

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



2017/HP/1767

**IN THE MATTER OF: SUBDIVISION NUMBER A OF SUBDIVISION Q1 OF  
FARM NO 1938 IN THE LUSAKA PROVINCE OF THE  
REPUBLIC OF ZAMBIA**

AND

**IN THE MATTER OF: AN APPLICATION UNDER ORDER 113 OF THE  
RULES OF THE SUPREME COURT, 1999 EDITION**

BETWEEN:

**ZHANG LING LING****PLAINTIFF**

AND

**THE OCCUPIERS OF SUBDIVISION NUMBER  
A OF SUBDIVISION Q1 OF FARM NO 1938  
SITUATE IN THE LUSAKA PROVINCE OF THE  
REPUBLIC OF ZAMBIA**

**DEFENDANTS**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 2<sup>nd</sup> DAY OF MARCH,  
2018**

*For the Plaintiff : Mrs D.N Chibombe, Mumba Malila and Partners*

*For the Defendants: Mr K.M. Simbao with Ms Nambao, Mulungushi Chambers*

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## **J U D G M E N T**

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CASES REFERRED TO:

1. *Liamond Chooka V Ivor Chilufya SCZ No 2 of 2002*
2. *Musa Ahmed Yusuf V Mahtani Group of Companies 2011/HPC/0081*

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court, 1999 edition*
2. *The Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia*



The Plaintiff commenced this action on 11<sup>th</sup> October, 2017 by way of Originating Summons claiming;

- i. A declaratory order that the Plaintiff Zhang Ling Ling is the legitimate and bonafide owner of the property known as subdivision number A of Subdivision number Q1 of Farm number 1938, Lusaka.*
- ii. An order of vacant possession of the property known as subdivision number A of Subdivision number Q1 of Farm number 1938, Lusaka.*
- iii. An order of interim injunction restraining the occupiers whether by themselves, agents, servants or whomsoever from any operations on the premises, construction or from disturbing the peaceful and quiet enjoyment of the demised premises by the Plaintiff until determination of the matter or until further order of the court.*
- iv. Further or other relief that the court may deem fit.*
- v. Costs.*

The affidavit filed in support of the Originating Summons states that the Plaintiff, a Chinese national resident in Zambia, is the legal and registered owner of Subdivision Number A of Subdivision Number Q1 of Farm Number 1938, Lusaka, as shown on the permanent residency permit and the certificate of title exhibited as 'ZL1' and 'ZL2' to the affidavit. That she acquired Subdivision Number A of Subdivision Number Q1 of Farm Number 1938, Lusaka on 27<sup>th</sup> February, 2017 from the personal representative of the estate of the late Lewis R. Kaluba, Mrs Daiffe Nyerongo Kaluba.

It is stated that before the Plaintiff acquired the said property, the Defendants were tenants on the property, conducting various businesses. That on 9<sup>th</sup> November, 2016, the Defendants were given six

months' notice to vacate the premises as exhibited on 'ZLL3', but they refused to vacate. Further that on 3<sup>rd</sup> March, 2017, the Defendants were given another six months written notice to vacate the premises, which was exhibited as 'ZLL4', but they failed again refused to vacate the premises.

It is further deposed in the affidavit that upon the expiry of the six months written notice given to the Defendants to vacate the property, the Plaintiff informed them that she wanted to start developing the property, but the Defendants however still refused to vacate the property. That the Defendants have continued to illegally occupy the Plaintiff's property to her prejudice as they have not been paying rent.

Some of the occupants of the property in issue entered into a consent agreement with the Plaintiff, giving them two months to vacate the said premises. The Plaintiff was also granted an ex-parte order of injunction restraining the Defendants from operating on the premises, as well as disturbing the Plaintiff's quiet enjoyment of the said premises. The affidavit also states that the Plaintiff on 24<sup>th</sup> November, 2017 filed a summons for an order of possession, pursuant to Order 113 Rule 6 of the Rules of the Supreme Court, 1999 against the occupiers of the property, with whom it did not reach a consent settlement.

