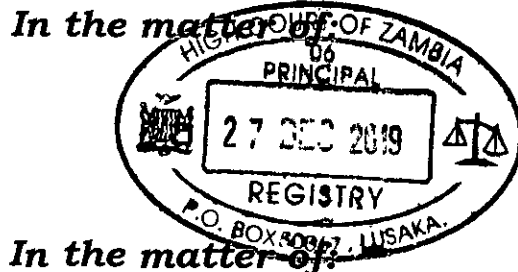


**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

20018/HP/1660



**Property Number L/Luimba/130
Situate in Luimba Settlement Area
in Lusaka Province of the Republic
of Zambia**

In the matter of:

**An Application under Order 113 of
the Rules of the Supreme Court of
England, 1999 Edition**

BETWEEN:

MULENGA JOHN CHISHIMBA

APPLICANT

AND

THE ATTORNEY GENERAL

1ST RESPONDENT

MAMAS SIBANDA

2ND RESPONDENT

FRANCIS TEMBO

3RD RESPONDENT

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Applicant: Mr. G. Tembo of Messrs Mumba Malila and Partners

For the 1st Respondent: Ms. A. T. Musiska State Advocate With Mrs. K. Mainza (Learner Legal Practitioner)

For the 3rd Respondent: Mr. M.K. Sambo of Messrs Sambo Kayukwa and Company

RULING

Cases Referred to:

1. *Liamond Choka v Ivor Chilufya SCZ Judgment No. 2 of 2002*
2. *Anti-Corruption Commission v Barnet Development Corporation Limited (2008)1ZR 69*
3. *Eleftheriadis v Attorney General (1975) ZR 69*
4. *Wilson Masauso Zulu V Avondale Housing Project Limited (1982) Z.R.172*
5. *Sentor Motors Limited V 3 Other Companies SCZ Judgment No. 9 of 1996*

The 3rd Respondent made an application to raise preliminary issues on points of law pursuant to Order 14A of the Rules of the Supreme Court of England for the determination of the following questions of law:

1. Whether the action herein, being brought under Order 113 of the Rules of the Supreme Court of England, 1999 Edition, is properly before the Court as it is brought under provisions of law allowing eviction of persons occupying property of a registered proprietor, when the Applicant is not a registered proprietor of the land allegedly occupied by the 3rd Respondent, who has title to the land he occupies.

2. Whether the action commenced by the Applicant may be allowed by virtue of Section 34 of the Lands and Deeds Registry Act Chapter 185 of the Laws of Zambia.
3. Whether the Applicant may claim the third Respondent's land, which he cannot prove ownership of under Section 33 and 35 of the Lands and Deeds Registry Act, when he does not hold any title to the land he claims to be occupied by the third Respondent without his consent or authority, and has no locus standi to commence any action under the circumstance of the matter.

The application was supported by skeleton arguments. It was submitted that the proceedings instituted by the Applicant under Order 113 of the Rules of the Supreme Court of England and these require that one proves ownership of the property. This may only be proven by a Certificate of Title. It was submitted that the Applicant was not the registered owner of the land that he claimed and does not even hold title to Lot No. 130 Luimba and therefore has no locus standi in making any claim against the 3rd Respondent who holds title.

It was contended that actions under Order 113 were matters that are brought by registered owners of land that has been adversely

possessed by other people and in the present case the Applicant as at the date of commencement of the matter did not possess title to the property. It was submitted that in the case in casu, the action against the 3rd Respondent was one against a certificate of title holder and not one who had adversely occupied it.

Counsel referred to sections 33, 34 and 35 of the Lands and Deeds Registry Act to support its arguments that an action under Order 113 cannot lie against a certificate of title holder.

In opposing the application the Applicant filed its skeleton and submitted that the action was properly before this Court as the Applicant was the legal owner of Plot L/Luimba/130 and the 3rd Respondent is a squatter with no genuine claim of right over the said plot as he entered onto or remained in occupation without the Applicant's license or consent. It was submitted that Order 113 provides for a summary procedure suitable for squatters and others without any genuine claim of right or who had since transformed into squatters. Counsel cited the case of ***Liamond Choka v Ivor Chilufya SCZ Judgment No. 2 of 2002*** to support this argument.

