

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 21/2010

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

VINCENT MULEVU MUSUKUMA

1st APPELLANT

**KAINDU MUKUMBI MULEVU (Suing as Administrators
of the Estate of the late Moses B. Mulevu)**

2ND APPELLANT

AND

MAJOR BAXTER C. CHIBANDA

1ST RESPONDENT

REGISTRAR OF LANDS AND DEEDS

2ND RESPONDENT

ATTORNEY –GENERAL

3RD RESPONDENT

Coram: Mwanamwambwa, Ag. DCJ, Wood, JS and Lisimba, Ag. JS.

On the 8th May, 2014 and 3rd July, 2014

For the Appellant: Mr. M.Z. Mwandenga – Messrs M.Z.

Mwandenga & Company

**For the 1st Respondent: Mr. C.K. Bwalya – Messrs D.H. Kemp &
Company.**

For the 2nd and 3rd Respondents: Ms. M.C. Mulenga – Ag.

**Principal State Advocate-Attorney General's
Chambers.**

JUDGMENT

Wood, JS, delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Mabvuto Adan'avuta Chikumbi Mwanza and others v The Attorney General, Zambia Co-operative Federation Limited and National Housing Authority, Application No. 135 of 1999.**
2. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R.172.**
3. **Sentor Motors Limited v 3 Other Companies, Supreme Court of Zambia, Judgment No. 9 of 1996.**
4. **Dr. J.W. Billingsley v J.A. Mundi (1982) Z.R.11.**
5. **The Minister of Home Affairs, The Attorney General v Lee Habasonda (Suing on his own behalf and on behalf of The Southern African Centre for the Constructive Resolution of Disputes) (2007) Z.R.207.**
6. **Abel Mulenga & 36 others v Mabvuto Adan'avuta Chikumbi, SCZ.No.8 of 2008.**
7. **Khalid Mohamed v The Attorney-General (1982) Z.R. 49.**
8. **Lewanika and Four Others v Chiluba (1998) Z.R.79.**

LEGISLATION REFERRED TO:

1. **The Constitution of Zambia, Chapter 1 of the Laws of Zambia.**
2. **The Supreme Court of Zambia Act, Chapter 25 of the Laws of Zambia.**
3. **Rules of the Supreme Court, Volume 1, 1999 Edition.**
4. **The High Court Act, Chapter 27 of the Laws of Zambia.**
5. **Lands and Deeds Registry Act, Chapter 185, of the Laws of Zambia.**

For convenience we shall refer to the appellant as the plaintiff and to the respondents as the defendants, which is what they were in the court below.

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The main facts leading to this appeal are not in dispute. On 15th May, 2002, the plaintiff issued an amended writ of summons against the three defendants, claiming *inter alia* the following:

- (1) An interim injunction restraining the 1st defendant from evicting the plaintiff from House No. 441a/205 Kasangula Road, Roma until the matter is determined by the court or until further order;
- (2) An order/declaration that the decision to sell House No. 441a/205 Kasangula Road, Roma of which the plaintiff has been a sitting tenant since January, 1993, to the 1st defendant (who is actually a sitting tenant in another Government House namely Plot No. A/96/F737a Vubu Road, Emmasdale, Lusaka) without giving the plaintiff an option to purchase the same is an unreasonable exercise of discretion by the Government rendering the purported sale null and void *ab initio*;
- (3) An order that the purported Title Deeds issued to the 1st defendant if any, be cancelled as they were issued in bad faith and illegally since the defendant apparently was offered the

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said House No. 441a/205 Kasangula Road, Roma after masquerading as the sitting tenant, when in fact he was a sitting tenant in another Government house No. A/96/F737a Vubu Road, Emmasdale, Lusaka;

(4) An order that House No. 441a/205 Kasangula Road, Roma be transferred to the plaintiff in lieu of payment of terminal benefits and in view of the fact that the plaintiff has property rights and accrued rights over the house arising from the High Court Judgment dated the 9th May, 2001 as supported by the inter-partes ruling dated the 18th of July, 1997; and

(5) An order/declaration that by virtue of section 26(3) of the Food Reserve Act, CAP 225 of the Laws of Zambia, the plaintiff has a right to sue for the recovery of the house and that the Government has a statutory obligation under the said Act to honour the liabilities which accrued from the previous owner of the property, Zambia Co-operative Federation Limited.

