

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

2024/HP/0742



BETWEEN:

LAKE KARIBA INNS LIMITED**PLAINTIFF**

AND

STEVEN NYIRENDA
NSPH INVESTMENTS LIMITED (T/A SAVEE BEACH RESORTS)
ATTORNEY GENERAL

1st DEFENDANT
2nd DEFENDANT
3rd DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 6th
DAY OF FEBRUARY, 2025**

For the Plaintiff : Ms. N Namwila, Messrs Simeza Sangwa and Associates
For the 1st Defendant : No appearance
For the 2nd Defendant : Mrs. M.S Phiri, Messrs Namonje Sikombe and Associates
*For the 3rd Defendant : Ms. Mwenzi Katolo, Assistant Senior State Advocate,
Attorney General Chambers*

R U L I N G

CASES REFERRED TO:

1. *Henderson v Henderson 1843-1860 ALL ER 378*
2. *Bellamano v Ligure Lombarda Limited 1976 ZR 262*
3. *Musakanya Valentine Shula and Edward Jack Shamwana v AG 1981 ZR 221*
4. *Development Bank of Zambia and another v Sunvest Limited 1995-1997 ZR 187*
5. *BP Zambia Plc v Interland Motors Limited 2001 ZR 37*
6. *Bank of Zambia v Jonas Tembo and other SCZ Judgment No 2 of 2002*
7. *Kansanshi Mines Plc v Joseph Maini Mudima & others Appeal No 149/2010*
8. *Amber Louise Guest Milan Trbonic v Beatrice Mulako Mukinga, Attorney-General 2011 Vol 1 ZR 370*
9. *Prisca Matimba Nyambe v Bank of Zambia Appeal No 2017 of 2012*

10. *Kufamuyeke Mukelabai v Esther Nalwamba, Commissioner of Lands and Attorney General 2013 Vol 2 312*
11. *Finance Bank Zambia Limited v Noel Nkhoma SCZ/8/2015*
12. *African Banking Corporation v Mubende Country Lodge Appeal No 116 of 2016*
13. *Betty Chizyuka v Finance Bank Limited & 3 others v Finance Bank Limited Appeal No 137 of 2019*
14. *Intelligent Mobility Solutions v Lamise Trading Limited Appeal No 214 of 2022*
15. *Nevers Mumba v Oliver Scott Appeal No 139 of 2023*
16. *Kasumba Wilfred Ngulube & 86 others v Nitrogen Chemicals of Zambia Appeal No 49 of 2024*
17. *African Banking Corporation (T/A Banc ABC) v Laurel Services Limited & others*

LEGISLATION REFERRED TO:

1. *The High Court Act, Chapter 27 of the Laws of Zambia*
2. *The Rules of the Supreme Court of England, 1965, 1999 Edition*

OTHER WORKS REFERRED TO:

1. *Black's Law Dictionary by Bryan A. Garner, 9th Edition, Thomas Reuters 2009*
2. *Odgers On Civil Court Actions, 24th Edition*

1. INTRODUCTION

1.1 In an application that was filed on 25th October, 2024, pursuant to **Order 14A Rules 1 and 2** and **Order 33 Rule 7 of the Rules of the Supreme Court of England, 1965, 1999 Edition** as read with **Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia**, the 2nd Defendant herein, being NSPH Investments Limited (T/A Savee Beach Resorts) seeks the determination of the following question:

- i. *Whether or not the matter is properly before this Court in light of the fact that it was fully and finally determined under cause number 2009/HP/0875 on 4th December, 2019 and thus is res judicata?*

Take further notice that NSPH Investments Limited (T/A Savee Beach Resorts) shall apply that this action is an abuse of the Court process and a multiplicity of actions and should be dismissed with costs.

- 1.2 The Notice of Motion was supported by an affidavit and a List of Authorities and Skeleton Arguments. In opposition, Lake Kariba Inns Limited, filed an affidavit in opposition and a List of Authorities and Skeleton Arguments in opposition on 27th November, 2024.

