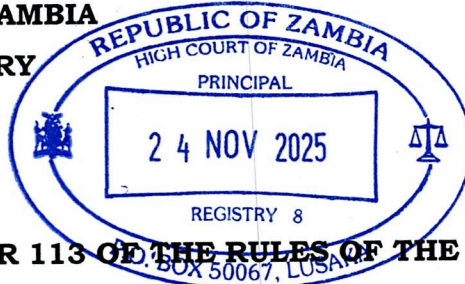


**IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)**

**2023/HP/1839**



**IN THE MATTER OF: ORDER 113 OF THE RULES OF THE SUPREME COURT OF ENGLAND AND WALES (1999 Ed.) Vol. 1 (WHITE BOOK)**

**IN THE MATTER OF: AN APPLICATION FOR VACANT POSSESSION OF PROPERTY NO. L/14571/M**

**AND**

**IN THE MATTER OF: AN ORDER FOR EVICTION OF THE RESPONDENT AND SQUATTERS FROM PROPERTY NO. L/14571/M**

**BETWEEN:**

**MASAUO SAKALA**

**APPLICANT**

**AND**

**CAROLINE CHUMA ZULU  
COMMISSIONER OF LANDS**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

**BEFORE HON. JUSTICE E. P. MWIKISA**

*FOR THE APPLICANT: NIL*

*FOR THE 1<sup>ST</sup> RESPONDENT: MR. M. BANDA WITH MR. M. CHIPOMPO OF MESSRS GEORGE KUNDA & CO*

*FOR THE 2<sup>ND</sup> RESPONDENT: MR. G. LYEMPE- ATTORNEY GENERALS CHAMBERS*

---

# **RULING**

---

**Cases Referred To:**

1. *Lusaka West Development Company Limited v Attorney General (2002) ZR 127*
2. *Kapwepwe and Others v Attorney General (1972) ZR 221*
3. *Anort Kabwe & Another v James Daka and 2 Others S.C.J No. 5 of 2006*
4. *Commissioner of Lands & Another v Star Tanganyika Appeal No. 220/2021*
5. *Chishala Karabasis Nivel and Another v Lastone Geoffrey Mwale, Selected Judgment No. 40 of 2018*

**Legislation Referred To:**

1. *The Rules of the Supreme Court of England, 1999, Edition, White Book*

This is the 1<sup>st</sup> respondent's application for the determination of an issue of law made pursuant to Order 14A of the Rules of the Supreme Court of England, 1999 edition, White Book. The application raised the following questions:

1. **Whether Order 113 of the Rules of the Supreme Court of England 1965 can be used to repossess land from a person occupying it under a Certificate of Title;**
2. **If this question is answered in the affirmative, then judgment should be entered for the 1<sup>st</sup> Respondent, and the action should be dismissed with costs to be borne by the Applicant;**
3. **If the question is answered in the negative, then the Court may proceed to set the matter down for trial, with costs to be determined in the cause.**

The application is dated 23<sup>rd</sup> September, 2024, and is supported by an affidavit and skeleton arguments of even date. The affidavit was deposed to by Caroline Chuma Zulu, the 1<sup>st</sup> respondent herein. It was deposed therein that on 19<sup>th</sup> October, 2023, the Applicant issued her with an originating summons accompanied by an affidavit in

support, list of authorities and skeleton arguments for the eviction of squatters from Plot No. L/14571/M in the Shantumbu area of Lusaka Province, the property herein. That the Applicant claimed that the 1<sup>st</sup> respondent had no right to the aforementioned property and no ownership of the said land.

The 1<sup>st</sup> respondent deposed that she legally acquired the property from the Ministry of Lands and that she is the first legal owner of the said property having been issued an offer letter and certificate of title from the Ministry of Lands as shown by copies thereof exhibited and marked "CCZ1" and "CCZ2" respectively. The 1<sup>st</sup> respondent deposed that she built a caretaker's house, drilled a borehole and erected a wire fence to protect the property from encroachers.

It was the 1<sup>st</sup> respondent's deposition that the Applicant claims that a re-entry was made onto her property thereby giving the Ministry of Lands authority to resell the 1<sup>st</sup> respondent's property to the Applicant. That at no time was a notice of [re]entry served on the 1<sup>st</sup> respondent or any of her servants. Further that her certificate of title has never been cancelled by the Ministry of Lands thus affirming her status as a valid title holder of the property in issue. That this matter

is contentious as both the Applicant and the 1<sup>st</sup> respondent possess valid certificates of title to the property in contention. It was deposed that such a contentious matter ought to be commenced by way of writ of summons and statement of claim as it requires a full trial to determine the true ownership of the property. That this Court has the jurisdiction to dismiss the matter on a point of law due to the improper procedure used to commence this contentious issue.

I note that the Applicant did not file an affidavit opposing the application.

When the matter came up for hearing on 7<sup>th</sup> May, 2025, there was no appearance by the Applicant. Counsel for the 1<sup>st</sup> Respondent, Mr Banda, proceeded with the application and told the Court that the 1<sup>st</sup> Respondent had filed an application to raise a preliminary issue pursuant to Order 14A of the RSC, White Book. Counsel stated that he would rely on the accompanying affidavit in support as well as skeleton arguments and prayed that the Court dismisses the Applicant's application.

