IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE

Appeal No. 161/2015
SCZ/8/166/2015

(Civil Jurisdiction)

BETWEEN:

CHISHALA KARABASIS NIVEL (MALE) — **1ST APPELLANT**

SHARON MWALE (FEMALE) — **2ND APPELLANT**

AND

LASTON GEOFFREY MWALE — **RESPONDENT**

Coram: **Mambilima, CJ, Malila and Musonda, JJS**
On 7th August, 2018 and 25th September, 2018

For the first appellant: No appearance

For the second appellant: No appearance

For the respondent: In person

JUDGMENT

MALILA, JS, delivered the Judgment of the Court.

Cases referred to:

1. *Chikuta v. Chipata Rural Council (1974) ZR 241.*
2. *New Plast Industries v. Commission of Lands and Attorney-General SCZ Judgment No. 8 of 2001*
3. *Lindsell v. Phillips (1885) 30 Ch D 291).*

4. *African Banking Corporation (Z) Limited (T/A Banc ABC) v. Plinth Technical Works Limited SCZ No. 28 of 2015.*
5. *Lumus Agricultural Services Co. Ltd. And Another v. Gwembe Valley Development Ltd. (SCZ No. 1 of 1999.*
6. *Sundi v. Ravalia (1949-54) NRLR 345.*
7. *Trevor Limpic v. Rachel Mawere and 2 Others (SCZ Judgment No. 35 of 2014).*
8. *Wilson Masauso Zulu v. Avondale Housing Project.*
9. *Davy v. Garret (1878) Z Ch. 473.*
10. *Sableland Zambia Ltd. v. Zambia Revenue Authority (2005) ZR 109*
11. *Patel and Another v. Monile Holding Company Ltd (1993 – 94) ZR 20*
12. *Mazoka and Others v. Mwanawasa and Others (2005) ZR 138.*
13. *Sithole v. Zambia State Lotteries Board[14] (1975) ZR 106.*
14. *Khalid Mohamed v. Attorney General (1982) ZR 49.*

Other legislation referred to:

1. *Rules of the Supreme Court White Book (1999 edition).*
2. *Lands and Deeds Registry Act.*

Other works referred to:

1. *Halsbury's Laws of England, 4th ed.*

The events which, in their legal bearing, we are being called upon to consider in this appeal, lie at the heart of any matrimonial union – mutual trust and confidence. They relate to a fraud allegedly perpetrated by a wife against her husband.

The appeal requires of this court to strike a balance between two competing principles. On one hand, the vindication of the rights of an innocent purchaser of land for value without

notice of any defect in the vendor's title; and on the other, judicial vigilance not to give succor to land transactions sullied in impropriety or fraudulent activity. On a wider canvass, the appeal requires this court to determine the fundamental question whether a co-owner of property could, without the consent of the other co- owner(s), assign the whole interest in the property to a third party.

There is, however, an overarching procedural question: was the mode of commencement of the proceedings in the lower court, measured against the relief sought, appropriate in the circumstances? Put nakedly, should the trial judge have proceeded in the manner she did, that is to say, relying solely on affidavit evidence, granted the relief sought in the originating process and the nature of the issues raised by the facts? We shall revert to these issues later in this judgment. For now, we continue with the narrative of the factual and procedural background.

The two appellants were, between themselves, purchaser and vendor respectively, of the property known as Stand No. 330, on Eucalyptus Avenue, Avondale, Lusaka (the property). And here we use the terms 'purchaser' and 'vendor' in a very generic way as will become apparent later on.

The second appellant, Sharon Erny Mwale, is the estranged wife of the respondent, Laston Geoffrey Mwale, and co-owned the property with the respondent.

Earlier in time, in 1996 to be precise, the property had been offered for sale to the respondent by Indeco Estates Limited. He paid for it in 2004. Probably against better judgment on his part, the respondent decided to have his wife included as co-owner of the property and proceeded to take the relevant steps for her to be reflected as such in the certificate of title. The certificate of title mentioned the two as owners without indicating the nature of the shared ownership, in particular, whether they were tenants in common or joint tenants. The respondent, however, claims in his supporting affidavit lodged in the lower court, that there was a joint tenancy.

