

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
(CIVIL JURISDICTION)**

2021/HP/0649

BETWEEN:

KAULMAS INVESTMENTS LIMITED



PLAINTIFF

AND

**THE COMMISSIONER OF LANDS
THE ATTORNEY GENERAL**

1ST DEFENDANT

2ND DEFENDANT

Before the Hon. Mrs. Justice R. Chibbabbuka on the 13th day of February, 2024.

For the Plaintiff:

Ms Mwambezi, Messrs Central Chambers

For the Defendants:

**Mr C. Watopa, State Advocate, Attorney General's
Chambers**

RULING

Cases referred to:

1. *Admark Limited vs Zambia Revenue Authority (2006) ZR*
2. *Post Newspapers Limited vs Rupiah Bwezani Banda 2008/HP/0984.*
3. *Chikuta vs Chipata Rural Council (1974) ZR 241*
4. *Polythene Products Zambia Limited vs Cyclone Hardware and Construction Limited and the Attorney General Appeal No. 42 of 2008*
5. *Kalvic Bakery Limited vs the Attorney General and Dar Farms and Transport Limited Appeal No. 78 of 2017*
6. *Union Gold (Zambia) Limited vs The Attorney General SCZ No. 14 of 2016*
7. *Yakub Falir Mulla and 2 Others vs Mohamed Jabi Selected Judgment No. 1 of 2018*
8. *Aaron Chungu vs Peter Chanda and Others SCZ/8/02/2023*
9. *Newplast Industries vs The Commissioner of Lands and The Attorney General (2001) Z.R 51*

Legislation referred to:

The Rules of the Supreme Court of England (White book), 1999 Edition.
Lands Act, Chapter 184 of the Laws of Zambia.
The Constitution, Act No. 2 of 2016
The Land Tribunal Act, 2010

Other works referred to:

Blacks Law Dictionary, 8th Edition.

1.0 Introduction

The plaintiff, by a writ of summons and statement of claim filed on 8th June, 2021, commenced an action to challenge the re-entry on Farm F/2344/A/50. The defendants have now raised the following preliminary issue:

1. Whether this action should be dismissed on ground of wrong commencement in the High Court instead of the Lands Tribunal?

The defendants' preliminary issue is raised pursuant to *Order 14A* of the *Rules of the Supreme Court of England, 1999 ed*, as read with *Section 13 subsection 3* of the *Lands Act, Chapter 184* of the *Laws of Zambia*.

2.0 The Defendants' Affidavit in Support

One Chingela Watopa, the State Advocate in conduct of this matter, deposed that the defendants filed a memorandum of appearance and defence on 22nd February, 2022, following the filing of the Consent Order to Amend Order for Directions. That he verily believes that the plaintiff wrongly commenced this action by way of writ of summons before the High Court. That the action ought to have been commenced before the Lands Tribunal within 30 days of the decision complained against.

2.1 The Defendants' Supporting Evidence

In support of the application, counsel filed skeleton arguments wherein he argued that *Order 14A* of the *Rules of the Supreme Court* empowers the defendants to move the court to make an order on any question of law arising in this matter. That the court in the case of **Admark Limited vs Zambia Revenue Authority**¹ held that a party may raise a point of law even though the same is not pleaded in the defence. Counsel argued that the point of law raised herein has a serious bearing on the outcome of this matter and thus should be determined first. For this argument, counsel relied on the case of **Post Newspapers Limited vs Rupiah Bwezani Banda**.²

Counsel argued further that the right mode of commencement in this action was by way of an appeal to the Lands Tribunal, and hence commencement by writ of summons and statement of claim was erroneous. Counsel relied on the case of **Chikuta vs Chipata Rural Council**³ for the argument that the courts will not have jurisdiction where a wrong mode of commencement is employed. Counsel argued that the plaintiff in *casu* having been aggrieved with the decision of the Commissioner of Lands, ought to have appealed against the same to the Lands Tribunal within 30 days of the decision. Counsel relied on *Sections 15, and 13 subsection 3 of the Lands Act*, as well as the cases of **Polythene Products Zambia Limited vs Cyclone Hardware and Construction Limited and Attorney General**⁴ and **Kalvic Bakery Limited vs the Attorney General and Dar Farms and Transport Limited**⁵ to buttress his argument.

In conclusion, he argued that this court has no jurisdiction to hear this matter and hence the same should be dismissed.