The affidavit filed in support of the Originating Summons further states that all the occupiers of the property in issue were served the originating process as shown on exhibit 'ZLL1' to the affidavit, and only one of the occupiers had come forward and executed a consent judgment with the Plaintiff, while the rest had continued to ignore the process served upon them. That the Defendants in occupation of the property are occupying it illegally, thereby depriving the Plaintiff of its use.

Aayatin Investments and Badiye Limited being some of the occupiers of the Plaintiff's property that did not reach a consent settlement with the Plaintiff, filed an affidavit in opposition to the summons for possession on 12<sup>th</sup> December, 2017.

In paragraphs 3, 4 and 5 of that affidavit, the deponent, Bashi Ali deposes that he is the Director of Aayatin Investments and Badiye Limited, which companies have been on the property in issue for the last six years, and that in January, 2017, he entered into a lease agreement with the then landlord of the property for a period of five years, as shown on the lease exhibited as 'BA1' to the affidavit on behalf of Aayatin Investments and Badiye Limited.

That with the consensus of the landlady Mrs Kaluba, improvements to the tune of K960, 000.00 were made to the property, as shown in the evaluation report exhibited as 'BA2'. Then in May 2017, the deponent received communication from Messrs Chifumu Banda and Associates on behalf of the Plaintiff that the landlady, Mrs Kaluba, had sold the premises that the two companies were renting, as shown on the letter exhibited as 'BA3'. That his lawyers wrote 'BA4' to Messrs Chifumu Banda and Associates informing them that there was a subsisting lease, and the notice to vacate the said premises was defective in that it did not conform to the provisions of the law. That while the deponent was served the summons for an order of possession, he had never been served the originating process. That the companies occupying the premises had not been made parties to these proceedings.

In the affidavit in reply, the Plaintiff deposes that there is no landlord and tenant relationship between herself and the Defendants, and that she was not privy to the lease agreement that was signed between the Defendants and the previous landlady of the premises. Further that as

legal owner of the property at the time, she did not sanction the evaluation of the property, and that the lease sought to be relied on by the Defendants was not valid, and therefore null and void.

That the certificate of title that she holds for the property is dated 15<sup>th</sup> March, 2017, while the evaluation report was done on 15<sup>th</sup> September, 2017, way after she had obtained title to the property and notice to vacate the said property had been given to all the tenants, including the Defendants. That notice to vacate the property had been acknowledged in paragraph 9 of the affidavit in opposition to the summons for an order of possession of the property.

When the matter came up for hearing on 16<sup>th</sup> January, 2018, Counsel for the Plaintiff applied for an adjournment to enable them file an affidavit in reply to the affidavit in opposition, as their client had been out of the country. On the same day the Defendants were granted an order of injunction restraining the Plaintiff from disconnecting power to the premises that they occupied.

At the hearing on 2<sup>nd</sup> February, 2018, initially only Counsel for the Defendants was before the Court, and leave was granted to proceed to respond to the applications. Counsel for the Plaintiff joined the proceedings some time later. In opposing the application, Counsel for the Defendants stated that there were two applications before the court, the first being for an order of possession, and the second one being applications for injunctions.

It was submitted that the order for possession of the property was misconceived, as the action was commenced by Originating Summons under Order 30 of the High Court Rules, Chapter 27 of the Laws of Zambia. Counsel stated that the proper course of action was to apply by

way of summons for an appointment to hear the summons, and not bring another summons under Order 113 of the Rules of the Supreme Court, 1999 edition, when the Originating Summons issued earlier had not been disposed of. That in fact Order 12 of the High Court Rules, states that no judgment in default can be entered without the leave of the court.

Counsel still in submission stated that the other issue was that there had been abuse of process, as the Plaintiff was aware of the names of the Defendants, but chose not to properly name them in the Originating Summons. That exhibit 'BA3' to the affidavit in opposition filed on 12<sup>th</sup> December, 2017 was a notice to vacate the premises issued to Badir Limited by the Plaintiff through its advocates, Chifumu Banda and Associates. The Plaintiff instead of following up on that notice mischievously went to her current advocates, who decided to sue without properly naming the Defendants in this matter. This it was stated, was abuse of court process which is proscribed in Order 18 Rule 19 of the Supreme Court, 1999 edition.

