

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

APPEAL NO. 163/2009
SCZ/8/137/2009

BETWEEN:

CHARLES PENYANI ZULU

APPELLANT

AND

FRANK BANDA

RESPONDENT

CORAM: Mwanamwambwa, Musonda, J.J.S, Lengalenga, AG.J.S.
On the 7th of February, 2013 and 4th July 2014

For the Appellant: Mr E.B Mwansa, of EBM Chambers, representing Mr Sakwiba Sikota of Messrs Central Chambers
For the Respondent: Mr M. Chitundu, of Chitundu and Company.

JUDGMENT

Mwanamwambwa, J.S., delivered the Judgment of the Court.

Cases referred to:

1. Stanley Mwambazi V. Morrester Farms Limited (1997) ZR 108.
2. Zambia Revenue Authority V. Jayesh Shah (2001) ZR 60.
3. Robert Chimambo and Another V. Commissioner of Lands (2008) ZR, Volume 1, P.1
4. Wilson Masauso Zulu V. Avondale Housing Project (1982) ZR 172.

Legislation referred to:

1. The High Court Rules, Cap 27 of the Laws of Zambia, Order 35 rules 2, 4, 5 and Order 5 rules 15 and 16.
2. The Rules of the Supreme Court, 1999, Order 35/2/5.

When we heard this Appeal, Hon. Mr Justice P. Musonda, was part of the Court. He has since resigned. Therefore, this Judgment is by the majority.

This is an appeal against two orders of the High Court. In the first order, dated the 31st of January, 2006, the learned High Court Judge struck off this matter from the active cause list. In the second order, dated the 29th of May, 2009, the learned High Court Judge refused to restore the matter to the active cause list.

The brief facts of the matter are the Appellant was allocated Lot 13482/M in chipata. The Appellant holds this land on title. The Respondent was allocated Lot 15375/M also in Chipata. The evidence on record shows that the Respondent was allocated this land by the Chipata Municipal Council. However, when the Respondent tried to process his title deed, it was discovered that Lot 13482/M belonging to the Appellant has encroached on his land or vice versa. On the other hand, the Appellant claims that his land was allocated to him first and hence the Respondent is the one who has encroached on his land.

On the 28th of September, 2005, the Appellant brought this action in the High Court by Originating Summons . He filed an affidavit in support of the Originating Summons in which he alleged that the Respondent had encroached on his land. The Respondent filed an affidavit in opposition in which he alleged

that the Appellant obtained Lot 13482/M illegally and that the Appellant had encroached on his piece of land.

When the matter came up for hearing before High Court Judge Nyangulu in 2005, it did not take off as the Judge was reportedly attending a seminar. No date for the next hearing was given. The matter came up again in January, 2006. On that date, the Appellant did not attend court. There was no evidence that the Appellant was aware of the hearing date. Judge Nyangulu struck off the matter and cancelled the Appellant's certificate of title for Lot 13482/M. The Appellant's certificate of title was cancelled based on paragraph 23 in the Respondent's affidavit in opposition to the Originating Summons. This paragraph stated as follows:

"That it is therefore my contention that the Plaintiff's title issued in respect of Lot No. 13482/M be cancelled by this honourable court as recommended by the council and directed by the Ministry of Lands."

On the 26th of May, 2009, the Appellant applied to have the order granted by Judge Nyangulu set aside and have the matter restored. However, Judge Nyangulu had retired by this time. So the matter came up before Judge Hamaundu, who refused to

restore the matter. Therefore, the Appellant appealed to this Court on the following grounds:

Ground one:

The trial Court erred in both law and fact to order cancellation of the Appellants certificate of title in respect of Lot No. 13482/M, Chipata without according the Appellant an opportunity to be heard and when there was no such application made to the Court.

Ground two:

The trial Court misdirected itself in law when it refused to restore the matter to the active cause so that the same could be determined on its merits.

Ground three:

The trial Court erred in both law and fact when it failed to determine all matters in controversy.

In Ground one, counsel submitted that the learned trial Judge erred in law and in fact when he ordered cancellation of the Appellant's certificate of title without according him an opportunity to be heard. That there was no notice of hearing to show that the matter was coming up in January, 2006, hence the Appellant's non-attendance. That the trial Judge should have ended at striking out the matter in accordance with **Order 35 rule 4 of the High Court Rules, Cap 27 of the Laws of Zambia.**

That in any case, Order 35, rule 4 requires the court to satisfy

itself that that the Plaintiff in the matter had notice of the hearing.

Counsel added that it is the practice of courts dealing with bonafide interlocutory applications to allow triable issues to come to trial. He cited the cases of **Stanley Mwambazi V. Morrester Farms Limited** ⁽¹⁾ and **Zambia Revenue Authority V. Jayesh Shah** ⁽²⁾ to support their argument.

On behalf of the Respondent, counsel submitted on this ground that paragraph 23 of the Respondent's affidavit in opposition to the originating summons (page 23 of the Record of Appeal) amounts to a counter claim and that the court can make a pronouncement on the same. He argued that the contention by the Appellant that the court had no power to order cancellation of the certificate of title was erroneous. He cited the case of **Robert Chimambo and Another V. Commissioner of Lands** ⁽³⁾ to support his argument.

Counsel argued that having shown that there was a counter-claim, the court can proceed to hear the matter as long as there is proof of service. He contended that the Appellant had

notice of hearing. That it is the duty of the owner of a case to follow up dates.