2. BACKGROUND

- 2.1 Lake Kariba Inns Limited commenced this action on 30th May, 2024, by Writ of Summons which was accompanied by a statement of claim and the other documents seeking:

- i. An Order directing the Southern Province Planning Authority to re-plan the disputed area affecting Stand No 412 and Stand No 1152 Siavonga based on the Survey Report of 20th December, 2011;*
- ii. An Order directing Steven Nyirenda and NSPH Investments Limited (T/A Savee Beach Resorts) to pull down and demolish all structures found to be encroaching following the re-planning of the area based on the Survey Report of 20th December, 2011;*
- iii. Damages for trespass to land against Steven Nyirenda and NSPH Investments Limited (T/A Savee Beach Resorts);*
- iv. Any other relief the Court may deem fit;*
- v. Costs.*

2.2 NSPH Investments Limited, (T/A Savee Beach Resorts) entered appearance and filed its' defence and the other documents on 11th June, 2024, while the Attorney General did so on 25th October, 2024. An application for an Order of injunction was filed, and it was heard and determined in a Ruling dated 24th September, 2024.

3. SUBMISSIONS AT THE HEARING

SUBMISSIONS BY COUNSEL FOR NSPH INVESTMENTS LIMITED, (T/A SAVEE BEACH RESORTS)

- 3.1 In making the application, Counsel for NSPH Investments Limited, (T/A Savee Beach Resorts) stated that they relied on the documents which were filed in support of the application. Counsel stated that there is a plethora of authorities, including the case of ***African Banking Corporation v Mubende Country Lodge*** ⁽¹²⁾, which guided on when ***Order 14A of the Rules of the Supreme Court of England***, can be employed in making an application.
- 3.2 Further submission was made, that in the case of ***Kasumba Wilfred Ngulube & 86 others v Nitrogen Chemicals of Zambia*** ⁽¹⁶⁾, which matter was on all fours with this matter, the Court of Appeal dismissed the matter for being res judicata, after an application was made pursuant to ***Order 14A of the Rules of the Supreme Court of England***.
- 3.3 Counsel still relying on the case of ***African Banking Corporation v Mubende Country Lodge*** ⁽¹²⁾ submitted that the Supreme Court in that matter, guided that ***Order 33 Rule 3 of the Rules of the Supreme Court of England***,

cannot be invoked to the exclusion of **Order 14A of the said Rules**.

- 3.4 In respect of **Section 13 of the High Court Act**, Counsel's submission was that the Court is empowered to fully and finally determine all issues in controversy, thereby deterring multiplicity of actions and abuse of the Court process. Counsel accordingly submitted that therefore, this Court has power under the provisions of that Section, to dismiss a matter. It was stated that the application was properly before Court.
- 3.5 Counsel referred to the definition of *res judicata*, as given by **Black's Law Dictionary, by Bryan A. Garner, 10th Edition**, stressing the Three (3) elements that are stated in the definition.
- 3.6 Applying that definition to this case, Counsel stated that the claim by Lake Kariba Inns Limited is centred on the same land which was adjudicated upon in cause number 2019/HP/0875, with the Court having delivered a Judgment in that matter.
- 3.7 Submission was made, that Lake Kariba Inns Limited and Steven Nyirenda were the parties in that matter, while NSPH Investments Limited (T/A Savee Beach Resorts) was a party in privity to them, having purchased the property from Steven Nyirenda. Counsel's contention was that the matter was therefore clearly *res judicata*.
- 3.8 It was stated that the Court of Appeal in the case of **Nevers Mumba v Oliver Scott** ⁽¹⁵⁾ acknowledged that the principle

of res judicata supports the good administration of justice in the interests of both the public and litigants, to prevent abuse and duplication of litigation.

- 3.9 Further reliance was placed on the case of ***Betty Chizyuka v Finance Bank Limited & 3 others v Finance Bank Limited*** ⁽¹³⁾, stating that in that matter, the Court of Appeal held that the Judge of the High Court had no jurisdiction to re-open a matter which was already determined by another Judge of equal jurisdiction.
- 3.10 Counsel took the view that re-opening the matter, would constitute abuse of the Court process, as the Court would be re-litigating the same dispute which was centred on the same subject, thereby undermining the principle of finality to litigation and judicial economy.
- 3.11 It was contended that if there were any issues, the parties ought to proceed in the matter where the Judgment was delivered, as opposed to commencing a fresh action. The prayer was that the application be granted.

SUBMISSIONS BY COUNSEL FOR THE ATTORNEY GENERAL

- 3.12 Counsel informed the Court that they had no instructions on the application, and therefore, they would abide by the decision that this Court would make.

RESPONSE BY COUNSEL FOR LAKE KARIBA INNS LIMITED

- 3.13 It was Counsel's submission in response, that they relied on the Skeleton Arguments which were filed in opposition to the

Notice of Motion, which addressed legal issues, which could not be contained in the affidavit in opposition.

