

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

**2023/HP/1224**

**BETWEEN:**

**JACOB KAMPEPO SANIDE LUNGU**



**APPLICANT**

**AND**

**COMMISSIONER OF LANDS**

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

**EKAN MACHIKU**

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

**Before the Honourable Mrs. Justice R. Chibbabbuka on the 14<sup>th</sup> day of March, 2025**

For the Applicant: Mr. J. K Matende, Legal Aid Counsel, Messrs Legal Aid Board

For the 2<sup>nd</sup> Respondent: Mr. F. Zulu, Messrs MSK Advocates

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## **RULING**

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### **Cases referred to:**

1. *William Jacks and Company Zambia Limited vs O' Connor (in his capacity as Registrar of Lands and Deed), Construction and Investment Holdings Limited (intervening) CAZ 8 109 of 1967*
2. *Sablehand Zambia Limited vs Zambia Revenue Authority (2005) ZR 109*
3. *African Banking Corporation Zambia v Mubende Country Lodge Limited (Appeal 116 of 2016)*
4. *Kolala v Zambia Postal Services Corporation (CCZ 16 of 2021)*

### **Legislation referred to:**

*The Rules of the Supreme Court of England, 1999 Ed.*

*The Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia*

*The Lands Act, Chapter 184 of the Laws of Zambia.*

*Statute of Limitation Act, 1939.*

## **1.0 Introduction**

The applicant commenced this action on 17<sup>th</sup> July, 2023 by way of originating summons and accompanying affidavit. The applicant is seeking an order of cancellation of the certificate of title issued in respect of Lot No. 314 Kasenga, Lusaka.

The 2<sup>nd</sup> Respondent by way of notice of motion filed on 16<sup>th</sup> August, 2023 raised the following preliminary issues:

1. Whether or not the applicant has locus standi to commence these proceedings as he has no registered interest in L/Kasenga/314;
2. Whether a matter alleging impropriety can be commenced by originating summons and not by writ of summons and statement of claim; and
3. Whether or not the applicant's claim for the purchase of L/KASENGA/314 is not statute barred.

The 2<sup>nd</sup> respondent's preliminary issues are raised pursuant to *Order 14A Rule 1* and *Order 33 Rule 3* of the *Rules of the Supreme Court of England, 1999 edition*.

## **2.0 The 2<sup>nd</sup> Respondent's Affidavit in Support**

The 2<sup>nd</sup> respondent's notice is supported by an affidavit of even date wherein he deposed that the applicant is not the registered owner of the property in question nor was he ever offered the same property by the Commissioner of Lands. That it follows that he has no registered interest in the property. That exhibits JKSL1' to 'JKSL5' contained in the affidavit in support of this action do not show that the property was ever offered to the applicant. That Mr. Vincent Salare was never the registered owner of L/KASENGA/314. There is no proof that the said Vincent Salare even exists. He has been advised and he verily believes that he is the first and only registered owner of L/KASENGA/314. An interest in land ought to be registered in the land register and that if the same is not registered within the specific and allotted time, it is null and void. There is no registration of the applicant's interest on exhibit 'EK1'.

As regards the 2<sup>nd</sup> preliminary issue, the applicant ought to have commenced these proceedings by way of writ of summons and statement of claim as this matter is contentious. Issues of impropriety must be properly pleaded and interrogated by the parties and court at trial.

As regards the 3<sup>rd</sup> preliminary issue raised, the claim for the sale of L/KASENGA/314, situated at Chongwe in the Lusaka Province of the Republic of Zambia is statute barred. The purported sale to the applicant happened on the 9<sup>th</sup> day of December, 1998 and became statute barred on the 8<sup>th</sup> day of December, 2010. Any claim arising from the sale ought to have been pursued within 12 years of the sale. When the land was offered to him, it was not developed by the applicant nor was he using it. That the instrument used by the applicant to claim ownership expired 13 years ago. That the said instrument having not been registered in the lands and deeds register is now null and void. In the circumstances, the matter cannot be continued and sustained in its current state.

### **1.0 The 2<sup>nd</sup> Respondent's Skeleton Arguments**

The 2<sup>nd</sup> respondent filed skeleton arguments wherein counsel referred to *Order 14A* and *33 (3)* of the *Rules of the Supreme Court* as the law on which the application is predicated.

