IN THE HIGH COURT FOR ZAMBIA **2020/HP/0200**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

CHANSA SIMFUKWE **1ST PLAINTIFF**

AMEC COLLEGE OF HIGH EDUCATION LIMITED **2ND PLAINTIFF**

AND

REV MARTIN CHAMA **DEFENDANT**

(Sued as trustee of African Methodist Episcopal Church)

BEFORE THE HONOURABLE MRS JUSTICE RUTH CHIBBABBUKA

For the Plaintiffs: Messrs Ferd Jere & Company

For the Defendant: Messrs Central Chambers

RULING

Cases referred to:

1. *Commonwealth Development Corporation vs Central Africa Power Corporation (1968) Z.R 70*
2. *Chief Mwanatete vs Lushato & Another 2014/HP/1043*
3. *Leopold Walford vs Unifreight [1985] Z.R 203*
4. *Henry Kapoko vs The People 2016/CC/0023*
5. *Raila Odinga and 5 Others vs Independent Electoral and Boundaries Commission and 3 Others [2013] EKLR*
6. *Access Bank (Zambia) Limited vs Group Five/ Zcon Business Park Join Venture (suing as a firm) SCZ/8/52/2014*
7. *United Communications Limited vs Vodacom International Holdings [2014] ZR Vol 3 395.*
8. *Dominic Mulaisho vs The Attorney General [2012] ZR Vol 3 550*
9. *Ronex Properties Limited vs John Laing Construction Limited & Others [1983] 3 ALL ER 961*
10. *Njolomole Mtonga (sued as Administrator of the estate of the late Gabriel Siwonamutenje Kapuma Mtonga vs The Attorney General & Daniel Mwale Appeal No. 004/2015*
11. *Zimba Jane Ndelemani Musanya vs Musanya Henry Chola (Co-Administrator of Newton Bwalya Musanya (2012) Z.R Vol 1*
12. *Boyle vs Sacker (1989) 39 CHD 249*

13. *Fry vs Moore (1889) 23 QB*
14. *Brenda Muzyamba vs Martha Muzyamba Sinabbomba and 21 others Appeal No. 11 of 2019*
15. *African Banking Corporation Zambia vs Mubende Country Lodge Limited Appeal No. 116 of 2016*

Legislation referred to:

The Rules of the Supreme Court (1999) Edition, The White Book
The Statute of Limitations Act of 1939
The High Court Act, Chapter 27 of the Laws of Zambia
The Constitution of Zambia, Chapter 1 of the Laws of Zambia

1.0 INTRODUCTION

By a notice to raise a preliminary issue made pursuant to *Order 14A* of the *Rules* of the *Supreme Court*, the defendant raised an issue, which was outlined as follows:

1. Whether or not the plaintiffs are legally entitled to proceed with this action contrary to *Section 4 (3)* of the *Limitation Act* of *1939*, which bars actions for recovery of land after twelve (12) years have elapsed in light of the fact that the plaintiffs' cause of action arose sometime in 1994 being over twenty years (20) after the cause accrued.

The defendant's application is accompanied by an affidavit and skeleton arguments, to which the plaintiffs accordingly responded to by filing an affidavit in opposition and accompanying skeleton arguments.

The defendant then responded to the plaintiffs' court process by filing an affidavit in reply with harmonising arguments in support. The plaintiffs proceed to file an application seeking an order expunging the said affidavit in reply and accompanying skeleton arguments from this court's record. The plaintiffs' application is made pursuant to *Order 3 Rules 1 and 2* of the *High Court Rules*, as well as *Order 2 Rule 2* of the *Rules* of the *Supreme Court*. The plaintiffs' application raised the following issues;

1. Whether or not an affidavit in reply can be filed into court without leave of court;
2. Whether or not arguments in reply can raise new issues that were not covered in opposition; and
3. Whether fresh evidence can be raised either in reply or in skeleton arguments.

I will first address the plaintiff's application to expunge documents from the record before determination of the defendant's preliminary issue.

2.0 THE PLAINTIFFS' AFFIDAVIT EVIDENCE – APPLICATION TO EXPUNGE DOCUMENTS FROM THE COURT RECORD

The plaintiffs filed an affidavit in support wherein the 1st plaintiff argued as follows: the defendant's affidavit in reply not only contains new issues that were never raised in the affidavit in opposition but was also issued without the leave of the court. Paragraphs 8,9,10,11,13,14 and 16 of the affidavit in reply contains fresh evidence contrary to the rules of procedure. The plaintiffs will not have an opportunity to rebut the new evidence. That a procedural injustice will be occasioned should the documents not be expunged from the record.

