

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

**Appeal No. 101/2022
CAZ/08/99/2022**

BETWEEN:

PETROS PHIRI

AND

ROAD DEVELOPMENT AGENCY



RESPONDENT

Coram: Kondolo, Makungu and Ngulube, JJA

On the 15th June, 2023 and 28th June, 2023

*For the appellant: Mr. E.B. Mwansa with Mr. F.S. Kachamba, both of
EBM Chambers*

*For the respondent: Mr. M. Mulonda, In-House Counsel for Road
Development Agency*

JUDGMENT

MAKUNGU, JA delivered the judgment of the Court

Legislation Referred to:

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

Cases Referred to:

- 1. Bank of Zambia v Jonas Tembo and Others (2002) ZR 101*
- 2. B.P. Zambia PLC v Interland Motors Limited (2001) ZR 37*
- 3. Bank of Zambia and Another v Sunvest Limited and Another (1995-1997) ZR 187*

Other works referred to:

1. *Zambian Civil Procedure Commentary and Cases, Volume 1 at page 321*

1.0 INTRODUCTION

1.1 This is an appeal against the whole ruling delivered by Mrs Justice Elita Phiri Mwikisa under **Cause No. 2021/HP/0168** on 9th March, 2022. In that ruling, the appellant's case against Road Development Agency (RDA) was dismissed on grounds that there was a multiplicity of actions, abuse of Court process and *res judicata*.

2.0 BACKGROUND

2.1 It is clear from the record that the appellant commenced an action against the respondent in 2015 under **Cause No. 2015/HP/2203** in which he claimed *inter alia* for a declaration that he is the legal owner of stand No. 16456, Kazungula, in the Southern Province of the Republic of Zambia, in extent of 9.6735 hectares. He also claimed for damages for trespass as he alleged that RDA had trespassed on 3.8 hectares of the same property in order to build the Kazungula Bridge. This action was settled by Consent Order which appears at page 53 of the Record of Appeal (ROA).

2.2 The main terms of the Consent Order were that the plaintiff would be paid the sum of ZMW360,000 as full and final settlement of the matter. Further, that upon payment of the said amount, the defendant would engage government surveyors for purposes of subdividing the 9.6735 hectares and obtaining survey diagrams thereto, which would enable the plaintiff to surrender the 3.8 hectares to the defendant.

2.2.1 Under the circumstances, the appellant technically ceded 3.8 hectares to the respondent and remained with 5.8735 hectares.

2.3 In 2017, the appellant commenced **Cause Number 2017/HP/1669** against Daewoo Engineering & Construction Limited and the Attorney General. In that action, the appellant claimed for, *inter alia*, an order that he is the legal owner and title holder of Lot 16456/M Kazungula District, Livingstone in the Southern Province of the Republic of Zambia, by virtue of Certificate of Title No. 180612 issued by the Ministry of Lands. He also claimed, among other things, for possession of the land he had remained with being 5,8735 hectares which was allegedly

occupied by the defendants without his consent and damages for trespass and loss of business opportunities.

- 2.4 In dismissing this action, in her judgment dated 22nd January, 2020, Hon. Mrs. Justice S. Kaunda Newa held that the wrong parties were sued as they were merely agents of RDA. The Judge stated at page 330 as follows:

"It is a matter of common knowledge that funds borrowed attract the payment of interest, and it would not be in the public interest to grant an order of possession of the plaintiff's land when the two governments (Zambia and Botswana) have obligations with regard to the repayment of funds that have been borrowed to carry out the project (Kazungula Bridge Project).

In short, the public interest overrides the plaintiff's interest at this stage, and in order that the plaintiff's rights are given effect, he should engage the RDA for his compensation."

- 2.5 On 16th February 2021, the appellant yet again commenced an action (2021/HP/0168) against RDA claiming substantially the same claims as in cause No.

2017/HP/1669. On 10th March, 2021, RDA applied to set aside the writ and statement of claim for irregularity pursuant to **Order II Rule 1 (4)** and **Order 3 Rule 2 of the High Court Rules⁽¹⁾**.

