

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2023/HP/0727

BETWEEN:

REGINA MPAPI

AND

GINO MORELLI

DANIELLE STAVO MORELLI

COMMISSIONER OF LANDS

ATTORNEY GENERAL



PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

3RD DEFENDANT

4TH DEFENDANT

BEFORE HONOURABLE JUSTICE SILOKA S. V. ON THIS 9TH DAY
OF OCTOBER, 2023.

For the Plaintiff:

*Mr. C. Ngoma – Messrs. Simeza, Sangwa &
Associates*

For the 1st & 2nd Defendants: Mr. H. Soko of Messrs. Lumangwe Chambers

R U L I N G

CASES REFERRED TO:

- 1. Mundia Sikatana Vs The Attorney General (1972) (1982) ZR 109.*
- 2. Registered Trustees of Archdiocese of Lusaka Vs Office Machines Services Limited (SCZ No. 18 of 2007) DB 2.*
- 3. KPMG Peat Marwick Vs Sunset Pharmaceutical Limited (1997) ZR.*
- 4. BP Zambia Plc Vs Interland and Motors Limited (2001) Z.R. 37.*
- 5. Gaedmic Automotive Limited and Another Vs Citizens Economic Empowerment Commission (SCZ Judgment No. 39 of 2014).*
- 6. Societe Nationale Des Chemis De Pur Dy Congo (SNCC) Joseph Nonde Kakandwe (SCZ selected Judgment No. 19 of 2013).*

7. *Henderson Vs Henderson (1843 -1860) ALL B.R. 378.*
8. *Jonathan Van Blerk Vs Attorney General and 5 Others (SCZ/08/03/2020).*
9. *ANZ Grindlays Bank (Z) Limited Vs Chrispin Kaoma (1995 SCZ NO. 12).*
10. *Chick Masters Limited and Dr. Mwilola Imakando Vs Investrust Bank Plc (SCZ Appeal No. 198/2014).*
11. *HH Casualty and General Insurance Limited Vs Chase Manhattan Bank (2003) 2 Lloyds, Rep 61.*
12. *David Moto Sikananu Vs Attorney General (Appeal No. 16 of 2015).*
13. *Indeni Petroleum Refinery Vs Kafco Oil Limited and 3 Others (Appeal No. 27 of 2014).*
14. *Annart Chinuye Vs Zambia Airways Corporation Limited (1985) Z.R. 4 SC.*
15. *Kabwe Transport Limited Vs Press Transport Limited (1975) (1984) Z.R. 43.*
16. *African Banking Corporation Zambia Limited Vs Copper Harvest Foods Limited and 3 Others (CAZ, Appeal No. 18/2021).*
17. *Duncan Vs Lambeth London Borough Council) (1968) 1 Q. B. 747 (1968) 1 ALL ER (84).*
18. *African Banking Corporation Zambia Vs Mubende Country Lodge Limited (Appeal No. 116 of 2016 delivered on 24th March, 2020).*
19. *Mukelabai Nalwamba and Others (2013) Vol. 2. Z. R. 312.*
20. *Bampi Aubrey and Joseph Busenga Vs Attorney General (2021/CCZ/0011).*
21. *Wang Ying Vs Yousun Zhuang and 4 Others (2020/CCZ/0015).*
22. *Development Bank of Zambia Vs Funvest Limited and Another (SCZ Judgment No. 3 of 1997 [1997] [ZMSC 11] 5th March, 1997).*
23. *Takhar Vs Gracefield Developments Ltd and Others (2019) UK SC 13.*
24. *Stanbic Bank Zambia Limited Vs Beatly Khumalo and 29 Others (Appeal No. 132 of 2014).*
25. *Sithole Vs State Lotteries Board (1975) Z. R. 106.*
26. *Finance Bank Limited Vs Noel Nkhoma (Appeal No. 108/2012 ZMSC 30).*
27. *Nistarini Dassi Vs Nundo Loll Base and Another (1899) ILR 26.*

28. *Sakaran Govinda Vs Lakshmi Bharethi & Others* (1974 AIR 1764, 1975) 5 CR (1) 57.

29. *Punjab Beverages PVT Ltd Vs G.T Agencies* (2008) 151 ILR 496.

30. *Urest Foams Limited Vs Puma Botswana Pty Limited & Another* (selected Judgment No. 27 of 2018).

LEGISLTATION REFERRED TO:

1. *Order 14A Rule 9 (1) (a) (b) and 33 Rule 3 of the Rules of the Supreme Court 1965 Edition.*
2. *Section 4 of the High Court Act Chapter 27 of the Laws of Zambia.*

1.0 INTRODUCTION

1.1. This Ruling was triggered by Summons for Determination of a case on point of law (pursuant to **Order 14A Rule 9 (1) (a) (b) and Order 33 Rule 3 of the Rules of the Supreme Court 1965 Edition**) dated the 5th of June, 2023. The summons was issued by the first and second Defendants.

2.0 THE APPLICANT'S APPLICATION

2.1. In summary, the Defendants wanted the following questions determined;

(i) Whether these proceedings are a multiplicity of action and or abuse of the process of the court.

(ii) Whether the proceedings are not res judicata in light of the judgment dated 26th August, 2013 under Cause Number 2013/HN/036.

(iii) Whether a High Court Judge can set aside a judgment handled down by another High Court Judge on the

basis that it was procured by fraudulent misrepresentation.