2.1 THE PLAINTIFFS' SUPPORTING EVIDENCE – APPLICATION TO EXPUNGE DOCUMENTS FROM THE COURT RECORD

The application is further supported by skeleton arguments wherein counsel argued that the general rule as regards excess affidavits is that they are to be filed into court with leave of court. That the defendant has not only filed an affidavit without leave but also introduced fresh evidence which the plaintiffs will be unable to respond to as they are not permitted to file a further affidavit once an affidavit in reply has been filed. Counsel referred this court to the cases of **Commonwealth Development Corporation vs Central Africa Power Corporation**[1] and **Chief Mwanatete vs Lushato & Another**[2] to buttress the argument.

Counsel reiterated that the filing of the affidavit in reply without the leave of this court is irregular. Further that paragraph 8,9,10,11,12,13 and 14, together with the attendant exhibits, were never raised in the affidavit in opposition and therefore constitute new evidence. Counsel argued further that additional affidavits filed without leave of court are inadmissible unless they have not been objected to or have raised issues that the mover of the motion would not have anticipated at the time of settling the affidavit in support. That in the cases cited, the court reiterated that the rationale behind the rule is that a party framing the first affidavit ought to frame it in such a way that ensures that it takes into account all relevant facts of the case.

Counsel argued that the defendant was trying to release facts in a piece meal fashion in a bid to prejudice the plaintiffs' case so that the plaintiffs are gagged by procedural rules and practice. That the contents of the affidavit in reply's prejudicial value far outweigh its evidential value and must be expunged from the record of the court. Further, that the defendant cannot argue that he did not anticipate the need to produce the land register, water and electricity bills, and the ground rates as these are primary to the settling of an affidavit where you are asserting a right to a property. Counsel prayed that the defendant's entire affidavit in reply or the offending portions be expunged from the record.

3.0 THE DEFENDANT'S AFFIDAVIT EVIDENCE- APPLICATION TO EXPUNGE DOCUMENTS FROM THE COURT RECORD

The defendant filed an affidavit in opposition to the plaintiffs' affidavit in support of the application to expunge the defendant's affidavit in reply from the court record. The defendant deposed as follows: the contents of paragraph 4 of the affidavit in support are false and puzzling on the basis that the plaintiffs in paragraphs (5), (7),

(8),(9),(10),(11),(12),(13) and (16) of their affidavit in opposition state as follows;

(a) The property was fraudulently taken from them;

(b) They only had notice in 2014;

(c) They admitted that the matter appears to have come to court some 26 years later and;

(d) That the matter is not statute barred with particular emphasis to paragraphs (12) and (16) that it falls within the exceptions under the Statute of Limitations.

The plaintiffs allege that this matter falls under the exceptions under the *Statute of Limitations Act* as such, the defendant is not barred from adducing evidence to show that this matter does not meet the requirements of the exception under the said statute. There is no written law that requires an affidavit in reply to be filed with leave. There was no time limit imposed by this court within which to file the reply which would warrant the need to seek leave to file the said reply out of time. An inquiry at Lusaka Water & Sewerage reveals that the name on the bills can be changed by anyone claiming to have a tenancy agreement, which the plaintiffs do not have, and it is clear that the only bill the plaintiffs are relying on is the 2021 bill when the defendant has shown the water and electricity bills from as far back as 2012.

The documents being referred to as fresh evidence cannot be said to be fresh when they are public documents free for inspection at the relevant entities and deemed to be known by all persons including the plaintiffs. The plaintiffs raised issues in their affidavit in opposition to the defendant's preliminary issue which were not in the contemplation of the defendant's motion by bringing evidence "CS-1-8" which normally is not brought in such an application and hence requiring an immediate response in rebuttal. In any event, this court has the discretion to allow any affidavit into evidence in the interest of justice.

3.1 THE DEFENDANT'S SUPPORTING EVIDENCE – APPLICATION TO EXPUNGE DOCUMENTS FROM COURT RECORD

The defendant filed skeleton arguments wherein counsel argued that the plaintiffs' affidavit in opposition to the defendant's affidavit raised issues that required a rebuttal from the defendant by production of evidence that so rebutted the plaintiffs' assertions. That when the plaintiffs deposed under paragraphs (12) and (16) of their affidavit in opposition as to their case falling under the exceptions of the *Statute of Limitations*, they opened a pandoras box, allowing the defendant to rebut such assertions by producing public documents marked exhibits "MC1-3".

Further that this court has the discretion to take judicial notice of the fact that the documents referred to as "MC1-3" are all public documents, available at the lands register, Lusaka Water and Sewerage Company register and the ZESCO register. The plaintiffs are deemed to know or would have known of the said documents had they acted diligently and hence no prejudice would be occasioned by admitting the documents into evidence as equity aids the vigilant not the indolent.