**REPLY BY COUNSEL FOR NSPH INVESTMENTS LIMITED
(T/A SAVEE BEACH RESORTS)**

3.14 The reply was that the case of *Intelligent Mobility Solutions v Lamise Trading Limited* ⁽¹⁴⁾ was applicable, as the Skeleton Arguments as filed by Lake Kariba Inns Limited brought out issues of both fact and law. Thus, the Skeleton Arguments which were not backed by an affidavit risked Counsel giving evidence at the bar, which was a compelling reason to expunge such Skeleton Arguments from the record.

3.15 On that basis, the prayer was that in the absence of any opposition to the application, it should be granted.

4. DECISION OF THIS COURT

4.1 I have considered the Notice of Motion. *Order 14A of the Rules of the Supreme Court of England, 1965, 1999 Edition* provides that:

“(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.

2. Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.”

4.2 **Order 33 Rule 7 of the Rules** states that:

“If it appears to the Court that the decision of any question or issue arising in a cause or matter and tried separately from the cause or matter substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just.”

4.3 **Section 13 of the High Court Act Chapter 27 of the Laws of Zambia**, on the other hand provides as follows:

“13. In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and every legal or

equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.”

- 4.4 Before I delve into the merits of the Notice of Motion, I wish to address the submission which was made by Counsel for NSPH Investment Limited (T/A Savee Beach Resorts) to the effect that the Skeleton Arguments which were filed by Lake Kariba Inns Limited should be expunged from the record, as they argued facts, which were not supported by an affidavit in opposition.
- 4.5 Further, that the said Skeleton Arguments should be expunged in line with the decision in the case of ***Intelligent Mobility Solutions v Lamise Trading Limited*** ⁽¹⁴⁾.
- 4.6 Counsel for Lake Kariba Inns Limited in response, argued that the Skeleton Arguments raised points of law which could not have been deposed to in an affidavit in opposition.
- 4.7 In the case of ***Intelligent Mobility Solutions v Lamise Trading Limited***⁽¹⁴⁾, the Court of Appeal stated the

following, as regards Skeleton Arguments and affidavits which are filed in relation to applications:

“According to the Ulster University Website; ulster.ac.uk, Skeleton Arguments are a written summary of one's case and main arguments of the case. The Skeleton Arguments outline relevant background facts of the case and a brief reference to the law to be relied on (paraphrased).

The same source defines "affidavit" as "a written document that gives a truthful version of the facts or events which is sworn under oath."

What is discernible from the two definitions, is that whereas the affidavit is purely factual, Skeleton Arguments are a combination of fact and law.

Since it is not permissible for Counsel to give facts from the bar, it follows that it is not permissible for Counsel to file a document containing a mixture of facts and law if there is no affidavit before Court deposing to the facts of the case. The above view is based on the fact that once a competent person has deposed to the facts within their knowledge, and such affidavit is filed into Court, the facts that the Skeleton Arguments will be speaking to will be as deposed to in the affidavit.

Allowing Skeleton Arguments not backed by an

affidavit in opposition would expose Counsel to giving evidence at the bar and that is reason enough to reject or expunge the Skeleton Arguments from the record.

In the premise, we would not fault the learned Judge for refusing to consider Skeleton Arguments following his order expunging the copy of the affidavit in opposition.”

- 4.8 Applying the above rationale to this matter, Counsel for NSPH Investment Limited (T/A Savee Beach Resorts) argued that the Skeleton Arguments which were filed by Lake Kariba Inns Limited argued aspects of both law and facts. As such, it should be expunged from the record. She further stated that consequently, the application should be allowed, there being no opposition as a result.
- 4.9 In response, Counsel for Lake Kariba Inns Limited submitted that the Skeleton Arguments had addressed issues of law and that was why, they did not file an affidavit in opposition.
- 4.10 Looking at the decision by the Court of Appeal as stated above, in considering the Skeleton Arguments which were filed by Lake Kariba Inns Limited, should they argue the law which is supposed to be supported by facts, I will expunge those portions of the Skeleton Arguments from the record.
- 4.11 Coming to the main application, Vijay Anaka Bhaskhar Reddy, the Managing Director for NSPH Investments Limited (T/A Savee Beach Resorts) deposed in the affidavit which was filed in support of the application, that Lake Kariba Inns

Limited commenced an action under cause number 2009/HP/0875 against Steven Nyirenda, in which it claimed inter alia, that it was the rightful owner of the property, known as number 412 Siavonga, as well as damages for injury which was caused by Steven Nyirenda.