- 3.0 The Defendants' Application was accompanied by an Affidavit in Support, Skeleton Argument and Written Submissions.
- 3.1. The Affidavit in Support was deposed to by one Gino Morelli, the 1st Defendant, who deposed that the Plaintiff commenced these proceedings against him and the 2nd Defendant on 4th May, 2023 as per Exhibit "**GM1**".
- 3.2. The Deponent further stated that prior to commencing this action, the Plaintiff did commence another action against him and the 2nd Defendant in the High Court of judicature, Principal Registry under Cause No. 2021/HP/1585 as per Exhibit "**GM2**". Further, that the proceedings under Cause No. 2021/HP/1585 are principally one and the same.
- 3.3. The Deponent further stated that the commencement of this action by the Plaintiff while the proceedings under Cause No. 2021/HP/1585 are ongoing constituted an abuse of court process and were a multiplicity of actions which may result in the Courts making contradictory decisions in the same matter.
- 3.4. The Deponent further deposed that in 2013, process was taken out before Ndola High Court under Cause No. 2013/HN/036 and, Judgment delivered as per Exhibit marked "**GM4**". In the said Judgment, the question of ownership of the subject land and authenticity of the certificate of title thereto was ably dealt with.
- 3.5. The Deponent further deposed that this matter is an abuse of court process for being res judicata as the question of ownership of the subject matter was conclusively dealt with, and that the Plaintiff

should have appealed against the decision as opposed to litigating on the same issue.

- 3.6. Turning to the submissions, in relation to the first preliminary issue raised, Counsel for the Defendants submitted that all High Court Judges have the same equal power and authority or jurisdiction pursuant to **Section 4 of the High Court Act Chapter 27 of the Laws of Zambia** and the guidance laid down by the Supreme Court in the case of **Mundia Sikatana Vs The Attorney General**.⁽¹⁾
- 3.7. It was Counsel's submission that since High Court Judges have the same jurisdiction, it is not possible for one Judge to overrule or nullify an Order given by another Judge as per the case of **Mundia Sikatana Vs The Attorney General** afore cited.
- 3.8. Following that guidance, Counsel submitted that the invitation of this Court, by the Plaintiff to re-open and reconsider the decision arrived at by Justice M. Siavwapa under Cause No. 2013/HP/036 based on the same facts or otherwise, is logically and legally not tenable and that such interference would be a mockery of justice.
- 4.0 Counsel further submitted that, bringing of multiple lawsuits, that raise the same issues that could have been brought in one action is multiplicity of actions which Courts have discouraged. Counsel relied on a plethora of authorities which include **Registered Trustees of Archdiocese of Lusaka Vs Office Machines Services Limited**,⁽²⁾ **KPMG Peat Marwick Vs Sunset Pharmaceutical Limited**⁽³⁾ and **BP Zambia Plc Vs Interland and Motors Limited**.⁽⁴⁾
- 5.0 It was also Counsel's submissions that this matter was improperly before this Court because the matter was res judicata.

- 5.1. Counsel submitted that it was trite that a party may not commence an action in connection with a matter which arose in previous proceedings and has been adjudicated upon. Counsel referred the Court to the case of **Gaedmic Automotive Limited and Another Vs Citizens Economic Empowerment Commission**⁽⁵⁾ wherein; the Supreme Court stated that, ***“litigation only comes to an end after a dispute is heard and determined on its merits by a court of competent jurisdiction.”***
- 5.2. Counsel further emphasized that res judicata is not only confined to similarity of actions but it also extends to the opportunity to claim matters which existed at the time of instituting the 1st action and giving the Judgment. In support of this assertion, Counsel referred the Court to the case of **Societe Nationale Des Chemis De Pur Dy Congo (SNCC) Joseph Nonde Kakandwe**⁽⁶⁾ and that of **Henderson Vs Henderson**.⁽⁷⁾
- 5.3. In conclusion, Counsel further submitted that the issues raised in this action by the Plaintiff are res judicata because the Plaintiff and her late husband as can be seen upon perusal of Exhibit marked **“GM4”** did raise fraud allegations pertaining to the contracts and assignment but that the same was dismissed.

6.0 PLAINTIFF’S CASE IN OPPOSITION

- 6.1. The Plaintiff in response filed in a Reply and Skeleton Arguments to the First and Second Defendant’s Defence.
- 6.2. In his reply, Counsel for the Applicant admitted that there was no appeal lodged against the decision delivered by Judge Mwiinde Siavwapa (as he then was) under Cause No. 2013/HN/036 but that, the lack of an Appeal does not affect an action challenging the

conduct of proceedings and the attendant process leading to delivery of the Judgment in matter under Cause No. 2013/HN/036 in any material respect.

- 6.3. Further, in his reply Counsel for the Plaintiff submitted that the Certificate of Title in relation to Stand No. 4248 Ndola is tainted and unraveled by the Second Defendant's fraudulent testimony and evidence proffered as he participated in the proceedings of Cause No. 2013/HN/036, which induced delivery of Judgment favourable to the First and Second Defendants.
- 6.4. Further, in his reply Counsel submitted that the First and Second Defendants' plea of res judicata cannot be deployed to terminate the proceedings as they impugn the process that the Judgment in Cause No. 2013/HN/036 was obtained.
- 6.5. In addition to the Affidavit in Reply, Counsel filed in Skeleton Arguments in Opposition of summons for determination of a case on point of law.
- 6.6. In his written submissions, Counsel for the Plaintiff submitted that there was no multiplicity of actions and abuse of Court process because the issues in the matter of 2021/HP/585 are distinguishable from the present matter in that the Plaintiff herein is seeking to challenge the judicial process leading to the judgment delivered under Cause Number 2013/HN/036 while the matter under Cause No. 2021/HP/585 involves the underlying dispute between the parties.
- 6.7. Counsel further added that challenging the judicial process, is a separate cause of action from the underlying dispute between