Counsel argued further that principles relating to affidavit evidence are found under *Order 5* of the *High Court Rules, Chapter 27* of the *Laws of Zambia*, while *Order 30* of the *High Court Rules* makes provision for proceedings in chambers. A perusal of the foregoing rules reveals that there is no requirement in any written law for leave to be obtained before an affidavit in reply can be filed. That there being no written law, breach of any requirement to obtain leave before filing an affidavit in reply should be considered procedural and not fatal. That the circumstances warranting leave would apply if this court had issued a time limit within which to file an affidavit in reply, and the defendant defaulted. The authorities cited by counsel for the plaintiffs represent old case law which is no longer supported by the modern practice. Counsel referred

this court to the case of **Leopold Walford vs Unifreight**[3] in support of the argument that a breach of a regulatory rule is curable and not fatal.

Further that if indeed the position is that leave of court is required prior to the filing of an affidavit in reply, *Article 118 Clause 2 (e)* of the *Constitution of Zambia* as read together with *Order 5 Rule 25* and *Order 30 Rules 21 and 24* of the *High Court Rules* clothe this court with the necessary jurisdiction and discretion to admit an affidavit filed without leave of the court. That the court in interpreting *Article 118 clause 2* of the *Constitution* in the case of **Henry Kapoko vs The People**[4] adopted the holding in the case of **Raila Odinga and 5 Others vs Independent Electoral and Boundaries Commission and 3 Others**[5] wherein it was stated that:

> *"the essence of the provisions is that the court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantial justice of the parties....the court as an agency of the process of justice is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course."*

That the plaintiffs' application lacks merit as there is no fresh evidence adduced by the defendant in its affidavit in reply and accompanying skeleton arguments, and that everything deposed to in the defendant's affidavit in reply was as a result of the pandoras box opened by the plaintiffs in submitting that the certificate was fraudulently procured and that the fraud was only discovered in 2014 when the public documents were there for inspection.

4.0 THE HEARING – APPLICATION TO EXPUNGE DOCUMENTS FROM THE COURT RECORD

By an order for directions dated 21st July, 2021, this court dispensed with the attendance of the parties for the hearing of this application,

and gave dates within which the defendant could oppose the application and within which the plaintiffs could respond.

5.0 DECISION OF THE COURT- APPLICATION TO EXPUNGE DOCUMENTS FROM THE COURT RECORD

I am indebted to counsel for the submissions and arguments which I have carefully considered.

By this application, the plaintiffs' argue that the defendant's affidavit in reply, and accompanying skeleton arguments, are irregularly before the court for having being filed without the leave of the court. The defendant argues in rebuttal that there is no written law that supports the plaintiffs' position that an affidavit in reply ought only to be filed after the leave of the court has been obtained. Counsel argued further that the authorities cited by counsel for the plaintiffs represent old case law which is no longer supported by modern practice.

I have carefully perused the law on affidavits as contained under *Order 5* of the *High Court Rules*, and indeed as counsel for the defendant has argued, there is no express provision that mandates a party to obtain the leave of court before filing an additional affidavit. The foregoing notwithstanding, our courts have had occasion to adjudicate on the same and have pronounced that it is generally objectionable for litigants to file excess affidavits during the course of litigation of an action. The filing of an affidavit in reply is not as a matter of right, but is a discretionary remedy granted on application. The court in the **Commonwealth** case had this to say;

> *"As I pointed out in the course of the hearing, the practice on application of this sort is, in general, to limit the number of affidavits - usually to one affidavit in opposition, which the defendant is entitled to put in as of right, and, with leave, one affidavit in reply on behalf of the plaintiff.* [Underling for the Court's emphasis]

Further, in the **Chief Mwanatete** case, the court persuasively opined that;

> *"The rationale is that a party putting in the 1st affidavit ought to frame it in such a way that it takes into account and covers all the facts relevant to his case. He ought not to anticipate to be given a second opportunity to advance his case, except possibly for augments on evidence before court."*

The above illustrates that the requirement for a litigant to obtain leave of the court before filing an excess affidavit has found its place in our case law, which as counsel for the defendant may agree, is a recognised source of law. The argument by counsel for the defendant that the position of the law is old law with no relevance to modern practice is baseless. The law remains good law, unless repudiated.

A further argument by the defendant's counsel is that there was no time limit imposed by this court within which to file the reply which would warrant the need to seek leave to file the said reply out of time. A prudent perusal of the order for directions of 21st July, 2021, by which this court gave the parties herein the time frame within which to file their affidavits and supporting documents, reveals that this court regrettably granted the plaintiffs leave to respond to the defendant's affidavit in opposition to the plaintiffs' affidavit in support of their application, but did not grant the defendant leave to respond to the plaintiffs' affidavit in opposition to the defendant's affidavit in support of its application. Nonetheless, the defendant was not precluded from applying to this court for an order for leave to file an affidavit in reply.

