentioned by the Respondents in their Affidavit in Opposition to the mortgage action. Zambia National Commercial Bank Plc, as Applicant in that matter,

replied to the allegations, as can be seen from the Court's Judgment at page J20 in paragraph 5.5.

13.63 The Court referred to Joseph Kapambwe Mulenga's legal interest in the subject property, at paragraph 6.1.18 at pages J34 and J35, where it held that:

“The arguments by the Respondents that the Applicant has not satisfied the requirements of Order 88 Rule 5 (3) of the Rules of the Supreme Court with regard to the contents of the statement of account which they alleged does not show a correct balance of the loan and that the applicant is aware that Joseph Kapambwe is in possession of a portion of Farm 411a, Lusaka, the said arguments do not hold water and are dismissed as I find that the evidence on record is that the Applicant and the 1st Respondent and his directors have been in discussion over the 1st Defendant's default on loan from as far back as the 2019 action or even earlier and as no evidence of payment has been adduced, I can therefore safely conclude that the 1st Respondent never paid the purchase price for the portion of land said to have been sold to the said Mr. Kapambwe which was never deposited in the 1st Respondent's account with Applicant in accordance with the consent for the sale of this portion of land. As also deposed in the affidavit

and the 2019 case, Mr. Steele, the 4th Respondent is said to have prevented access to the farm or any attempt to subdivide any portion of the mortgaged farm and Mr. Kapambwe therefore has no legal interest in any portion of the mortgaged property and cannot be said to be in possession thereof for lack of consideration.”

13.64 Noteworthy from the above, is that the Court concluded that Joseph Kapambwe Mulenga had no legal interest in the subject property, because Master Butcheries Limited did not pay the purchase price for the portion of land that was alleged to have been sold to Joseph Kapambwe Mulenga. The Court further found that the said purchase price was never deposited in Master Butcheries Limited’s account which was held with Zambia National Commercial Bank Plc, in accordance with the consent for the sale of that portion of land.

13.65 The Court also found that the 4th Respondent in that matter, prevented access to the subject property or any attempts to subdivide it.

13.66 *Res judicata* is defined in ***Black’s Law Dictionary, 9th Edition by Bryan A. Garner, Thomas Reuters, 2009*** at page 1425 as;

“A thing adjudicated. 1. An issue that has definitely been settled by judicial decision. 2. An affirmative defence barring the same parties from litigating a lawsuit on the same claim, or any

other claim arising from the same transaction or series of transactions that could have been but was not raised in the first suit. The three essential elements are (1) an earlier decision on the issue (2) a final Judgment on the merits and (3) the involvement of the same parties, or parties in privity with the original parties.”

13.67 The said *Black’s Law Dictionary at page 829* defines *estoppel* as:

“A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true. 2. A bar that prevents the re-litigation of issues. 3. An affirmative defence alleging good-faith reliance on a misleading representation and an injury or detrimental change in position resulting from the reliance.”

13.68 There is a plethora of authorities that speak to the meaning and requirements of *res judicata*. In the case of *Mpongwe Farms Limited v Dar Farms and Transport Limited*⁽²⁸⁾, the Supreme Court held that:

“Our understanding of this authoritative definition is that res judicata puts to rest and entombs in eternal quiescence every justifiable issue and question actually adjudicated upon or which should have been raised in the initial suit. And the law is fairly settled and defined beyond

peradventure in a plethora of cases decided by this Court, that for a party relying on the defence of res judicata to succeed, he must satisfy the following five conditions, namely; (i) that the parties or their privies are the same in both the previous and present proceedings(ii) that the claim or issue in dispute in both actions is the same; (iii) that the res (the subject of the litigation) in the two cases are the same; (iv) that the decision relied upon to support the plea of estoppel is valid, subsisting and final; (v) that the Court that gave the previous decision relied upon to sustain the plea, is a Court of competent jurisdiction.”

13.69 In the case of *Bank of Zambia v Tembo and others*⁽¹⁸⁾, the Supreme Court held that:

“In order that a defence of res judicata may succeed, it is necessary to show that the cause of action was the same, but also that the Plaintiff had an opportunity of recovering, but for his fault, might have recovered in the first action, that which he seeks to recover in the second. A plea of res judicata must show either an actual merger or that the same point had been actually decided between the same parties.”

13.70 In light of the authorities cited above, it is imperative to test both matters that are in issue in this application, in

line with the prerequisites for the defence of res judicata to succeed. It has been seen that the first requirement is that the parties or their privies in both actions should have been the same. In this matter, a mere glance at the Court process reveals that the parties are not the same. It will be observed that Joseph Kapambwe Mulenga and C & S Investments Limited were not parties to the mortgage action, and the guarantors in the mortgage action, are not parties to this action.

13.71 In relation to *privies* being the same in both matters, *privity* is defined in the said ***Black's Law Dictionary 9th Edition by Bryan A. Garner, Thomas Reuters, 2009*** at page 1320 as;

“The connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding or piece of property); mutuality of interest.”

13.72 From the mortgage action, whose Judgment has been exhibited by the parties, Master Butcherries Limited who was a respondent in that action, disclosed that it had an agreement in relation to the subject property with Joseph Kapambwe Mulenga, and that Zambia National Commercial Bank Plc was aware of the agreement.

13.73 Therefore, the relationship that existed between the parties, and in relation to the subject property, was disclosed in that matter. Consequently, the requirement of

privity in relation to a plea of res judicata has been satisfied, as the interest that each party had in the property was disclosed.