As regards the first issue raised, counsel argued that locus standi is basically the right for a person to be heard or a right to bring up a legal action to a court of law or to appear in a matter. It is the ability of a person to invoke the jurisdiction of courts or tribunals over an action. That it follows that a person has locus standi in a matter if such a person has sufficient interest in the subject matter. Counsel referred to the definition of locus standi as defined by the authors of **Black's Law Dictionary** which is defined as:

*"The right to bring an action or to be heard in a given forum; standing."*

Counsel submitted that the applicant has no interest whatsoever in the matter of L/KASENGA/314 as he is neither a lessee nor registered owner of the property. There is no Power of Attorney from the said Mr. Vincent Salare whom he claims was the owner of the property allowing him to represent him as such. The exhibits marked 'JKSL4' and 'JKSL5' in the applicant's affidavit in support of originating summons, that he alleges transfer ownership of L/KASENGA/314 to him were never registered at the Lands and Deeds Registry and hence are null and void. Counsel referred to *Sections 4 (1), 5 and 6 of the Lands and Deeds Registry Act* and the case of **William Jacks and Company Zambia Limited vs O' Connor (in his capacity as Registrar of Lands and Deeds), Construction and Investment Holdings Limited (intervening)**<sup>1</sup> to buttress the argument. Counsel referred to *Section 5 (1) of the Lands Act* in arguing that no transfer of land can take place without the vendor applying for State Consent to transfer or assign. That it follows that there was no valid sale to the applicant and hence he has no interest in the subject property.

As regards the second preliminary issue, counsel argued this matter should have been commenced by way of writ of summons and statement of claim as it is contentious. That the question of cancellation of a certificate of title cannot be dealt with by affidavit evidence, but requires a party to fully plead the issues in contention so that the other party may traverse, interrogate and answer the allegations properly at the trial of the case. Further, as the applicant has raised issues of impropriety the same must be properly pleaded, interrogated and proven at a trial. Counsel submitted that impropriety as raised by the applicant is synonymous with dishonesty and fraud and it is trite that fraud must be specifically pleaded and proved. Counsel referred to *Order 18 Rule 8 (1) of the Rules of the Supreme Court, 1965 (White book) 1999 edition* to buttress the argument.

Counsel further referred to the case of **Sablehand Zambia Limited vs Zambia Revenue Authority**<sup>2</sup> wherein it was held that an allegation of fraud must be clearly and distinctly proved. That while *Order 28 Rule 8 (1)* of the *Rules* of the *Supreme Court* gives this court the power to continue a matter commenced by originating summons as if it was commenced by writ of summons, *Order 30 Rule 11 (c)* pursuant to which this action was commenced is not used to commence contentious matters. Counsel implored this court to continue with the matter as if it was commenced by writ of summons and statement of claim with costs to the 2<sup>nd</sup> respondent.

As regards the third preliminary issue, counsel argued that any claims for the property in question accrued to the applicant as soon as the agreements marked 'JKSL4' and 'JKSL5' exhibited in the affidavit in support of the originating summons were executed, which is on 9<sup>th</sup> December, 1998 and expired on 8<sup>th</sup> December, 2010. The agreements are therefore statute barred. The applicant further did not register his interest in the property as required by *Lands and Deeds Registry Act, Chapter 185* of the *Laws of Zambia*. The property in issue was not used or occupied by the applicant when it was offered to the 2<sup>nd</sup> respondent. Counsel prayed for the dismissal of this action.

### **3.0 The Applicant's Affidavit in Opposition**

The applicant filed an affidavit in opposition on 31<sup>st</sup> August, 2023 wherein he deposed that he has been advised and verily believes that the notice of intention to raise preliminary issues is not properly before this court. He bought the land from a Mr. Vincent Salare who was the registered owner of the L/Kasenga/314. The showing of Vincent Salare's national registration card as proof of his existence is not mandatory and in any case the same was lodged with the 1<sup>st</sup> respondent. The core of this case is that Mr. Vincent Salare owned the land prior to the 2<sup>nd</sup> respondent. This court has discretion to extend the period in which registrations may be done and to nullify any document wrongfully registered on

the lands registry. Delay in registration does not render a conveyance null and void. That his claim may properly be commenced by originating summons and in the alternative, this court has discretion to order the change of proceedings as if began by writ.