2.6 Upon hearing both parties, the lower court dismissed the action for multiplicity, abuse of court process and res judicata as in her view, the property in issue had already been subject of litigation and had been adjudicated upon. Neither party was awarded costs, leave to appeal was granted.

3.0 GROUNDS OF APPEAL

3.1 Dissatisfied with the said judgment, the appellant has appealed to this court and advanced three grounds of appeal couched as follows:

1. The lower Court misdirected itself in law and fact when it held that in its considered view the plaintiff's action is a multiplicity of actions, an abuse of Court process and is res judicata as the property in issue has already been subject of litigation and has been adjudicated upon.

2. The lower Court misdirected itself in law and fact when it held that in its considered view the matter before it (cause No. 2021/HP/0168) amounts to forum shopping, an abuse of court process and as such the defence of res judicata succeeds.

3. The lower court misdirected itself in law and fact when it held that it cannot make a determination on the issue of possession of the plaintiff's land as there is a risk of passing conflicting decisions or decisions which undermine each other.

4.0 APPELLANT'S ARGUMENTS

4.1 The appellant's heads of argument were filed on 12th May, 2022 and relied upon during the hearing of the appeal. The appellant argued the 1st and 2nd grounds of appeal together. The essence of the arguments is as follows:

4.2 **Cause No. 2021/HP/0168** is not an abuse of court process and the defence of res judicata cannot succeed. To fortify this, the case of **Bank of Zambia v Jonas Tembo and Others**¹ was cited, where the Supreme Court held as follows:

"The test of (res judicate) is therefore threefold that is, the cause of action should be the same or that

the same point had been decided upon and parties must be the same in the two actions. Further, it must be demonstrated that the plaintiff in the new matter had an opportunity to seek the remedy he now seeks, but for his own fault did not do so.”

- 4.3 The appellant’s counsel recapped the history of the case as stated in the background in this judgment. He further stated that the 5.8735 hectares was not occupied before the first action **2015/HP/2203** was concluded. It was occupied in 2017 by the agents of RDA who were wrongly sued in **cause No. 2017/HP/1669**. Counsel stated that **cause No. 2012/HP/0168** was therefore a new cause of action relating to the remaining extent of the appellant’s land.
- 4.4 That the defendant involved in **cause No. 2021/HP/0168** is not the same as the defendants in **cause No. 2017/HP/1669**. The appellant further stated that the respondent is still in occupation of 5.8735 hectares of the appellant’s property. Counsel prayed that the first two grounds of appeal be upheld.
- 4.5 On the 3rd ground of appeal, it was argued that in the first and second actions, it was common ground that the appellant

is the registered owner of Lot 16456 Kazungula and he was declared so by the lower court. That even in **cause No. 2021/HP/0168**, the respondent did not deny that the said property is owned by the appellant. Counsel contended that for this reason, the risk of passing conflicting judgments which may undermine each other cannot arise and therefore, the 3rd ground of appeal should also succeed.

5.0 RESPONDENT'S HEADS OF ARGUMENT

5.1 The respondent's heads of argument filed on 13th June, 2022 were relied upon during the hearing of the appeal. The respondent's counsel started by giving the history of the case, which is not in dispute. Counsel contended that the appellant has been seeking substantially the same reliefs in different actions. That the reliefs he sought in **cause No. 2021/HP/0168** have already been adjudicated upon.

5.2 That under **cause No. 2017/HP/1669**, which dealt with the entire property being Lot No. 16456/M, Kazungula, it was held that the appellant was only entitled to compensation in the public interest, which he is supposed to get from the respondent. Counsel stated further that it was under the circumstances, mischievous for the appellant to commence

a fresh action seeking a fresh order in respect of the same property.

