

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

2021/HP/0877

BETWEEN:

LAWRENCE R.S. MUSIPA

ALLAN MUSIPA

AND

DAVID PHIRI

MORGAN MUSIPA

ISAAC MUSIPA

ENSON MUNAKEZWA

COMMISSIONER OF LANDS

MUMBWA TOWN COUNCIL



1ST PLAINTIFF

2ND PLAINTIFF

1ST DEFENDANT

2ND DEFENDANT

3RD DEFENDANT

4TH DEFENDANT

5TH DEFENDANT

6TH DEFENDANT

*Before the Hon. Mrs. Justice M.M. Bah- Matandala,
On the 6th day of August, 2024.*

*For the Plaintiff: Mr. G. Lungu- Messrs. Mulezi Mwiimbu & Company
For the 1st Defendant: Mr. W. Ngwira- Messrs Chipanzhyha & Company
2nd to 6th Defendant: N/A*

RULING

Legislation Referred to:

1. The Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia
2. Rules of the Supreme Court of England (White Book) 1999 Edition

Cases Referred to:

1. Daniel Katongo v Ndola City Council (2014) 3 ZR 158
2. Fara v Mutinta and Another (2014) 2 ZR 361
3. Sailos Nzowani and others v Flamingo Farm Limited (Selected Judgment No. 5 of 2019)
4. Stanley Mwambazi v Morester Farms Limited (1977) ZR 108 (SC)

1.0 Introduction

1.1 This is a ruling on an application to raise preliminary issues on points of law and facts.

1.2 The 1st Defendant raised a preliminary issue pursuant to ***Order 14A (1), 18 (19), and Order 43 of the Rules of the Supreme Court 1999 Edition (White Book)***.

2.0 Background

2.1 The background of the matter is that the Plaintiff, by Writ of Summons dated 29th July, 2021, sought, inter alia, the cancellation of the Certificate of Title No. 71400 for Lot No. Mumbw/3165078 representing 10.4940 hectares in Mumbwa in the name of the 1st Defendant.

2.2 It is against this background that on 12th July 2022, the 1st Defendant took out summons for the determination of the questions of law pursuant to ***Order 14A (1), 18 (19), and Order 43 of the Rules of the Supreme Court 1999 Edition (White Book)***.

3.0 Affidavit in Support of Application to raise a Preliminary issue

- 3.1 In the Affidavit in Support, deposed by David Phiri, the 1st Defendant herein, it was deposed that the action herein was commenced on the purported order of appointment of Administrator dated 1st November, 2001, and that the aforementioned order was not registered in the Lands and Deeds Register within the requisite period of time or at all.
- 3.2 Further, it was deposed that the evidence herein does not disclose any other Certificate of Title relating to Lot No. Mumbw/3165078, since he was the only person holding a Certificate of Title relating to the aforementioned property.

4.0 Affidavit in Opposition to the Application

- 4.1 In the Affidavit in Opposition, deposed to by the 1st Plaintiff herein being Lawrence S.M. Musipa, it was averred that the main action was not commenced solely on the purported order of appointment as Administrator as asserted by the 1st Defendant, but it was also commenced by the 2nd Plaintiff as a family member and beneficiary of the traditional land in issue.
- 4.2 It was further deposed that the order of appointment was not registered because the land in dispute is said to be

customary and not state land. Additionally, the Certificate of Title exhibited by the 1st Defendant is in fact the reason the matter is now before the court in the main matter for determination.

5.0 Skeleton Arguments in Support of the Application

5.1 In the Skeleton Arguments in Support of this application, it was submitted that the order of appointment as Administrator was not registered pursuant to **Section 5 (3) of the Lands and Deeds Registry Act Chapter 185** of the Laws of Zambia and, therefore, is null and void and cannot be relied upon in any proceedings before court. Further reference was made to the case of **Daniel Katongo v Ndola City Council (2014) 3 ZR 158¹**, where the court reiterated the meaning of Sections 5 and 6 of the Lands and Deeds Registry Act. It was also argued that the provisions of **Sections 33 and 35 of the Lands and Deeds Registry Act** are clear that a Certificate of Title is conclusive evidence of ownership. I was further referred to the case of **Fara v Mutinta and Another (2014) 2 ZR**

361² in which the court interpreted the efficacy of Section 35 of the Lands and Deeds Registry Act.