### **3.1 The Applicant's Skeleton Arguments**

In opposing the application, the plaintiff filed skeleton arguments wherein counsel argued that the filing of a notice of intention to defend is a condition precedent to launching preliminary issues under *Order 14A Rule 1* as read together with *Order 33* of the *Rules of the Supreme Court of England (White Book) 1999 edition*. That the 2<sup>nd</sup> respondent having not filed an affidavit in opposition, which would stand as notice of intention to defend in the circumstances of the case herein, renders this application improperly before this court. Counsel relied on the cases of **African Banking Corporation Zambia v Mubende Country Lodge Limited**<sup>3</sup> and **Kolala v Zambia Postal Services Corporation**<sup>4</sup> to support the argument. Counsel prayed for the dismissal of the action on the foregoing reason.

In the alternative, counsel argued that the applicant is clearly seeking the cancellation of the certificate of title issued by the 2<sup>nd</sup> respondent on the basis of impropriety in the issuance as there is an alleged prior interest that was quenched in breach of the law. That the applicant has sufficiently disclosed his interest in the land, as purported buyer from a Mr. Vincent Salare who himself was offered the land on a date prior to any claim by the 2<sup>nd</sup> respondent. The questions of how the applicant acquired his interest in the land, whether there was prior interest on the land, whether his interest was duly registered and the effect thereof, whether the prior interests if any were properly extinguished and whether the certificate of title issued to the 2<sup>nd</sup> respondent should be cancelled are the substantive issues that cannot properly be argued as preliminary issues.

As regards the mode of commencement, counsel argued that this action has been properly commenced by originating summons in line with the provisions of *Order 30 Rule 11 (c)* of the *Rules of the High Court*. However, that should this court hold that the mode of commencement employed is wrong, it has the power under *Order 28 Rule 8* of the *Rules of the Supreme Court of England* to order this action to proceed as if it had been commenced by writ of summons and statement of claim. As regards the issue relating to any claim by the applicant being limited by statute, counsel argued that time starts to run from the date on which the date right of action first accrues as per *Section 3* of the *Statute of Limitation Act, 1939*. That the evidence in *casu* is that the 2<sup>nd</sup> respondent was issued with a certificate of title for the land in issue on 23<sup>rd</sup> September, 2021 and the applicant only discovered this on 17<sup>th</sup> June, 2022. That the forestated dates are well within the 12 years limitation period. Counsel beseeched this court to dismiss the 2<sup>nd</sup> respondent's application.

#### **4.0 The 2<sup>nd</sup> Respondent's Affidavit in Reply**

In reply to the applicant's affidavit in opposition, the 2<sup>nd</sup> respondent deposed as follows: the notice of intention to raise preliminary issues is properly before this court, and that Vincent Salare was never a registered owner of the property in question and therefore there is need to exhibit his national registration card to show proof of his existence. The period within which registrations ought to have been made cannot be extended in this matter as a certificate of title has been issued on the subject property, and the lapsed period is inordinate. The issues relating to cancellation of a title deed are contentious and should only be decided at a trial.

#### **4.1 The 2<sup>nd</sup> Respondent's Skeleton Arguments in Reply**

The 2<sup>nd</sup> respondent filed skeleton arguments in reply wherein counsel more or less reiterated the arguments contained in the skeleton arguments in support of the affidavit in support of this application. In addition, counsel argued that the

provisions under *paragraph 14/2/3 of the Rules of the Supreme Court* as well as the holding of the court in the **African Banking Corporation Zambia Limited vs Mubende** case relate to matters commenced by writ of summons and statement of claim. That when the Supreme Court in the aforementioned case referred to entering appearance, it meant appearance to a writ of summons and statement of claim as provided under *Order 11 Rule 1 (1) of the High Court Rules*, which has now been amended by the *High Court (Amendment) Rules, 2020*. Counsel argued that in a matter commenced by originating summons, such as this one, there is no requirement for entering appearance. In that regard, the preliminary issues are properly before this court.

## **5.0 At the Hearing**

- 5.1** At the hearing of the application on 7<sup>th</sup> September, 2023, counsel for the 2<sup>nd</sup> respondent relied on the affidavit and skeleton arguments filed in support of the application, which he restated. He prayed for the dismissal of this action in its entirety. In the alternative, counsel prayed that this court orders this matter to proceed as one commenced by writ of summons and statement of claim. Counsel prayed for costs.
- 5.2** In opposing the application, counsel for the applicant equally relied on the documents filed in opposition to the application which he also restated. Counsel prayed for the dismissal of the preliminary issues and the application for costs.
- 5.3** Counsel for the 2<sup>nd</sup> respondent sought leave to file a written reply, which was granted. Counsel filed the affidavit in reply with accompanying skeleton arguments on 12<sup>th</sup> September, 2023, which have been referred to above.