3.0 The Plaintiff's Affidavit in Opposition

In opposing the application, Robert Kaulu Masiye, a Director in the plaintiff company, deposed to an affidavit in opposition. He deposed that in addition to the claim challenging the 1st defendant's re-entry on Farm F/2344/A/50, the plaintiff is also seeking the following reliefs:

1. An Order that Kaulmas Investments Limited is the true and legal owner of Farm F/2344/A/50.
2. An Order for the rectification of the Lands Register to reflect that Kaulmas Investments Limited is the true and legal owner of Farm F/2344/A/50.

That contrary to the defendants' averments, the plaintiff has a choice of forum between the Lands Tribunal and the High Court for Zambia, and hence this action is properly before the High Court.

3.1 The Plaintiff's Supporting Evidence

In support of the affidavit in opposition to the defendants' application, the plaintiff filed skeleton arguments wherein counsel argued that the High Court has jurisdiction to hear and determine land matters as per the holding in the case of **Union Gold (Zambia) Limited vs The Attorney General**⁶ wherein she argues that the Supreme Court held that litigants have a choice of forum in land matters between the Lands Tribunal and the High Court. Counsel argued that the facts in this case are similar to the facts in the **Union Gold** case, wherein the Supreme Court stated at page J18 that;

“Section 4 of the Lands Tribunal Act did not oust the jurisdiction of the High Court.”

That it is undisputed that *Section 4 of the Lands Tribunal Act No. 39 of 2010* gives this court jurisdiction to determine a question relating to re-entry. That what is in contention is whether the High Court's power to deal with issues of re-entry is ousted. Counsel argued that it is flawed for the defendants to argue that the court has no jurisdiction to determine a matter on re-entry when the Supreme Court has guided on many occasions that the *Lands Tribunal Act* does not oust the jurisdiction of the High Court.

Counsel relied on *Article 134 of the Constitution Act No. 2 of 2016* for the argument that the High Court has unlimited and original jurisdiction in civil and criminal matters. Further that the court in the case of **Yakub Falir Mulla and 2 Others vs Mohamed Jabi**⁷ held that the *Lands Tribunal Act* does not oust the jurisdiction of the High Court. That *Section 13 subsection 3 of the Lands Act*, provides that a person aggrieved with the President's decision to cause the issuance of a certificate of re-entry may within the prescribed time appeal to the Lands Tribunal for an order of rectification of the register. Counsel argued that the use of the word 'may' does not make it mandatory in nature for an aggrieved party to appeal to the Lands Tribunal. That the authors of the **8th edition** of the **Black's Law Dictionary** define the word 'may' to mean

possibility, and therefore counsel argued that the use of the word ‘may’ under *Section 13 subsection 3* of the *Lands Act* is merely to state that the aggrieved party has the possibility of appealing the decision to the Lands Tribunal for an order of rectification of the register.

That the defendants’ application is aimed at curtailing the trial of this action. That the defendants have, by contending that this matter should have been commenced within 30 days of the decision before the Lands Tribunal, alleged that the matter is statute barred. That *Section 4 subsection 3* of the *Limitations Act, 1939* provides that an action for recovery of land is only barred after 12 years from the date on which the right accrued.

In conclusion, counsel argued that the High Court has jurisdiction to hear and determine this matter and hence the defendants’ application should be dismissed and the matter set down for trial.

4.0 The Hearing

4.1 Counsel for the defendants relied on the affidavit and skeleton arguments filed in support of the application which he reiterated. He added that the Supreme Court in the case of **Aaron Chungu vs Peter Chanda and Others**⁸ held that the decision of the court in the **Polythene Products Zambia** case is still good and applicable law. Counsel prayed that the action be dismissed with costs.

4.2 In opposition, counsel for the plaintiff relied on the affidavit and skeleton arguments filed in opposing the application which she restated. She prayed for the dismissal of the defendants’ application with costs.

4.2 In reply, the defendants’ counsel argued that the **Aaron Chungu** case is distinguishable from the **Union Gold** and **Yakub Falir** cases as there was no issue of re-entry in those cases. Counsel repeated his prayer.

5.0 The Decision of the Court

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

The defendants' application is made pursuant to *Order 14A Rule 1* of the *Rules of the Supreme Court of England, 1999 ed* which 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."*

By their application, the defendants are challenging the jurisdiction of this court to hear and determine this matter, and hence the defendants' question is one that is suitable for determination without the full trial of the action, and is one that is capable of finally determining the action, and hence rightly brought under *Order 14A*.