- adversaries, for this proposition, Counsel referred the Court to the case of **Jonathan Van Blerk Vs Attorney General and 5 Others**.⁽⁸⁾
- 6.8. Further, Counsel submitted that this matter is distinguishable because the Plaintiff is seeking to correct an apparent judicial wrong in the conduct of proceedings that ensued in the matter under Cause 2013/HN/036.
- 7.0 Coming to the question as to whether, this matter was res judicata, Counsel submitted that res judicata, does not apply in this case because the question the Plaintiff is seeking to be determined is whether a Judgment can stand in the wake of conclusive evidence of deception and fraud inducing its delivery.
- 7.1. It was Counsel's submission that res judicata will not aid a party where the allegation impugns the process in which the judgment was impugned. Counsel referred the Court to the case of **Jonathan Van Blerk Vs Attorney General and 5 Others**.
- 7.2. Counsel further submitted that in order for a defense of res judicata to succeed, it is necessary to show that the cause of action was the same, but also that the Plaintiff had an opportunity to recover 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 the same point had actually been decided. Counsel referred the Court to the case of **ANZ Grindlays Bank (Z) Limited Vs Chrispin Kaoma**⁽⁹⁾ and that of **Chick Masters Limited and Dr. Mwilola Imakando Vs Investrust Bank Plc**.⁽¹⁰⁾
- 7.3. Coming to whether, a High Court Judge can set aside a Judgment handed down by another High Court Judge on the basis that it was procured by fraudulent misrepresentation, Counsel submitted that

fraud is a basis upon which a judgment may be set aside. A party making such an allegation, must categorially identify the fraudulent act that impugn the judgment.

- 7.4. According to Counsel, this cause of action is independent of the cause of action asserted in the earlier proceedings because it relates to the conduct of the proceedings and not the underlying dispute.
- 7.5. Counsel also added that, the fraud and/or fraudulent activities identified will have the effect of unravelling the sanctity of such a judgment. In such circumstance, the judgment cannot be sustained as it is then liable to be set aside. Counsel relied on the case of **Jonathan Van Blerk Vs Attorney General and 5 Others**, where the Supreme Court held;

“The question which then follows is this. Is a judgment obtained in those circumstances liable to be set aside? The fact that a judgment was obtained through fraud or collusion is universally held sufficient reason for vacating such judgment either during or after the time at which it was rendered and opening the door for another hearing of the matter. We are in no doubt that the Court of Appeal came to the correct conclusion when it held, albeit obiter that a judgment obtained through fraudulent misrepresentation is liable to be set aside.”

- 7.6. 204. According to Counsel, res judicata cannot therefore be deployed to terminate such proceedings as what is being impugned is the process of how that Judgment was obtained.
- 7.7. Allowing res judicata to be used as a shield in such circumstances Counsel submitted, would go against the values of a judicial system

as judgments should be obtained in an open and transparent manner and not through deception. Counsel referred the Court to the English case of *HH Casualty and General Insurance Limited Vs Chase Manhattan Bank*⁽¹¹⁾ where it was held that:

“...Fraud is a thing apart. This is not a mere slogan. It also reflects an old legal rule that fraud unravels all ...once fraud is proved, ‘it vitiates Judgments, contracts and all transactions whatsoever’

8.0 DEFENDANT’S REPLY

- 8.1. The Affidavit in Reply to the Affidavit in Opposition of Summons for Determination of a Case on Point of Law was deposed by Gino Morelli. In his Affidavit, the deponent averred that the conviction of the alleged forgery of a contract of sale and deed of assignment which contract and assignment were the subject of proceedings under Cause 2013/HN/036 has been appealed against before the Court of Appeal which appeal is yet to be caused listed as per **“GM1”**.
- 8.2. That allowing these proceedings to carry on may bring about conflicting judgments under Cause 2021/HP/1585 and under the cause herein which situation has the potential to bring the administration of justice into disrepute.
- 8.3. In addition to the Affidavit in Reply, the Defendant also filed in Skeleton Arguments in Reply.
- 8.4. The gist of the reply was basically the same as the Affidavit in Support of Summons to Raise a Preliminary Inquiry, save to add that this matter was properly before this Court because the requirements of **Order 14 and Order 33 of the Rules of the Supreme Court** were

met as per the guidance given by the SC in the case of *David Moto Sikananu Vs The Attorney General*.⁽¹²⁾

- 8.5. Further that determination of the matter with finality under this rule also means rendering the hearing of the matter irrelevant as per the guidance of the Supreme Court in *Indeni Petroleum Vs Kafco Limited and 3 Others*.⁽¹³⁾
- 8.6. As regards the propriety of invoking **Order 33 Rule 3**, Counsel argued that even if it was to be conceded that **Order 33 Rule 3** was wrongly invoked in moving the Court to determine the application, he argued that the citing of **Order 33 Rule 3**, which in fact is being read with **Order 14A** cannot be a basis of rendering the application at hand incompetent.
- 8.7. Further, that this action is a multiplicity of actions and an abuse of court process because though the Plaintiff have attempted to distinguish the underlying dispute between the adversaries, yet the facts and circumstances prevailing qualifies these proceedings to be an abuse of court process.
- 8.8. It was Counsel's further contention that if this Court is inclined to accepting the Plaintiff's submission then in the alternative, it would be argued that the proceedings are prematurely before this Court in light of the affidavit evidence in reply, particularly in Paragraph 5 wherein, the first Defendant has deposed to the fact that the very same conviction of fraud at the center of these proceedings is a subject of appeal before the Court of Appeal.
- 8.9. Counsel for the Defendant further submitted that this Court should not proceed with this matter, because proceeding with this matter would result into confusion. In support of this, Counsel drew the

attention of the Court to the case of **Annart Chinuye Vs Zambia Airways Limited**⁽¹⁴⁾ where it was held:

“Following the Kabwe Transport Limited Vs Press Transport Limited,⁽¹⁵⁾ the result of criminal trial cannot be referred to as proof of a fact which must be established in a Civil Court; and this applies whether the criminal trial resulted in a conviction or and acquittal.”