It is important to note that the court retains the discretion to allow the admission of an affidavit that has been filed without leave where the affidavit in opposition raises issues that could not have been reasonably predicted at the time the affidavit in support of an application was being deposed to.

Justice Chali in the **Chief Mwanatete** opined that;

> *"In the case before me, the plaintiff filed an affidavit in reply without first having sought leave of the court. And counsel for the defendant had taken issue with that affidavit. In my view, I can only admit that affidavit on two grounds, one that the facts or issues raised in the opposing affidavit could not have been reasonably anticipated by the plaintiff at the time he settled his affidavit in support of the application and two that the issues and matters raised in the affidavit in reply are critical to a determination whether or not to grant the interlocutory injunction."*

Further, counsel for the defendant implored this court to admit his affidavit in reply on the basis that procedural irregularities are curable as per the law under *Article 118 clause 2 (e) of the Constitution of Zambia (Amendment) Act No. 2 of 2016.* The Supreme Court has pronounced itself in several cases on the true intent of *Article 118 clause 2 (e)* of the *Constitution.* In **Access Bank (Zambia) Limited vs Group Five/ Zcon Business Park Join Venture (suing as a firm)**[6], the Supreme Court held that;

> *"All we can say is that the Constitution never means to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts"*

I have carefully perused the defendant's affidavit in reply and accompanying skeleton arguments, and do note that the main argument by the defendant in a bid to coax this court into allowing its affidavit in reply is that everything deposed to in the defendant's affidavit in reply was as a result of the pandoras box opened by the plaintiff in submitting that the certificate was fraudulently procured and that the fraud was only discovered in 2014. In addition, the defendant argued that by the plaintiffs' exhibition of documents "CS 1-

8" in its affidavit in opposition to the defendant's affidavit in support was not in the contemplation of the defendant.

The question then is whether the argument by the defendant illustrates that issues were raised by the plaintiff in their affidavit in opposition that the defendant could not have reasonably anticipated at the time he settled his affidavit in support. To answer this question, I have perused the plaintiffs' amended originating process, which the defendant had sight of as per the averments under paragraphs 5, 6 and 7 of his affidavit in support of his application. The said originating process contain allegations of fraud. The statement of claim goes further by giving detailed particulars of the alleged fraud. The defendant's application to raise a preliminary issue is premised on the plaintiffs' originating process, and as such the defendant, when settling his affidavit in support of the application, ought to have anticipated that the plaintiffs' allegations of fraud may arise in their affidavit in opposition, and that the plaintiffs' were likely to exhibit documents that support their allegation. The issues raised in the plaintiffs' affidavit are those that the defendant could have reasonably anticipated at the time he made his application.

Premised on the above, the plaintiffs' application is allowed and the defendant's affidavit in reply and accompanying arguments are accordingly expunged in their entirety from the court record.

I will now turn to determination of the defendant's application to raise a preliminary issue.

6.0 THE DEFENDANT'S AFFIDAVIT EVIDENCE – PRELIMINARY ISSUE

The affidavit of Lubosi Yeta reveals that; the plaintiff caused to be filed before this court an amended writ and statement of claim on 30th July, 2020. A perusal of the said court process discloses that the plaintiffs' cause of action arose sometime in 1994, seeking to challenge

certificates of title for stands 8153 and 8154 issued in 1994. The action has been brought to court over 20 years later from when the titles were issued. This action is premised on an action for the recovery of land as such the question being asked of this court can be determined without a full trial. This action is an abuse of court process for being statute barred. Failure to dismiss this action will cause the defendant great prejudice as the documents in support are long lost, and key witnesses have died, and moved away.

6.1 THE DEFENDANT'S SUPPORTING EVIDENCE – PRELIMINARY ISSUE

The application is further supported by a list of authorities and skeleton arguments wherein counsel argued that *Order 14A* of the *Rules* of the *Supreme Court* clothes this court with the authority to grant the application sought. He placed reliance on the case of **United Communications Limited vs Vodacom International Holdings**[7]. That *Section 4* of the *Statues* of *Limitations Act* of *1939* prevents the recovery of land after the expiration of 12 years from the date on which the cause of action accrued to him. He referred this court to the cases of **Dominic Mulaisho vs The Attorney General**[7], and **Ronex Properties Limited vs John Laing Construction Limited & Others**[8] to buttress his argument.

Counsel argued that the assignment and certificate of title exhibited in the defendant's affidavit as LY 1 -2 were executed on 15th June, 1994 by the 1st plaintiff's deceased father over 26 years ago. That it is untenable at law for the plaintiffs to seek the cancellation of certificates of title issued over 26 years ago. Counsel referred this court to the case of **Njolomole Mtonga (sued as Administrator of the estate of the late Gabriel Siwonamutenje Kapuma Mtonga vs The Attorney General & Daniel Mwale**[9] to support his argument, and argued that although the cited case is on contempt proceedings, its origin was on whether a litigant can bring an action touching on land after the period of 12 years

has elapsed. Counsel prayed that this court dismisses this action for being statute barred and hence an abuse of court process.

