

**IN THE COURT OF APPEAL OF ZAMBIA**

**Appeal No. 358 of 2024**

**HOLDEN AT NDOLA**

**(Civil Jurisdiction)**

**BETWEEN:**

**TIKUMBE MINING LIMITED**

**ZUMRAN MINING AND EXPLORATION LIMITED**

**AND**

**CHINA COPPER MINES LIMITED**



**1<sup>ST</sup> APPELLANT**

**2<sup>ND</sup> APPELLANT**

**RESPONDENT**

**CORAM: SIAVWAPA JP, CHISHIMBA & PATEL, JJA**

**On 17<sup>th</sup> & 20<sup>th</sup> March 2026**

**For the Appellants: Mr. M. Mukwasa**

Messrs M. Mukwasa Legal Practitioners

**For the Respondent: Mrs. L. Tembo- Chilinda & Mr. K. Lweya**

Messrs James and Doris Legal Practitioners

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**J U D G M E N T**

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**Patel, JA, delivered the Judgment of the Court**

**Cases referred to:**

1. Kidinson Mwandila v Yotam Phiri Appeal No. 182 of 2013 (unreported)
2. Zambia Revenue Authority v T. and G. Transport -SCZ Appeal No. 183 of 2003

**Rules and Legislation referred to:**

1. The Rules of the Supreme Court of England (“The White book”) 1965 (1999 Edition)
2. The High Court (Amendment) Rules Statutory Instrument No. 58 of 2020
3. The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia
4. The Court of Appeal Act, No. 7 of 2016

**1.0 INTRODUCTION**

- 1.1 This is an appeal against the Judgment delivered by **Honourable Mrs. Justice K. E. Mwenda Zimba** under **Cause Number 2024/HPC/310** on 28<sup>th</sup> June 2024, in favour of the Respondent against the Appellants in an action over dispute of land.
- 1.2 The matter was commenced in the lower Court by the Respondent by way of Originating Summons under **Order 113** Rules of the Supreme Court<sup>1</sup> (RSC) for an order for summary possession of **Lot No.694/M** and **Lot No.1034/M**,

Chingola. (The properties in dispute). We shall speak to these properties later.

- 1.3 We shall, once again, consider the mode of commencement and more specifically the use of **Order 113** of the RSC in the circumstances of the dispute before the lower Court.
- 1.3 The Parties shall be referred to as they appear in the appeal before us.
- 1.4 The Record of Appeal (ROA) consists of one volume and reference to page numbers shall refer to the ROA unless otherwise indicated.
- 1.5 As it turned out, the fate of the appeal was determined on account of leave not having been obtained in circumstances where it was manifestly necessary, prompting the Court to raise jurisdictional issues *suo motu* and engage Counsel at this stage of the hearing.

## **2.0 BACKGROUND**

- 2.1 On 30<sup>th</sup> April 2024, the Respondent (Applicant in the lower Court), applied for an order for summary possession by way of Originating Summons filed in accordance with **Order 113** of the RSC<sup>1</sup>, accompanied by an Affidavit in Support. As a consequence of the said application, the Respondent's relief was for an Order that the Respondent recover possession of Lot No.694/M and Lot 1034/M Chingola ( also referred to as OB11) (A commercial property within Chingola Town), on the ground that the Respondent is entitled to possession and that the Appellants' (who were the Respondents in the lower Court) are in occupation without a license or consent.

- 2.2 The Affidavit in support was deposed by one **Yu Zhengxiong**, director in the Respondent Company, who deposed that the Respondent owns Lots 694/M and 1034/M Chingola, otherwise known as OB11. (the properties in dispute). The Affidavit is noted from **pages 26 to 51** of the ROA.
- 2.3 According to the Respondent, the Appellants', without a license or consent, encroached/trespassed on the subject property by being in occupation and putting up structures, thereby depriving the Respondent the full use of the property.
- 2.3 It was further deposed that despite efforts to make the Appellants vacate, the Appellants refused and neglected to do so.
- 2.4 The Appellants filed their Affidavit in Opposition and List of Authorities and Skeleton Arguments in Opposition on 15<sup>th</sup> May 2024. The Affidavit was sworn by one **Soumyakanti Sengupta**, a geologist in the 2<sup>nd</sup> Appellant Company. This is seen from pages 55 to 77 of the ROA.
- 2.5 According to the opposing affidavit, the Appellants, the following facts were deposed to:
- i. That the 1<sup>st</sup> Appellant entered into and remained in occupation and possession of OB11 with the consent of **Mimbula Mining Consortium Limited ("Mimbula")** long before the certificates of title for Lots 694/M and Lot 1034/M were issued.
  - ii. That the certificates of title for the two Lots were subservient to the 1<sup>st</sup> Appellant's mining rights of entry and mining on OB11 as they were issued