- 8.10. It was Counsel’s further submission that the guidance in **Jonathan Van Blerk Vs Attorney General and 5 Others** to the effect that res judicata cannot therefore be deployed to terminate such proceedings if what is being impugned is the very process of how the Judgment was obtained but that the circumstances in the case in *casu* are distinguishable and therefore the Jonathan Van Blerk case does not apply.
- 8.11. In reply to whether a High Court Judge can set aside a Judgment handed down by another High Court Judge on the basis that it was procured by fraudulent misrepresentation, Counsel conceded that fraud is a basis upon which a Judgment may be set aside. However, what appears to be a problem is that facts in a criminal trial in the case in *casu* were being used as proof in a civil matter.
- 8.12. It was Counsel’s submission that unlike in the Jonathan Van Blerk’s case, where the claims or issues forming part of the proceedings which culminated into a Judgement that Mr. Blerk sought to impugn, in the case in *casu*, nothing has changed apart from the conviction of the 1st Defendant for fraud which conviction is now a subject of an appeal before the Court of Appeal.

9.0 THE LAW, ANALYSIS AND DETERMINATION

The following are the questions for determination:

- (i.) *Whether the matter is rightly before Court;*
- (ii.) *Whether these proceedings before Court are a multiplicity of actions and an abuse of court process;*
- (iii.) *Whether these proceedings are res judicata; and*
- (iv.) *Whether a High Court Judge can set aside a Judgment of another High Court Judge.*

- 9.1. I am grateful to Counsel for the parties for the detailed submissions presented before me.
- 9.2. As a starting point, I note that there was a spirited argument as to whether this matter was rightly before me. Before delving into the main questions of the preliminary inquiry, I will start by resolving this issue.
- 9.3. Counsel for the Plaintiffs submitted that this matter is wrongly before me because it has not met the requirements of **Order 14A and Order 33 of the Rules of the Supreme Court 1965**. On the other hand, the Defendants vehemently argued that this matter is correctly before Court because the requirements of **Order 14A and Order 33 of the White Book** have been satisfied.
- 9.4. I have considered the arguments of both parties in relation to whether this action was correctly before me. To properly determine this question the Court needs to examine **Order 14A of the Rules of the Supreme Court 1965**. This Order provides:

(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.*

9.5. Further the explanatory note to paragraphs at Paragraphs **14A /2/3 of the Rules of the Supreme Court 1965** explains the procedure for invoking the above provision as follows:-

“The requirements for employing the procedure under this Order are the following:-

- (a) The Defendant must have given notice of intention to defend;*
- (b) The question of law or construction is suitable for determination without full trial of the action (Para. 1 (i) (c));*
- (c) Such determination will be final as to the entire cause or matter or any claim or issue therein (Para. 1 (i) (h)); and*
- (d) 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 (Para. 1 [3])”*

9.6. Further the explanatory note at Paragraph **14A/2/10 of the Rules of the Supreme Court 1965** explains a determination of a question of law or construction as follows:-

“Upon making its determination of the question of law or construction, the Court may dismiss the action or make such Order or Judgment as it thinks just. In this way, the action will be finally disposed of without a full trial and the Judgment or Order will have the same force and effect as a Judgment or Order after a full trial of the action.”

- 9.7. Analyzing the application in *casu* in the light of **Order 14A**, it is my considered view that, the application is correctly before me because it has met the requirements of **Order 14A**. In stating this, I am not oblivious of the arguments by Counsel for the Plaintiff that the 1st and 2nd Defendants’ application does not meet the requirements because the questions raised by the first and second Defendant have no bearing on the merits of the substantive action and that, the questions raised are purely procedural in nature and that their determination will not consequently lead to the determination of the dispute on the merits.
- 9.8. In my understanding of **Order 14A**, the main purpose of **Order 14A**, is to determine a matter without full trial a guided in **African Banking Corporation Zambia Limited Vs Copper Harvest Foods Limited and 3 Others**;⁽¹⁶⁾ and the case of **Sikananu Vs Attorney General**.
- 9.9. Further, I agree with Counsel for the Defendants’ submission that **Order 14A** is employed to have a matter dismissed where the determination of the question raised will dispose off the matter. Determination of the matter with finality under this rule, also means rendering the hearing of the matter irrelevant. Implicit in this, is that if one of the questions raised in the preliminary inquiry succeeds, the

success will trigger the dismissal of the main matter, effectively dismissing the substantive action as guided in the **Indeni Petroleum Refinery Vs Kefco Oil Limited and 3 Others**.