In ground two, counsel for the Appellant argued that in the interest of justice, the court below ought to have allowed the matter to be restored to the active cause list so that the Appellant's application could be dealt with on its merit. They stated that Judge Hamaundu could have restored the matter as he assumed the same powers as those of Judge Nyangulu. That the Appellant did not delay in making the application for restoration. Counsel added that the Order granted to the Respondent was, for all intents and purposes, a default judgment which was liable to be set aside in accordance with Order 35 Rule 5, Rules of the High Court, Cap 27.

On behalf of the Respondent, counsel submitted that Order 35 Rule 5 is not mandatory in that it uses the word 'may'. That it gives the Judge discretion on whether or not to set aside any orders or judgment made under Order 35. Counsel cited **Order 35/2/5 of the RSC, 1999** and submitted that the proper course is for the defaulting party to apply to the Judge who heard the case to set aside the Judgment and restore the action to the list.

He argued that the application should have been made to Judge Nyangulu and not Judge Hamaundu.

In ground three, counsel for the Appellant submitted that in deciding on the alleged counter-claim of cancelling the certificate of title, the court failed to adjudicate upon all issues in controversy in the matter. They contended that the trial court has a duty to adjudicate upon all issues in controversy in the matter. They cited the case of **Wilson Masauso Zulu V. Avondale Housing Project**⁽⁴⁾ to support their argument.

In response on ground three, counsel for the Respondent submitted that Order 35 rule 2 allows a Judge to proceed in the absence of the Defendant to hear a counter claim. He argued that the issues in controversy were presented by both parties in their affidavits.

For convenience, we shall deal with all the three grounds of appeal together.

We have looked at the evidence on record and considered the submissions filed by both parties. It is our view that the only issue to be resolved in this appeal is whether, in the

circumstances of this case, the Court below was in order to strike out the matter and order cancellation of the certificate of title.

Order 35, Rule 2 of the High Court Rules, provides for the striking out of course if the Plaintiff fails to attend Court without a good reason. It provides as follows:-

“If the plaintiff does not appear, the Court shall, unless it sees good reason to the contrary, strike out the cause (except as to any counter-claim by the defendant), and make such order as to costs, in favour of any defendant appearing, as seems just:

Provided that, if the defendant shall admit the cause of action to the full amount claimed, the Court may, if it thinks fit, give judgment as if the plaintiff had appeared.”

Order 35 rule 4 of the High Court Rules, Cap 27 of the Laws of Zambia provides that:-

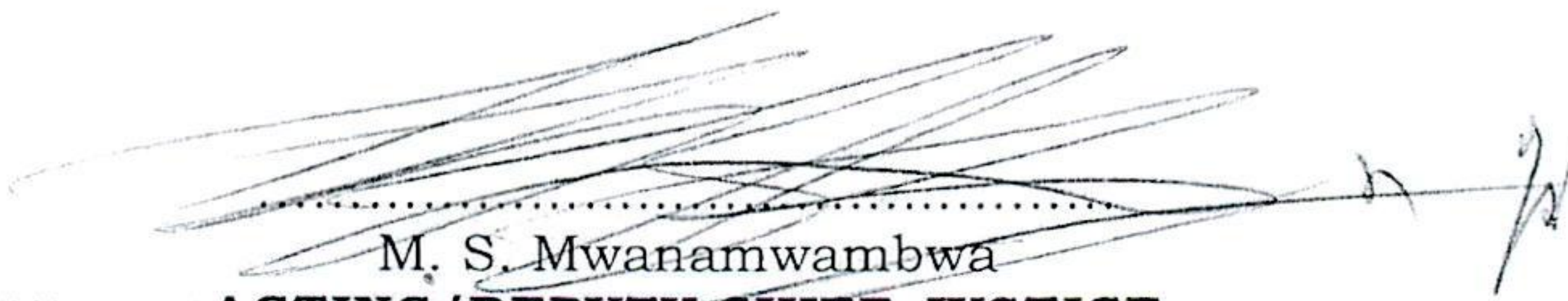
“Where the defendant to a cause which has been struck out under rule 2 has a counter-claim, the Court may, on due proof of service on the plaintiff of notice thereof, proceed to hear the counter-claim and give judgment on the evidence adduced by the defendant, or may postpone the hearing of the counter-claim and direct notice of such postponement to be given to the plaintiff.”


Order 35, Rules 2 and 4 can only be invoked if there is proof that the that the Plaintiff is aware of the hearing date and he fails to attend Court, without an explanation. In this matter, there is

no proof that the Appellant was served with the notice of hearing for the hearing date in January 2006.

In the absence of proof that the Appellant was aware of the new hearing date, it was a misdirection on the part of the learned trial Judge to strike out the Appellant's claim and then cancel his certificate of Title to the property in dispute.

We find merit in the appeal and we allow it. The trial Judge's orders to Strike out the Appellant's claim and cancelling his certificate of Title are hereby set aside. We hereby order restoration of the Certificate of Title in question. The matter is sent back to the High Court, for retrial, on merit. We award costs to the Appellant, to be agreed taxed, in default of agreement.


 M. S. Mwanamwambwa
ACTING/DEPUTY CHIEF JUSTICE


 F. M. Lengalenga
AG/SUPREME COURT JUDGE

.....(Retired).....
 P. Musonda
SUPREME COURT JUDGE