

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



2017/HP/2001

**IN THE MATTER OF: AN APPLICATION UNDER ORDER 113 RULE 1 OF
THE RULES OF THE SUPREME COURT, 1999
EDITION**

AND

**IN THE MATTER OF: AN ORDER FOR POSSESSION OF REM FARM No
1068, LIVINGSTONE**

BETWEEN:

DENNIS CHOLA
(Suing as Attorney for Saul Radufiski)

APPLICANT

AND

NANCY MUSESA

RESPONDENT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 20th DAY OF
FEBRUARY, 2018**

For the Applicant : Ms T. Sakala, Fraser Associates

For the Respondent : No appearance

R U L I N G

LEGISLATION REFERRED TO:

1. The Rules of the Supreme Court, 1999 edition

The Applicant suing by way of Originating Summons on 16th November, 2017, commenced this action claiming;

1. *An order of possession of Plots B1-B4 of Rem Farm No 1068, Livingstone on the ground that he is entitled to possession and that the persons in occupation are without a licence or consent.*

The affidavit in support of the Originating Summons shows that the Applicant holds a power of attorney on behalf of Saul Radunski, the legal owner of Farm No 1068, Livingstone, as evidenced by the power of attorney exhibited as 'DC1' and the certificate of title exhibited as 'DC1A'. That the owner of the property Saul Radunski has subdivided the property into at least forty (40) residential plots of diverse dimensions with the intention of selling them, as shown on the sketch map exhibited as 'DC2' to the affidavit.

It is also deposed in the affidavit that the sale of the plots is being handled by the Applicant and Abel Bakery Limited an agent appointed by Saul Radunski, and the said sale was advertised to members of the public. That the Respondent approached the Applicant with a proposal to purchase four of the residential plots, and she picked the ones marked B1 to B4 on the sketch map.

The Applicant further deposes that he informed the Respondent that Saul Radunski would determine the price of the properties, and he would thereafter communicate the same to her. However the Respondent deposited K18, 000.00 into Saul Radunski's bank account, purporting the same to be a deposit towards the purchase price of the properties, and she dubiously proceeded to obtain a certificate of title relating to the said land, and also obtained building permission from the Livingstone City Council, and commenced construction.

The Applicant also deposes that he then informed the Respondent that each property was being sold at K240, 000.00, and advised her to desist from constructing on the properties until a contract of sale was signed between the parties. However the Respondent has refused and or neglected to pay the purchase price in full and has continued developing the properties as shown on exhibit 'DC3'. That the applicant's occupation of the property is illegal, and she is therefore a squatter.

At the hearing, Counsel for the Applicant told the court that they had obtained an order to serve the Respondent by way of substituted service and had advertised the process in the Zambia Daily Mail on 20th and 21st December, 2017, and they had filed an affidavit of service to that effect. Counsel was granted leave to proceed as there was proof of service. It was Counsel's submission that they relied on the affidavit filed in support of the application and added that efforts to remove the Respondent from the property had proved futile. That Order 113 of the Rules of the Supreme Court, 1999 edition, is very clear when orders for possession may be granted.

That one such ground is when the person in occupation has no legal basis, and that as the Applicant has in the affidavit in support of the Originating Summons exhibited a certificate of title to show ownership of the property, the application should be granted.

I have considered the matter. Order 113 of the Rules of the Supreme Court, 1999, edition pursuant to which the matter has been brought provides 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.”

In terms of the scope of the Order, Order 113/8/2 of the said Rules of the Supreme Court provides 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 but of course the Order will not apply before the licence has expired (ibid.). 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.”

The Applicant in the affidavit in support of the application deposes that the Respondent is in occupation of the property unlawfully, as she has no legal claim to the same. The said affidavit in support shows that the Respondent approached the Applicant to buy properties number B1-B4 and occupied the same before the sale price and contracts of sale were executed. Further that she has obtained a certificate of title for the properties as well as planning permission from the Council to develop the said property.

Order 113/8/3 states that **“where the existence of a serious dispute is apparent to a plaintiff he should not use this procedure”**.

The Respondent did not file an affidavit in opposition despite being served process by way of substituted service, but the averments in the affidavit in support of the Originating Summons show that the Respondent has obtained title to plots number B1-B4. This raises dispute as to ownership of the property, and the matter is therefore not suitable for determination summarily

under Order 113 of the Rules of the Supreme Court, 1999 edition. I accordingly direct that there shall be trial of the matter, and deem this matter as having been commenced by writ of summons. The Applicant is at liberty to amend the originating process to include any other appropriate relief. This shall be done within fourteen days from today. The Respondent shall thereafter file the defence within fourteen days, and there shall be discovery and inspection within fourteen days thereafter. The parties shall then file their respective bundle of documents and pleadings within fourteen days of the discovery and inspection being done. The matter shall come up for trial on 29th May, 2018 at 14:30 hours. Costs shall be in the cause.

DATED THE 20th DAY OF FEBRUARY, 2018

Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**