- 4.12 Averment was made, that the Court delivered Judgment in that matter on 4th December, 2019, which was exhibited as 'VABR1'. Then post the Judgment, NSPH Investments Limited (T/A Savee Beach Hotels) acquired the properties known as Stands 408 and 1152 from Steven Nyirenda for which it holds certificates of title to.
- 4.13 It was also deposed, that the Court in the Judgment, ordered the re-planning of the whole affected area, and that the claim for trespass could not be entertained, as the whole area was subject of re-planning. Further in averring, Vijay Anaka Bhaskhar Reddy, stated that the Judgment also directed that all property owner owners who were affected by the re-planning, were to take ownership of the Stands as would be re-planned.
- 4.14 Then by the letter dated 10th July, 2023, which was copied to NSPH Investments Limited (T/A Savee Beach Resorts) and Lake Kariba Inns Limited, and was exhibited as 'VABR2', the Ministry of Local Government and Rural Development followed the guidance which was given in the Judgment in re-planning the disputed area.
- 4.15 Therefore, as advised by his advocates, Vijay Anaka Bhaskhar Reddy contended that the rights of the parties had

been completely and effectually determined. He further stated that following the re-planning, new certificates of title were issued, which were exhibited as 'VABR3'.

4.16 However, Lake Kariba Inns Limited being affected by the re-planning, had brought another suit arising out of same issues or a series of issues which were already settled and/or determined by the High Court Judge.

4.17 In the List of Authorities and Skeleton Arguments in support, NSPH Investments Limited (T/A Savee Beach Resorts), relied on the case of **Bank of Zambia v Jonas Tembo and others** ⁽⁶⁾ on what res judicata is.

4.18 Further reliance was placed on the case of **Musakanya Valentine Shula and Edward Jack Shamwana v AG** ⁽³⁾ stating that the Court in that matter, held as follows as regards res judicata:

“I agree with Denning, M.R., in (1) quoted above that this res judicata, is a strict rule of law and the parties are bound by any decision made by a competent Court. I do not agree that the Courts have discretion on these issues.”

4.19 It was argued that the long-standing boundary dispute between Lake Kariba Inns Limited and Steven Nyirenda was resolved in cause number 2009/HP/0875 when the Court ordered re-planning, in line with the report which was at page 16 of the Defendant's bundle of documents, and directed that all property owners would take ownership of the properties as re-planned.

- 4.20 Further argument was made, that the Court stated that it had not declared any party as the owner of any disputed land, save for the Order that the affected area be re-planned.
- 4.21 Citing the case of ***Finance Bank Zambia Limited v Noel Nkhoma*** ⁽¹¹⁾, it was stated that the Court in that matter, held that multiplicity of actions refers to the commencement of more than one action on the same facts or transaction or the piecemeal litigation of actions.
- 4.22 As authorities that frowned on the same, the cases of ***Development Bank of Zambia and another v Sunvest Limited*** ⁽⁴⁾ and ***BP Zambia Plc v Interland Motors Limited*** ⁽⁵⁾ were stated. On that basis, the prayer was that this matter be dismissed for being a multiplicity of actions.
- 4.23 In the Skeleton Arguments in opposition, Lake Kariba Inns referred to the cases of ***Bellamano v Ligure Lombarda Limited*** ⁽²⁾ and ***Kansanshi Mines Plc v Joseph Maini Mudima & others*** ⁽⁷⁾, as having held that every application which is filed into Court, must be endorsed with the Order or Rule which empowers the Court to grant the relief which is sought.
- 4.24 The case of ***African Banking Corporation (T/A Banc ABC) v Laurel Services Limited & others*** ⁽¹⁷⁾ was argued, as having held that an application would be ipso facto irregular, if a wrong provision of the law was used to move the Court. It was consequently argued, that it is not enough simply to cite a provision or rule as the basis for moving the Court, but rather, the correct provision or rule must be cited, otherwise

the application is ipso facto irregular, and is liable to be set aside.

- 4.25 With specific reference to this matter, it was argued that **Order 14A of the Rules of the Supreme Court of England, 1965, 1999 Edition**, which had been relied on, in raising the Notice of Motion, does not empower the Court to dismiss a matter on the grounds that it is res judicata.
- 4.26 Reference was made to the explanatory notes in **Order 14A/1-22 of the said Rules of the Supreme Court of England**, stating that they set out the prerequisites that a party ought to satisfy, before they can bring an application under that Order 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 a full trial of the action (para. 1 (i)(a));

(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)).”