It was further argued that the Applicant had shown that he was the beneficial owner of Plot L/Luimba/130 and the 1st Respondent

through their witness Helen Mwansa, the Senior Lands Officer had deposed that the Deeds Registry at the Ministry of Lands had no record of the 2nd and 3rd Respondents ever owning Plot L/Lwimba.130 and that the Applicant was the beneficial owner of the said land by virtue of the contract of sale executed on 14th August, 2004 between the Applicant and Mr. Chikwasha.

It was the Applicant's contention that the 3rd Respondent was a squatter without any genuine claim of right and because he was illegally occupying the said property, the proceedings under Order 113 were properly before Court.

It was submitted that in light of sections 33, 34 and 35 of the Lands and Deeds Registry Act the conclusiveness of a certificate of title was not absolute as there were exceptions such as allegations of fraud or where the interest of a proprietor claiming the same land under a current prior title issued under parts III and VII or as regards the omission or misdescription of any right of way or other easement included in the certificate of title, evidencing the title of such Registered Proprietor by wrong description. It was argued that although there can be no action against the registered proprietor holding a certificate of title, this is not absolute as noted from the exceptions outlined in section 33 of the Lands and Deeds Registry

Act. Counsel referred to the case of ***Anti-Corruption Commission v Barnet Development Corporation Limited (2008)1 ZR 69*** where it was held that:

“under Section 33 of the Lands and Deeds Registry Can a certificate of title is conclusive evidence of ownership of land by a holder of a certificate of title. However, under section 34 of the same Act, a certificate of title can be challenged and cancelled for fraud or reason of impropriety in its acquisition.”

It was submitted that the evidence of the Applicant had outlined the historical background with clear documentation of how the land was acquired which position had been verified by the 1st Respondent through their witness, Helen Mwansa.

It was contended that the 1st respondent in stating that there was no record at the Ministry of Lands that the 2nd and 3rd Respondent had ever owned the land in issue clearly demonstrated that the certificate of title that the 3rd Respondent had was not genuine. That it was on this basis that the Applicant submitted that the only logical inference was that there may have been fraud or impropriety in the acquisition of the certificate of title that the 3rd Respondent

had. Counsel called in aid the case of ***Eleftheriadis v Attorney General (1975) ZR 69*** where it was stated that:

“The Court may draw inferences from given facts if it is only such inferences that can be made.”

It was contended that since the 3rd Respondent had invoked the aid of the law in section 33, 34 and 35, he must therefore prove his case that his title is genuine by filling in his Defence rather than raising unmeritorious preliminary issues.

It was prayed that this application be dismissed with cost.

I have considered the evidence on record and the arguments by both parties. This application has been made pursuant to Order 14A of the Supreme Court Rules which provides that:

“14A/1 (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.”

The Applicant in this matter seeks to terminate the proceedings pursuant to this Order which makes provision for a matter to be summarily dismissed on points of law.

I have carefully considered the issues raised by both parties and I called in aid the case of **Wilson Masauso Zulu V Avondale Housing Project Limited(1982) Z.R.172** where the Supreme Court held that:

“The trial court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter is determined in finality.”

Further, in the case of **Sentor Motors Limited V 3 Other Companies SCZ Judgment No. 9 of 1996** the Supreme Court stated that:

“It is the primary function of the court to adjudicate disputes which have been submitted for determination..... The parties before us complained that their case was never tried.

It is unnecessary to stress that they are entitled to a trial and to a judgment.”

Having carefully considered the facts of this case and the authorities I have referred to, I hold the firm view that there are serious issues that have been raised by both parties that require to be determined in finality by the Court. I therefore find that this is not a fit and proper case to terminate the proceedings under Order 14A.

I accordingly dismiss the application with costs. The originating summons comes up for hearing on 27th January, 2020 at 08:30 hours.

Leave to Appeal is granted

Delivered under my hand and seal the 27th day of December, 2019



**Mwila Chitabo, SC
Judge**