On 3rd April, 2009, the 1st defendant raised two preliminary issues and these were:

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(1) Whether the challenge by the plaintiff of the sale of House No. 441a/205, Roma, Lusaka by the State to the 1st defendant was competent in view of the decision by the Industrial Relations Court of 22nd December, 2000 between **MABVUTO ADAN'AVUTA CHIKUMBI MWANZA AND OTHERS v THE ATTORNEY GENERAL, ZAMBIA CO-OPERATIVE FEDERATION LIMITED AND NATIONAL HOUSING AUTHORITY**¹ which declared the above sale to be valid and binding;

(2) Whether the court had jurisdiction to adjudicate upon matters that had previously been decided by the Industrial Relations Court or to review decisions of the said court, particularly the decisions of the latter mentioned in issue (1) above and its ruling dated 21st February, 2003.

On 9th April, 2009, the 3rd defendant raised the following preliminary issues:

(1) That the proceedings by the plaintiff were contrary to the provisions of the **Lands and Deeds Registry Act, Chapter**

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185, of the Laws of Zambia and were therefore inappropriately before the court and as such were an abuse of court process;

(2) That the proceedings in the court below were a veiled application by a party to stay execution of a judgment of the Supreme Court in SCZ Judgment No. 92/2003.

The parties argued the preliminary issues on 15th May, 2009 and judgment was delivered on 8th January, 2010. In her judgment, the learned trial Judge recounted the history of this matter, how it was litigated upon in the Industrial Relations Court and the Supreme Court. She then quoted extensively from **Order 14A of the Rules of the Supreme Court, 1999** and also made reference to **Order 33(3) of the Rules of the Supreme Court, 1999**, and then delved into the claim on the basis of the pleadings. The learned trial Judge came to the conclusion that the matter was one that was suitable for determination without a full trial. She ordered that the plaintiff gives up vacant possession of House No. 441a/205 Kasangula Road, Roma, Lusaka and that he should pay *mesne* profits at a rate equivalent to the current open market value per

month from 15th May, 2002, until possession was delivered up in addition to interest and costs.

Dissatisfied with the judgment, the plaintiff filed in four grounds of appeal as follows:

- 1. That the learned trial Judge misdirected herself by failing or neglecting to address the preliminary issue raised by the 1st defendant in his notice of intention to apply for a trial on a preliminary point of law filed in the court below on 3rd April, 2009, and which preliminary issue was opposed.**
- 2. That the learned trial Judge misdirected herself by failing or neglecting to address the preliminary issues raised by the 3rd defendant in his notice to raise preliminary issues filed in the court below on 9th April, 2009 and which preliminary issue was opposed.**
- 3. The learned trial Judge misdirected herself when she dealt (or purportedly dealt) with the substantive matter without**

hearing the substantive matter on the merits in the normal course of a trial.

4. Further or in the alternative, the learned trial Judge erred in law and in fact when she delivered the judgment in favour of the 1st respondent on his counterclaim without the 1st respondent proving his case in the normal course of a trial.

Mr. Mwandenga argued the first two grounds together. He submitted that the learned trial Judge ought to have dealt with the following questions:

- (i) Whether the challenge by the plaintiff of the sale of House No. 441a/205, Roma, Lusaka by the State was competent in view of the decision by the Industrial Relations Court between **MABVUTO ADAN'AVUTA CHIKUMBI MWANZA AND OTHERS v THE ATTORNEY GENERAL, ZAMBIA CO-OPERATIVE FEDERATION LIMITED AND NATIONAL HOUSING AUTHORITY¹**;

- (ii) Whether the High Court had jurisdiction to adjudicate upon matters that had previously been decided by the Industrial Relations Court or to review its decision;
- (iii) That the proceedings by the plaintiff were contrary to the provisions of the **Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia** and were therefore not properly before the Court and as such an abuse of court process; and
- (iv) That the proceedings in the court below were a veiled application by a party to stay execution of the Supreme Court Judgment under cause No. SCZ 92/2003.