- 9.10. Further, I also agree that questions raised by the Defendants do not invite the Court to determine the issues with finality on merits as argued by the Plaintiff. Indeed, it is true that, it is the questions posed before Court that needs determination without a full trial which will result in the matter being disposed of and not substantive claims raised by the Plaintiff, in line with the explanatory of Paragraph 14A/2/10.
- 9.11. The arguments of the parties did not only end with **Order 14A of the Rules of the Supreme Court 1965**, but were also extended to **Order 33 of the Rules of the Supreme Court**.
- 9.12. In relation to this order, Counsel for the Plaintiff argued that the provisions of **Order 33 Rule 3 of the Rules of the Supreme Court 1965** were wrongly invoked and therefore failed to meet the requirements provided for in the said provision.
- 9.13. It was Counsel's submission that it is a preserve of the Court to direct the question(s) or issue(s) that must be stated by or in the form of special case; in line with explanatory note at Paragraph 33/3/1 of the Rules of the Supreme Court 1965 which states:-

“Under this rule, the Court can if necessary, direct that a question or issue shall be stated by or in the form of a special case (see Duncan Vs Lambeth London Borough Council⁽¹⁷⁾ but the parties cannot under this rule agree between themselves, without obtaining the order of the

Court, to state questions of law in the form of a special case.....”

- 9.14. On that premise, Counsel submitted that, the rule was not applicable herein as the questions of law were settled by Counsel for the Respondent without the requisite order of the Court. Under Order 33, it is the Court that settles the question to be determined and it is the Court that may alternatively make an order requiring Counsel of one of the parties to settle and sign the questions to be tried as preliminary issue. For this failure, Counsel urged the Court to dismiss the preliminary issue for failing to meet the requirements of **Order 14A and 33 Rules of the Rules of the Supreme Court 1965**.
- 9.15. In response Counsel for the first and second Defendant conceded that **Order 33 Rule 3** was wrongly invoked in moving the Court to determine the Application.
- 9.16. It was Counsel for the first and second Defendant’s argument that in spite of that default, the Court should proceed to hear the Application.
- 9.17. I have heard the submissions of the parties. From the outset, I must state that I agree with Counsel for the Plaintiff that **Order 33** was wrongly invoked. However, I do not agree that such a default should result in the dismissal of the action. I say so because an application can be solidly made under **Order 14A** alone. This was the guidance given by the Supreme Court in the **African Banking Corporation Zambia Vs Mubende Country Lodge Limited**⁽¹⁸⁾ case. The Supreme Court in that case guided as follows;

“The import of Order 33 Rule 3 RSC is that a preliminary point of law can be raised at any stage of the proceedings

including the period before trial. To that extent we agree with the Appellant that the parties need not wait for setting down the matter for trial before an Application to determine a preliminary point of law can be raised.”

(Court emphasis).

- 10.0 Further, my brother Chali, J in *Mukelabai Nalwamba and Others*,⁽¹⁹⁾ guided that wrong reference to **Order 33 Rule 3** was not fatal. I therefore find that the wrong reference to **Order 33 Rule 3** was not fatal.
- 10.1. Having resolved that this Application was competently and properly before me, I now move to determine the questions raised in the preliminary issue.
- 10.2. The first issue I have to consider is whether these proceedings are a multiplicity of actions and an abuse of court process.
- 10.3. It was Counsel for the Defendant's submission that bringing of multiple lawsuits that raise the same issues that could have been brought in one action is multiplicity of actions which Courts have discouraged. On the other hand, Counsel for the Plaintiff submitted that there was no multiplicity of actions and abuse of process because the issues in the matter of 2021/HP/1585 are distinguishable from the present matter in that the Plaintiff herein is seeking to challenge the judicial process leading to the Judgment delivered under Cause No. 2021/HP1/585 which involves the underlying dispute between the parties.
- 10.4. I have considered the arguments of both parties in relation to the issue of multiplicity of action and abuse of court process.

- 10.5. The doctrine of multiplicity of actions has been extensively discussed by Zambian Courts in several cases such as **Bampi Aubrey and Joseph Busenga Vs Attorney General**,⁽²⁰⁾ **Wang Ying Vs Yousun Zhuang and 4 Others**,⁽²¹⁾ **Development Bank of Zambia Vs Funvest Limited and Another**⁽²²⁾ where it was guided that multiplicity of action is not only confined to similarity or otherwise of the claim in the first and second one. It also extends to the opportunity to claim matters which existed at the time of instituting the first action.
- 10.6. As a point of departure, Counsel for the Plaintiff submitted that in spite of the well settled principle of multiplicity of actions as was elucidated by the Supreme Court and Constitutional Court, afore cited, the matter in *casu* is distinguishable from the present matter because the Plaintiff is seeking to challenge the judicial process leading to the Judgment delivered under Cause No. 2013/HN/036 while the matter under Cause No. 2021/HP/1585 involves the underlying dispute between the parties therein challenging the judicial process which is a separate cause of action from the underlying dispute. In support of this, Counsel relied on **Jonathan Van Blerk** case.
- 10.7. On the other hand, Counsel for the Defendant submitted that although he agreed that challenging judicial process is a separate cause of action from the underlying dispute between the adversaries, the facts and circumstances prevailing in the case in *casu* qualifies these proceedings to be an abuse of court process.
- 10.8. I have considered the submissions of both parties. From the onset, it is my considered view that the parties agree that the underlying

dispute in both matters is the same which could have triggered in multiplicity of action, save the fact that the Plaintiff herein are challenging the judicial process as a separate cause of action as guided in the **Jonthan Van Blerk** case.