Further that Order 19 of the said Rules of the Supreme Court, 1999 edition warns Plaintiffs of the difficulty of enforcing judgments where there is misnomer, and the case of **MUSA AHMED YUSUF V MAHTANI GROUP OF COMPANIES 2011/HPC/0081**, was relied on, stating that in that case it was emphasized that where there is a misnomer, the right course of action is to take out summons to amend, so that the parties can be properly described. That while the Plaintiff in paragraph 5 of the affidavit in reply states that she does not know Badir Limited, this was not true, as she gave the said Badir Limited notice to vacate the said premises, thereby recognizing them as tenants.

On the skeleton arguments filed by the Plaintiff, Counsel's submission was that the same were misplaced, and should not be considered, as the action was not properly before the court. That the Plaintiff should first make good the Originating Summons by properly naming the Defendants, and also appointing a date for the granting of leave to enter judgment. As regards the application for injunction that was granted to the Defendants, they submitted that paragraph 6 of the affidavit in opposition had exhibited a consent judgment 'ZLL4', under which the Plaintiff in paragraph 5 agreed to pay the Defendants K150, 000.00 in order for them to give vacant possession of the premises.

That if Badir Limited and Aayatin Investments were given reasonable compensation they would be willing to vacate the premises. Therefore that until such time as there was an agreement, the injunction should remain in force. Counsel further submitted that the application for an order of possession was misconceived as no judgment had been obtained, and it should be dismissed with costs.

In response, Counsel for the Plaintiff stated that they had obtained an injunction against the Defendants. That as regards the main matter, it was stated that it had been commenced pursuant to Order 113 of the Rules of the Supreme Court, 1999 edition, which applies to squatters and those who are not in genuine possession of land. That Rule 3 of the said Order provides for the filing of an affidavit in support of the application, and that the procedure provided in the order is suitable for cases such as this one. The case of **LIAMOND CHOOKA V IVOR CHILUFYA SCZ No 2 of 2002** was relied on.

Counsel further submitted that the Plaintiff in the affidavit in support of the Originating Summons had shown that she is the lawful owner of the property in issue, and had exhibited a certificate of title to that effect.

That the Defendants had no right to be on the property and conduct business there, as there was no relationship of landlord and tenant between the Plaintiff and them. Further that such a relationship if existent conferred rights and obligations on the parties to it. That the Defendants in this matter had no such rights, and they had not exhibited a lease agreement evidencing the relationship of landlord and tenant between them and the Plaintiff.

Further, that Section 4 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia requires the registration of leases in excess of one year, and therefore the lease exhibited to the Defendants affidavit in opposition was null and void. That any rights that the Defendants wished to assert could only be addressed to the previous landlord, with whom they had entered into a tenancy agreement with. Counsel also stated that the notices to vacate the premises that had been issued to the Defendants expired on 30<sup>th</sup> November, 2017, by which date the Defendants should have vacated the premises.

As regards the propriety of the application before the court, Counsel for the Plaintiff submitted that the argument that there was no judgment was misconceived as Order 113 of the Rules of the Supreme Court, 1999 edition does not state that for one to seek such relief, there must be a judgment. On the submission that the Defendants had not been named, it was stated that there was no dispute that the Defendants were in possession of the Plaintiff's property. That the Plaintiff had tried to obtain further and better particulars from the Defendants, but this was resisted, and that there was no relationship between the Plaintiff and the Defendants, and the application should be granted. Counsel asked the court to grant leave to the Plaintiff to amend if it agreed with the submissions by the Defendant.



