

SCZ. Appeal No. 023/2013

**IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE**

(Civil Jurisdiction)

BETWEEN:

VICTOR K. SISHEMO

APPELLANT

AND

OSCAR SIKAZWE

RESPONDENT

(sued in the capacity as Administrator of the estate of the late Kingford Sikazwe)

Coram : **Chibomba, Phiri, Wood, JJS**

On 16th July, 2015 and 28th January, 2020

For the Appellant: **Dr. O.M. Banda – Messrs. O.M.M. Banda and Company**

For the Respondent: **No Attendance**

JUDGMENT

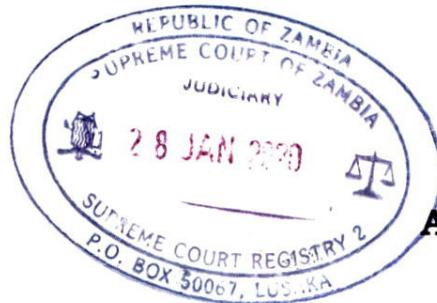
PHIRI, JS, delivered the Judgment of the Court.

CASES REFERRED TO:

1. Walter Manzi, Mfune, Simpemba and 60 Others Vs Kingford Sikazwe (Trading as Dwika Enterprises) SCZ/8/167/2006 Appeal No, 180/2006

LEGISLATION REFERRED TO:

1. Rules of the Supreme Court, Chapter 25 of the Laws of Zambia



When we heard this appeal, we sat with Hon. Madam Justice H. Chibomba. This is the majority judgment. The delay in delivering it is deeply regretted.

There was previous High Court litigation involving the property which is subject of this appeal. That litigation was under cause numbers 2001/HP/0942 and 2003/HP/0419. The present appeal arose from the decision of Mwikisa J; in the High Court Cause No.2009/HP/0590 between the Appellant and the Respondent relating to stand No. F/378a/A/1342 and stand No. F/378 a/A/1420 which were created out of the erroneous demarcation by the Lusaka City Council of the original property then known as Remaining Extent S/DA of Farm 378a named "The Place". The Lusaka City Council was not a party to Cause No. 2009/HP/0590. In her ruling, Mwikisa J. opined that this case had already been finally decided in favour of the Respondent.

The brief background facts were that this property was initially owned by Avondale Housing Development Limited, a subsidiary of the Zambia State Insurance Corporation (ZSIC), a parastatal body.

When the subsidiary Company was liquidated, the property reverted to the Zambia State Insurance Corporation (ZSIC) which, in turn, sold it to Kingford Sikazwe (since deceased) whose estate was now administered by Osward Sikazwe the Respondent in this appeal.

In the meanwhile, the property (R Ext./S/DA 378a) was erroneously demarcated by the Lusaka City Council and subdivided into 60 renumbered market stands which the Council offered to new developers including the Appellant, who equally erroneously believed that the market stands were on state land which was available for development. The erroneous demarcations and subdivisions of the Remaining Extent (R. Ext/S/DA 378a) were later reversed by the Lusaka City Council and the property was renumbered.

Ownership of this property was contested before Nyangulu J. who held that the property on which the demarcated stands sat belonged to the said Kingford Sikazwe who purchased it from ZSIC in a contract of sale dated 29th November, 2002. The High Court also held that the entire Remaining Extent S/DA of 378a had been erroneously subdivided pursuant to an erroneous Lusaka City Council resolution

passed in 2001 which was later rectified through a reversal resolution in 2003, following which the property was renumbered as F/378a/A/1424. The High Court Judgment was entered in favour of the Respondent and the court ordered that the Appellant and the other squatters vacate their stands. Dissatisfied with the decision of Nyangulu J, the Appellant launched an appeal to this court under Appeal No. 180/2006. The Supreme Court upheld the High Court Judgment and the Appellant lost his claim to ownership of the subdivided stand. The Appellant's case did not end there. He launched a fresh action in the High Court under Cause No. 2009/HP/0590 on the basis of his understanding that the property referred to in the Supreme Court judgment was different from that which the Lusaka City Council offered him. The Lusaka City Council was not made a party to this cause. The Appellant sought and obtained an *ex parte* injunction order against the Respondent before Mwikisa J. thereafter, he commenced contempt proceedings against the Respondent alleging non-compliance with the *ex parte* order of injunction.