5.2 It was submitted that *in casu*, the Plaintiffs have not disclosed the existence of a Certificate of Title relating to the property herein. The 1st Defendant prayed that the Plaintiffs herein do not have a Certificate of Title relating to Lot No. Mumbw/3165078 to warrant their claims as endorsed in the pleadings.

6.0 Skeleton Arguments in Opposition and List of Authorities

6.1 In the Skeleton Arguments and List of Authorities in Opposition, it was submitted that it was not correct for the 1st Defendant to assert that the 1st Plaintiff took out a Writ of Summons and Statement of Claim solely relying on the order of appointment as Administrator but that the 1st and 2nd Plaintiffs are part of the parcel beneficiaries of their late father's estate, although the land is customary and may not form part of the estate.

6.2 Further, the Plaintiffs have submitted that they are entitled to stay on the land and use this farm which was left by their father since it belongs to the Chief who has

not revoked his right to allow the family of the late Silly Gumbo Guyangu to continue living on the said farm.

6.3 It was further submitted that the Plaintiffs are not claiming ownership of the land in dispute but the cancellation of the Title Deed for the 1st Defendant, cancellation of any contract, and demolition of all structures illegally constructed on the family farm.

6.4 Further, the Plaintiffs herein are challenging the manner in which the 1st Defendant obtained title to the land in *casu* and that procedure was not followed. Reference was made to the case of ***Sailos Nzowani and others v Flamingo Farm Limited (Selected Judgment No. 5 of 2019)***³ where the court addressed the issue of failure to follow procedure in land acquisition as another way besides fraud that can lead to the cancellation of Certificate of Title. I was also invited to look at the case of ***Stanley Mwambazi v Morester Farms Limited (1977) ZR 108 (SC)***⁴.

7.0 Hearing

7.1 At the hearing of the matter, only the 1st Defendant was heard as the Plaintiffs were absent. The 1st Defendant relied on the Skeleton Arguments and Affidavit in Support of the application herein and further augmented that the Plaintiffs have conceded that the land in casu is not amenable to the Intestate Succession Act and that it does not belong to them but to the Chief.

7.2 It was argued that the 1st Defendant, having a Certificate of Title, was conclusive evidence that he owns the purported piece of land subject of these proceedings and in the absence of fraud in holding title the 1st Defendant cannot be faulted.

8.0 Analysis and decision

8.1 I have taken due consideration of the evidence on record and authorities cited in the Skeleton Arguments filed by the parties herein.

8.2 This application hinges on ***Order 14A Rule 1 of the Rules of the Supreme Court of England 1965 1999 Edition (White Book)***, which provisions states as follows:

"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."

8.3 Furthermore, Order 33, Rule 3 of the White Book provides as follows:

"The Court may order any question 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, 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."

8.4 I also took time to look at **Order 33 of the Lands and Deeds Registry Act Chapter 85 of the Laws of Zambia**, which provides as follows:

"(1) A Certificate of Title shall be conclusive as from the date of its issue and upon and after the issue thereof, notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the President or otherwise, which but for Parts III to VII might be held to be paramount or to have priority; the Registered Proprietor of the land comprised in such Certificate shall, except in case of fraud, hold the same subject only to such encumbrances, liens, estates or interests as may be shown by such Certificate of Title and any encumbrances, liens, estates or interests created after the issue of such Certificate as may be notified on the folium of the Register

relating to such land but absolutely free from all other encumbrances, liens, estates or interests whatsoever:

- (a) Except the estate or interest of a proprietor claiming the same land under a current prior Certificate of Title issued under the provisions of Parts III to VII; and*
- (b) Except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and*
- (c) Except so far as regards any portion of land that may be erroneously included in the Certificate of Title, evidencing the title of land that may be erroneously included in the Certificate of Title, evidencing the title of such Registered Proprietor by wrong description of parcels or of boundaries.”*

8.5 Furthermore, Section 35 of the Act provides as follows:

“After land has become the subject of a Certificate of Title, no title thereto, or to any right, privilege, or easement in, upon, or over the same, shall be acquired by possession or user adversely to or in derogation of the title of the Registered Proprietor.”