7.0 THE PLAINTIFFS' AFFIDAVIT EVIDENCE – PRELIMINARY ISSUE

The 1st plaintiff filed an affidavit in opposition on 2nd December, 2020, wherein the he deposed that he indeed filed an amended writ of summons and statement of claim wherein it is stated that both stands 8153 and 8154 were fraudulently transferred to the defendant without the plaintiffs' consent. At the time of the amendment, the plaintiffs did not mention, in any paragraph, that the cause of action arose in June 1994 but did claim for the rentals from June 1994. That the plaintiffs came to know that the properties had been transferred from the 2nd plaintiff to the defendant in 2014 when the defendant called for a meeting, and on 6th January, 2020 when the 1st plaintiff was served with a notice of eviction.

He represents the estate of the late Rev David Kosamu Simfukwe who died intestate in 2011. At the time of his father's demise, the 1st plaintiff was not aware of the fraudulent transfer of the properties in question to the defendants. The cause of action did not arise in 1994 but in 2014 when the notice of transfer was given to the plaintiffs, or in/or around 2011, the time of the intestate's demise, or 2020 when the notice of eviction was issued. The 1st plaintiff seeks to challenge the fraudulent transfer of his father's estate to the defendant and that fraud vitiates title. Though it appears that the process has been brought 26 years later, he only came to know of the fraud when the notice of the said change was communicated in December 2014, or in 2020 when the notice of eviction was issued. The action is premised on the action for recovery of land which he verily believes, as advised by his counsel, falls within the permissible exceptions to the *Statute of Limitations.*

The trial of this action will help establish how the defendant perpetrated the fraud against the intestate's estate. That is desirable that this action

be decided by a full trial so that it can be shown how the defendant used force, misrepresentation, deceit and/or fraud to disinherit the plaintiffs. That failure by the defendant to find witnesses or documents to defend its case cannot be used as a tool of injustice against the plaintiffs. That the certificates of title were in the names of the 2nd plaintiff, and the defendant has admitted to changing the name of the title holder into its name, without the plaintiff's prior consent. That this is not a proper case that can be summarily determined as the plaintiffs are alleging fraud.

7.1 THE PLAINTIFFS' SUPPORTING EVIDENCE – PRELIMINARY ISSUE

The plaintiffs filed their skeleton arguments wherein counsel argued that the plaintiffs' action is based on fraud, mistake, misrepresentation, duress and/or deceit and that by *section 26* of the *Statute of Limitations Act,* the period of limitation does not begin to run until the plaintiff has discovered the fraud, or the mistake. That paragraphs 10 and 12 of the plaintiffs' statement of claim clearly demonstrate the particulars of fraud being relied on by the plaintiffs, as per the requirement of *Order 18 Rule 8 Sub-rule 16* of the *Rules* of the *Supreme Court.*

That fraud, misrepresentation and mistake vitiates the period of limitation provided the party did not know of the said vitiating factors. The plaintiffs have demonstrated in their affidavit in opposition, particularly paragraphs 5, 7,8, 9 and 10 that the fraudulent transfers of the properties in question were concealed by the Board of the defendant until 2014, which period is not only within the statutory limitation period of 12 years as per *section 4 subsection 3* of the *Limitation Act* of *1939* but is also covered in the exceptions under *section 26* of the same *Act.* Counsel referred this court to the case of **Zimba Jane Ndelemani Musanya vs Musanya Henry Chola (Co-Administrator of Newton Bwalya Musanya**[10] in support of his argument that time is measured from the date of accrual of a right of

action. Counsel argued that the *Statute of Limitations* is no defence and does not apply to proceedings of this nature. That the plaintiffs have established that they only came to know about the fraudulent transfer of the property in 2014 in a meeting called by the defendant, minutes of which have been exhibited under "CS1-2" of the plaintiffs' affidavit in opposition. It was at the said meeting that the plaintiffs discovered that the properties in question had been transferred without consideration, consent, licence and execution of any assignment.

Counsel argued further that the holding in the **Dominic Mulaisho** and **Ronex Properties** cases are distinguishable from this case as the plaintiffs herein have satisfied the ingredients of not only *sections 4 subsection 3* but those of *section 26* of the *Limitations Act* which offers an exception to the general rule. That the plaintiffs came to know of the concealed fraud in 2014, and in 2020 initiated this action. The time frame is well within the statute of limitation and/or the exception to it. Counsel argued that dismissal of a matter must be resorted to sparingly as it deprives a party of his or her right to trial and also denies a party the opportunity to remedy the procedural irregularities. Further that dismissal of an action should be limited to plain and obvious cases where there is no point in having a trial. Fraud, mistake, duress and/or misrepresentation vitiates the limitation period, and that the plaintiffs have clearly demonstrated that the acquisition of the properties in issue was done fraudulently without their consent and/or licence.