There was a preliminary motion filed on behalf of the Respondent to discharge the injunction under cause No. 2009/HP/0590. Mwikisa J. discharged the interim injunction order and set aside the order to commence contempt proceedings against the Respondent on the ground that the case had already been concluded by the Supreme Court. This is the decision which is subject of this appeal.

The Appellant filed six (6) grounds of appeal as follows:

- 1. That the learned trial Judge erred and misdirected herself both in law and in fact by holding that the Supreme Court had already adjudicated upon the properties in dispute when the property numbers are not one and the same.**
- 2. That the learned trial Judge erred and misdirected herself both in law and fact by ignoring the fact that the Supreme Court in its judgment under SCZ/8/167/2006, Appeal No.180/2006 made reference to stand No. F/378a/142 on page J5 and Rem of S/DA of Farm 378a Avondale, Lusaka on page J6 and not F/378a/A/1342 and F/378a/A/1420 Avondale. Lusaka which were offered and allocated to the Appellant.**
- 3. That the learned trial Judge erred and misdirected herself by setting aside the Order of Interim Injunction and the Committal proceedings against the Respondent on the ground that the Supreme Court closed the matter.**

- 4. That the learned trial Judge erred and misdirected herself both in law and fact by ignoring the fact that the Respondent has been attempting to execute or enforce the Supreme Court judgment on properties not indicated or mentioned in the Supreme Court judgment.**
- 5. That the learned trial Judge erred and misdirected herself both in law and fact by holding that the case is a forum shopping and abuse of Court process.**
- 6. That the learned trial Judge erred and misdirected herself both in law and fact by awarding costs to the Respondent.**

In support of ground 1 and 2, Dr Banda, for the Appellant, argued that there was documentary evidence on the Record of Appeal which clearly reveals and demonstrates that the appellant was offered stand number 1342 of subdivision A of Farm 378a Gardenia, Avondale, Lusaka.

It was further submitted that there was no dispute to the fact that stand numbers 1342 and 1420 of subdivision A of Farm 378a Gardenia, Avondale, Lusaka were not subject of Appeal No. 180/2006 (SCZ/8/167/2006) and therefore, the court below erred and misdirected itself by holding that this court had already ruled upon the properties or the matter. It was further argued that at pages J5 and J6 of the Supreme Court judgment under Cause No.

SCZ/8/167/2006; Appeal No. 180/2006¹ this court made reference to stand No. F/378a/A/142 and Rem of S/D A of Farm 378a Avondale, Lusaka and did not refer to F/378a/A/1342 and F/378a/A/1420, Gardenia, Avondale, Lusaka which were offered and allocated to the Appellant.

In support of ground 3, Dr Banda argued that it was a misdirection for the court below to set aside both the order of interim injunction and committal proceedings against the Respondent on the basis that this court put the dispute to finality, when the evidence reveals that the property numbers were different from the ones which the Supreme Court decided on under SCZ/8/167/2006, Appeal No. 180/2006 on property numbers stand Nos. F/378a/A/1342 and F/378a/A/1420 which were not indicated or mentioned in the Supreme Court judgment; and therefore the court should not have ignored the Appellant's evidence that enforcement was directed at wrong properties.

In support of grounds 5 and 6, Dr. Banda submitted that there was no forum shopping or abuse of court process on the part of the

Appellant because the properties he contested were not subject of the litigation which took place in the court below.

The Respondent's Advocate filed a notice of non-attendance at the hearing of the appeal, and did not attend.

We have carefully considered the evidence on record, the submissions made by Dr. Banda on behalf of the Appellant and the judgment of Nyangulu J. under cause No. 2002/HP/0772 as well as the Rulings made in the lower court under cause numbers 2001/HP/0942 and 2003/HP/0419; And most importantly, the Ruling of Mwikisa J. under cause No. 2009/HP/0590. We have also deeply reflected on the judgment of Nyangulu J. and our own judgment under Cause No. SCZ/8/167/2006/ Appeal No. 180/2006 in relation to the property at the centre of this appeal.