- 5.3 According to the respondent's counsel, the respondent was essentially or indirectly joined to **cause No. 2017/HP/1669** as can be gleaned from the judgment which made orders against RDA. We were referred to page 155 of the ROA (J30 of the judgment in **cause No. 2017/HP/1669** the last paragraph which reads:

"The plaintiff having partially succeeded, he shall be paid his costs which shall be taxed in default of agreement. The said costs shall be paid by RDA as principal of the defendants, pursuant to Section 40(2) of the Public Roads Act which provides that;
"(2) Any expense incurred by any servant or agent shall, in connection with any action, claim or demand referred to in Subsection (1), be paid by the road authority out of its funds."

- 5.4 Counsel emphasized that the dispute relating to the whole property was clearly settled in the 2017 action and all that remained was the aspect of the appellant engaging the respondent for adequate compensation. Counsel relied on

the case of **B.P. Zambia PLC v Interland Motors Limited**² where it was held as follows:

“A party in dispute with another over a particular subject should not be allowed to deploy his grievances piecemeal in scattered litigation and keep on hauling the same opponent over the same matter before various courts.

The administration of justice would be brought into disrepute if a party managed to get conflicting decisions which undermined each other from two or more different judges over the same subject matter.”

5.5 Still on the issue of multiplicity of actions and res judicata being frowned upon by the courts, the respondent referred to the case of **Development Bank of Zambia and Another v Sunvest Limited and Another**³. He also referred to **Zambian Civil Procedure Commentary and Cases, Volume 1 at page 321**⁴ where the author states as follows:

“This multiplicity of proceedings are barred in relation to matters which directly and substantially had arisen in a former case between

or amongst the same parties so that the parties are not vexed twice”.

5.6 That the author continues at page 141 to state as follows:

“The implication of the plea of res judicata is that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the respective rights of the parties and their privies...to be applicable, the rule requires the matter subject of the plea to be identified, together with the identify of the persons or parties to the action...the plea constitutes an absolute bar to a subsequent action invoking the same claim, demand, or cause of action. Therefore, the sum and substance of the plea is that a matter once adjudicated upon, is finally decided”.

5.7 Counsel therefore prayed that the first ground of appeal should fail.

5.8 On the second ground of appeal, the respondent’s counsel submitted that the court below was on firm ground when it held that **cause No. 2021/HP/0168** was an abuse of court process and res judicata. He argued that the appellant

appears to be forum shopping for a favorable judgment in respect of a property already adjudicated upon. To buttress this submission, we were referred to **Order 18/19/18 of the Rules of the Supreme Court of England, 1965 (White Book) 1999 Edition (RSC)**²:

“Para. (1) (d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be “an abuse of the process of the Court.” This term connotes that the process of the Court must be used bona fide and properly and must not be of vexation and oppression in the process of litigation...The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances and for this purpose considerations of public policy and the interests of justice may be very material.”

5.9 Further, **Order 18/19/19** provides thus:

“It is an abuse of the process of law for a suitor to litigate again over an identical question which has

already been decided against him even though the matter is not strictly res judicata.”

5.10 In light of the preceding authorities, we were urged to dismiss the second ground of appeal as well.

5.11 In opposing the third ground of appeal, counsel for the respondent submitted that the gist of their arguments in respect to ground 3 have been subsumed in the foregoing arguments. Counsel stated that the crux of the matter was dealt with in **cause No. 2017/HP/1669** as the court ordered as it did after considering the public interest involved. That any other judgment would hold contrary to what was held in that action and this made **cause No. 2021/HP/0168** res judicate. The prayer was that ground 3 should also be dismissed and costs be awarded to the respondent.

6.0 OUR ANALYSIS AND DECISION

6.1 We have prudently considered the record of appeal and the written and oral arguments made on behalf of both parties. The grounds of appeal are interrelated. The main question as we see it, is whether **cause No. 2021/HP/0168** was a multiplicity of action, res judicata or an abuse of court process.