In reply, Counsel for the Defendants stated that there was nothing to amend. That Order 113 of the Rules of the Supreme Court, 1999 edition is an originating process, and they could not be two originating processes in one action. The assertion that the Defendants were squatters was denied, stating that the Plaintiff had recognised them, hence the reason why she gave them notice to vacate the said premises. It was further submitted that the Plaintiff had used Order 113 as the notice to vacate did not comply with the law, and that in abuse of the court process, Order 113 was abandoned. Further that when the Plaintiff bought the property, the Defendants were already in occupation of the premises, and therefore she should have been put on enquiry as to the developments made at the previous landlord's consent. That while the Defendants may not have remedies under the lease, they had remedies as licence's who occupied the premises with the express permission of the landlady, and they had a right to be heard.

I have considered the matter. I will deal with the issue of the process used to commence this action. The Originating Summons filed on 11<sup>th</sup> October, 2017 shows that the process was commenced pursuant to Order 113 of the Rules of the Supreme Court, 1999 edition. It was not commenced pursuant to Order 30 of the High Court Rules, Chapter 27 of the Laws of Zambia, as argued by Counsel for the Defendants, and therefore, there are no two processes that were used to commence this action.

This brings me to the merits of the action. Order 113 of the Rules of the Supreme Court, 1999 edition states that;

***“Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy)***

***who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.”***

The affidavit in support of the Originating Summons states that the Plaintiff bought the property from Mrs Kaluba, who was the previous landlady of the premises, and that upon purchasing the same, the Plaintiff gave notice to all the tenants notice to vacate the property twice, which was ignored. The Defendants did not file an affidavit in opposition to the Originating Summons but to the affidavit in support of the order for injunction. This affidavit in opposition shows that the Defendants had signed a lease agreement with the previous landlady, Mrs Kaluba, to rent the property for five years, which was exhibited as 'BA1' to the said affidavit.

This document was argued by the Plaintiff as being null and void as it was not registered in line with the provisions of Section 4(1) of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia. The said lease agreement states that the Defendants were tenants of the property from January, 2017 to January, 2022, at monthly rentals of K3000.00. Exhibit 'ZLL2' to the affidavit in support of the Originating Summons being the certificate of title that the Plaintiff was issued in respect of the property shows that she acquired the same on 15<sup>th</sup> March, 2017. This was after the previous landlady had executed the five year lease with the Defendants.

While it is true that the lease that the Defendants signed with the previous landlady Mrs Kaluba, is null and void, as it was not registered at the Lands and Deeds registry in line with Section 4(1) of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia, the question

is whether the Defendants have a right to be on the premises now that it is owned by the Plaintiff? As rightly submitted by Counsel for the Plaintiff, a tenancy or lease agreement is a contract that confers rights and obligations on the parties to it. Therefore when Mrs Kaluba as landlady of the Defendants sold the property to the Plaintiff, the relationship of landlord and tenant between Mrs Kaluba and the Defendants came to an end. The rights that the Defendants enjoyed under the tenancy agreement with Mrs Kaluba did not pass over to the Plaintiff, as she was not privy to the agreement.

Order 113/8/1 of the said Rules of the Supreme Court provides for the scope of that order. It states that;

***“The application of this Order is narrowly confined to the particular circumstances described in r.1, i.e. to the claim for possession of land which is occupied solely by a person or persons who entered into or remain in occupation without the licence or consent of the person in possession or of any predecessor of his. The Court has no discretion to prevent the use of this summary procedure where the circumstances are such as to bring them within its terms, e.g. against a person who has held over after his licence to occupy has terminated. Proceedings under this Order will ordinarily be heard and determined by a Master, who may refer them to a Judge if he thinks they should properly be decided by him (r.1A).***

***This order does not extend to the claim for possession of land against a tenant holding over after the termination of the tenancy (r.1).***

***Where the tenant of premises dies intestate, the landlord is not entitled to possession of the demised premises, even as against trespassers, unless and until the tenancy has been effectively terminated by service of a notice to quit on the President of the Family Division, in whom the tenancy becomes vested pending the grant of administration but of course the Order will not apply before the licence has expired. The Order applies to unlawful sub-tenants.***

