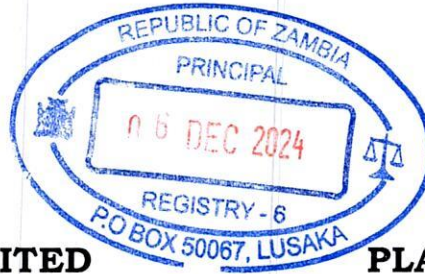


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**



BETWEEN:

TUNISIKI INVESTMENTS LIMITED

PLAINTIFF

AND

BERNARD CHIPILI CHANDALALA

1ST DEFENDANT

CHRISTIAN OMILY JOHNNY

2ND DEFENDANT

BERENDA NYIRENDA

3RD DEFENDANT

Before Mulenga J. on 5th December 2024

For the Plaintiff:

Mrs. S.K Sinkamba appearing with Mr. Z. Phiri both of TMS Legal Practitioners

For the: Defendants:

Mrs. L.S. Chirwa of Messrs. Andrew and Partners.

**RULING ON AN APPLICATION TO STRIKE OUT DEFENCE FOR
PLEADING MATTERS RES JUDICATA**

Cases Referred to

1. *Food Reserve Agency v CBR Business Ltd* SCZ, Appeal No 34 of 2016.
2. *Freddie Hirsh v Auto-Care Ltd* 2016 HCC 0085
3. *Chinyanta and Others v Alasia Building Construction Ltd and Another* SCZ Appeal 158 of 2015
4. *Shilling Bob Zinka v The AG* 1991-1992 ZLR at 73
5. *Hope Foundation for Women and Children V Munalula Linyati*, Appeal no 70 of 2015

Legislation referred to

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

1.0 Introduction

- 1.1 This is a ruling on an application on the part of the Plaintiff to strike out the defence of the 2nd Defendant, or portions thereof. The Plaintiff alleges that the impugned defence, being a pleading that recites matters or issues which are *res judicata*, merits dismissal, having previously been adjudicated upon in a judgment by my learned sister, Yangailo J, in a cause numbered 2019/HP/1505.
- 1.2 The delay in rendering this ruling is deeply regretted and resulted from the court's being seriously indisposed of ill health for a continuous period of two months, during which period the court had specifically reserved as the time for delivery of several rulings and judgments.

2.0 Background

- 2.1 The application was anchored on a Notice of Intention to Raise a Preliminary Issue made pursuant to **Order 33 Rule 3** of the Rules of the Supreme Court and filed before my learned sister, Bah-Matandala before her transfer from this court and before I took up judicial office.
- 2.2 The relief claimed was thus framed:

"That the defence in its entirety or parts thereof be expunged from the record for being res judicata and barred by issue estoppel and estoppel by judgment and further that the 2nd Defendant be mis-joined from the proceedings following the

delivery of judgment by the Honourable Judge PK Yangailo in the matter under cause number 2019/HP/1505 in which the Plaintiff herein was the Defendant and the 2nd Defendant herein was the Plaintiff.”

3.0 The Arguments in Support

- 3.1 At the hearing of the application, learned counsel for the Plaintiff Mrs. Sinkamba, who appeared with Mr. Phiri, indicated that she would be relying on the affidavit in support of the motion, filed on 29th March 2023 and the affidavit in reply to the opposition, filed on the same date. The Plaintiff submitted that reliance would also be placed on the respective skeleton arguments filed with each such affidavit.
- 3.2 Counsel invited the court to note that an examination of the contents of the defendant's fifteen-paragraph defence would reveal that all but paragraphs 7, 8 and 13 are issues contained in a statement of claim that was filed under cause number 2019/HP/1505 as exhibited at “**IS 1**” in the affidavit in support of the application.
- 3.3 The court was also invited to note that these specific issues were already dealt with in the judgment of Honourable Judge PK Yangailo, which was exhibited as “**IS 2**”. It was counsel's further submission that the judgment exhibited had in fact, been appealed against by the 2nd Defendant in this matter for determination of the said issues raised in the defence. The Plaintiff argued that the court would note, upon a careful consideration of

the defendant's defence at paragraphs 7, 8, 17 and 19 through to 23, that the 2nd defendant is attempting to change the facts in this matter from how he originally pleaded under cause no 2019/HP/1505.