It is unclear as to when the matrimonial bliss between the second appellant and the respondent may have ended. What is certain, however, is that the respondent, in the year 2000, relocated to the United Kingdom where he was engaged in gainful activity in an accounting firm named Daniel & Associates, which he established. The second appellant remained in Zambia.

It appears that while the respondent was away in England, the second appellant was oppressed by a financial obligation of a considerable magnitude which she had assumed to a company called Brafuss Limited (Brafuss) associated with or owned by the first appellant. That obligation culminated in a law suit in the High Court at the instance of the said company under cause No. 2011/HP/907, which suit led to the settlement of a consent order.

In terms of that consent order the second appellant's indebtedness in the sum of K450,000 to Brafuss, was amortised through the assignment of the subject property to the first appellant, assessed at a selling price of K750,000, with the sum of **K300**,000 being paid to the second appellant in cash. The

transfer of the property was subsequently registered in the Lands and Deeds Registry at the Ministry of Lands.

The respondent's narrative of events is that the conveyance of the property by the second respondent to the first was without his knowledge and consent as co-owner; that the second respondent purported to act on his behalf using the authority of a forged power of attorney dated 4th September, 2009 which was neither signed by himself, nor authenticated as required by section 3 of the Authentication of Documents Act, chapter 75 of the laws of Zambia, nor registered at the Lands and Deeds Registry in terms of the provisions of the Lands and Deeds Registry Act, chapter 185 of the laws of Zambia.

It was the respondent's further narration that from 2000 to 2005 he was residing in the United Kingdom while his estranged wife continued to live in Zambia at the said property. To his knowledge and understanding the certificate of title to the property remained in the names of his wife and he. He was, however, alerted in December 2014 that the property had been locked and his wife no longer resided there. It was then that the

full details of what had transpired, as explained above, were revealed to him.

The respondent reiterated that he had never authorized his wife to sell his interest in the property, nor had he issued any power of attorney in favour of his spouse in regard to the property. Furthermore, he swore that the identity document, namely Passport No. ZG 05265, used to facilitate the assignment of the property, had expired on 7th April, 2008.

It was the respondent's further testimony that he was unaware of the second appellant's dealings with Brafuss and the first appellant, nor was he privy to the consent judgment entered into between the second appellant and Brafuss affecting the subject property although it mentions him as a consenting party. He asserted that the whole assignment of the property to which he, as co-owner, was not privy, was a fraud.

It was on the foregoing basis that the respondent, by originating summons, moved the High Court seeking:

(a) a declaration that he was a joint tenant of the subject property;

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(b) *a declaration that the sale of the property by the second appellant without his knowledge and consent was null and void;*

(c) *an order for a writ of possession to issue against the occupant of the subject property;*

(d) *costs; and*

(e) *any other relief that the court deemed fit.*

The learned High Court judge evaluated the evidence deployed before her. In a judgment given on 1st June, 2015, she upheld the respondent's claim. She agreed with the respondent that the second appellant had committed a fraud on the respondent given that the consent order on the strength of which the conveyance of the property to the first appellant was done, was not signed by the respondent, nor did the respondent execute the assignment and the power of attorney used to convey title in the property to the first appellant. Furthermore, the said power of attorney was neither authenticated nor registered as required by law, thus making the document null and void.

The learned judge also noted many other irregularities which, in her view, pointed to nothing less than fraudulent conduct on the part of the second appellant. She found that the second appellant lacked authority to transfer ownership in the property to the appellant. The factors leading to the conveyance of the property did, in the learned judge's view, combine to legally undermine the integrity of the property conveyance transaction between the first appellant and the second appellant.