Counsel argued further that the defendant has filed a defence pursuant to *Order 14A Rules* of the *Rules* of the *Supreme Court* and/or properly guided by some decision of the Supreme Court. That the requirement for a notice of intention to defend is similar to the requirement under *Order 11 Rule 1* of the *High Court Rules*, provided should the defendant wish to enter conditional appearance, the rules obliges him or her to apply within 14 days to set aside the writ. That the defendant has filed

so much evidence in court that it amounts to a waiver of any irregularity, if any. Counsel argued that steps taken with the knowledge of an irregularity are taken with a view to defending the case on the merit. Counsel referred this court to the cases of **Boyle vs Sacker**[11] and **Fry vs Moore**[12] to buttress his argument. He prayed that the defendant's application be dismissed with costs.

8.0 THE HEARING – PRELIMINARY ISSUE

By an order for directions dated 21st July, 2021, this court dispensed with the attendance of the parties for the hearing of this application, and gave dates within which the defendant could oppose the application and within which the plaintiffs could respond.

9.0 DECISION OF THE COURT – PRELIMINARY ISSUE

I am indebted to counsel for the submissions and arguments which I have carefully considered.

The issue raised by this application, and for this court's consideration, is whether the plaintiffs' action was commenced outside the statutory period stipulated by law for recovery of land. The defendant argues that by *section 4 subsection 3* of the *Statute of Limitations Act* of *1939*, the plaintiffs are barred from bringing an action for recovery of land for which the defendant was issued with a certificate of title over 26 years ago. The *section* provides as follows;

> *"No action shall be brought by any other person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."*

The plaintiffs' argument in rebuttal is that their action is based on allegations of fraud, mistake, misrepresentation and duress, which factors vitiate the limitation period as per *section 26* of the *Statute of Limitations Act of 1939.*

It is indeed trite law, as argued by counsel for the defendant, that a person is barred from the recovery of land after a period of 12 years has elapsed from the date the cause of action first accrued. The Court in the case of **Brenda Muzyamba vs Martha Muzyamba Sinabbomba and 21 others**[13] observed that the rational for the *Statute of Limitations* is to prevent the oppression of the public by stale claims, to protect settled interests from being disturbed and to bring certainty and finality to disputes. As regards when the cause of action arises, the Supreme Court in the **Daniel Mwale** case, observed that:

> *".....time begins to run when there is a person who can sue and another to be sued, when all facts have happened which are material to be proved to entitle the plaintiff succeed..."*

Undoubtedly the time prescribed by the law for the recovery of land is 12 years from the date of the cause of action, as per *section 4 subsection 3* of the *Statute of Limitations Act* of *1939*, reproduced above. However, the said law is not without exceptions as rightly argued by counsel for the plaintiffs. *Section 26* of the *Statute of Limitations Act* provides that;

> *"Where, in the case of any action for which period of limitation is prescribed by the Act either-*
>
> *(a) the action is based upon fraud of the defendant or his agent or of any person through whom he claims or his agent, or*
>
> *(b) the right of action is concealed by the fraud of any such person as aforesaid; or*
>
> *(c) the action is for relief from the consequence of mistake;*
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud or mistake as the case may be, or could with reasonable diligence have discovered it..."*

A perusal of the originating process reveals that one of the reliefs the plaintiffs seek is predicated on an allegation of fraud. Relief (iv), contained in the statement of claim, is for an order to cancel the certificates of title for Stands No. 8153 and 8154 on account of fraud,

mistake, misrepresentation, duress and/or deceit in procedure and assignment. The plaintiffs' go on to give the particulars of the alleged fraud in their statement of claim.

The pleading of an allegation of fraud entitles the plaintiffs to the exception afforded by *section 26* of the *Statute of Limitations Act* as to the computation of time. The time will therefore be calculated from the time the plaintiffs discovered the alleged fraud. The question that begs an answer is when was this alleged fraud discovered by the plaintiffs? The defendant argues that the plaintiffs' originating process reveals that its cause of action arose sometime in the year 1994 and therefore a claim for the recovery of the land ought to have been commenced in that year. The plaintiffs argue that they have not stated, anywhere in their documents, that they discovered the fraud in 1994 but have merely claimed for rentals from as far back as June, 1994. The plaintiffs further argue that the cause of action arose on the happening of one of the following events:

i. in 2011 when the 1st plaintiff's father and a director in the 2nd plaintiff company died; or
ii. in 2014 when the notice of the transfer was given to the parties; or
iii. in 2020 when the notice of eviction was issued.