- 3.4 It was argued that the defence filed was effectively an attempt to get a second bite at the cherry after losing the first case and that the 2nd Defendant had only added a few paragraphs to make his case better. In submitting that there must be an end to litigation, counsel suggested that the 2nd defendant had suddenly come up with evidence that he did not have in the earlier matter in order to suit the pleas that he is making before this Court.
- 3.5 Counsel referred me to the authorities cited in the skeleton arguments, which suggest that courts frown upon litigants who deploy their grievances piecemeal in scattered litigation. The fact that this matter and the issues raised in the defence have already been adjudicated upon before an honourable judge of the High Court and further that there is an appeal pending before the Court of Appeal, presents the danger that if the court were to proceed with the defence on the record, there may be conflicting judgments on the same issue.
- 3.6 Mrs. Sinkamba ended her submissions by clarifying that the court should disregard the prayer in the list of authorities in reply of 29th September 2023. To clarify, counsel stated that the relief being sought from the court is as stated in the Notice of Intention filed on 29th March 2023, which is that the defence in its entirety

or parts thereof be expunged and barred by *issue estoppel* and *estoppel by judgment* and further that the 2nd defendant be disjoined from these proceedings based on the reasons cited in the skeleton arguments.

3.7 Mr. Phiri, still on behalf of the Plaintiff, submitted that any challenge regarding the regularity or competence of the present application ought to have been raised by way of summons or notice of motion as prescribed by **Order 2 R 2** of the Rules of the Supreme Court 1999 Edition. He further cited the case of **Chinyanta and Others v Alasia Building Construction Ltd and Another**³, to buttress that position. He also relied on the case of **Food Reserve Agency v CBR Business Ltd**¹ to support the proposition that the manner in which the application was raised before court is common practice.

3.8 In closing, it was counsel's submission that irrespective of the form of the application to the court, the court's authority to entertain the present application is traceable to **Order 33 R3** of the White Book, pursuant to which it has been made. In this regard, the Court was referred to the case of **Shilling Bob Zinka v The AG**,⁴ for the proposition that the court could exercise any jurisdiction which it had, provided that such exercise of power could be traced to a legitimate source.

4.0 Arguments in Opposition

4.1 In opposition to the application, learned counsel for the 2nd Defendant, **Mrs. Shachinda**, relied on the opposing affidavit filed

on 5th May 2023. The said affidavit was accompanied by skeleton arguments, which counsel intimated placing reliance upon. Counsel spiritedly argued that the Notice of Intention to Raise Preliminary Issue is incompetently before this court, being merely an intention to raise some issue at a later date. The case of **Freddie Hirsh v Auto-Care Ltd²**, which is unreported but has persuasive effect on this court, was cited to persuade me to find in favour of the 2nd Defendant on this point.

- 4.2 Regarding the Plaintiff's contention that the proper course for the 2nd Defendant to have taken would have been to challenge the Plaintiff's notice by recourse to Order 2 r 2 of the Rules of the Supreme Court, counsel submitted that the use **Order 8 Rule 3** of the Rules of the Supreme Court was justified. Learned counsel's argument was that **Order 8 rule 3** is couched in mandatory terms and therefore, a party wishing to raise an issue before the court by this means, must follow the form prescribed in Appendix A, which, she argued, was done in this case.
- 4.3 As to the argument that it is common practice among practitioners to proceed in the manner that the Plaintiff proceeded, the rejoinder was that however common the practice may be, it is not sound at law. It was submitted that the rules are clear as to the form such an application must take, namely, as per **Form 38 in Appendix A** in the Rules of the Supreme Court. It was therefore the 2nd Defendant's prayer that the Plaintiff having not complied with the form which must be used, the application must fail. It was argued that this was especially true because it espoused a mere intention,

which intention was not consummated by an actual application. The argument was effectively that what was indicated by the Plaintiff was a notice of intention to raise an issue and not a notice of motion actually raising such issue; for which there could not be said to have been a proper application before court.