In the estimation of the learned judge, the first appellant was not guilty of any impropriety, yet the fact that the property was transferred to him through fraudulent conduct on the part of the second appellant meant that the title that he acquired was tainted, thus making the challenge of that title by the respondent legally appropriate in the circumstances.

According to the trial judge, the first appellant cannot, in the premises, be considered to be a purchaser for value who obtained title in good faith without notice of defects in title because the principal party, namely the second appellant, had no authority to unilaterally confer title in a co-owned property on

any person whatsoever. Citing section 34(1)(c) of the Lands and Deeds Registry Act, the learned judge concluded that, as the first appellant was not a *bona fide* purchaser of the property, cancellation of the title deeds issued to the first appellant was warranted. She ordered accordingly.

More interestingly perhaps, the learned judge, buoyed by what she regarded as despicable conduct on the part of the second appellant in all this, also ordered that, as the second appellant had engaged in fraud, she forfeited her interest in the property.

Disconsolate with the judgment, the first appellant now appeals on two grounds namely:

1. *That the learned trial judge erred in law in holding by ordering that the cancellation of certificate of title without considering the fact that the property in issue was jointly owned and that as regards the 2nd appellant interest in the property in question she had sufficient interest to transfer her interest in the property to effect transfer or her interest to the 1st appellant in the said property. [sic!]*

2. *The learned High Court judge misdirected herself in law and fact when she held that the 2nd respondent had forfeited her interest in the property in question without going further to declare as to whom forfeited interest was to devolve to. [sic!]*

On behalf of the first appellant, very brief heads of argument were filed in support of the appeal by Messrs Palan & George, Advocates. Prior to the hearing, however, the said firm of Advocates obtained from a single judge of this court, an order for withdrawal as Advocates.

There were no heads of argument filed by the second appellant, and this hardly surprised us as the record shows that she did not take any active part in the proceedings in the court below. There were equally no heads of argument filed on behalf of the respondent.

At the hearing of the appeal, there was no representation or appearance for both appellants. The respondent appeared in person and offered an explanation for his counsel's absence. He was, however, unable to give a satisfactory answer as to why no heads of argument were filed on his behalf despite his Advocates

having been served with all the appeal documents as way back as 2015.

In these circumstances, we would have been inclined to strike out, or even dismiss, the appeal for non appearance of the appellants in accordance with Rule 71 of the Supreme Court Rules, chapter 25 of the laws of Zambia. Considering, however, that the respondent had had to travel for the appeal from the United Kingdom, and also that he had not filed his own heads of argument, we directed that the heads of argument on behalf of the respondent be filed within 21 days from the date of hearing and that we would, in any event, deliver our judgment thereafter taking fully into account the parties' heads of argument.

On behalf of the respondent, heads of argument were filed on 27th August, 2018, the very last day of the period given for that purpose.

Besides recounting the undisputed facts regarding the second appellant's indebtedness, the consent order and the conveyance of the subject property to the first appellant, the first

appellant's heads of argument did not raise any significant point of law, nor did they make reference to any authority.

The only point raised with some verve is the claim that as the lower court had ordered forfeiture of the second appellant's interest in the property, that interest ought to be transferred to the first appellant. It was contended that if this is not done, the second appellant would benefit by operation of the law in the event of death or divorce as she is the wife of the respondent.

In the respondent's heads of argument it was argued, in respect of grounds one and two, that the lower court judge was right in ordering the cancellation of the certificate of title. This was because, besides being forged, the power of attorney was not authenticated. We were referred to section 3(a) of the Authentication of Documents Act, chapter 75 of the laws of Zambia which provides as follows:

> ..... *Any document executed outside Zambia shall be deemed to be sufficiently authenticated for the purpose of use in Zambia if*
>
> > *(a) In case of a document executed in Great Britain or Ireland it is duly authenticated b y a notary public under his signature.*

Counsel also adverted to the case of *Lumus Agricultural Services Co. Ltd. And Another v. Gwembe Valley Development Ltd.*[5] where it was stated, among other things, that if a document executed outside Zambia is not authenticated, as provided by the Authentication of Documents Act, then it is invalid for use in this country.