## **5.0 Decision of the Court**

I am indebted to counsel for the arguments which I have taken into consideration.

*Order 14A* pursuant to which this matter has been commenced provides that:

*“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.”*

While *Order 33 Rule 3* of the said *Rules of the Supreme Court, 1999 edition* provides that;

*“The Court may order any questions or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise to be tried before, or at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated”.*

It is trite law that the filing of a notice of intention to defend is a prerequisite to raising a preliminary issue under *Order 14A* of the *Rules of the Supreme Court*. *Order 14A/2/3* of the *Rules of the Supreme Court* provides that:

*“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 a full trial of the action.*”

A notice of intention to defend is defined by *Order 1 Rule 4* of the *Rules of the Supreme Court* as”

*“An acknowledgment of service containing a statement to the effect that the person by whom or on whose behalf it signed intends to contest the proceedings to which the acknowledgment relates.”*

The editorial note to *Order 1 Rule 4* provides under 1/4/3 that:

*“Notice of intention to defend- this definition describes an acknowledgment of service which does, as contrasted with one which does not, state an intention to contest the proceedings. Throughout the RSC frequent references are made to “notice of intention to defend” and under this definition, such a reference means that the defendant has lodged an acknowledgment of service and stated his intention to contest the proceedings.”*

In reconciling the provisions of the *Rules of the Supreme Court of England* with our own rules, the Supreme Court in the **Mubende** case examined which document is filed in our jurisdiction to signal a defendant’s notice of intention to defend an action. The court found that in a case commenced by writ of summons and statement of claim, it is the filing of a memorandum of appearance and defence which amounts to a notice of intention to defend as those are the documents that show that a party is contesting the action. The question that follows in *casu* is what document signals a respondent’s notice of intention to contest proceedings in an action commenced by way of originating summons? *Order 12 Rule 9 (1)* of the *Rules of the Supreme Court of England* provides that a respondent to an originating summons must acknowledge service of the

summons as if it were a writ. Editorial note 12/9/2 of the *Rules of the Supreme Court of England* provides that:

*“Order 10, r.1 (6) and r.5 provide that every copy writ or originating summons shall be accompanied by a form of acknowledgment of service in the respective prescribed form. The earlier provisions in this Order cast in terms which suggests that they apply only to proceedings in which a writ has been issued and served in an action commenced by writ. This rule extends their effect to proceedings brought against a defendant named in and served with an originating summons..... Such a defendant is required to acknowledge service of the summons as if it were a writ, save that an acknowledgement of service of an originating summons must be in Form No.15...”*

It follows that according to the *Rules of the Supreme Court of England*, a party served with an originating summons must file a notice of intention to defend as if the action was one by writ of summons. The party must file a document that contains his or her statement of intention to defend the action. In our jurisdiction, the document that signals a party’s intention to defend an action commenced by originating summons is the affidavit in opposition to the affidavit in support of originating summons. I therefore opine that it is the filing of an affidavit in opposition that would signal the respondent’s intention to defend an action commenced by originating summons.

Premised on the foregoing, I therefore do not accept the 2<sup>nd</sup> respondent’s argument that the filing of a notice of intention to defend is only a prerequisite where the matter is commenced by writ of summons and statement of claim. *Order 14A/2/3* of the *Rules of the Supreme Court* is uncompromising in terms of the requirements that ought to be employed in relying on *Order 14A*. Regardless of the mode of commencement, a party seeking to rely on *Order 14A* must file a notice of intention to defend. It follows that the 2<sup>nd</sup> respondent should have filed

an affidavit in opposition to the affidavit in support of originating summons before making the application before court.

I am alive to the fact that the 2<sup>nd</sup> respondent has not only relied on *Order 14A* in making his application but has also relied on *Order 33 Rule 3* of the *Rules of the Supreme Court*. It is trite, as was stated in the **Mubende** case that *Order 33 Rule 33* cannot be invoked to the exclusion of *Order 14A* to raise preliminary issues. On totality of the foregoing, I find that this application is incompetently before this court and is therefore dismissed with costs.

Leave to appeal is hereby granted.

Dated at Lusaka this <sup>14<sup>th</sup></sup>.....day of <sup>March</sup>.....2025