4.4 Arguments in Reply

Mrs. Sinkamba in reply, submitted that the Plaintiff had thoroughly addressed the defendant's opposition in the skeleton arguments filed in reply. In summary, it was submitted that **Order 8 Rule 3** of the Rules of the Supreme Court cited by the Plaintiff's counsel is not applicable in these circumstances. As can be seen, the editorial note in Order 8 of the Rules of the Supreme Court at **8/0/2** provides guidance in which matters originating and other motions are applicable. Further, it was argued that the case of **Freddie Hirsh** cited by the Defendants' counsel is distinguishable from this case in that the preliminary issue in that case was raised pursuant to **Order 14 A Rule 2 A**. It was counsel's submission that **Order 33** does not prescribe the manner in which a party may raise such an application. Further, on the question of costs, it was submitted that these are always at the discretion of the court and I was urged to exercise my discretion judiciously.

5.0 Issues

- 5.1 I would observe at the outset that the parties by their counsel have raised such a multifarious array of arguments that it is not difficult to lose sight of the real issue or issues at hand. In order

to navigate the labyrinth of legal posers thrown up by the parties, it would be useful to distill what, in essence, is the case of each party.

5.2 I see three issues from the perspective of the Plaintiff and one main one from the Defendants. For the Plaintiff, the first issue is quite simply whether the entire defence of the 2nd Defendant, or at the very least parts of it, ought to be expunged from the record. The reason cited is that the defence raises issues which, as between the 2nd Defendant and the Plaintiff, are *res judicata*, to the extent that they were the subject of a final judgement in a cause decided by my learned sister, Yangailo J. This issue is resolved at paragraph **6.28** of this ruling.

5.3 The second issue for the Plaintiff is whether the 2nd Defendant should be removed altogether from further partaking of this action as a party. In truth, this issue is related to the first because if I should determine that this action ought not to proceed because the 2nd Defendant has already been adjudged, in a related suit, to have no legal standing in the contract of sale relating to the subject property, then it should necessarily follow that the 2nd Defendant should have no business featuring as a party in this action. The contention raises a related but unstated issue, namely, what becomes of the 3rd Defendant, who cannot articulate her case without adducing evidence or pleading facts which necessarily involve the 2nd Defendant. I reserve this issue for comment and analysis in a later part of this ruling and resolve it at paragraph **6.19**.

5.4 The third, which is implied in the invocation of **Order 33 rule 3**, is the timing of the trial of the question or issue of *res judicata*. This issue is resolved at paragraph **7.2.4** of this ruling.

5.5 From the perspective of the Defendants, I see the main ground of attack as being whether a 'Notice of Intention to Raise a Preliminary Issue' anchored on **Order 33 r 3** is an acceptable means of raising a plea of *res judicata*.

5.6 In the paragraphs that follow, I proceed to deal with the foregoing issues.

6.0 **Analysis and Decision**

6.1 Given that the Defendants' issue challenges the procedural and substantive soundness of the application raised by the Plaintiff, I consider it a sensible approach to deal with it first.

6.2 In so doing, I have found it necessary to examine the case of **Freddy Hirsch**, cited by learned counsel for the Defendant in support of the proposition that the application before me is misconceived for irregularity. In that case, as in the present, the applicant had in the course of proceedings purported to raise a preliminary issue on a point of law by filing a notice of such intent. By contrast, however, notice to raise the point of law in that case was expressly raised under **Order 14 A**, and not **Order 33 rule 3**, as happens in this case. In finding that the applicant ought to have raised the issue either by notice of motion, or summons clearly setting out the relief sought, my learned brother, Nkonde

J., ruled that the application before him was neither a notice of motion, nor a summons that set out clear relief.

