

Selected Judgment No. 36 of 2018
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IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

APPEAL NO. 215/2015
SCZ/8/202/2015

BETWEEN:

ALICK SAKALA

APPELLANT

AND

MORGAN PHIRI

(Suing as Administrator of Garden North
Baptist Church)

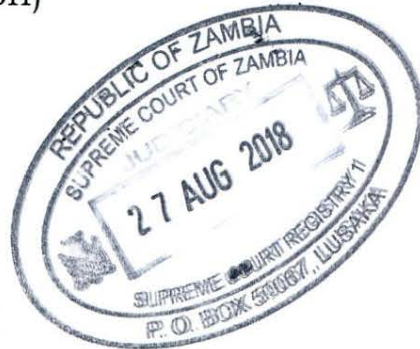
RESPONDENT

Coram: Mwanamwambwa, DCJ, Kaoma and Kajimanga, JJS

On 7th August, 2018 and 27th August, 2018

For the Appellant : N/A

For the Respondents: Dr. OMM Banda of OMM Banda & Company



JUDGMENT

Kaoma, JS delivered the Judgment of the Court.

Case referred to:

1. John Chisata v Attorney General (1990-1992) Z.R. 154

Legislation and other works referred to:

1. Rules of the Supreme Court (White Book) 1999, Order 14A
2. Societies Act, Cap 119
3. Land (Perpetual Succession) Act, Cap 186, sections 2, 3 and 9

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This is an appeal against a ruling of the High Court on a preliminary issue raised by the appellant pursuant to **Order 14A** of the **Rules of the Supreme Court (White Book), 1999 edition**.

The brief history of the appeal is that the respondent commenced an action by writ against the appellant claiming, inter alia, for an order that Garden North Church is the lawful, legal and registered owner of subdivision CH 275 of Stand 8531, Garden Site 3, Lusaka; an order of interim injunction to restrain the appellant from constructing on, occupying or dealing with the property in any way and interfering with the Church members' peaceful and quiet enjoyment of the property; an order that any sale or purchase of any portion of and any mortgage or loan regarding any portion of the property was at the party's own risk; an order for cancellation of certificate of title (if any) issued to the appellant; leave to issue writ of possession; and an order to compel the appellant to demolish his illegal structures and to restore the property to its original status.

The appellant admitted in his defence that the Church is the lawful, legal and registered owner of the subject property but disputed the survey diagram inside the certificate of title alleging

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that it was illegally done. He also pleaded that he has never claimed to be the owner of any part of the subject land and averred that his developments are within the confines of Plot 339/8531 legally allocated to him by the Lusaka City Council.

In his reply, the respondent joined issue with the appellant upon its defence in so far as the same consisted of admission. On 21st December, 2010 the court granted the respondent an order of interim injunction which was confirmed on 3rd December, 2012 by the trial Judge. However, the respondent was also ordered not to deal adversely with or carry out any construction activities on the land in dispute pending the determination of the matter.

In the meantime, on 29th May, 2012 the appellant applied to join the Lusaka City Council to the proceedings on the basis that the Council was the rightful party to clarify the allocation of the properties in issue as well as the extent of the properties and the boundaries. The court granted the application on 27th June, 2012. Thereafter, the Council filed a defence admitting that Garden North Baptist Church was the lawful and registered owner of the subject

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property and that it issued the respondent with an offer letter and certificate of title for the property.

The trial commenced on 10th June, 2014. The respondent testified as PW1 on how the Garden North Baptist Church was registered as a religious society under the **Societies Act, Cap 119** of the **Laws of Zambia** and how it was allocated the subject property and issued with a certificate of title on 13th May, 2010 by the Lusaka City Council. After his evidence in chief, PW1 was subjected to cross-examination by counsel for the appellant on a number of issues, including the Church's certificate of registration.

In the midst of cross-examination, counsel for the appellant applied for an adjournment so that they could be availed the certificate of incorporation (if any) under the Land Perpetual Succession Act, before they could continue cross-examination. Since there was no objection by the other two advocates the matter was adjourned to 29th September and 2nd December, 2014.