10.9. Having stated as such, the question for me to answer is whether the judicial process that led to Judge Siavwapa's Judgment can be impugned within the confines outlined in the **Jonathan Van Blerk's case.**

10.10. In the **Jonathan Van Blerk** case the Supreme Court stated;

“Res Judicata cannot therefore be deployed to terminate such proceedings as what is being impugned is the very process of how the Judgment was obtained. We fully agree with the Court of Appeal on this point as well as the numerous authorities cited by the learned Counsel for the Appellant in this regard. Allowing res judicata to be used as a shield in such circumstances would go against the values of a judicial system as judgments should be obtained in an open and transparent manner and not through deception.” (Court emphasis)

10.11. Further in the leading case of **Takhar Vs Gracefield Developments Limited and Others**,⁽²³⁾ Lord Kerr held that, ***“an action to set aside an earlier Judgment for fraud is not a procedural application but a cause of action in its own right (deriving from the Court's equitable jurisdiction to reverse transactions procured by fraud means of an original bill of equity). That cause of action was independent of the cause of action asserted in the earlier proceedings, it related to the conduct***

of earlier proceedings, and not the underlying dispute. If a claimant can establish a right to have the Judgment set aside for fraud, there can be no question of cause of action nor estoppel; res judicata cannot arise.”

10.12. In the light of the above guidance, my understanding of the ***Jonathan Van Blerk*** case and ***Takhar Vs Gracefield*** case is that for a judicial process to be impugned, the judgment should be obtained;

(1) in a manner which is not open and transparent;

(2) by deception;

(3) the claimant must establish a right to have the judgment to be set aside for fraud.

10.13. In light of the above guidance, have the Plaintiff in *casu* met the above elements for me to trigger the impugnation of the judicial process as submitted by Counsel for the Plaintiff?

10.14. In answering that question, I will first consider whether the judgment that is being assailed was obtained in an open and transparent manner or by deception. I have gone through the judgment and I must admit that I find that the judgment was obtained in an open and transparent manner. Both parties were heard after which the Court delivered its Judgment. I find no deception in how the judicial process was triggered.

10.15. This now brings me to the 3rd element. Which is, whether the claimant have established a right to have the judgment set aside for fraud.

10.16. From the Affidavit in Opposition of Summons for Determination of a Case on Point of Law deposed to by Regina Mpapi in Paragraph 5 deposed as follows;

“5. That the said Judgment is liable to be set aside because the evidence offered in the said action which induced the Court to enter Judgment in favour of the first and second Defendant was founded on fraud and was thus a misrepresentation to the Court.”

10.17. Having looked at the Judgment being impugned in the light of the submissions of the parties, it is my considered view that there was nothing wrong with the judicial process that is being impugned because the fraud allegation being referred to were considered by the Court under Cause 2013/HN/036 particularly at page J8 – J19 of the Judgment exhibited and marked as “GM4” and the same was dismissed by the Court. Further inline with the guidance given by the Supreme Court in **Stanbic Bank Zambia Limited Vs Beatly Khumalo & 29 Others**,⁽²⁴⁾ **Jonathan Van Blerk** case and **Sithole Vs State Lotteries Board**,⁽²⁵⁾ fraud is a serious allegation which must be specifically proved and that, it is for a party alleging fraud to prove the allegation to a greater extent. The Plaintiff in this case has failed to prove any fraud.

10.18. Having said the above, the issue of multiplicity raised by the Defendants succeeds. For the avoidance of doubt, the commencement of this matter amounts to multiplicity of actions and further that the holding in **Jonathan Van Blerk** regarding the impugnation of the judicial process is distinguishable from the case

in *casu* and therefore does not apply because there was no fraud and misrepresentation in the judicial process.

11.0 I now move to the 2nd issue, which is whether these proceedings are Res Judicata.

11.1. In his submissions, Counsel for the Plaintiff submitted that the Plaintiff's action does not fall under any limb of the doctrine of res judicata. In support of this proposition, Counsel referred to the case of **Finance Bank Limited Vs Noel Nkhoma,**⁽²⁶⁾ **ANZ Grindlays Bank (Z) Limited Vs Chrispin Kaoma, Chick Masters Limited & Dr. Mwilola Imakando Vs Investrust Bank Plc.**

11.2. Further, Counsel relying on the case of **Jonathan Van Blerk Vs Attorney General & 5 Others** submitted that res judicata cannot be deployed to terminate proceedings if what is being impugned is the very process of how the Judgment was obtained.

11.3. On the other hand, Counsel for the Defendant submitted that this matter is res judicata because issues under 2013/HN/036 and 2023/HP/0727 are the same.

11.4. It was Counsel's submission that, the issues or allegations of fraud regarding the contracts and assignments that were raised by the Plaintiff and her late husband were considered by the Court under Cause 2013/HN/036 particularly at page J8 – J19 of the Judgment. However, the same was dismissed by the Court. Counsel relied on the case of **Chick Masters Limited & Dr. Mwilola Imakando Vs Investrust Bank Plc** wherein it was held that;

“The first limb of the concept of res judicata related to a matter actually heard and determined. Such a matter cannot be a subject of a subsequent action or

determination by the same or another Court of similar jurisdiction. The second limb and this is the one which is relevant for purposes of this ground, is that a matter that could have been raised, is also res judicata.”

11.5. I have considered the arguments of both parties in relation to this preliminary issue raised.

11.6. According to the learned authors of the Black’s Law Dictionary, the phrase and doctrine of res judicata has been defined as follows:

“Res Judicata---[Latin “a thing adjudicated”] 1. An issue that has been definitively settled by 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 it was not raised in the first suit.