***This order does not extend to the claim for possession of land against a tenant holding over after the termination of the tenancy (r.1). Where the tenant of premises dies intestate, the landlord is not entitled to possession of the demised premises, even as against trespassers, unless and until the tenancy has been effectively terminated by service of a notice to quit on the President of the Family Division, in whom the tenancy becomes vested pending the grant of administration.***

In my view, going by the above provision that Order does not apply where a tenant holds over after the termination of a tenancy, encompasses a situation where a tenant remains on the property after the tenancy agreement comes to an end, and the landlord with whom the tenant had a tenancy agreement is still the landlord of the premises. The Order does not relate to instances where the landlord has for instance sold the premises to a third party, as in this case. Whatever rights a tenant had with the previous owner cannot be asserted against the new owner, as there is no privity of contract between them. The tenant can only pursue the previous owner for damages for breach of contract, if any.

Therefore in this case when the Plaintiff became owner of the premises as of 15<sup>th</sup> March, 2017, the Defendants were in illegal occupation of the

property, unless the Plaintiff allowed them to remain there, in which case they became licensees. The Plaintiff however gave them six months' notice to vacate the said premises which was ignored, and a further six months' notice to vacate was given. The giving of notice was not in recognition of the Defendants as tenants as argued by Counsel for the Defendants, which by virtue of Section 5 (1) of the Landlord and Business Premises Act, Chapter 193 of the Laws of Zambia, required Mrs Kaluba to give the Defendants six months' notice to terminate the lease, but out of her good will. The fault lay with Mrs Kaluba who should have given the Defendants six months' notice to vacate the premises before she sold it to the Plaintiff, so that vacant possession could have been yielded to the Plaintiff.

The Plaintiff was under no obligation to give the Defendants notice to vacate the premises, as she had no agreement with them, and as I have already stated that while Order 113/8/1 of the Rules of the Supreme Court states that the Order does not apply to a tenant holding over after the expiration of a tenancy, this is not the position in this case, as the previous landlord is not the landlord or owner of the property at the moment, and who enjoyed a tenancy relationship with the Defendants. The Order is therefore applicable to the facts of this case.

The Plaintiff on 24<sup>th</sup> November, 2017 took out summons for an order of possession of the premises pursuant to Order 113 Rule 6 of the Rules of the Supreme Court. The Defendants stated that this procedure was improper as what should have been taken out was an appointment to hear the Originating Summons.

Order 113/8/5 of the Rules of the Supreme Court, 1999 edition lays down the procedural steps to be taken under the Order as;

***“When employing the procedure under this Order, the successive steps to be taken by the plaintiff are as follows:(1)***

***Issue originating summons in the prescribed form, App. A, Form No. 11A (r.2). No acknowledgment of service is required.(2)***

***Originating summons may be issued in the QBD or ChD (see para. 113/8/6).(3)***

***Limit the claim to possession of the specified land (r.1).(4)***

***At the time of issue of originating summons, file or prepare requisite supporting affidavit (r.3).(5)***

***Effect due service of originating summons, accompanied by supporting affidavit (r.4).(6)***

***Attend hearing before Master in Chambers and produce the affidavit of service for consideration and filing. If the affidavit of service has already been filed it should be bespoken.(7)***

***Obtain order for possession in prescribed form, App. A, Form No. 42A and in due time (r.6).(8)***

***Issue writ of possession in prescribed form, App. A, Form No. 66A (r.7).”***

The Plaintiff made the application for the possession pursuant to Order 6 Rule 1 of the Rules of the Supreme Court, 1999 edition, which provides that;

***“6.(1) A final order for possession in proceedings under this Order shall, except in case of emergency and by leave of the court, not be made -***

***(a) in the case of residential premises, less than five clear days after the date of service, and***

***(b) in the case of other land, less than two clear days after the date of service.***

***(2) An order for possession in proceedings under this Order shall be in Form No. 42A.***

***(3) Nothing in this Order shall prevent the Court from ordering possession to be given on a specified date, in the exercise of any power which could have been exercised if possession had been claimed in an action begun by writ.”***

In my understanding of the provisions of the law cited above, when the court proceeds to hear the Originating Summons on the date appointed for such hearing, and if it is satisfied as to the Plaintiff's claim, it can make an order for possession of the premises, and give a date when an order for possession may be given. Order 113 Rule 6 only comes in to play when a final order for possession is made in the case of an emergency and with leave of the court, and this can only be done not less than five days after service in the case of residential properties, and not less than two clear days of service for other premises.