The learned State Advocate, Mr Lyempe, also supporting the application, submitted that the matter in dispute pertains to

ownership of land which is on title. That as such, commencing a matter by way of originating summons will limit the 1<sup>st</sup> respondent from fully presenting her defence which act is contrary to the principles of natural justice. Counsel referred to the case of **Lusaka West Development Company Limited v Attorney General (2002) ZR 127<sup>1</sup>**, where the court emphasized the need for fair procedure, particularly in contentious matters. Further that in the case of **Kapwepwe and Others v Attorney General (1972) ZR 221<sup>2</sup>**, the Supreme Court stated that where cases involve disputes relating to land and conflicting titles, a full trial is necessary to resolve the issues raised. Counsel submitted that the institution of this matter by way of originating summons was not appropriate in this case. Counsel prayed that the matter be dismissed for the reasons stated. I have taken note of the affidavit evidence as well as the skeleton arguments on the record.

I have carefully considered the affidavit evidence as well as the skeleton arguments filed in this action. The record shows that the Applicant herein filed an originating summons dated 19<sup>th</sup> October, 2023, seeking inter alia; an order for eviction of the 1<sup>st</sup> respondent

and an order for vacant possession of L/14571/M Lusaka in favour of the Applicant. The Applicant, in the affidavit in support of the application deposed that he was issued a certificate of title to property No. L/14571/M as shown by copy of the same exhibited and marked "MS1." He deposed that prior to the issuance of a certificate of title, the property belonged to the 1<sup>st</sup> respondent but that a notice of re-entry was entered against the 1<sup>st</sup> respondent as shown by copy of the Lands Register exhibited and marked "MS2." The Applicant stated that he is therefore the rightful owner of the property in issue herein.

In the affidavit in support of this application, the 1<sup>st</sup> respondent deposed that although the Applicant claims that a re-entry was made on the property in issue, which the 1<sup>st</sup> respondent also held title to, at no point was a notice of [re]entry served on her or any of her servants. The 1<sup>st</sup> respondent deposed that the situation herein demonstrates that the matter herein is contentious as two parties are claiming ownership of the same property both possessing valid certificates of title for the property in issue.

It is a well settled principle of law that where a notice of re-entry is not served on the property owner, the notice of re-entry is invalid at law. I am fortified by the Supreme Court Judgment in **Anort Kabwe & Another v James Daka and 2 Others S.C.J No. 5 of 2006<sup>3</sup>**. See also Court of Appeal judgment in the case of **Commissioner of Lands & Another v Star Tanganyika Appeal No. 220/2021<sup>4</sup>**.

I am of the considered view that the argument that the 1<sup>st</sup> respondent was never served with the notice of re-entry of Property No. L/14571/M, the property herein, makes this matter contentious as per guidance of the superior Courts in the authorities cited above. I am of the considered view that these issues can therefore only be determined at trial. In the case of **Chishala Karabasis Nivel and Another v Lastone Geoffrey Mwale, Selected Judgment No. 40 of 2018<sup>5</sup>** the Supreme Court stated:

***“Our reading of Order 30 rule 11 is that originating summons should only be resorted to in circumstances where there is no dispute on questions of fact or a likelihood of such dispute; where for example, the issue is to determine short questions of construction, and not matters so contentious or potentially contentious that the justice of the case would demand the settling of pleadings and the leading of evidence in a particular way.”***

Commencement of this action by way of originating summons was therefore inappropriate in the circumstances as shown above as there are disputes on questions of fact. The usage of Order 113 of the RSC, White Book, is therefore misconceived in the circumstances.

The Supreme Court in **Chishala Karabasis Nivel & Another v Lastone Geoffrey Mwale Supra**, went on to state that:

**“Notwithstanding commencement of an action through a wrong mode, Order 28 Rule 8 of the RSC allows a judge to deem a matter that has been commenced by originating summons as having been commenced by writ of summons... in these circumstances, our views as ventilated in Chikuta v Chipata Rural Council apply. A wrong mode of commencement of proceedings was employed. Consequently, the Court had no jurisdiction to proceed to hear a matter which was wrongly commenced.**

**If, however, the learned judge had resorted to Order 28 Rule 8 of the Rules of the Supreme Court and deemed the action to have been commenced by writ and clearly noted this fact and guided the parties accordingly, the act of deeming the proceeding to have been commenced properly would have saved the proceedings from suffering the consequences of the court lacking jurisdiction.**

**The legal theory here is that the act of deeming, properly done, transitions the proceedings from the destiny of being null and void for want of jurisdiction, to new proceedings under the freshly deemed mode of commencement under which the Court is clothed with jurisdiction.”**

It is trite law that wrong mode of commencement in a matter goes to jurisdiction. However, pursuant to the **Chishala Karabasis Nivel**

**and Another v Lastone Geoffrey Mwale**, supra the act of deeming the proceeding to have been commenced by writ of summons saves the proceedings from suffering the consequences of the Court lacking jurisdiction and cloths the Court with jurisdiction.

**Order 28 rule 8 (1)** of the RSC, White Book provides that:

***“Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.”***

In light of the authorities above and in the interest of justice, I have power to deem this matter as having been commenced by writ of summons and I accordingly deem it as such and the matter shall proceed to trial accordingly.

Leave to appeal is granted.

Dated at Lusaka the .....<sup>24<sup>th</sup></sup> day of .....<sup>November</sup>....., 2025



.....  
**ELITA PHIRI MWIKISA**  
**JUDGE**