- 6.3 He held that the application could not be said to have been a proper notice of motion, firstly because it was not titled as such, and secondly - and more crucially - because its form was not consistent with the form of notice of motion set out at Appendix A in Form No. 38, and prescribed in **Order 8 rule 3** of the Rules of the Supreme Court of England, which is titled "*Form and issue of notice of motion*". As regards the status of the application as a summons, Nkonde J, dismissed the notice of intention to raise a preliminary issue in **Freddy Hirsch** because it failed to set out any relief claimed, as required of a proper summons.
- 6.4 Having examined that case, and the reasoning of Nkonde J, therein, I now proceed to pronounce myself on whether I stand persuaded by it. Quite apart from the consideration that, by the law of this jurisdiction, my learned brother's ruling is of mere persuasive effect upon me, I take the view that the **Freddy Hirsch** case is distinguishable from the present case, as next detailed.
- 6.5 First, I am not here dealing with an application under **Order 14A**, but with an application under **Order 33 r 3**, which provides follows:

"3. The court may order any question or issue arising in a cause or matter, whether of fact or of 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.”

It is worthy of note, as correctly submitted by learned counsel for Plaintiff, that this rule does not provide for the procedure by which an application under the rule may be made. However, it is clearly provided in the explanatory note numbered **33/3/1**, that **Order 33** may be read together with, among others, **Order 14A**. Without purporting to lay down any general rule of practice, I would think it fair to say that it would not be improper for a party making an application under **Order 33 r 3**, to proceed by summons or notice of motion to raise an issue for determination by the court before, at or after the trial of the cause or matter, provided that the issue is one of fact or of law, or partly of fact and partly of law.

- 6.6 In the present case, the Plaintiff has proceeded by way of notice of intention to raise an issue. The 2nd Defendant contends that the correct form which should have been used is such as is prescribed by **Order 8 rule 3** of the Rules of the Supreme Court of England. Under this rule, all written motions, not being of an originating character, are required to be in **Form No. 38 in Appendix A**.
- 6.7 An examination of the notice of intention to raise a preliminary issue filed in this case does not show that it complies strictly with Form 38 as prescribed in Appendix A of the Rules of the Supreme Court of England. Neither does it show, in my review of it, that that it departs materially from it. In my considered view, such

deviation as there is, should not be fatal to the application for three reasons. The first is that it is provided in **section 47** of the **Interpretation and General Provisions Act** that whenever any form is prescribed by any written law, a document which purports to be in such form, shall not be void by reason of any deviation which does not affect the substance of such instrument or document, or which is not calculated to mislead.

6.8 The second reason is that upon examining the notice, I have come to the conclusion that the starkest point of deviation is that it is styled a 'notice of intention', rather than a 'notice of motion'. Whilst this does not show faithfulness to the form prescribed as Form 38 in Appendix A, it cannot, in fairness, be said to be so lacking in essence when evaluated for substantial conformity with the prescribed form, as to warrant dismissal. This is to be seen in the reality that the application does effectively place the defendants on notice that the court will be moved to determine a question or issue, namely, whether the present action is objectionable on the basis of *res judicata*.

6.9 The third reason is in keeping with the case of **Chinyanta and Others v Alasia Building Construction Ltd and Another**,³ cited by learned counsel for the Plaintiff. There occurs in that judgment, *obiter dicta* pronouncing upon the import of **Order 2 r 1** of the Rules of the Supreme Court and suggesting that where there has been a failure to comply with the requirements of the rules, whether in respect of time, place, manner, form or content or in any respect, such failure is to be treated as an irregularity and