Counsel's argument, as we understand it in regard to the power of attorney, is that it could not be a basis for conveying title to the first appellant as it was void on two accounts; it was a forged document, and was not authenticated.

The learned counsel for the respondent then moved on to submit on the law relating to the registration of documents under the Lands and Deeds Registry Act. He quoted section 4 of that Act which reads in part that:

> *Every document purporting to grant, convey or transfer land or an interest in land must be registered within the time hereafter specified in the registry.*

He also cited section 6 of the same Act which states that any document requiring registration under the Act which is not registered shall be null and void. Predictably, counsel also

referred us to *Sundi v. Ravalia*[6] where the equivalent of section 6 of the Act was interpreted to mean that such documents were without legal effect.

Counsel also cited the case of *Trevor Limpic v. Rachel Mawere and 2 Others*[7] where we held that compensation would not be ordered for a party who had acquired a property fraudulently. This authority, according to counsel for the respondent, supported his submission that as the first appellant fraudulently acquired the property, no question of compensation to him arose.

The case of *Wilson Masauso Zulu v. Avondale Housing Project*[8] was also cited to buttress the submission counsel made that the lower court's findings of fact should not be tempered with because on available evidence they were not perverse.

The learned counsel then focused his energies on the import of section 33 of the Lands and Deeds Registry Act on the conclusiveness of the certificate of title and the fraud exception. We appreciate the arguments that were made in this regard part of which were already canvassed in the lower court.

We have carefully considered the circumstances that motivated the current proceedings. If proven, they could constitute a perfect example of betrayal of trust and confidence by a spouse against another; the very antithesis of the matrimonial vows. It is, however, not the province of this court to pronounce itself on the morality or possible criminality of the second respondent's conduct.

As we intimated at the outset, the question that calls for determination is whether the appellant was indeed an innocent purchaser for value of the property without notice of any defect in title on the part of the second appellant. The second and consequential issue is what the effect is on the conveyance of the property to the first appellant if fraud on the part of the second appellant is confirmed.

We intimated early on in this judgment that the certificate of title issued to the second appellant and the respondent revealed shared ownership of the property. What the certificate of title does not state is the precise nature of such shared ownership; were the two title holders joint tenants or tenants in

common? We believe this is an important point warranting our comment, albeit in passing.

The distinction between the two forms of common ownership is significant. A joint tenancy is characterized by the presence of the four unities, namely unity of title, unity of possession, unity of time and unity of interest. All this is underpinned by the right of survivorship.

In a tenancy in common, on the other hand, none of the owners owns a specific part of the property; they have different ownership interests which interests may be created at different times. Tenancy in common carries no right of survivorship.

How do we categorise the shared ownership of the property by the first appellant and the respondent? The answer resides in section 51 of the Lands and Deeds Registry Act chapter 185 of the laws of Zambia. That section provides as follows:

> *(1) Any two or more persons named in any instrument under Parts III and VII, or requiring to be registered under this Act as transferees, mortgagees, lessees or proprietors of any land or estate or interest therein, shall, unless the contrary is expressed, be deemed to be*

entitled as joint tenants with the right of survivorship, and such instrument, when registered, shall take effect accordingly.

In the present case, therefore, although the certificate of title did not state that the second appellant and the respondent were joint tenants, they were such tenants by operation of section 51 of the Lands and Deeds Registry Act.

Notwithstanding the foregoing observation, we believe that the procedural question in this case deserves more eminent consideration as it implicates the jurisdiction of the court.

The proceedings in the lower court were commenced, as we have stated already, by originating summons pursuant to Order 30 Rule 11 of the High Court Act, chapter 27 of the laws of Zambia.

It is important to bear in mind that, as far as commencement of proceedings in the High Court is concerned, the anchor provision is Rule 6 of the High Court Rules, chapter 27 of the laws of Zambia which provides as follows:

(1) Except as otherwise provided by any written law or these Rules every action in the High Court shall be commenced by writ of summons endorsed and accompanied by a full statement of claim.