6.2 We shall therefore tackle the 3 grounds of appeal together. In answering the said major question, we shall consider the threefold test for res judicata as enumerated in the case of **Bank of Zambia v Jonas Tembo and others** as follows:

1. The cause of action should be the same or that the point had been decided upon.
2. The parties must be the same in both actions.
3. It must be demonstrated that the plaintiff in the new matter had an opportunity to seek the remedy he now seeks, but for his own fault did not do so.

6.3 It is clear from the ROA that **Cause No. 2015/HP/2203** was between the appellant and the respondent regarding only 3.8 hectares of the appellant's Lot 16456, Kazungula whose full extent was 9.6735 hectares. The matter was indeed settled by consent of the parties. The respondent agreed to pay the appellant the sum of ZMW360,000.00 as full and final settlement of the matter, while the appellant agreed to give up 3.8 hectares of his land.

6.4 In 2017, the appellant's remaining portion in extent 5.8735 was occupied by the respondents' agents Daewoo Engineering and Construction Limited and GRZ Immigration

Department. Consequently, the appellant sued the said agents of RDA and the Attorney General in **Cause No. 2017/HP/1669**. That case was dismissed by Nwawa J, mainly for the reason that the wrong parties were sued instead of RDA which is capable of suing and being sued.

6.5 Although **Cause No. 2017/HP/1669** involved the piece of land in extent 5.8735 hectares, it was clear in those proceedings that the appellant still held title to the whole piece of land including the 3.8 hectares. We note that the defendants in **cause No. 2017/HP/1669** were different from the defendants in **cause No. 2021/HP/0168**.

6.6 It is clear that the appellant has not been re-litigating the same subject matter from one action to another as no court of competent jurisdiction has rendered a final judgment on its merits concerning the respective rights of the parties in relation to the appellant's property in extent of 5.8735 hectares of Lot 16456 Kazungula. (See **Zambia Civil Procedure Commentary and Cases Vol. 1 P.321 and 141**)¹¹.

In short, **cause No. 2017/HP/1669** involved different defendants from the one cited in **cause No. 2021/HP/0168**. Further, **cause No. 2017/HP/1669** was not tried and determined on its merits but dismissed on a technicality. Therefore, the appellant is not guilty of bringing up a multiplicity of actions and abusing court process. For the foregoing reasons, the lower court misdirected itself in dismissing **cause No. 2021/HP/0168** as the case did not pass the test for res judicata mentioned in the case of **Bank of Zambia v Jonas Tembo and others supra**.

- 6.7 In our considered view, **Cause No. 2021/HP/0168** involves a different subject matter from **Cause No. 2015/HP/2203** even though the parties are the same as the extent of the appellant's land in question is different. It is abundantly clear from the record that even though **cause No. 2015/HP/2203** was decided on its own merits, the cause of action leading to **Cause No. 2021/HP/0168** arose later in 2017 and involved the appellant's remaining extent of the land.

6.8 It is important to note that in dismissing **cause No. 2017/HP/1669**, the learned Judge made certain pronouncements which she should not have made in light of the fact that she intended to dismiss the case and finally did so. The statement we are referring to is the one quoted at paragraph 5.3 herein and which the respondent relies upon to buttress its submission that **cause No. 2021/HP/0168** is a multiplicity of action and res judicata.

6.9 Under the circumstances, we reject the respondent's submissions. We further hold that the ruling appealed against was erroneous as the appellant was not guilty of forum shopping, abuse of court process and res judicata. The same ruling is consequently quashed and we hold that the appellant still has the right to sue RDA over the remaining portion of his land.

6.10 The import of this judgment is that **cause No. 2021/HP/0168** is restored. Nevertheless, it shall be presided over by a different puisne Judge.

7.0 CONCLUSION

7.1 All being said; the appeal succeeds and costs here are awarded to the appellant. The same shall be taxed in default of agreement between the parties.

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M.M. Kondolo, SC
COURT OF APPEAL JUDGE

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C.K. Makungu
COURT OF APPEAL JUDGE

.....
P.C.M. Ngulube
COURT OF APPEAL JUDGE