11.7. Further in ***Finance Bank Zambia Limited Vs Noel Nkoma***, the Supreme Court considered the above doctrine and held:

“Res Judicata means a matter that has been adjudicated upon. It is a matter that has been heard and determined between the same parties. The Principle of Res Judicata states that once a matter has been heard between the same parties, by a Court of competent jurisdiction, the same matter should not be re-opened. The rationale is that there should be an end to litigation.”

11.8. Although the general position is as stated in the case of ***Finance Bank Zambia Limited Vs Noel Nkoma*** and ***ANZ Grindlays Bank***

(Z) Limited Vs Chrispin Kaoma, there are exceptions where the doctrine will not apply.

11.9. Res Judicata, for instance, cannot be deployed to terminate proceedings where a Judgment was obtained by fraud. Once the deception is exposed it unravels the Judgment. This was the guidance in **HH Causalty and General Insurance Ltd Vs Chase Manhattan Bank**, where Lord Bingham of Cornhill famously stated that:

“----- fraud is a thing apart. This is not a mere slogan. It also reflects an old legal rule that fraud unravels all--- once fraud is proved, it vitiates Judgments, contracts and all transactions whatsoever.

11.10. Further the Supreme Court of England in the leading case of **Takhar Vs Gracefield Developments Ltd and Others**, held that, ***“an action to set aside an earlier judgment for fraud is not a procedural application but a cause of action in its own right (deriving from the Court’s equitable jurisdiction to reverse transactions procured by fraud by means of an original bill in equity). That cause of action was independent of the cause of action assented in the earlier proceedings; it related to the conduct of the earlier proceedings, and not the underlying dispute. If a claimant, can establish a right to have the judgment set aside for fraud, there can be no question of cause of action nor issue estoppel; res judicata cannot arise.”*** (Court emphasis)

11.12. Similarly, there are a plethora of persuasive Indian decisions on setting aside a Judgment obtained by fraud. The cases of **Nistarini**

Dassi Vs Nundo Loll Base and Another,⁽²⁷⁾ **Cal Sakaran Govinda Vs Lakshmi Bharethi & Others**⁽²⁸⁾ and **Punjab Beverages PVT Ltd Vs G.T Agencies**⁽²⁹⁾ where it was guided that a Judgment obtained through fraud or collusion is universally held sufficient reason for opening or vacating such judgment either during or after the term of which it was rendered.

11.13. Our very own Supreme Court adopted similar views as the Supreme Court of England in **Jonathan Van Blerk Vs Attorney General and 5 Others**, where the Supreme Court held:

“Res Judicata cannot therefore be deployed to terminate such proceedings as what is being impugned is the very process of how that judgment was obtained. We fully agree with the Court of Appeal on this point as well as the numerous authorities cited by the learned Counsel for the appellant in this regard. Allowing res judicata to be lifted as shield in such circumstance would go against the values of a judicial system as judgments should be obtained in an open and transparent manner and not through deception.”

11.14. From all the authorities cited above, it is clear that Res Judicata is a well settled doctrine that prevents opening up matters that have once been litigated upon. Further, from the above said authorities, it has been demonstrated that there are exceptions to the doctrine of Res Judicata as elucidated in the case of **Jonathan Van Blerk Vs Attorney General and 5 Others**.

11.15. Having considered the above authorities, can the matter in *casu* be put aside for fraud as prayed by Counsel for the Plaintiff?

- 11.16. In my considered view, the answer is no. It is no because;
- 11.17. Firstly, the matter in *casu* is distinguishable in that the issue of fraud was considered by the High Court sitting at Ndola particularly at page J8 - 19 of the Judgment exhibited and marked as “GM4”. Therefore, Counsel’s submission would have been meritorious if the issue of fraud was not considered. However, since the issue was considered, reopening of this matter is an attempt to have a second bite of the cherry, which flies in the teeth of the doctrine of *re judicata*.
- 11.18. Secondly, the finding in *Van Blerk* case is also distinguishable and therefore does not apply in this case. It does not apply because in the case in *casu*, the fraud alleged is drawn from a conviction in a criminal matter.
- 11.19. In my considered view, it is fatal for Counsel for the Plaintiff to refer to a criminal matter in a Civil matter because Civil and Criminal Matters stand apart. This was the guidance laid down in *Kabwe Transport Limited Vs Press Transport (1975) Ltd.* Further in *Urest Foams Limited Vs Puma Botswana Pty Limited & Another*⁽³⁰⁾ the Supreme Court stated that;
- “The prohibition in Kabwe Transport against making reference to or introducing evidence of criminal conviction or outcomes applies to all civil proceedings and that the said prohibition is restricted to outcomes as opposed to the process or evidential material leading to such outcomes.”***
- 11.20. In light of the above guidance, it is my considered view that the Plaintiff cannot refer to the outcome of a criminal trial of Cause

HN/A/11/2021 because such reference or reliance is prohibited as per the guidance in the **Urest Foam case** afore cited.

11.21. The Plaintiffs could have referred to the evidence but they are precluded from relying on the outcome of the criminal matter in a civil matter. Apart from reliance on criminal trial results, the Plaintiffs have nothing independent to show that the Judgment under Cause 2013/HN/036 was procured by fraudulent misrepresentation.

11.22. Thirdly, the alleged fraud upon which the Plaintiff's application is anchored on, has been challenged by way of Appeal to the Court of Appeal. Since there is an Appeal, the allegations of fraud relied on in this matter are on shaky ground as it is reasonably possible that the Court of Appeal may disagree with the Subordinate Court and set aside the conviction. If the conviction is set aside, the alleged fraud will also lamentably collapse. Therefore, since the circumstance of the alleged are not clear as guided in **Sithole Vs State Lotteries Board**, the allegation of fraud fails.