fully aware of the prior rights of the 1<sup>st</sup> Appellant which was already in possession and quiet enjoyment of OB11 and the surface rights.

- iii. That according to the Appellants, this was pursuant to **Mining License No 8390-HQ-SML** issued on 17<sup>th</sup> August 2006, over OB11 for a period of 10 years which was subsequently renewed on 4<sup>th</sup> May 2016, for a further period of 10 years.
- iv. That according to the Appellants, there is a written agreement between the 1<sup>st</sup> Appellant and **Mimbula**, where **Mimbula** consented to the 1<sup>st</sup> Appellant carrying out mining activities at OB11 dump. It was deposed that the consent was procured at a fee paid by the 1<sup>st</sup> Appellant.
- v. That on 11<sup>th</sup> March 2021, the 2<sup>nd</sup> Appellant, with the consent of the 1<sup>st</sup> Appellant, was granted mineral processing licence No. **28536-HQ-MPL** for a term of 25 years over the same OB11 covered by Mining Licence No **8390-HQ-SML**.
- vi. That between August 2006 and December 2023, the Appellants expended in excess of USD25 million in developing the mining operations at OB11 in compliance with the condition tied to licenses number **8390-HQ-SML** and **28536-HQ-MPL**.
- vii. That in April 2021, the Appellants were offered surface rights by the Chingola Municipal Council and paid the relevant charges.

2.6 The Appellants submitted that this was a proper case in which the Court should order a trial pursuant to **Order 113** of the Rules of the Supreme Court. It was submitted that the Appellants remained in possession with the

consent of **Mimbula** in 2015, while the certificates of title were issued in 2019 and 2020.

2.7 On 21<sup>st</sup> May 2024, the Respondent filed its Affidavit in Reply. This is noted from **pages 83 to 102** of the ROA. The facts deposed to included inter alia the following:

- i. That the documents that were produced by the Appellants were not documents of title and cannot supersede a certificate of title in as far as surface rights are concerned.
- ii. That the Respondent has a right to quiet enjoyment and possession of the said land.
- iii. That the Respondent is currently the owner of both the mining and surface rights.
- iv. The Respondent admitted that the Appellants did, at some point, hold some mining licenses over part of the area but that they had since expired, or were cancelled and that the Respondent has since been granted a Large Scale Mining Licence.

2.8 The matter was heard on 21<sup>st</sup> June 2024, and judgment was subsequently delivered on 28<sup>th</sup> June 2024, which is now the subject of this appeal.

### **3.0 DECISION OF THE LOWER COURT**

3.1 The learned Judge's decision was based on the Respondent's application for summary possession of Lot 694/M and Lot 1034/M Chingola, Zambia

pursuant to **Order 113 of the Rules of the Supreme Court, 1999**. The learned Judge noted that the Appellants' opposed the application on grounds that they are not squatters and that the matter is not fit for commencement under **Order 113**. The Appellants urged the lower Court to order that it be deemed to have been commenced by Writ and allowed to go to trial.

3.2 The learned Judge began by addressing the Appellants' contention that the matter was not suitable for determination under **Order 113** and dealt with this issue at the outset, taking the view that it went to the jurisdiction of the Court and therefore had to be determined first.