He submitted that the above questions were not answered by the learned trial Judge and this was not consistent with the case of **WILSON MASAUSO ZULU v AVONDALE HOUSING PROJECT LIMITED²** in which this court held that:

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

He also submitted that this was not in conformity with the case of **SENTOR MOTORS LIMITED v 3 OTHER COMPANIES**³ in which this 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.”

Mr. Mwandenga further referred us to the case of **DR. J.W. BILLINGSLEY v J.A. MUNDI**⁴ in which we held that:

“Unless the parties have specifically and clearly applied for a consent judgment, which they are at liberty to apply for at any stage of an action, the court should only deal with the particular application before it.”

A perusal of the judgment particularly at page 13 of the record of appeal reveals that the learned trial Judge in fact considered the whole case when she stated that:

“In deciding whether or not the claim sought by the plaintiff ought to be entertained the court carefully considered all the evidence before reaching its decision.”

This, according to Mr. Mwandenga, was an error on the part of the trial court as it should only have done so at the end of the trial

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and not at the stage when the court was asked to determine preliminary issues that had been raised.

In the appellant's last ground of appeal, Mr. Mwandenga submitted that the trial court should not have granted the relief sought by the 1st defendant as pleaded in his counter-claim because he had not proved his claim in any way that he was so entitled to judgment.

Mr. Bwalya on behalf of the 1st respondent quite properly conceded that the learned trial Judge fell into error when she went ahead to deal with the merits of the whole case instead of only addressing the preliminary issues before her. He nevertheless submitted, albeit faintly and understandably without enthusiasm, that this court in the circumstances should invoke its powers under **Section 25 (1) (a) of the Supreme Court of Zambia Act, Chapter 25 of the Laws of Zambia** and place itself in the position of the High Court and determine the matter. He submitted that in any event, this Court has in the past decided on the rights of the parties to a dispute before it.

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Ms. Mulenga on behalf of the 3rd defendant submitted that while she agreed that the learned trial Judge did not deal with the preliminary issues raised before her, she nevertheless supported the 1st defendant's submissions to the effect that this court could rely on **Section 25 (1) (a) of the Supreme Court of Zambia Act**, to determine the preliminary issues raised by the 3rd defendant as well. The relevant part of **Section 25 of the Supreme Court of Zambia Act**, reads as follows:

“25. (1) On the hearing of an appeal in a civil matter, the Court:

(a) Shall have power to confirm, vary, amend, or set aside the judgment appealed from or give such judgment as the case may require.”

We have considered the evidence in the court below and, the judgment appealed against. We have also considered the submissions by Counsel.

In our view, the power under **Section 25 of the Supreme Court Act** is not unlimited. It is predicated on a number of conditions. It is not in each and every case that this power can be exercised. **Section 25 (1) (a) of the Supreme Court of Zambia Act**, itself

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uses the words “as the case may require” which means that certain procedures in relation to the conduct of a matter in the High Court have to be complied with. These include the holding of a trial and the parties being allowed to present their case in full, or an application at chambers being determined after a hearing on the basis of affidavits or otherwise. This was the position we took in **THE MINISTER OF HOME AFFAIRS, THE ATTORNEY GENERAL v LEE HABASONDA (SUING ON HIS OWN BEHALF AND ON BEHALF OF THE SOUTHERN AFRICAN CENTRE FOR THE CONSTRUCTIVE RESOLUTION OF DISPUTES)**⁵, when we held that:

“On a consideration of the pleadings on record and the issues raised, it is our view that this is not a case where we should rewrite the judgment on behalf of the trial Judge.”