11.23. In the light of the above, I agree with Counsel for the Defendant that this matter is res judicata and therefore cannot be litigated on.

12.0 I now consider whether the High Court Judge can set aside a Judgment handed down by another High Court Judge on the basis that it was procured by fraudulent misrepresentation.

12.1. In his submissions Counsel for the Defendant submitted that it is trite that all High Court Judges have the same equal power and authority or jurisdiction in line with **Section 4 of the High Court Act Chapter 27 of the Laws of Zambia**.

- 12.2. It was Counsel's further submission that High Court Judges are vested with equal powers, authority and jurisdiction. Further, that since Judges in the High Court have same jurisdiction it is not possible for one Judge to overrule or nullify an Order given by another Judge of the same Court. This was the guidance by the Supreme Court in the case of **Mundia Sikatana Vs The Attorney General**. In that case the Supreme Court guided that;
- “A Judge of the High Court has no jurisdiction to re-open a matter already determined by another Judge of equal jurisdiction.”***
- 12.3. In response, Counsel for the Plaintiff submitted that a Judgment may be set aside where a judgment was obtained by fraud.
- 12.4. Counsel for the Plaintiff further submitted that the fraud and/or fraudulent activities identified will have the effect of unraveling the sanctity of such a Judgment. Counsel referred the Court to the English case of **HH Casualty and General Insurance Limited Vs Chase Manhattan Bank**, and that of **Jonathan Van Blerk**.
- 12.5. In reply, Counsel for the Defendant conceded that the **Jonathan Van Blerk Vs Attorney General and 5 Others** case wherein, it was pronounced that fraud is a basis of setting aside a judgment. However, that unlike in the **Jonathan Van Blerk** case where claims or issues forming part of the allegation of a Judgment being procured by fraud never formed part of proceedings which culminated into a judgment that Mr. Blerk sought to impugn, in the case in *casu*, nothing has changed apart from the conviction of the 1st Defendant for fraud which conviction is now a subject of an Appeal before the Court of Appeal.

12.6. It was Counsel' further contention that these proceedings are not any close to challenging the conduct of the proceedings under Cause 2013/HN/036 but are a ploy to disguise the true agenda of re-opening the aforesaid settled case otherwise the Plaintiff.

12.7. I have considered the submissions of both parties in connection to the last preliminary issue raised.

12.7. Indeed, it is trite that all High Court Judges have the same equal power and authority or jurisdiction pursuant to **Section 4 of the High Court Act Chapter 27 of the Laws of Zambia**. This Section provides:

“Subject to any express statutory provisions 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 Court, and, or for such purpose, shall be and form a court.”

12.8. Further, the Supreme Court in the case of *Mundia Sikatana Vs the Attorney General* held that:

“A Judge of the High Court has no jurisdiction to re-open a matter already determined by another Judge of equal jurisdiction.”

12.9. An Analysis of the various authorities cited by both Counsel, indicate that the position in the *Mundia Sikatana* case is a general rule. To every rule there is an exception.

12.10. The exception was clearly explained in the case of **HH Casualty and General Insurance Limited Vs Chase Manhattan Bank** where it was held:

“Fraud is a thing apart. This is not a mere slogan. It also reflects an old legal rule that fraud unravels all...once fraud is proved, it vitiates Judges’ contracts and all transactions whatsoever...”

12.11. Further, the Supreme Court in the **Jonathan Van Blerk** case held:

“Our views are similar to the views expressed by the Supreme Court of England in the leading case of Takhar Vs Gracefield Developments Ltd and Others where Lord Kerr held that, an action to set aside an earlier Judgment for fraud is not a procedural application but a cause of action in its own right (deriving from the Court’s equitable jurisdiction to reverse transactions procure by fraud by means of original bill in equity). That cause of action was independent of the cause of action asserted in the earlier proceedings; it is related to the conduct of earlier proceedings, and not the underlying dispute. If a claimant can establish a right to have the Judgment set aside for fraud, there can be no question of cause of action nor issue estoppel; re judicata cannot arise.” (Court emphasis).

12.12. Analyzing the parties’ arguments in the light of the law, it is my considered view that for a Judge to review another Judge’s Judgment, the claimant must establish a right to have the Judgment

set aside for fraud. If this right is not established, a Judge cannot reopen and review another Judge's Judgment.

12.13. In view of the guidance, I have found that I cannot set aside the Judgment delivered by Judge Mwiinde Siavwapa because the Applicant/Plaintiff has not proved that the said Judgment (2013/HN/036) was procured by fraud. The allegation of fraud was adequately considered by the Judge and matter dismissed. Further, alleged fraud relied on has been appealed against as such the allegations of fraud has not been established with certainty since an appeal may succeed or fail. Therefore, since the Plaintiff has failed to prove the allegation of fraud, this preliminary issue succeeds.

13.0 **CONCLUSION**

13.1. Over and above, the preliminary issues raised by the Defendants all succeed because this matter is res judicata as it was already determined by another High Court Judge. Since it was decided by another High Court Judge, this Court has no power to re-open the matter afresh as High Court Judges have equal jurisdiction. Since the preliminary issues have succeeded, this matter is therefore dismissed with costs.

DELIVERED AT LUSAKA THIS 9TH DAY OF OCTOBER, 2023.



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V. S. SILOKA
HIGH COURT JUDGE