It is clear from the arguments above that this court has not been amply aided with evidence to assist it in identifying the precise time or period within which the alleged fraud was discovered by the plaintiffs. I must state that it is perplexing that the plaintiffs cannot clearly give a definite time or period when they became aware of the alleged fraud but are basing their arguments on conjecture. It has been left to this court to decipher, from the evidence and arguments before it, the time or period within which the plaintiffs could be said to have reasonably been made aware of the alleged fraud. An obligation has been placed on the court

to further examine the evidence and arguments on a balance of probabilities.

I will start by addressing the defendant's arguments that the cause of action can be discerned from the originating process. Counsel for the defendant argued that the mere fact that the plaintiffs are claiming rentals from as far back as June, 1994, it follows then that that is the time of the cause of action. This reasoning presupposes that if the 2nd plaintiff believes it had legal ownership of the properties in question and the defendant was in occupancy merely as a tenant, the defendant should then having been remitting rent to the 2nd plaintiff. Failure by the defendant to remit rent would give rise to a cause of action from the date of default, which the plaintiffs allege, by their claim, is June, 1994.

The concomitant result of failure to pay rent would give rise to a cause of action for rental arrears. It would not in my view give rise to a cause of action to the recovery of land, or ownership of the same. Simply put, it cannot be inferred from a claim of rentals that a cause of action for ownership of the land in question had arisen. The two are separate claims.

That being said however, pertaining to tangible evidence before this court, a closer scrutiny of the documents on record, particularly the defendant's affidavit in support of the application, reveals that the assignment in the alleged fraudulent conveyancing of the subject pieces of land was executed on behalf of the 2nd plaintiff by the demised Rev. D.K Simfukwe in his capacity as director in the 2nd plaintiff company. Whether this was done by way of the alleged duress or not, it clearly brought the intention of the defendant to have the property registered in its names to the attention of the 2nd plaintiff, who could have commenced an action against the defendant at that time. Paragraph 10 of the plaintiffs' statement of claim provides as follows;

> *"The plaintiff will aver at trial that the intention was altered by a group of youths sent by the defendant which youths*

threatened violence and in fact used actual violence on the founding director in order to force him to release the certificates of title." [Underling for Court's emphasis]

Under the particulars of duress, the plaintiffs allege under (iv) that;

> *"The threat of wanting to kill him and laying hands on him to inflict pain and apprehension of fear on him by the use of violence by the youths sent by the defendant achieved its objective to get hold of the certificate of title by use of force and violence and the plaintiffs have suffered loss and harm."* [underling for court's emphasis]

Going by the observation of the Supreme Court in the **Daniel Mwale** case, a cause of action arose at this point as there was a person that could sue, and one that could be sued. While the plaintiffs' reproduced averments do not stipulate the time within which the alleged duress occurred, it is clear that the same happened before the demise of Reverend Simfukwe and before the issuance of the certificates of title, that is sometime before 15th June, 1994. This evidence clearly supports the defendant's argument that the cause of action arose on or before 15th June, 1994, as the 2nd plaintiff could have commenced an action as the cause of action had arisen at that time.

Coming to the plaintiffs' argument that the cause of action arose in one of the years speculated by them, the first being the year 2011 in which the director in the 2nd plaintiff's company, Reverend Simfukwe died. Not much evidence has been led to support the argument that the cause of action arose after the demise of the said reverend, and hence I will not belabour to extensively opine on the same, save to point out that the 2nd plaintiff is a person at law and acts through a board of directors. There was nothing preventing the board from commencing an action on its behalf, the moment the demised reverend was coerced into surrendering the certificates of title to the defendant. It would appear though that by virtue of the 1st plaintiff having been appointed as a

personal representative of his late father's estate, he wants to assume the said intestate's directorial duties in the 2nd plaintiff company, which is untenable at law.

As regards the argument that the cause of action arose in 2014, on the receipt by the plaintiffs of a notice of transfer, I have carefully perused the minutes exhibited as "CS 1-2" in the 1st plaintiff's affidavit in opposition to this application, which I have reproduced verbatim hereunder:

