

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

2022/HP/1970

BETWEEN:

RICHARD MUYABE



PLAINTIFF

AND

DOROTHY MICHELO

DEFENDANT

Before the Honourable Ms. Justice S. Chocho, in Chambers, on the 17<sup>th</sup> day of May, 2024.

*For the Plaintiff* : Mr. C. Nyimbiri Messrs Makebi Zulu and Advocates  
*For the Defendant* : No Appearance

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## EXTEMPORE RULING

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Cases referred to:

1. ANZ Grindlays Bank (z) Limited V Kaoma SCZ Judgment No. 12 of 1995
2. Amber Louise Guest Milan Tribonic V Beatrice Mulako and Attorney General  
2010/HP/0344

Legislation referred to:

1. Order 3 Rule 2 of the High Court Rules
2. Order 18 Rule 19 of the Rules of the Supreme Court (White Book)

**UPON Hearing** Counsel for the Plaintiff and **Upon Reading** the Defendant's affidavit and skeleton arguments in support of the Defendant's application to dismiss matter on point law. It is hereby ordered as follows:

Principally the Defendant avers that the Plaintiff has over the years commenced various court cases/litigation between them. The one of particular interest is the latest matter 2022/HP/0288 where my sister Honourable Justice Lombe-Phiri dismissed the Plaintiff's action that was commenced by originating summons.

In her Judgment at page J6 she states: -

***“Considering the issues presented to the Court I find that owing to the serious issue raised which requires a clear interpretation of the reach of the Local Court’s Judgment in relation to the Subject Property, the Respondent has shown just cause why her interest in the Property should be protected until such a time that the issue is resolved, as between the Parties.***

***In view of the foregoing, I find that the application by the Applicant fails and is dismissed with costs ordered for the Respondent.”***

It is my considered view that the Judgment under cause 2022/HP/0288 did not determine all of the claims as appears in the current one. The issue as I see it is simply was the property acquired before or during the marriage between the Plaintiff and Defendant. Under (ii) of writ of summons, in casu-

***“An order that property known as lot No 43 Palabana Lusaka was acquired prior to the Plaintiff’s marriage to the Defendant.”***

It is clear from the above that the Plaintiff seeks to follow the guidance in the Judgment under cause 2022/HP/0288. That Judgment clearly states that the caveat cannot be lifted until the question of law and fact as to who is the owner and when the Lot/property in question was acquired.

I find that in fact the Plaintiff's claims/action cannot be defeated by reason of res-judicata. The issue as regards to, the date property in question was acquired has never been litigated or determined, before.

I am forfeited in this by the authority in cases of **ANZ GRINDLAYS BANK (Z) LIMITED V KAOMA<sup>1</sup>**.

The Supreme Court held:-

*“In order for a defence of res-judicata to succeed, it is necessary to show not only that the cause of action was the same but also that the Plaintiff has had no opportunity of recovering in the first action that which he hopes to recover in the second.”*

In the case of **AMBER LOUISE GUEST MILAN TRIBONIC V BEATRICE MULAKO AND ATTORNEY GENERAL 2010/HP/0344<sup>2</sup>** Justice Dr. Patrick Matibini (as he then was) held inter alia :-

*“In order for a plea of res judicata to succeed it must be demonstrated that a judgment should have earlier on been pronounced between the parties.”*

In the matter before me the Defendant has not demonstrated that any Court pronounced itself on the question of whether or not the subject Property was acquired during the subsistence of the marriage or not. Neither has the Defence shown that the Plaintiff had no opportunity of recovering in the first/any action before, that which he hopes to recover in the current action.

Granted the issue of the removal of the caveat has been settled by judgment under cause 2022/HP/0288 to this end and pursuant to Order 3 Rule 2 of the High Court Rules and Order 18 Rule 19 of the Rules of the Supreme Court (White Book) I hereby order that the claim as relates to caveat and determined before **BE** and **IS** struck off and that the Plaintiff be allowed to amend his pleadings with the Defendant having right to amend their defence if need be.

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The Defendant's application fails. It is hereby ordered that the Defendant does file application to vary or extend time within which to comply with the issued Orders for Directions.

Each party to bear its own costs.

Matter stands adjourned to the 18<sup>th</sup> July, 2024 at 08:30 for a Status Conference.

**Delivered at Lusaka on 20<sup>th</sup> May, 2024.**



**S. CHOCHO  
HIGH COURT JUDGE**