- 4.27 That going by the above, the question of law or construction, should be suitable for determination without a full trial of the action. It was added that the determination of the issue should resolve the entire cause or matter on the merits, as a determination under the Order replaces the trial process, as stated in ***Atkins Court Forms***.
- 4.28 Thus, a determination under ***Order 14A*** goes to the merits of the case, without the need for trial, and it should not be used to determine procedural issues or matters bordering on technical issues in a matter.
- 4.29 Argument was further made, that abusing the Court process or re-litigating a matter, is provided for under ***Order 18 Rule 19/19 of the Rules of the Supreme Court of England***. Thus, re-litigation or res judicata is not suitable for determination under ***Order 14A*** of the said Rules, as they do not go to the merits of the case. Therefore, the Notice of Motion should be dismissed.
- 4.30 As regards ***Order 33 Rule 3 of the said Rules of the Supreme Court of England***, it was submitted that the Supreme Court in the case of ***Kufamuyeke Mukelabai v Esther Nalwamba, Commissioner of Lands and Attorney General*** ⁽¹⁰⁾ held that:

“Order 33 Rule 3 of the Rules of the Supreme Court envisages a trial or enquiry into the issue so as to establish if it is a matter of fact in the determination of the whole cause or matter. It is

not suited to the disposing of the cause or matter on a point of law as envisaged under Order 14A.”

- 4.31 Thus, the contention was that ***Order 33 Rule 3 of the Rules of the Supreme Court of England*** did not sanction the application, as NSPH Investments Limited (T/A Savee Beach Resorts), had not moved the Court to conduct a trial or an enquiry into the issues alleged, so that it could establish them as a matter of fact.
- 4.32 The argument was that NSPH Investments Limited (T/A Savee Beach Resorts) sought to have the action dismissed based on the fact that the Court process was being abused, without trial being had to establish that fact.
- 4.33 Still in argument, it was stated that ***Section 13 of the High Court*** does not in any way empower the Court, to dismiss an action on the grounds that the Court process is being abused as claimed in this matter.
- 4.34 As to whether the matter is res judicata, note was made that NSPH Investments Limited (T/A Savee Beach Resorts) had contended that the issues sought to be determined in this matter, were determined under cause number 2009/HP/0875. However, the position that was taken by Lake Kariba Inns Limited, was that the issues that they had raised in this matter, were not determined in the earlier action.
- 4.35 It was stated that for purposes of clarity, what was determined in cause number 2009/HP/0875, was that the

whole area where Stands No 412 and 1152 were situated be re-planned to resolve the boundary dispute.

- 4.36 Reliance was placed on the case of ***Prisca Matimba Nyambe v Bank of Zambia*** ⁽⁹⁾, stating that in that matter, the Court held that for the defence of res judicata to succeed, as held in the case of ***Bank of Zambia v Jonas Tembo and others*** ⁽⁶⁾, it is necessary to show not only that the cause of action was the same, but that the Plaintiff had the opportunity of recovering what he seeks to recover in the second action.
- 4.37 The argument was that NSPH Investments Limited (T/A Savee Beach Resorts), had not identified the specific issues that were determined in cause number 2009/HP/0875 which are sought to be determined in this action. It was contended that the defence of res judicata would only have succeeded, had NSPH Investments Limited (T/A Savee Beach Resorts) demonstrated that in this matter, a party seeks to have re-litigated, an issue which was determined in cause number 2009/HP/0875.
- 4.38 Still in argument, it was stated that under cause number 2009/HP/0875, the boundary dispute involving Stands No 412 and 1152 Siavonga was resolved by directing the Provincial Planning Authority to re-plan the affected area based on the Kateka/Chungu survey report, and that the Southern Province Planning Authority was not a party to cause number 2009/HP/0875.
- 4.39 It was stated that the said re-planning, is what is the subject of this action as regards, whether it was done in relation to

the valuation report as directed, and the defence of res judicata could not stand, as the issues sought to be determined in this action, were not decided in cause number 2009/HP/0875, and neither were they issues that could have arisen in that cause.

4.40 In support of the argument, the explanatory notes in **Order 20 Rule 8 (2) of the Rules of the Supreme Court of England, 1965, 1999 Edition** were relied on, as providing that:

“The rule as to the effect of an amendment is the reason why a Plaintiff may not amend his writ by adding a cause of action which has accrued to him since the issue of the writ.”