What is in issue herein is the jurisdiction of the High Court to determine issues relating to re-entry on land by the President, through the Commissioner of Lands. The power to cause the issuance of a certificate of re-entry is provided for under *Section 13* of the *Lands Act*. *Section 13 subsection 3* of the same *Act* gives the person aggrieved with the President's decision to cause a certificate of re-entry to be entered in the lands register, the option to appeal against the decision to the Lands Tribunal within 30 days for an Order that the land register be rectified.

What is in issue herein is whether *Section 13 subsection 3* of the *Lands Act* as read together with *Section 4* of the *Lands Tribunal Act* ousts the High Court's jurisdiction to determine land matters particularly relating to re-entry. Counsel for the plaintiff has relied on *Article 134* of the *Constitution* to argue that the High Court has unlimited and original jurisdiction in civil and criminal matters. While the preceding is indeed the case, the court has in a plethora of

cases, dealt with the interpretation of what is meant by ‘unlimited and original’ jurisdiction of the High Court. The courts have stated that the ‘unlimited and original’ jurisdiction on the High Court does not mean that the High Court’s jurisdiction is limitless as it must still operate within the margins of the law.

Having highlighted the foregoing, what then is the position of the law as regards the jurisdiction of the High Court to determine matters of re-entry on land?

It is trite law that the mode of commencement is generally provided for by statute as was held in the **Chikuta, and Newplast Industries vs The Commissioner of Lands and The Attorney General**⁹ cases. Where a mode of commencement and forum is provided for by statute, there can be no choice by the parties. In *casu*, *Section 13 subsection 3* of the *Land Act* provides that:

“A lessee aggrieved with the decision of the President to cause a certificate of re-entry to be entered in the register may within thirty days appeal to the Lands Tribunal for an order that the register be rectified.”

The Supreme Court in the **Polythene Products Zambia Limited** case in dealing with the question of forum in view of *Section 13 subsection 3* of the *Lands Act*, held that:

“...we hold that the 1st defendant, being aggrieved by the certificate of re-entry on Stand 12094 had the option to appeal to the Lands Tribunal, in its challenge of the certificate of re-entry. The 1st defendant did not do so.”

The above clearly shows that the *Lands Act* provides the forum to which an appeal against the decision of the President to cause the issuance of a certificate of re-entry lies, which is the Lands Tribunal, and therefore there can be no choice of forum. *Section 13 subsection 3* of the *Lands Act* ousts the High Court’s jurisdiction to entertain matters relating to challenges of re-entries. In the recent case of **Aaron Chungu vs Peter Chanda and Others**, the Supreme

Court reaffirmed its decision on the **Polythene Products case** when it stated that :

“ ...the Faramco case did not in any way overrule the Polythene Products case. The unlimited jurisdiction which the High Court enjoys is subject to section 13 (3) of the Lands Act when it comes to claims involving re-entry.”

The Court went on to state on page J28, that:

“The correct position therefore is that while the High Court has unlimited jurisdiction in land matters, its jurisdiction is limited as in this case by section 13(3) of the Lands Act.”

Premised on the above, it follows therefore that this matter being premised on the certificate of re-entry entered against Farm F/2344/A/50 ought to have been commenced in the Lands Tribunal, by way of an appeal. I consequently agree with the defendants that this court has no jurisdiction to entertain this action. The **Union Gold** and **Yakub Falir** cases are distinguishable from the case herein as the said cases do not deal with issues of re-entry.

As regards the use of the word ‘may’ in the *Section 13 subsection 3* of the *Lands Act*, the Supreme Court in the **Aaron Chungu** case adequately addressed this when it stated that:

“The use of the word ‘may’ in section 13 (3) does not refer to the choice of forum but rather to the decision to be taken by the aggrieved party. This is so because an aggrieved party has a choice whether or not to accept a decision which is not in his favour.”

The issue of whether the matter is statute barred for not having been commenced within 30 days of the issuance of the certification re-entry is one to be made before the Lands Tribunal and not this court. I will accordingly not address the same. This matter is hereby dismissed in its entirety for want of jurisdiction.

The interpretation of *Section 13 subsection 3* of the *Lands Act* has in the past been ambiguous and therefore each party shall bear the costs of this entire matter.

Leave to appeal is hereby granted.

Dated at Lusaka this..... day of.....2024

13th February

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA

13 FEB 2024

R.H Chibhabuka, J
P.O. BOX 50067, LUSAKA

HIGH COURT JUDGE