13.74 The second and third requirements for res judicata to succeed, are that the claim or issue in dispute in both matters, should be the same. In the mortgage action as shown at page J5 of the Judgment, the reliefs were:

- i. *Payment of all monies and contractually agreed interest due and owing to the Applicant under a credit facility letter dated 25th January, 2019 for ZMW 2,000,000.00 being a Renewed Overdraft Facility and ZMW 1,249,579.65 existing Medium-Term Loan Facility was secured by a Legal Mortgage, relating to the remaining Extent of Farm Bo. 411a Lusaka situate in Lusaka Province of Zambia, and which monies stand at K1,753,703.53 on the overdraft and K1,309,056.53 on the medium-term loan as at 20th January, 2021;*
- ii. *An order to Foreclosure on the Mortgage Property;*
- iii. *Delivery of vacant possession on the Mortgage Property to the Applicant;*
- iv. *An Order for sale of the said Mortgage Property by the Applicant;*
- v. *An Order that the 2nd, 3rd and 4th Respondents being guarantors of the 1st Respondent honour their guarantees in the event of the 1st Respondent failing to settle its indebtedness in full to the Applicant;*
- vi. *Any further or other relief the Court may deem fit; and*

vii. Costs.

13.75 The reliefs that are sought in this matter, are as listed under the paragraph 2.1 of this Ruling. In his affidavit in opposition, Joseph Kapambwe Mulenga has listed eleven (11) points that he states are new, bona fide and reasonable causes of action for this Court's determination. A perusal of the reliefs claimed in the mortgage action, and those in this matter, reveal that they relate to the same subject property. However, it cannot be said that the reliefs are the same.

13.76 The fourth and fifth requirements for res judicata to succeed, can be answered in the affirmative, as the decision in the mortgage action was final, and it was delivered by a Court of competent jurisdiction. However, as the first Three (3) requirements have been answered in the negative, the last Two (2) requirements cannot be considered in detail.

13.77 It is also worth noting that Joseph Kapambwe Mulenga has argued that the portion of the mortgage action Judgment which has been exhibited by Zambia National Commercial Bank Plc is obiter dicta. The position that is maintained by Zambia National Commercial Bank Plc is that the matter is res judicata, as it has been determined on its' merits.

13.78 In supporting this position, at the hearing, Counsel for C & S Investments Limited stated that the decision regarding Joseph Kapambwe Mulenga's interest in the property was a

significant point that was raised by Master Butchereries Limited in the mortgage action, as seen at page J13 of the Judgement. Therefore, it cannot be termed as obiter dicta.

13.79 A reading of the Court's pronouncement in relation to Joseph Kapambwe Mulenga's interest in the property, cannot be said to be obiter dicta, as the Court made a finding based on the evidence or lack thereof before it. However, as already stated, the reliefs claimed in both matters, are not the same, as demonstrated by a through consideration of the pleadings and the issues that have been raised by the parties.

13.80 Therefore, all the elements of res judicata have not been satisfied, in Order for me to conclude that the matter is in fact res judicata. What is significant however, is that Joseph Kapambwe Mulenga's interest in the property was determined by the Court in cause number 2021/HPC/0025.

13.81 **Section 4 of the High Court Act Chapter 27 of the Laws of Zambia** is as follows in provision:

“4. Subject to any express statutory provision to the contrary, all the Judges shall have and may exercise, in all respects, equal power, authority and jurisdiction, and, subject as aforesaid, any Judge may exercise all or any part of the jurisdiction by this Act or otherwise vested in the Court, and, for such purpose, shall be and form a Court”.

13.82 In the case of *Attorney General and Speaker of the National Assembly v The People* ⁽³⁾ it was held that;

“There is only one High Court. A decision of one Judge of the High Court becomes a Judgment of the High Court. A Judge of the High Court cannot override or otherwise interfere with a Judgment of another High Court Judge”.

13.83 Going by the above, I cannot proceed to hear this matter and determine Joseph Kapambwe Mulenga’s claim that he is a bona fide equitable owner of a total of Sixty-Nine (69) acres of Sub division P of the remaining extent of Farm 411a Lusaka. This is because to do so, would be to interfere with the finding that another Court of equal jurisdiction, made in cause number 2021/HPC/ 0025, that Joseph Kapambwe Mulenga had no interest in the said property.

13.84 This also risks the Two (2) Courts making conflicting decisions over the same subject matter, which would bring the administration of justice into disrepute.

13.85 It is also worth noting, that the rest of the claims in the statement of claim, are anchored on the success of the claim for a declaration that Joseph Kapambwe Mulenga is a bona fide equitable owner of the property. The Court in cause number 2021/HPC/ 0025 having determined Joseph Kapambwe Mulenga’s interest in the property, entails that any right that Joseph Kapambwe Mulenga seeks to assert

in relation to the property, should be determined by that Court.

13.86 Thus, Joseph Kapambwe Mulenga should invoke the procedures that are available to re-open that matter, and join any other parties, and possibly have the mode of commencement of the action amended, so that he can be heard with finality before that Court.

13.87 That being the position, Zambia National Commercial Bank Plc succeeds on the question of the law that has been raised. Further in view of that, the fate of the statement of claim that has been attacked by C & S Investments Limited becomes otiose.

14. CONCLUSION

14.1 Having found that I cannot proceed to determine Joseph Kapambwe Mulenga's interest in the property, the action is dismissed with costs to Zambia National Commercial Bank Plc and C & S Investments Limited, which shall be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THE 28th DAY OF JULY, 2023

found
S. KAUNDA NEWA
HIGH COURT JUDGE