does not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

6.10 The present application is anchored upon **Order 33**, which generally deals with the place, mode and time of trial. The specific rule on which the application in *casu* is grounded is rule 3, which has to do with time. As I see it, it is not the place an applicant proceeding under that provision, to suggest when the issue or question raised may be tried, but it is for the court, in exercising its discretion, to pronounce the timing for trial of the question or issue raised. There is, in my view, sufficient particularity in the application filed, to place both the court and the Defendants on notice of the issue to be resolved. In making this finding with respect to the present case, I distinguish it from the case of **Freddy Hirsch**, where Nkonde J., held that the notice was somewhat lacking as to the relief sought and as to the question meant to be resolved. Accordingly, I find that the application by way of the notice on record, being, as it is, in substantial conformity with prescribed form, is competent.

6.11 Before departing the subject, I should comment upon a rather daring argument advanced by learned counsel for the Plaintiff. It was that if I should find that the Plaintiff's application is indeed objectionable and could have been made under a more suitable order, I should, in line with a case he cited, nevertheless entertain the application because my jurisdiction is traceable to **Order 33 rule 3**. According to counsel, and to paraphrase him, the case of **Shilling Bob Zinka v the Attorney General** purportedly lays

down some rule as to how a person's official act is not invalidated by reason only that it has been exercised under a wrong provision of the law, where the exercise of that power is traceable to some legitimate enabling provision.

6.12 Whilst I accept that such a proposition may be true in respect of public officers from the executive branch of government, I will say without hesitation that I do not accept this argument as applying to the exercise of judicial authority. Indeed, if the courts were to accept that the **Shilling Bob Zinka** case has laid down any such rule in relation to their jurisdiction, it would open a door through which much chaos would pass. It would entail that any application, no matter how outrageous in its violation of the rules of court, could conceivably be entertained, on the footing that some rule exists, somewhere in the statute book, upon which the court could assume jurisdiction.

6.13 Having dismissed the 2nd Defendant's objection to the form in which the plea of *res judicata* was raised by the Plaintiff, I now consider the merits of the three issues which I identified at paragraphs **5.2**, **5.3** and **5.4** above, as to which, for more logical flow, I will deal with the second issue first.

6.14 By that issue, I am invited by the Plaintiff to disjoin the 2nd Defendant from this action. I find this relief rather perplexing, when pursued without a corresponding attack on the continued participation of the 3rd Defendant. This is because the 3rd Defendant derives what interest she may have in the subject

matter of this suit from the 2nd Defendant, the latter of whom, it has been argued, has already been adjudged to lack any interest in it. In other words, the 2nd and 3rd Defendants' cases are so intertwined that the case of one cannot be pleaded without articulating the case of the other, at least in part.

6.15 Despite this, I would say in response to that invitation, that if in the area of joinder of parties, there is one thing clearer than another, it is that courts are encouraged, indeed, required, to join a party to an action if the verdict of the court will affect such a party. Yet the Plaintiff's prayer is that the 2nd Defendant should be removed from the action. The strangeness of this invitation is further borne out by two reasons, as next detailed.

6.16 The first is that the joinder of the 2nd Defendant was made pursuant to a ruling delivered on 16th November 2022 by my learned sister, Bah-Matandala, following a contested application in which detailed arguments were advanced by the parties. The court found, after reasoned analysis, that the joinder of the 2nd and 3rd Defendant was indeed merited. To disjoin a party from proceedings in these circumstances would amount to reviewing the order of my learned sister, Bah-Matandala J., who granted the order for joinder. Whilst it is open to me to review my own decision, pursuant to the High Court Rules, I cannot find any authority by which I am empowered to review the decision of another judge of equal jurisdiction. The terms of **Order XXXIX, rule 1** make this clear in providing as follows:

“1. Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision: Provided that where the judge who was seised of the matter has since died or ceased to have jurisdiction for any reason, another judge may review the matter” (Underlining mine for emphasis.