The record shows that instead, on 19th September, 2014 the appellant filed a notice of intention to raise a preliminary issue on a point of law pursuant to **Order 14A** of the **White Book**, asking the

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court to determine whether the respondent is able to own land in light of the fact that it had no legal capacity to do so. The appellant also filed skeleton arguments in support of the notice to raise a preliminary issue. The respondent also filed skeleton arguments in reply to the appellant's arguments.

The record does not have a transcript of proceedings on the preliminary issue but the ruling appealed against shows that the court entertained and heard the matter on 12th January, 2015 and reserved ruling to 20th March, 2015 though it was delivered on 20th May, 2015. We are not sure whether the Council was heard on the preliminary issue. Anyhow, the court found that the church being a society and not a limited company is not a person at law and cannot hold land in its own name and that after registration; it needed to be incorporated as a body corporate under the **Land (Perpetual Succession) Act, Chapter 186** of the **Laws of Zambia**.

However, the court took the view that the irregularity was not fatal to the proceedings and could be cured; and that therefore, the preliminary issue could not properly be determined under **Order 14A** which is strictly meant for issues that would finally determine

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the entire cause or matter, subject only to appeal. The court ordered the respondent to regularise the defect by obtaining a certificate of incorporation under the Land (Perpetual Succession) Act before the matter could proceed further and meanwhile, stayed the action. A certificate of incorporation has since been obtained.

Displeased with the decision, the appellant filed this appeal advancing one ground that the High Court Judge when dismissing the preliminary issue misdirected herself in law and fact when she ruled that the preliminary issue raised would not finally determine the cause or matter in light of the fact that she acknowledged that the respondent has no legal capacity to own land.

In support of the appeal, counsel for the appellant filed heads of argument which are a replication of the arguments made in the court below. In response, counsel for the respondent also filed heads of argument. Counsel for the appellant did not attend the hearing of the appeal although he was aware of the Court sitting.

Because of the position we have taken, we have found it unnecessary to go into the arguments, except perhaps for the contention by the respondent that matters must be decided on their

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merits and that interlocutory orders which prevent a matter to proceed to trial must be avoided.

It is undeniable that the court has power under **Order 14A rule 1** of the **White Book**, either upon application by a party or of its own motion, to determine any question of law or construction of a document arising in any cause or matter at any stage of the proceedings where it appears to the court that (a) such question is suitable for determination without a full trial of the action, and (b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein (Underlining for emphasis only). However, this power is not open ended. The editorial note at **paragraph 14A/2/7**, at page 202 of the **White Book** is very instructive. It reads as follows:

“The application may be made at any time after the defendant has given notice of intention to defend and before the full trial of the action has begun.” (Underlining ours for emphasis)

From this passage, it is very clear that the court below ought not to have entertained the preliminary issue after the trial of the action had begun and in the course of cross-examination of PW1.

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We wish to take this opportunity to draw the attention of trial Judges and all legal practitioners to this very important factor.

Regarding the respondent's argument that matters must be decided on their merits and interlocutory orders which prevent this must be avoided, we indeed held, in the case of **Chisata v Attorney General**¹ that whenever possible, matters should be allowed to proceed to trial on the merits and that interlocutory Orders which prevent this should be avoided.

In this case, the decision the court took to entertain the preliminary issue when it should not have, has greatly delayed the trial of this matter, which is still pending as we write this judgment.

We have also observed, although this is not a subject of this appeal, that in ordering the respondent to obtain a certificate of incorporation under the Land (Perpetual Succession) Act, before the trial of the action could proceed any further, the court below in effect, determined the respondent's claim that Garden North Baptist Church is the lawful, legal and registered owner of S/D CH 275 of Stand 8531, Garden Site 3.

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If the court below had to make any orders to rectify any defect in the certificate of title issued to the Church, it should have waited until the conclusion of the trial, after all the parties had been heard.

Nonetheless, the end result is that the appeal lacks merit and ought to be dismissed with costs to the respondent. The matter should take its full course in the court below.


M. S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE
R. M. C. KAOMA
SUPREME COURT JUDGE
C. KAJIMANGA
SUPREME COURT JUDGE