While it is accepted that **Section 25 (1) (a) of the Supreme Court of Zambia Act**, can be used as a basis for this court to interfere with a High Court judgment, it should be done sparingly and for good cause. The case of the **MINISTER OF HOME AFFAIRS, THE ATTORNEY GENERAL v LEE HABASONDA**

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(SUING ON HIS OWN BEHALF AND ON BEHALF OF THE SOUTHERN AFRICAN CENTRE FOR THE CONSTRUCTIVE RESOLUTION OF DISPUTES)⁵, is a good example of the approach to be taken by this Court when a trial Judge does not discuss specific issues raised by the parties. In that case we emphasised that:

“... every judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions, if made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities, if any, to the facts. Finally, a judgment must show the conclusion. A judgment which only contains a verbatim reproduction and recitals is no judgment.”

It can be seen from the above judgment that **Section 25 (1) (a) of the Supreme Court of Zambia Act**, in so far as rewriting judgments is concerned is not to be invoked lightly, particularly in cases where the basic minimum standards relating to the conduct of a matter have not been complied with. Mr. Bwalya and Ms. Mulenga argued that this section gives us the power to rewrite a judgment of the High Court. We do not agree with that argument. In this case, the learned trial Judge did not render a ruling on the

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preliminary issues raised, therefore there is no judgment to rewrite in that respect. Mr. Bwalya and Ms. Mulenga are in essence asking

us to render the ruling on behalf of the learned trial Judge, which we cannot do.

The authorities cited by Mr. Mwandenga in support of this appeal cannot be faulted. He has quite correctly shown that according to **Article 18 (9) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia**, a party to proceedings shall be given a fair hearing within a reasonable time. This is also found in **Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia** which places a responsibility on the High Court to completely and finally determine all matters in controversy between the parties. In the case of **WILSON MASAUSO ZULU v AVONDALE HOUSING PROJECT LIMITED**² we 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.”

This also explains why in the case of **SENTOR MOTORS LIMITED v 3 OTHER COMPANIES**³ we used words such as **“It is**

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

The issues that were raised by the defendants in the form of preliminary issues were not determined in finality. We therefore agree with Mr. Mwandenga that the trial court should only have dealt with the particular application before it and that it should not have dealt with the merits of the whole case. This amounted to a final determination of all the issues which at that particular stage, was premature, incompetent and accordingly a complete nullity.

It is quite clear from Mr. Bwalya's submission that regardless of the fact that the 1st and 3rd defendants' preliminary issues were never determined, the judgment should stand because the challenge of the decision of the Industrial Relations Court before the High Court was incompetent and that the High Court had no jurisdiction to adjudicate upon matters previously decided by the Industrial Relations Court. He further submitted that the decision of this court in the case of **ABEL MULENGA & 36 OTHERS v MABVUTO ADAN'AVUTA CHIKUMBI AND ATTORNEY GENERAL**⁶

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fortified his argument that in any event, judgment was properly entered in the court below. These are arguments, in our view, which

should have been addressed by the learned trial Judge in her ruling and not before this Court on appeal.

We also agree with Mr. Mwandenga's submission that the 1st defendant should not have had judgment in his favour in respect of the counter-claim, as he did not adduce evidence to prove his claim in the normal course of a trial. In the case of **KHALID MOHAMED v THE ATTORNEY-GENERAL**⁷ we held that:

“A plaintiff cannot automatically succeed whenever a defence has failed, he must prove his case.”

Further in the case of **LEWANIKA AND FOUR OTHERS v CHILUBA**⁸ at page 80, we stated as follows:

“...for the petitioners to succeed, it is not enough to say that the respondents failed to provide a defence or call witnesses, but that the evidence adduced establishes the issues raised to a fairly high degree of convincing clarity.....”

In this case, the 1st defendant did not adduce any evidence in support of his counter-claim. The evidence before the learned trial

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Judge was only in respect of the preliminary issues raised, which the learned trial Judge did not address. To succeed, the claims made should be supported by evidence.

For the foregoing reasons the appeal is allowed. The judgment of the court below is set aside, and the case remitted to the High Court before the same Judge to take its normal course. We order that costs will abide the outcome in the court below. In passing we express the hope that the parties will proceed with this matter with due dispatch as it was commenced in 2002.

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M.S.MWANAMWAMBWA
ACTING DEPUTY CHIEF JUSTICE

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A.M.WOOD
SUPREME COURT JUDGE

.....
M.LISIMBA
ACTING SUPREME COURT JUDGE