(2) Any matter which under any written law or these Rules may be disposed of in chambers shall be commenced by an originating summons.

For any person contemplating litigation, this rule should form the starting point in considering the procedural options for commencement of an action. It seems to us that in terms of Rule 6 of the High Court Rules, it is mandatory to initiate proceedings by writ of summons save for circumstances specified in that rule. A party employing originating summons to move the court ought to be in a position to demonstrate that his use of such procedure is required or permitted under a rule or statute, or involves matters that can be determined in chambers.

In *Chikuta v. Chipata Rural Council*[1] we stated that where a matter is commenced using a wrong mode, the court will have no jurisdiction. Moreover, where the mode of commencement is prescribed under a statute, such mode of commencement must be followed. We held in *New Plast Industries v. Commissioner of Lands and Attorney-General*[2] that where a statute prescribes the mode of

commencement of action, it was such prescription rather than the relief sought which should determine how an action is commenced.

As regards the nature of the business that may be disposed of in chambers, Order 30 rule 11 of the High Court Rules lists these as follows:

> *(a) Application for time to plead, for leave to amend pleadings, for discovery and production of documents, and generally all applications relating to the conduct of any cause or matter;*
>
> *(b) An application by any person claiming to be interested under a deed, will or other written instrument for the determination of any question of construction arising under the instrument and for a declaration of the rights of the person interested;*
>
> *(c) An application by any person claiming any legal or equitable right, in a case where the determination of the question whether he is entitled to the right depends upon a question of construction and for a declaration as to the right claimed;*
>
> *(d) All proceedings in the Court under the Trustee Act, 1893, or under the Land Transfer Act, 1897, of the United Kingdom;*
>
> *(e) Application as to the guardianship and maintenance or advancement of infants;*

(f) Applications connected with the management of property;

(g) Applications for or relating to the sale by auction or private contract of property, and as to the manner in which the sale is to be conducted, and for payment into Court and investment of the purchase money;

(h) All applications for the taxation and delivery of bills of costs and for the delivery by any Advocate of deeds, documents and papers;

(i) All matters which under any other rule or statute were formerly allowed to be commenced by originating summons;

(j) Such other matters as a Judge may think fit to dispose of in chambers.

Our reading of Order 30 rule 11 is that originating summons should only be resorted to in circumstances where there is no dispute on questions of fact or a likelihood of such dispute; where for example, the issue is to determine short questions of construction, and not matters so contentious or potentially contentious that the justice of the case would demand the settling of pleadings and the leading of evidence in a particular way.

Courts have consistently guided themselves, and in our view correctly, by refraining from trying matters of disputed questions of fact on originating summons. See for example *Lindsell v. Phillips*[3].

The drafting of the reliefs sought by the respondent in the lower court was in very basic terms. In fact, so simple a style was used to structure the reliefs that one would be persuaded at first blush to imagine that the dispute could be disposed of on affidavit evidence in chambers. A perusal of the affidavit filed in the lower court, however, confirms that the devil indeed lies in the detail. It reveals that the facts relied upon by the respondent to found his claim in the lower court were anything but straight forward. They were potentially disputable. At any rate they required strict proof.

The respondent imputed forgery or fraudulent conduct on the part of the second appellant. It is now settled that claims founded on forgery or fraud ought to be specifically pleaded and strictly proved. Pleadings in this case were not only desirable, they were necessary.

The case of *Davy v. Garret*[9] is authority for the position that any charge of fraud must be pleaded with utmost particularity and fraudulent conduct must be distinctly alleged and proved and is not to be left to be inferred from the facts. Paragraph 36 of *Halsbury's Laws of England* (4th ed.) provides that where a party relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence by another party, he must supply the particulars in his pleadings.