4.41 Accordingly, the argument was that pleadings cannot be amended, to add a cause of action that arose after the Writ was issued to the said cause. Consequently, the claim that the issues raised in this matter could have determined under cause number 2009/HP/0875 lacked merit.

DECISION

4.42 From the arguments as advanced by Lake Kariba Inns Limited, it contends that **Order 14A of the Rules of the Supreme Court of England** was wrongly invoked in raising the Notice of Motion. This is because, the Order should only be invoked where the question of law or the construction of a document that is sought to be determined, goes to the merits of the matter, and not to the resolution of procedural issues or matters that border on technicalities.

4.43 In the case of ***African Banking Corporation v Mubende Country Lodge*** ⁽¹¹⁾, the Supreme Court guided that in Order for ***Order 14A of the Rules of the Supreme Court of England*** to be invoked, the requirements in ***Order 14A/2/3 of the Rules of the Supreme Court of England***, which have been set out above by Lake Kariba Inns Limited in its' Skeleton Arguments, must be satisfied.

4.44 They further stated as follows as regards ***Order 33 Rule 3 of the Rules of the Supreme Court of England***:

“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 a matter for trial before an application to determine a preliminary point of law can be raised. We should quickly point out however, that Order 33 Rule 3 cannot be invoked independently or to the exclusion of the mandatory requirements of Order 14A RSC which require the filing of a notice of intention to defend....”

4.45 In view of the guidance as given above, a preliminary issue on a point of law or the construction of documents, can be raised at any stage of the proceedings before trial, pursuant to ***Order 33 Rule 3 of the said Rules of the Supreme Court of England*** on the requirements under ***Order 14A*** of the said Rules being satisfied.

4.46 That said, ***Black's Law Dictionary by Bryan A. Garner, 9th Edition Thomas Reuters 2009*** at page 1425 defines *res judicata* as;

“A thing adjudicated. 1. An issue that has been settled by judicial decision. 2. An affirmative defence barring the same parties from litigating a second lawsuit on the same claim or any other claims arising from the same transaction that could have been but was not raised in the first suit. The three elements are;

1) An earlier decision on the same issue.

2) A final decision on the merits.

3) Involvement of the same parties or parties in privity with the original parties”.

4.47 *Privity* is defined in the said ***Black's Law Dictionary*** as;

“The connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding or piece of property); mutuality of interest.”

4.48 The case of ***Bank of Zambia v Jonas Tembo and others*** ⁽⁶⁾ in relation to *res judicata*, held inter alia that;

“(1) In Order that a defence of res judicata may succeed, it is necessary to show that the cause of action was the same, but also that the Plaintiff

had an opportunity of recovering and but for his own fault might have recovered in the first action that which he seeks to recover in the second.

(2)A plea of res judicata must show either an actual merger or that the same point had been actually decided between the same parties”.

4.49 Further, the Court in the case of ***Amber Louise Guest Milan Trbonic v Beatrice Mulako Mukinga, Attorney-General*** ⁽⁸⁾ noted the following with respect to res judicata:

“According to Strouds Judicial Dictionary of Words and Phrases Volume 3, Seventh Edition. [London, Thomson; Sweet and Maxwell, 2006] p. 2379;

The phrase res judicata is used to include two separate state of things. One is where a judgment has been pronounced between parties and findings of fact are involved as a basis of that judgment. All the parties affected by the judgment are then precluded from disputing those facts, as facts in any subsequent litigation between them.

The other aspect of the term arises when a party seeks to set up facts, which if they had been set up in the first suit, would or might have affected the decision. This is not strictly raising any issue which has already been adjudicated, but it is

convenient to use the phrase res judicata as relating to that position.”

4.50 Then in the case of ***Henderson v Henderson*** ⁽¹⁾ it was held that:

“Where a given matter becomes the subject of litigation, the Court requires the parties to that litigation to bring forward their whole cases and will not except in special circumstances, permit the same parties to open the same subject of litigation in respect of the matter, which might have been brought forward as part of the subject in contention, but which was not brought forward only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points on which the Court was actually required by the parties to form an opinion, and pronounce a Judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.”