6.17 The second is that the 3rd Defendant is, as admitted by the Plaintiff itself, already in possession of part of the subject property. The Plaintiff by its affidavit evidence has made clear that some fairly extensive developments have been undertaken by the 3rd Defendant. To altogether exclude the 2nd Defendant from this action, from whom the 3rd Defendant derives her purported title, would constitute a radical departure from one of the most basic and hallowed principles by which this court exercises its judicial authority, namely, to seek to resolve at once all issues in controversy between all parties in a cause, and thereby avoid proliferation of causes and applications.

6.18 In these circumstances, removing the 2nd Defendant from this action will only spur him to further litigation, and would place the 3rd Defendant in the position of having to recraft its defence to

plead matters not covered in the defendants' pleading. On this point, the law is very clear in its stipulation that a court ought not to make an order which will only serve as a launchpad for further legal action, resulting in multiplicitous litigation. Avoidance of multiplicity of litigation is one of the hallmark principles by which this court exercises its jurisdiction, as is so clearly spelt out in **section 13 of the High Court Act**, quoted below.

“13. In every civil cause or matter ... 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.”

6.19 To avoid the scenario of multiplicitous legal proceedings and in order, further, as far as possible, to completely and finally determine all matters in controversy between the parties in the present case, I decline to remove the 2nd Defendant from this action. There is an additional reason why it would be sensible to retain the 2nd Defendant in this action. This is quite simply that, as observed at

paragraph **6.14** of this ruling, the 3rd Defendant's case is so intricately woven into the tapestry of the 2nd Defendant's, that the former's case cannot be articulated without pleading the latter's. In any case, were I to adjudge this action exclusively among the Plaintiff, the 1st Defendant and the 3rd Defendant, the verdict I would arrive at will necessarily engage the 2nd Defendant. Indeed, as stated by Malila JS., as he then was, in the case of Hope Foundation for Women and Children V Munalula Linyati, Appeal no 70 of 2015:

"It is the well-settled position of the law on joining a party to an action that he should be bound or otherwise affected by the results of the action. The issues to be settled in the action must be questions which cannot effectually and completely be settled unless he is a party."

6.20 Proceeding therefore, with this most instructive passage, I would decline the invitation to remove the 2nd Defendant from these proceedings. The implication of doing so is that his evidence will be allowed at trial. I am alive to the fact that the said evidence, going by what is disclosed in the pleadings, will involve a recitation of facts which are the subject of objection in the present application. This brings me to the second and more decisive legal question to be resolved, namely the *res judicata* objection.

6.21 At this juncture, I would ask myself the question whether this court, if it disregarded the case as pleaded by the 2nd Defendant, because the 2nd Defendant has been adjudged in another matter to have no *locus standi*, would be displaying the requisite fidelity to section **13**

of the High Court Act quoted above. That section clearly requires me to interrogate ‘every legal or equitable claim or defence properly brought forward’ by a party, 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.

6.22 The use of the expression ‘properly brought forward’, at once places me on notice that in the context of the present case, the equitable claim or defence sought to be advanced by the 2nd Defendant must be one that is free from legitimate objection; it must, in other words, not be readily impeachable on legal grounds. In the case at hand, the 2nd Defendant’s pleading is attacked principally on the footing that it advances a case already decided. This brings me to the crux of the present application, which I set out to resolve, in the succeeding paragraphs.

6.23 In deciding the first of the questions alluded to in paragraph 5.2 above, namely, whether the pleadings *in casu* engage the same factual and legal issues as were decided in the prior action before Yangailo J., hence being *res judicata*, it is helpful to take stock of what my learned sister actually decided in cause No. 2019/HP/1505. In the operative part of the judgment, Yangailo J., (substituting the references to ‘Plaintiff’ and ‘Defendant’ with references to Christian Omili and Tunisiki, respectively) stated thus:

“6.19 ***Based on the foregoing authorities and my findings above, it is clear that Christian Omili herein is not a party to the contract of sale that he wishes to be declared null and void, by this***

action. It is also clear that Christian Omili's oral testimony at trial cannot vary the terms of the said contract of sale to include his alleged interest in the Subject Property. It follows therefore, that Christian Omili herein has no locus standi to sue Tunisiki based on the said contract of sale as he is not a party to it. Therefore, Christian Omili's claims against Tunisiki are accordingly dismissed.