3.3 The learned Judge observed that the High Court Rules do not make provision for summary possession of land. She therefore invoked **section 10** of the High Court Rules<sup>2</sup> and held that recourse must be had to the Rules of the Supreme Court of 1999, which incorporates **Order 113**, a provision derived from the United Kingdom legal system, and which provides as follows:

*"Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his license or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order."*

3.4 The learned Judge identified the following matters as common ground between the parties:

- i. First, that the properties in dispute are held under certificates of title issued to the Respondent in 2019 and 2020.
- ii. Secondly, the Respondent presently holds a Large-Scale Mining License granted on 5<sup>th</sup> March 2013 over the subject land, which license was reinstated by the Ministry of Mines on 21<sup>st</sup> December 2023.
- iii. Thirdly, the Small-Scale Mining Licence No. 8390-HQ-SML issued to the 1st Appellant, and Mineral Processing Licence No. 28536-HQ-MPL issued to the 2nd Appellant in respect of the same land, were cancelled by the Ministry of Mines on 20th December 2023.

3.5 The learned Judge noted that the Appellants exhibited an agreement with **Mimbula** dated 15<sup>th</sup> October 2015, showing that they had entered the portion of the land subject to cancelled Licence No. **8390-HQ-SML** with the permission of **Mimbula**. She further noted that the Respondent had exhibited a copy of a sale agreement dated 13<sup>th</sup> July 2010, showing that **Mimbula** sold portions of Mines including OB11 to Datong Construction Limited in 2010 and therefore could not have given consent to the Appellants in 2015.

3.6 The learned Judge in further addressing the question of whether the action should have been commenced by originating summons under **Order 113 RSC 1999**, was of the considered view that **Order 113 RSC** applies to possession of land by an owner of land. She further noted that it applied in a situation where a person initially had a license but has remained in occupation without a license.

- 3.7 The learned Judge was of the considered view that there was no evidence before the Court to demonstrate that the Appellants were on the premises with the permission of the owner or any previous owner. She further observed that the Appellants had not substantiated their claim to ownership, nor had they demonstrated any legitimate source of title, as guided by the Supreme Court in **Kidinson Mwandila v Yotam Phiri**.<sup>1</sup>
- 3.8 The learned Judge observed that the Appellants contended that they possessed mining rights over the area in question. However, she held that even assuming that to have been the case, the mining licenses exhibited by the Appellants, had since been cancelled by the Minister of Mines. Consequently, the Appellants were left in the position of trespassers, remaining on the land without any subsisting license. The learned Judge therefore concluded that, following the cancellation of their licenses, the Appellants had no lawful right to remain in possession.
- 3.9 According to the learned Judge, the issue before her was for possession of land held on title by the Respondent and not mining licenses, which appear to be the main thrust of the Appellants' case. It was her considered view that even if the Appellants were entitled to be on the land under a mining license, they would still require permission from the title holder. It was her view that the owner of the land cannot be prevented from seeking possession from a person who has no license to be there.
- 3.10 The learned Judge was of the settled view that the present action fell within the ambits of **Order 113** of the RSC. She found that the Court had jurisdiction to determine the question of summary possession of land.

3.11 The learned Judge referred to **section 33** of the Lands and Deeds Registry Act<sup>3</sup> and found that it was not in dispute that the Respondent is the holder of certificates of title for Lots 694/M and 1034/M Chingola. The learned Judge noted that there was no claim of prior ownership of the said pieces of land. She ultimately found that the Respondent, as holder of the certificates of title, is entitled to possession of the said Lots.

3.12 The learned Judge found that the Respondent proved its case on a balance of probabilities and entered Judgment in its favour against the Appellants. The learned Judge ordered that the Appellants vacate Lots 694/M and 1034/M, Chingola by 28<sup>th</sup> July 2024.

#### **4.0 THE APPEAL**

4.1 Dissatisfied with the Judgment in the Court below, the Appellants lodged their Notice and Memorandum of Appeal on 23<sup>rd</sup> July 2024, advancing three (3) grounds of appeal, as follows;

i. *The Court below erred in law and in fact when it held that there was no evidence of the Appellants being in occupation, with the permission of the Respondent or the permission of the previous owners, of the land comprising Lot 694/M and Lot 1034/M Chingola, Zambia.*

ii. *The Court below erred in law and in fact when it held that there was no evidence that the Appellants were also claiming ownership of the land comprised in Lot 694/M and Lot 1034/M Chingola, Zambia.*

- iii. *The Court below erred in law and in fact when it held that the cancellation of the Appellants' mining licenses left the Appellants in a position of trespassers to the land comprised in Lot 694/M and Lot 1034/M Chingola, Zambia as the Appellants remained on the land without a licence.*

## **5.0 THE APPELLANTS' HEADS OF ARGUMENT IN SUPPORT OF APPEAL**

- 5.1 We have considered and appreciated the Appellants' Heads of Argument filed on 19<sup>th</sup> December 2024.
- 5.2 For reasons that will become clear, we have not summarized the arguments of the Parties.

