

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

2023/HP/0092

BETWEEN:

**ESNART MUMBA**

AND

**COSMO MUMBA**



**PLAINTIFF**

**DEFENDANT**

**Before:** *The Hon. Mr. Justice Charles Zulu.*

For the Plaintiff: Mr. B. Phiri of Messrs Mwelwa, Phiri & Partners.

The Defendant: In Person.

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**R U L I N G**

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Cases referred to:

1. *Mirriam Mbolela v Adam Bota (SCZ Judgment No. 26 of 2017).*
2. *Phillips v Coping (1935) 1 K.B. 1.*
3. *Justin Mutale v William Mutale (SCZ Appeal No 141 2008) unreported.*
4. *Kansashi Mining Plc v Zambia Revenue Authority (SCZ Appeal No 143/2014).*

Legislation referred to:

1. *The Rules of the Supreme Court of England and Wales 1965 (White Book, 1999 Edition).*
2. *The Limitation Act, 1939 (England).*
3. *The Housing (Statutory Improvement Areas) Act Chapter 194 of the Laws of Zambia.*
4. *The Urban and Regional Planning Act No. 3 of 2015.*

## **1.0 INTRODUCTION**

1.1 This ruling emanates from an application at the instance of the Defendant via notice of motion to raise preliminary issues. The application was made pursuant to Order 14A of the **Rules of the Supreme Court of England and Wales (White Book, 1999 Edition)**. The issues raised for determination were couched as follows:

- 1. Whether this matter should not be dismissed for being statute barred having been brought before Court 13 years from the time the Defendant purchased, took possession and/ or occupied the property and lived there with the Plaintiff's full knowledge who is a neighbor.***
- 2. Whether this matter should not be dismissed from being irregular and abuse of Court process the Plaintiff having sued multiple times before different courts and the same having been dismissed for lack of evidence, one such [action] being Cause No. 2022/HP/0360.***
- 3. Whether the Court should proceed to hear this matter when the Plaintiff has failed to disclose a plausible cause of action in this matter.***

## **2.0 BACKGROUND**

2.1 A brief background to this application is that, the Plaintiff, took out a writ of summons and a statement of claim dated January 24, 2023, against the Defendant seeking the following reliefs:

- (i) an order that the Defendant gives possession of property;***
- (ii) special damages for loss of building materials that went to waste upon the Defendant taking possession of the property;***



- (iii) aggravated damages for mental distress suffered;*
- (iv) damages for conversion;*
- (v) any other relief the Court may deem fit; and*
- (vi) costs.*

2.2 In her statement of claim, the Plaintiff alleged that, on November 15, 2009, she purchased Property No. 0031/2620 of Subdivision No. 687/A/1/D/35 from Afranc Transport Services Limited.

2.3 She alleged that, on April 22, 2013, the Defendant chased her builders from the site, and forcibly took occupation of the property, and began to construct a house.

2.4 The Defendant entered appearance and defence dated January 26, 2023, wherein he averred that he purchased the subject property on November 15, 2009, from Afranc Transport Services Limited, and took occupation of the property in 2009. And that thereafter the Lusaka City Council issued to him an Occupancy Licence bearing Stand No. 100/192 dated May 19, 2017. He denied allegations that he unlawfully took possession of the Plaintiff's alleged portion of land.

### **3.0 THE PARTIES' AFFIDAVIT EVIDENCE**

3.1 An affidavit in support was deposed to by the Defendant Cosmo Mumba. He stated that the present action was statute barred. According to him, the action was only taken out after thirteen (13) years, instead of within twelve (12) years from the date the action allegedly occurred.

3.3 An affidavit in opposition was deposed to by the Applicant, Esnart Mumba. She stated that the Defendant started causing confusion on her subject property on April 22, 2013. According to her, only ten years had passed since the Defendant initiated his unlawful claims over the property. That the Defendant's Occupancy Licence and other documents relied on by the Defendant were improperly issued.

3.4 And that having been made aware of the Occupancy Licence in this Court, the Plaintiff would now proceed to amend the writ of summons and statement of claim and seek a claim to have the said Occupancy Licence cancelled for impropriety.

#### **4.0 THE PARTIES' ARGUMENTS**

4.1 The parties filed their respective arguments for and against the application. Mr. Mumba generally recounted the contents of his affidavit in support and urged the Court to dismiss the action.

4.3 The Plaintiff's Counsel contended that the present action was not statute barred, because the same was brought within the allowable timeline as provided by section 15 of the **Statute of Limitations Act of 1939**.

4.4 It was further contended that the issues raised were not suitable for determination via Order 14A RSC. I was instead urged to allow the action to proceed to trial.

#### **5.0 DETERMINATION**

5.1 I have carefully considered the application and the parties' respective arguments. Incidentally, *suo moto* an issue has



been invoked within the general context of questioning whether the matter is regularly before this Court. The issue relates as to whether this Court has jurisdiction to determine this subject matter essentially falling under the provisions of the **Urban and Regional Planning Act No. 3 of 2015**. And in effect challenging an Occupancy Licence issued in favour of the Defendant by the Lusaka City Council.

5.2 In taking this approach, I have recourse to the case of **Mirriam Mbolela v Adam Bota<sup>(1)</sup>** wherein the Supreme Court with approval of an English case of **Phillips v Copping<sup>(2)</sup>**, in a judgment delivered by Kajimanga JS, had this to say:

***It is the duty of the court when asked to give judgment which is contrary to statute to take the point, although the litigants may not take it. Illegality once brought to the attention of the Court overrides all questions of pleadings, including any admission made therein.*** (emphasis supplied).

5.3 It should be noted that the land subject of an occupancy licence was previously governed by the **Housing (Statutory Improvement Areas) Act Chapter 194 of the Laws of Zambia** (now repealed). The Court that was vested with jurisdiction relating to land governed by that Act was the Subordinate Court. And in the case of **Justin Mutale v William Mutale<sup>(3)</sup>** the Supreme Court, held that, the court of first instance mandated to resolve disputes involving property situated in a Housing (Statutory and Improvement) Area was the Subordinate Court.

5.4 After the repeal of the **Housing (Statutory Improvement Areas) Act Chapter 194 of the Laws of Zambia**, the **Urban**

**and Regional Planning Act No. 3 of 2015** was enacted. And section 2 of the Urban and Regional Planning Act, defines court mentioned therein to mean, the Subordinate Court. Therefore, the court of first instance having jurisdiction over the subject matter is the Subordinate Court. The case of **Justin Mutale v William Mutale**<sup>(3)</sup> (supra), remains applicable in the present case, notwithstanding it was decided under the repealed regime.

## **6.0 CONCLUSION**

6.1 In the light of the foregoing, I will not delve to determine the merits or demerits of the present application, but to dismiss the whole action for want of jurisdiction, and I so order. In **Kansashi Mining Plc v Zambia Revenue Authority**<sup>(4)</sup> the Supreme Court in a judgment delivered by Malila JS, (as he then was) held:

***The High Court only has jurisdiction if a matter is correctly commenced before it.***

6.2 I cannot *play possum* to the jurisdictional issue or, pretend to proceed to trial, even assuming the Defendant's objection had no merit, when jurisdiction in the first place lies in the Subordinate Court.

6.3 I make no order as to costs.

6.4 Leave to appeal granted.

**DATED THIS 22<sup>ND</sup> DAY OF APRIL, 2024.**



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**THE HON. MR. JUSTICE CHARLES ZULU**