8.6 Further reference was made to **Section 5 (3) of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia** provides that:

“Probate of a will affecting land or any interest in land shall be registered within twelve months of the grant thereof or the sealing thereof under the provisions of the Probates (Resealing) Act, as the case may be.”

8.7 Section 6 provides that:

“Any document required to be registered as aforesaid and not registered within the time specified in the last preceding section shall be null and void.”

8.8 In *casu*, the 1st Defendant asserts that the order of appointment as Administrator dated 1st November, 2001 was not registered in the Lands and Deeds Registry, and it is the 1st Defendant's considered view that the matter herein, having been commenced on the purported order of appointment of Administrator, is not properly before court as the appointment is null and void for lack of registration.

8.9 On the other hand, the Plaintiffs have argued that the probate was not registered because the land in dispute is customary and not state land.

8.10 A perusal of the pleadings herein will show that the 1st Plaintiff does not purport to have sued in the capacity of a personal representative but as an interested beneficiary. This is deduced from the way the pleadings are couched.

8.11 Furthermore, the Plaintiffs joined hands with the 1st Defendant on the assertion that they have no title to the land in issue and argue that the land in dispute is traditional land and they are beneficiaries entitled to be on the aforementioned farm.

8.12 I also took time to look up the definition of land in the ***Lands and Deeds Registry Act where land is defined under Section 2*** as follows:

“means land within Zambia, and includes units and remainders under common leasehold schemes, tenements and hereditaments, but does not include any mining right as defined in the Mines and Minerals Act in or under or in respect of any land;”

8.13 It is clear from the above provision that land under the Deeds and Registry Act does not include customary land, and therefore, the requirement for probate registration under ***Section 5 (3) of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia*** does not include where the land in question is held under customary tenure.

8.14 The other question for determination is whether it is competent for the Plaintiffs to claim ownership or interest in relation to the property in dispute herein in the absence of a Certificate of Title. The Plaintiffs have reiterated that

the land is customary, and the purported Certificate of Title held by the 1st Defendant is the reason why the matter is before court.

8.15 The record shows that there is a Certificate of Title exhibited which obtained on 13th February, 2020 in the names of David Phiri (the 1st Defendant herein) for Lot Mumbw/3165078. I have perused the pleadings in the main matter herein and it is clear that the dispute in the main matter between the parties is on how the title for Lot No. 71400 for Lot No. Mumbw/3165078 was acquired. It is, therefore, my considered view that it is the procedure of acquiring title on the land in issue which is being questioned in calling for its cancellation. It is clear that there are triable issues needing consideration in the main matter, and therefore, this matter cannot be thrown out on technicalities. Put in another way, the question of whether or not the Plaintiffs have demonstrated that they have an interest to seek legal recourse in the said property is answered in the affirmative although they have no title to the land in dispute.

8.16 I found comfort in the case of **Stanley Mwambazi v Morester Farms Limited (1977) ZR 108 (SC)**, where the court held that:

“It is the practice in dealing with bona fide interlocutory applications for courts to allow triable issues to come to trial despite the default of the parties; where a party is in default, he may be ordered to pay costs, but it is not in the interests of justice to deny him the right to have his case heard.”

8.17 Furthermore, in the case of **Zambia Revenue Authority v Jayeshah (2001) ZR 60⁵**, it was stated that:

“Cases should be decided on their substance and merit. The rules must be followed, but the effect of a breach will not always be fatal if the rule is merely regulatory or directory.”

8.18 In sum, I opine that the questions raised by their very nature can only be wholly determined after hearing the main matter. To this extent, having referred to **Order 5 Rule 15 and 16 of the High Court Act Chapter 27 of**

the Laws of Zambia and Order 41 Rules 6 of the Rules of the Supreme Court of England (White Book), the application herein is dismissed.

9.0 Costs are in the cause.

Dated at Lusaka, this 6th day of August, 2024.



**M.M. BAH-MATANDALA
HIGH COURT JUDGE**