> *"On Friday 05th December, 2014, the committrr met Br Chansa Simfukwe and his relative Sr Beatrice Daima Mwambazi who were invited to meet the above committee that was tasked by the Official Board to establish facts about the house where Br Chansa and family of the late Rev. D.K Simfukwe are currently leaving.*
>
> *When asked about what Br. Chansa Knew about the house, Br. Chansa started by passionately thanking the church leadership for according him and other family members an opportunity to have an audience with them. He then gave history of how his young brother Mr Philip Simfukwe wrote a letter several years ago appealing to the Official Board of that time requesting for consideration to be given the house as a token of appreciation for his father's roll in establishing AMEC Mechanical Institute and Ebenezer Secondary School. The Official Board at that time did not grant the request but instead decided that the house be made available to Rev. Simfukwe and his family each time they were visiting Zambia from the U.S.A where they were leaving.*
>
> *In this regard, it was resolved by the Official Board that sat that time that Br Chansa Simfukwe be relocated from Mission Flats where he was renting one of the Mission Flats to go and take care of the house at AMEC Mechanical and Training Institute. By then Rev. D. K. Simfukwe was still alive and was leaving in USA. The meeting wanted to find out from Br. Chansa whether himself or*

any other family members of Rev. Simfukwe had any claim against the house. In response Br. Chansa informed the meeting that himself nor any member of Rev. Simfukwe's family had no claim of any kind against the house.

Sr. Beatrice Daima Mwambazi, one of the late Rev. D.K Simfukwe's grand child and speaking on behalf of other members of the larger family also informed the meeting that their desire was an appeal to the current board to consider giving the family the house as way of appreciating what Rev, Simfukwe did for the church.

The meeting went a step further by calling Mr Philip Simfukwe, a young brother to Br. Chansa Simfukwe who is leaving in Florida U.S.A to find out what claims he had against the house. Mr Philip Simfukwe informed the meeting that he had no claims of any kind but was appealing to the church at large to consider giving out the house to the family members of the late Rev. Simfukwe as a token of appreciation to what his father the late Rev. D.K Simfukwe did for Ebenezer Church..."

It is clear that the minutes do not speak to any transfer of properties, and hence it is difficult for this court to appreciate the argument by counsel for the plaintiffs that the fraud was discovered in 2014 at that meeting. A prudent look at the minutes reveals that the 2nd plaintiff was not in attendance at the said meeting, as only the 1st plaintiff was captured as an attending member. It is unreasoned therefore for counsel for the plaintiffs to argue that it is at that meeting that both plaintiffs came to learn of the alleged fraudulent transfer of the properties when the 2nd plaintiff was not in attendance. The only person who could be said to have discovered anything at the meeting was the person in attendance, that is the 1st plaintiff. It can be inferred that he only came to learn of the same at that meeting, if indeed that was the case, because he is not privy to the dealings of the 2nd plaintiff by virtue

of the 2nd plaintiff being a person at law. The foregoing brings into question the 1st plaintiff's locus standi in this matter, and his capacity to interfere into the dealings, fair or unfair, between the 2nd plaintiff company and the defendant. The alleged fraudulent transfer of the properties is between the 2nd plaintiff and the defendant, and therefore the 1st plaintiff's alleged discovery at the meeting in 2014 cannot be said to have been the time the cause the action, arose.

A further look at the minutes shows that they speak to the fact that the 1st plaintiff outrightly professed not to have any interest in a house that appears to be on the subject land. What is odd however is that even in assuming both plaintiffs uncovered the alleged fraud in 2014, the plaintiffs still did not commence an action against the defendant but waited until the 1st plaintiff was served with an eviction notice in 2020 to commence an action for recovery on the land.

On the balance of probabilities, the evidence when considered in totality suggests to this court that the plaintiffs were aware of the fact that the defendant was the registered owner of the properties in question prior to being served with the notices of 2014 and 2020. I am therefore inclined to hold that the plaintiffs have always known that the properties in question have been in the ownership of the defendant from as far back as 1994.

Further, counsel for the plaintiff argued that *Order 14A* of the *Rules* of the *Supreme Court,* upon which this application has been made, is similar to *Order 11 Rule 1* of the *High Court Rules* which makes provision for the defendant to enter conditional appearance and to apply within 14 days to set aside a writ of summons. That the defendant has filed so much evidence in court that it amounts to a waiver of any irregularity, if any. It is trite law that the provisions of *Order 14A* of the *Rules* of the *Supreme Court* may be invoked where a party wishes to have the entire matter disposed of on a point of law without a full trial, and not when a party wishes to have a writ of summons set aside for

irregularity in which case the filing of a conditional memorandum of appearance without a defence would be appropriate. The foregoing was elaboratively discussed in the case of **African Banking Corporation Zambia vs Mubende Country Lodge Limited**[14]. The defendant's application is not aimed at raising an irregularity and hence the plaintiffs' argument is devoid of merit.

The net result is that the plaintiffs' application to expunge the defendant's affidavit in reply succeeds with costs awarded to the plaintiff. Further, the defendant's application to dismiss this entire action on a point of law equally succeeds with costs awarded to the defendant.

All costs awarded are to be taxed in default of agreement.

Leave to appeal is granted.

Dated the 1st day of April 2022

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
01 APR 2022
R. CHIBBABBUKA, J
P.O. BOX 50067, LUSAKA

Ruth Chibbabbuka

HIGH COURT JUDGE