6.20 Tunisiki made the following Counter Claims against Christian Omili: -

- (i) Damages for the loss of use of land;*
- (ii) Special damages in the sum of K35,000.000 for legal fees incurred by Tunisiki in relation to the purchase of the property in question; and*
- (iii) Costs incidental to these proceedings.*

6.21 However, based on my finding that Christian Omili herein is not a party to the contract of sale, it follows that Tunisiki herein cannot enforce the said contract of sale against Christian Omili. Therefore, Tunisiki's Counter Claims against Christian Omili have no legal basis and are accordingly dismissed.

7 CONCLUSION

7.1 As Christian Omili is not a party to the contract of sale of the Subject Property that he wishes to be declared null and void, Christian Omili has no locus standi to bring this action against Tunisiki. Similarly, Tunisiki's Counter Claims cannot stand against Christian Omili as Christian Omili is not a party to the contract of sale of the Subject Property. Accordingly, this action is dismissed."

6.24 I will caveat my reflections on my learned sister's judgment by observing that it is neither my place, nor my intention, to comment on Yangailo J's judgment beyond the legal issues raised in this action, so far as their determination hinges on an application of the legal import of her judgment. From the quoted text, what is clear to me is that Yangailo J., focused - as indeed she ought to have done, given the nature of the case pleaded - on the strict legal rights of the parties, *vis-à-vis* the contract which she was invited to annul. The case was thus decided principally on the legal consideration that the 2nd Defendant had no basis in law to concern himself in the annulment of a contract to which he was not a party.

6.25 The Supreme Court of Zambia in the case of **Jonasi Tembo v Bank of Zambia**, cited with approval a passage occurring at paragraph 528 of **Halsbury's Laws for England**. This court finds that passage very helpful in informing its view on the issue in contention in this application. In it, the learned editors state that a party wishing to avail themselves of the plea of *res judicata*, must demonstrate certain things. Such a party must show, not only that the cause of action in the prior action was the same, but also that the relevant party 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.

6.26 In my judgment, on the question of whether the Plaintiff had an opportunity of recovering, in the action before Yangailo J., that which he seeks to recover in this action, I would be inclined to

think that he did. However, that does not settle the matter. The learned authors proceed, in the same passage alluded to above, to say as follows:

“A plea of res judicata must show either an actual merger, or that the same point had been actually decided between the same parties...It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue or claimed”.

6.27 In applying such guidance as there is to be garnered from this quite instructive passage, I ask myself the question whether the Plaintiff has satisfied me that the case pleaded by the 2nd Defendant in this case was the same as that pleaded in the prior action. I find it incontrovertible that the two cases are quite different. In fact, learned counsel for the Plaintiff made much of the fact that the 2nd Defendant has embellished his case somewhat in this action by pleading additional matters which he did not plead in the earlier case. On that score, I am guided by this passage in in holding, as I hereby do, that it is not enough that the matter alleged to be concluded in the earlier action might have been put in issue.

6.28 I adopt the approach, consistently with the cited paragraph in **Halsbury's' Laws of England**, that it is necessary to show that the relevant issue was actually so put in issue or claimed. The

Plaintiff has not shown to me that the issue of how the 2nd Defendant came to be possessed of the ability to purportedly sell or be an agent in the contract of sale of the entire extent of the subject property, was put in issue and actively claimed. What my examination of the record in the other action reveals is that the legality of the first contract dated 8th March 2008 and made between the 1st Defendant as vendor and the 2nd Defendant as purchaser was never interrogated. This related to the 4 hectares only of the subject property. This question remains outstanding. The court has a duty, as has been so consistently affirmed by the superior courts of this country, to resolve all matters in controversy between all parties in order that there be finality to litigation.