Therefore, it was irregular for the Plaintiff to take out summons for an order for possession, as this is what was to be considered on the date appointed for the hearing of the Originating Summons. I say so because the basis of the said Order 113 is that an applicant seeks summary possession of land against squatters or persons who have no legitimate

right to be on the land. However no prejudice was occasioned to the Defendants by the Plaintiff employing that method, as the service of the order of interim injunction on the Defendants put them on notice of the matter before the court that had been commenced by Originating Summons, as the said application is clear that there was a matter commenced pursuant to the Order. The same goes for the failure to cite the Defendants by name.

While the Defendants argued that the Plaintiff had given notice to the Defendants to vacate the premises as acknowledged in paragraph 5 of the summons for possession, exhibits 'ZLL3' and 'ZLL4' to the affidavit in support of the Originating Summons show that the Badir Limited and Aayatin Investments were not named in the notice to vacate. However exhibit 'BA3', which was authored by the Plaintiffs' advocates then, Messrs Chifumu Banda and Associates on 26<sup>th</sup> May, 2017, shows that Badir Limited was given notice to vacate. Chifumu Banda and Associates are no longer the Plaintiff's advocates, and it is not clear why the Plaintiff did not give her current advocates the particulars of the Defendants before Court. While Counsel for the Plaintiff in her submissions stated that efforts to obtain the Defendants particulars were met with hostility, this is not reflected in any of the affidavits filed by the Plaintiff before the court. Therefore the case of **MUSA AHMED YUSUF V MATHANI GROUP OF COMPANIES 2011/HPC/0081** relied on to argue that the failure to name the Defendants in this matter was a misnomer, which can only be rectified by an application for amendment cannot stand as Order 113/8/9 of the Rules of the Supreme Court states that the procedure under Order 113 of the said Rules of the Supreme Court allows a plaintiff to proceed without naming the defendants. It states that;



***“This procedure enabling a person claiming possession of land to proceed on a summons without naming as defendants any persons whose names he does not know, must be strictly complied with and it would not be right to waive any defect arising from any non-compliance with such special procedure (see per Pennycuick V.-C., Re 9 Orpen Road, Stoke Newington [1971] 1 W.L.R. 166 at 945, 168; [1971] 1 All E.R. 944. The particular irregularity that concerned the court in that case namely failing to take reasonable steps to identify every person occupying the land before issuing the originating summons is no longer necessary following the amendment of r.3.***

***See also Burston Finance v. Wilkins and Persons Unknown (1975) 240 E.G. 375 where Oliver J. held that O.2, r.1 gave discretion to waive such irregularity if no injustice would be caused.”***

There was no injustice that was caused in this matter as the Defendants, Badir Limited and Aayatin Investments were not brought to Counsel for the Plaintiff's attention. The evidence on record shows that the Defendants before court are not in legal possession of the Plaintiff's property as they have no relationship with her, the Plaintiff succeeds in showing that the Defendants are in illegal occupation of her property. Section 33 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia states that a certificate of title is conclusive evidence of ownership of property, and in this case it is clear that the Plaintiff bought the land from Mrs Kaluba, and thus there is no dispute as to ownership of the property.

The Defendants having previously been given notice to vacate the said premises and not having done so, I order that they shall vacate the said premises within thirty (30) days from today, failure to which a writ of possession shall issue, and the order of injunction granted to them shall be discharged. Costs shall go to the Plaintiff, to be taxed in default of agreement. Leave to appeal is granted.

**DATED THE 2<sup>nd</sup> DAY OF MARCH, 2018**

*S. Kaunda*

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**S. KAUNDA NEWA  
HIGH COURT JUDGE**