4.51 In cause number 2009/HP/0875, Lake Kariba Inns Limited sued Steven Nyirenda claiming the following reliefs:

- i. *A decree that the Plaintiff is the rightful owner of the property Number 412 Siavonga;*

- ii. Damages for injury caused to the Plaintiff's property by way of trespass by the Defendant resulting in the extensive demolition of the Plaintiffs' boundary fence at the instance of the Defendant;
- iii. Further or in the alternative, reconstruction of the boundary fence by the Defendant and at the Defendant's cost, to the prior standard and by a contractor to be advised by the Plaintiff;
- iv. An Order of injunction deterring the Defendant whether by himself, or by his servants or agents from any further acts of trespass, encroachment or damage to the Plaintiff's property.

4.52 The Judgment in that cause has been seen, as having considered the survey report which was at page 18 of the Defendant's bundle of documents, which stated as follows:

“With due respect to the maps and plans used in this survey, there is adequate land for the two properties to exist side by side. Stand No 412 is clearly on the ridge while Stand No 1152 sits below Stand 412 and is more to the lake than the ridge.

However, if Stand No 412 remains as planned, this will mean that Stand No 454 will be adversely reduced in size to conform to the plan and contour map.

Mindful the northern developments of Stand 1152 have encroached slightly on Stand 412 and that

from our survey its' apparent that the fencing surrounding 454 is overlapping the planned boundary and that Stand 408 on the western side of Stand 412 is also encroaching on Stand 412, a re-planning of the whole area based on our survey is the best durable solution for the problem."

4.53 Based on the above, the Judge in the Judgment directed that:

"On the above basis, I Order that the whole affected area be re-planned based on the survey which was the subject of the survey report at page 16 of the Defendant's bundle of documents filed on 22nd September, 2016. This may most likely affect other stands. Thereafter, all property owners who shall be affected shall be affected by the re-planning, shall take possession of the stands as shall be re-planned.

The claim for trespass shall not be entertained because the whole area is now subject of re-planning...

This Court has not declared any party as an owner of any disputed piece of land save for the Order for re-planning of the affected area...

The Plaintiff's claims have failed, but succeed only to the extent that the area shall be re-planned as directed."

4.54 It is common cause that the re-planning was done, and Lake Kariba Inns Limited is dissatisfied with that re-planning. It commenced this action whose reliefs are:

- i. An Order directing the Southern Province Planning Authority to re-plan the disputed area affecting Stand No 412 and Stand No 1152 Siavonga based on the survey report of 20th December, 2011;*
- ii. An Order directing Steven Nyirenda and NSPH Investments Limited (T/A Savee Beach Resorts) to pull down and demolish all structures found to be encroaching following the re-planning of the area based on the Survey Report of 20th December, 2011;*
- iii. Damages for trespass to land against Steven Nyirenda and NSPH Investments Limited (T/A Savee Beach Resorts);*
- iv. Any other relief the Court may deem fit;*
- v. Costs.*

4.55 Looking at the reliefs that Lake Kariba Inns Limited claims in this matter, it can be seen that it seeks the re-planning to be done in line with the Survey Report dated 20th December, 2011.

4.56 The Judgment in cause number 2009/HP/0875 at pages J2-4 recounted the evidence that PW1, Jason Oxford Townsend gave in that matter on behalf of Lake Kariba Inns Limited, stating that after Steven Nyirenda pulled down his wire fence, he sought guidance from Siavonga District Council, and they were advised to go to the Survey Department.

- 4.57 Thereafter, on going to the Survey Department, a team of surveyors went to Siavonga to try and resolve the impasse, and they found that Plot 412 was next to Plot 1152, but that Plot No 1152 had no beacons. He also testified that a meeting was held on 11th May, 2015 at the Survey Department headquarters following which, another site visit was done.
- 4.58 He testified that following the site visit, a Survey Report was prepared, but it was not dated. Thus, another report was prepared which was dated October, 2016.
- 4.59 From this evidence, it is clear that the question of verification of the boundaries of the plots which were in issue arose in cause number 2009/HP/0875, and evidence was led to show that a Survey Report was prepared in 2016 by the Survey Department, which advised that a re-planning of the whole area be done to resolve the dispute.
- 4.60 Based on that, the Court in its' Judgment ordered re-planning of the whole affected area, which was done, and which Lake Kariba Inns Limited is dissatisfied with. When Lake Kariba Inns Limited adduced its' evidence in cause number 2009/HP/0875, it had the opportunity of producing the 20th December, 2011 Survey Report had it seen it necessary for the proper adjudication of the matter.
- 4.61 Jason Oxford Townsend, as the witness for Lake Kariba Inns Limited however instead informed the Court that a Survey Report was done in October, 2016.
- 4.62 Counsel for NSPH Investments Limited (T/A Savee Beach Resorts) argued that the Court of Appeal in the case of

Kasumba Wilfred Ngulube & 86 others v Nitrogen Chemicals of Zambia ⁽¹⁶⁾ found that the issues were res judicata, the parties having had opportunity to raise them in a previous matter.