Order 18 rule 12(1)(a) of the Rules of the Supreme Court, the cases of *Sableland Zambia Ltd. v. Zambia Revenue Authority*[10] and *Patel and Another v. Monile Holdings Company Ltd*[11] as well as *Mazoka and Others v. Mwanawasa and Others*[12] all reiterated the point that fraud must be pleaded specifically. The standard of proof is higher than a mere balance of probabilities. In *Sithole v. Zambia State Lotteries Board*[13] we stated that if a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities.

We are of course mindful of the fact that the first respondent did not rebut the allegations of fraudulent conduct on her part. So it was, but that did not attenuate the respondent's duty as plaintiff in that court to prove his case. In *Khalid Mohamed v. Attorney General*[14] we stated that a plaintiff cannot automatically succeed whenever a defence has failed; he must prove his case.

The respondent's claim before the lower court was based on facts that required strict proof. To the extent that fraud was alleged, there was need to plead it specifically and to prove it.

On the whole, our view is that this is not a case that could properly be proved and disposed of on mere affidavit evidence in an action in chambers commenced by originating summons.

Notwithstanding commencement of an action through a wrong mode, Order 28 Rule 8 of the *Rules of the Supreme Court* (White Book) (1999 edition) allows a judge to deem a matter that has been commenced by originating summons as having been commenced by writ of summons. That order reads as follows:

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28/8 – Continuation of proceedings as if cause or matter began by writ.

(1) Where, in the case of a cause or matter began by originating summons, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been began by writ, it may order the proceedings to continue as if the cause or matter had been so began and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof.

.....

(3) This rule applies notwithstanding that the cause or matter in question could not have been begun by writ.

We applied this rule in *African Banking Corporation (Z) Limited (T/A Banc ABC) v. Plinth Technical Works Limited*[4]. We stated in that case that:

Where, in a matter begun by originating summons, it appears to the court that the matter should have commenced by writ of summons, the court has power under Order 28 Rule 8 RSC at any stage of the proceedings, to order that the proceedings should continue as if the matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings and give further directions on the conduct of the matter.

Although, as we have pointed out, the learned judge could have treated the matter as having been commenced by writ and given directions as to the further conduct of the matter, she did not do so. In these circumstances, our views as ventilated in *Chikuta v. Chipata Rural Council*[1] apply. A wrong mode of commencement of proceedings was employed. Consequently, the court had no jurisdiction to proceed to hear a matter which was wrongly commenced.

If, however, the learned judge had resorted to Order 28 Rule 8 of the Rules of the Supreme Court and deemed the action to have been commenced by way of writ and clearly noted this fact and guided the parties accordingly, the act of deeming the proceeding to have been commenced properly would have saved the proceedings from suffering the consequences of the court lacking jurisdiction.

The legal theory here is that the act of deeming, properly done, transitions the proceedings from the destiny of being null and void for want of jurisdiction, to new proceedings under the freshly deemed mode of commencement under which the court

is clothed with jurisdiction. In the present case there was no evidence in the record of appeal to suggest that the learned judge applied her mind to the appropriateness or otherwise of the mode of commencement employed, let alone to Order 28 rule 8.

There is another matter that we ought to comment upon. There was a consent judgment obtained in this matter which touches upon the subject property. That judgment is still subsisting. Regrettably the parties had proceeded through court proceedings both here and below without contemplating the status and effect of that judgment on the rights of the parties.

As the parties return to the drawing board, they may wish to give this issue some serious reflection.

For the avoidance of doubt, and, perhaps, at the risk of repetition, our conclusion is that the trial court had no jurisdiction to deal with the action in the manner that it did because a wrong mode of commencement was employed and nothing was done by the trial court in the way of invoking Order 28 rule 8 of the Rules of the Supreme Court (White Book) 1999 edition to save the proceedings. The proceedings before the lower

court were accordingly a nullity. The appeal is thus misconceived and it is accordingly dismissed.

We make no order as to costs.

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I. C. MAMBILIMA
CHIEF JUSTICE

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M. MALILA
SUPREME COURT JUDGE

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M. C. MUSONDA
SUPREME COURT JUDGE