- 6.29 Furthermore, the aspect of the 2nd Defendant being in possession of the title deeds, and occupying, in the mind of the Plaintiff, the undisputed position of an agent of the 1st Defendant in relation to the subject property, was hardly addressed. This was for the very good reason that it was not relevant to the question before Yangailo J, who was called upon to nullify a contract by a party who was, by all legal indications, a stranger to the contract which he sought to nullify. In this vein, it is pertinent to observe that the Plaintiff himself has not denied his dealings with the 2nd Defendant, either in this action or in the action before Yangailo J. Indeed, he acknowledges making payment for the subject property – or at least a portion of it – to a company of which the 2nd Defendant is a controlling shareholder.

6.30 Equally, the 1st Defendant, by which I mean the late Josiah Chanka Chishala when he was alive, and by extension, the representative of his estate, has not disavowed the dealings that he had with the 2nd Defendant. In these circumstances, it cannot be said that the factual and legal issues that have been raised for resolution in this action were identical to those called for resolution in the case before Yangailo J. Whilst the factual considerations are largely similar, the legal considerations are certainly different.

6.31 I consider it necessary to address the quite pertinent argument of the Plaintiff that to not uphold the present objection would be courting the rather embarrassing possibility that there might arise two conflicting decisions in two courts, among the same parties and over the same facts. In reflecting on this submission, I would note, firstly, that the 3rd Defendant is not a party to the other action which is presently on appeal. This shows that the action is not, strictly speaking, among the same parties. Secondly, it is clear that the facts pleaded, although largely similar, are not identical. This shows that it is not the same point that is being litigated, thereby dissipating any notion of conflicting judgments because the additional facts, if proved, could alter the legal analysis altogether.

6.32 In **6.21** and **6.22** above, I raised the question of whether the 2nd Defendant had 'properly brought forward' his case, within the meaning of that expression in section 13 of the **High Court Act**. Having interrogated the pleadings in this case and that before

Yangailo J, and having analysed the arguments of the parties on the point, it is my holding based inter-alia on the reasons more particularly articulated at paragraph **6.28**, that the 2nd defendant's defence as filed in this action may stand and I accordingly decline the invitation to expunge it, either in part only, or in its entirety.

6.33 There remains one matter that requires addressing. **Order 33 r 3**, of the Rules of the Supreme Court, upon which this application was grounded, requires the court to pronounce a time for the trial of an issue whether of fact, or of law, and whether partly of fact and partly of law. Such issues of fact as have been raised by the present application will be tried as part of the main cause, in terms of the directions I give below.

7.0 ORDERS

7.1 Having carefully considered the record both in this cause and in the cause numbered 2019/HP/1505, as well as the arguments advanced by the learned counsel of the parties, I make the following findings and orders: -

7.2.1 I dismiss the 2nd Defendants objection to the propriety of the Plaintiff's Notice of Intention to Raise a Preliminary Issue and hold that the said notice, being as it was, in substantial conformity with the prescribed form, was not fatally vitiated;

- 7.2.2 I dismiss the Plaintiff's plea of *res judicata*, and hold that the issues raised in this action engage different factual and legal considerations which, though largely common, are sufficiently dissimilar to exclude the apprehension that two different courts might arrive at two conflicting decisions;
- 7.2.3 I dismiss the Plaintiff's application to disjoin the 2nd Defendant from further participation in these proceedings, as his joinder was ordered pursuant to a prior order of this court, following a contested application in respect of which the option of appeal was open to the Plaintiff, but was never exercised.
- 7.2.4 I set the action down for commencement of trial before me at Lusaka on the 3rd and 4th of February, 2025 at 08:30 hours on both dates.
- 7.2.5 The Plaintiff having failed in his application, the Defendants will have their costs. I grant leave to appeal.

Dated the **6th** day of **December** 2024



G C MULENGA
JUDGE