4.63 The Court of Appeal in that case stated that:

“The real question that fell for determination by the application filed in the High Court on 29 September 2011 was whether the action commenced by the Appellants before Phiri J. was an abuse of process for duplicity of actions given the earlier action Victor C. Kunda and 136 Others v Nitrogen Chemicals of Zambia limited, which was later renamed to the case of Robert Mwangala and 136 Others v Nitrogen Chemicals of Zambia 2009/HPC/486 after the demise of Mr. Victor C. Kunda. A perusal of the main relief sought by the Plaintiffs in that case against the Respondent as shown at pages 388 of Volume I of the record of appeal shows a 'sum of K 15, 110, 126,328.59 being the total amount owed by the Defendant to the Plaintiffs in separation packages with interest, costs and any other remedy deemed fit by the Court.

In the later matter before Phiri J. before which the application in casu was filed, the main relief sought by the Appellants as shown in the statement of claim found at pages 52 to 53 or the

volume I of the record or appeal is the order or payment of the Sum of K1, 633,325,708, being total amount deducted by the Defendants from the Plaintiffs' terminal or retirement benefits, and payment of subsistence allowance and housing allowances, interest, costs and any other reliefs the Court may deem fit.

Without belabouring further on the principle of res judicata which espouses that all matters in contention must be brought in one action for determination rather than piece meal, it is our considered view that the Appellants' attempt at the second High Court action was res judicata, as it raised issues which ought to have been determined in the earlier action involving the same parties.

For this reason, the application of 29th September 2011 ought to have succeeded, and it is so successful. Given the merit of that application, the action in the High Court stands dismissed for being res judicata.”

4.64 In this matter, I have highlighted that Lake Kariba Inns Limited in cause number 2009/HP/0875 had the opportunity of raising the issues which were contained in the 20th December, 2011 Survey Report. However, it did not do so.

4.65 Thus, whilst it is true that a cause of action that arises after a matter has been commenced cannot be dealt with in that matter, in line with the principles that govern amendment to pleadings as argued by Lake Kariba Inns Limited, that principle is not applicable in this matter, seeing that the 20th December, 2011 Survey Report was available when cause number 2009/HP/0875 was decided, and Orders in that matter were made in relation to the Survey Report which was dated 2016.

5. CONCLUSION

5.1 Consequently, by seeking to litigate issues which were in the 20th December, 2011 Survey Report, Lake Kariba Inns Limited is attempting to have a second bite at the cherry, and to conduct the litigation piecemeal. The decision in the case of ***Bank of Zambia v Jonas Tembo and others*** ⁽⁶⁾ is applicable as regards its' holding that:

“In Order that a defence of res judicata may succeed, it is necessary to show that the cause of action was the same, but also that the Plaintiff had an opportunity of recovering and but for his own fault might have recovered in the first action that which he seeks to recover in the second”.

5.2 This position was also reiterated in the cases of ***Amber Louise Guest Milan Trbonic v Beatrice Mulako Mukinga, Attorney-General*** ⁽⁸⁾ and ***Henderson v Henderson*** ⁽¹⁾ which have been seen above.

5.3 **Odgers On Civil Court Actions, 24th Edition** defines *abuse of the Court process* as:

“The term abuse of the Court process is simply descriptive. It connotes that the powers of the Court must be used bona fide and properly, and must not be abused. The Court will prevent the improper use as a means of vexatious and oppressive behaviour in the process of litigation. In particular, it is an abuse of the Court process for a Plaintiff to litigate again identical issues which have already been decided against him in earlier proceedings, even though the matter may not be strictly res judicata. The operation of this principle may be avoided if the Plaintiff can show that the earlier decision was obtained by perjury or if he can adduce fresh evidence, but such evidence must not have been obtained by reasonable diligence at the time of the earlier proceedings and must conclusively show that the earlier decision was wrong.”

5.4 Consequently, the claims in this matter are res judicata, and commencing this action is a multiplicity of actions and an abuse of the Court process. The Notice of Motion therefore succeeds, and the matter is dismissed for being res judicata, and which discharges the Order of injunction which was earlier Granted.