In our considered view the Appellant's main contention in this appeal is reflected in grounds 1 and 2 whose supporting argument is that the Appellant's stand Nos F/378a/A/1342 and F/378a/A/1420 Avondale, Lusaka are totally different and cannot be associated with stand No. F/378a/A/142 which was referred to at page J5 of the Supreme Court judgment in Appeal No. 180/2006 (SCZ/8/167/2006).

The mystery in the Appellant's contention appears to us to be locked-up in the judgment of Nyangulu J. which preceded our judgment under Appeal No. 180/2006. In that judgment, Nyangulu J. heavily relied on the exhibited letter of the Director of City Planning, Timothy Hakuyu, who testified as the second witness. The letter's contents explained the position as follows:

"Lusaka City Council approved the creation of 60 business plots on part of remainder of F/378a/A on a site formerly used as a construction site office popularly known as "the place" in Avondale. At the time, Council believed that the land in question was open state land available for development. Approval of the creation was under minute number C/92/05/2001. Later in the year, the Zambia State Insurance Corporation Limited (ZSIC) claimed ownership of the piece of land. Ownership of land by ZSIC has since been confirmed by records at Commissioner of Lands.

Subsequently, in August 2003, Lusaka City Council received an application from Messrs ZSIC the owner of Rem of 378a/A to consider the creation and numbering of stand covering the same area upon which 60 business plots were earlier created and approved by Council. Arising from the clarification that the land was owned by ZSIC, Lusaka City Council approved the application to create a stand covering 5850m² under Minute Number PWD/156/08/2003. The approved layout has since been forwarded to Commissioner of Lands and has been numbered as F/378a/A/1424.

I wish to clarify that the creation and numbering of Stand F/378a/A/1424 technically cancelled the 60 business plots created through Council minute number PWD/75/05/2001.

In other words, Council resolution number PWD/156/08/2003 superseded resolution number PWD/75/05/2001 in favour of ZSIC."

In his judgment, Nyangulu J. placed reliance on the foregoing documentary evidence which was augmented by Timothy Hakuyu's oral evidence during trial; and it was on that basis that he decided

the case in favour of the Respondent. We upheld Nyangulu J's. judgment under **Appeal No. 180/2006¹**.

However, a re-examination of that judgment reveals that we did not quote the correct renumbered property when we said that;

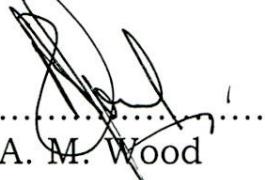
"As a result of the said correction, the City Council then went ahead and renumbered the land as stand No. F/378a/A/142 in favour of Zambia State Insurance Corporation."

Thus, the property number that we presented in our judgment which upheld Nyangulu J.s judgment, was different from the actual renumbered stand that was created by the Lusaka City Council. That property should have been properly and correctly specified and written as stand No. F/378a/A/1424. We therefore find it necessary to invoke the provisions of **Order 78 of the Rules of the Supreme Court, Chapter 25 of the Laws of Zambia**, and do hereby correct our judgment in Appeal No. 180/2006 delivered on 22nd December, 2008 by the deletion of stand No. F/378a/A/142 and replacement thereof of Stand No. F/378a/A/1424, which, according to the evidence in the lower court's record, technically cancelled the 60 business plots wrongly created though Council Minute number PWD/75/05/2001. By implication, this means that Stand No. F/378a/A/1342 and Stand No. F/378a/A/1420 upon which the

Appellant's claim is premised ceased to exist. We take cognizance of the fact that although the Appellant insisted on basing his claim of ownership on property numbers, the dispute was not about property numbers as such; it was about ownership of the actual property identified in the final description reflected in the evidence that was before the trial court.

In the circumstances, we hold that Mwikisa J. was on firm ground when she ruled that the matter that was brought before her had already been adjudicated upon under the Supreme Court Cause No. **SCZ/8/167/2006 (Appeal No. 180/2006)**¹; and that the new action under High Court Cause No. 2009/HP/0590 was an abuse of Court process. We do not find any merit in the rest of the grounds of appeal and we uphold the Ruling of Mwikisa J. The costs are to follow this event and should be taxed if not agreed.

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G.S. Phiri
SUPREME COURT JUDGE

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A. M. Wood
SUPREME COURT JUDGE