## **6.0 THE RESPONDENT'S HEADS OF ARGUMENT**

- 6.1 We have equally considered and appreciated the Respondent's Heads of Arguments filed on 13<sup>th</sup> February 2025.

## **7.0 THE HEARING**

- 7.1 At the hearing of the appeal, Counsel Mukwasa placed reliance on the Appellants heads of argument filed and invited the Court to find that the matter ought not to have been heard by way of Originating Summons as the issues were contentious and required to be determined at trial.
- 7.2 This line of submission was quickly abandoned, after being questioned by the Bench on whether the issue of mode of commencement had been raised as a ground of appeal.

7.3 Again, prompted by further questions from the Bench, Counsel conceded that leave had in fact not been obtained, rendering the entire appeal nugatory and incompetent.

7.4 For her part, Counsel Chilinda admitted that the issue of leave (not having been obtained), had been overlooked but immediately prayed that the appeal be dismissed.

## **8.0 ANALYSIS AND DECISION OF THIS COURT**

8.1 Putting aside the broader issue of the appropriate mode of commencement of such matters, the Bench raised the essential requirement of leave to appeal. Leave to appeal, meaning permission granted by the Court to challenge a decision, is a fundamental gateway in the legal process. Its significance lies in serving as a preliminary filter, ensuring that only cases with arguable merit are allowed to proceed. This step protects judicial resources and upholds the integrity of the appellate system by preventing frivolous or unsubstantiated appeals from advancing.

8.2 Again, while lamenting wasted resources and time, Counsel appeared to be oblivious to the requirement for leave to appeal against a matter heard in Chambers and whose Judgment was also delivered in Chambers. **Page 8** refers.

8.3 **Section 23 rule 1 (e)** of the Court of Appeal Act is categorical in the requirement of leave from a decision made in Chambers. The said subsection provides as follows:

*“(1) An appeal shall not lie-*

*(e) from an Order made in Chambers by a Judge of the High Court....without the leave of that judge, or if that has been refused, without the leave of a judge of the Court.”*

- 8.4 In *casu*, Judgment was delivered on 28<sup>th</sup> June 2024, and the Notice and Memorandum of Appeal were filed on 23<sup>rd</sup> July 2024. It was a stark reality that leave to appeal was neither granted in the Judgment, nor subsequently sought. The Judgment was delivered in Chambers, which would ordinarily necessitate an application for leave in the Court below.
- 8.5 There are recognized exceptions, for example, where leave is expressly granted in the Judgment, where the decision is delivered in Open Court, or in instances where a matter that proceeded to trial, may be treated as having been delivered in Open Court notwithstanding the indication that it was delivered in chambers. However, this ill-fated appeal does not fall within those categories.
- 8.6 When questioned, Counsel for the Appellant was at pains to provide an answer, and surprisingly, the Respondent too, had overlooked this cardinal but elementary rule of appellate procedure.
- 8.7 Authorities abound on the consequences of proceeding without leave. The decision of the Supreme Court rendered in the case of **Zambia Revenue Authority v T. and G. Transport** has long since settled the issue that this failure is incurable and an appeal filed in contravention, is simply incompetent.


8.8 The appeal collapses and is dismissed at this point as there is simply no value in us proceeding otherwise.

8.9 With great judicial restraint, we make no order for costs. It is a well-established doctrine that equity does not reward the indolent. In legal proceedings, Parties are expected to act with diligence and to comply with procedural requirements. Failing to observe necessary steps, such as seeking leave to appeal where mandated, demonstrates a lack of diligence that the Court cannot condone.



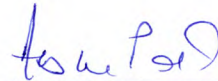
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**M. J. SIAVWAPA  
JUDGE PRESIDENT**



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**F. M. CHISHIMBA  
COURT OF APPEAL JUDGE**



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**A. N. PATEL S.C.  
COURT OF APPEAL JUDGE**