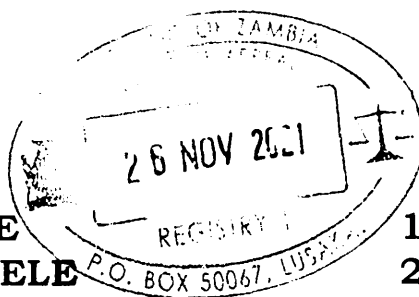


**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

**CAZ Appeal No. 136/2020
CAZ/08/057/2020**

BETWEEN:

**ENOCH KAVINDELE
DOROTHY KAVINDELE**



**1ST APPELLANT
2ND APPELLANT**

AND

**BOLOGNA PROPERTIES LIMITED
DIEGO CASILLI**

**1ST RESPONDENT
2ND RESPONDENT**

CORAM : Kondolo, Chishimba and Ngulube JJAs

On the 28th August, 2021 and 26th November, 2021

For the 1st & 2nd Appellants : Mr. K Nchito of Messrs Kapungwe
Nchito Legal Practitioners

For the 1st & 2nd Respondents: Mr. Mwamba & Mr. M Mkunika of
Simeza Sangwa & Associates

J U D G M E N T

Chishimba JA, delivered the Judgement of the Court.

CASES REFERRED TO:

- 1) Ya Tung Investments Company Limited v Dao Heng Bank Limited (1975) AC 581
- 2) Mohamed Omar v Zambia Airways Corporation Limited (1986) ZR 23
- 3) Zambia Consolidated Copper Mines Plc v Daka (1998) ZR 12
- 4) Kingfarm Products Limited v Dipti Rani Sen (2008) 2 ZR 72
- 5) Macfoy v united Africa Company Limited (1961) 3 All ER 1169
- 6) Phillip Mutantika & Another v Kenneth Chipungu SCZ Judgment No. 13/2014 (App. No. 94/2012)

- 7) Roman Wilhelm Buchman v Attorney General (1993 - 1994) ZR 131
- 8) Kenny Sililo v Mend-A-Bath Zambia Limited & Spencom Zambia Limited SCZ Appeal No. 168/2014
- 9) Richard Mofya v Staylon Employment & Investments Limited & Ecobank Limited SCZ Judgment No. 37/2014 (App. No. 011/2013)
- 10) Murray & Roberts Construction Limited and Kaddoura Constrcution Limited v Lusaka Premium Health Limited & Industrial Development Corporation of South Africa SCZ Appeal No.141/2016
- 11) Nevers Sekwila Mumba v Muhabi Lungu SCZ No. 54 of 2014
- 12) Owners of the Motors Vessel "Lillian S v Caltex Oil (Kenya) Limited 1989 KLR
- 13) Antonio Ventriglia & Manuela Ventriglia v Finsbury Investments Limited

LEGISLATION CITED:

1. The High Court Act Chapter 27 of the Laws of Zambia.
2. The Rules of the Supreme Court, 1999 Edition.

1.0 INTRODUCTION

- 1.1 This appeal seeks to impugn the ruling of the Hon. Mr. Justice Charles Chanda dated 14th February, 2020 in which he refused to review the decision of the Deputy Registrar and referred the matter to another Deputy Registrar for an inquiry as to damages arising from discharge of an injunction order obtained earlier. The appeal deals with the effect of non-compliance with the provisions of **Order 2 Rule 3 of the High Court Rules on** failure to give one month's notice to the other party of intention to proceed in a matter in which there have been no proceedings

for one year or more from the last proceedings. The other question was whether a court had jurisdiction to proceed in a matter where the said order had not been complied with.

1.2 For convenience, we shall refer to the appellants as plaintiffs and the respondents as defendants, which were their designations were in the court below.

2.0 **BACKGROUND**

2.1 The events leading to the appeal are as follows: on 14th February, 2013, the plaintiffs issued a writ of summons and statement of claim against the defendants seeking several reliefs, connected to the ownership of Plot No. 2152/M, Leopards Hill Road, Lusaka. Of relevance to the appeal was the injunction sought against the defendants to prevent them from entering the property.

2.2 On 22nd February, 2013, the plaintiffs were granted an ex-parte order of interim injunction against the defendants which was subsequently discharged on 12th June, 2013 after an inter-parte hearing. The main matter was heard by the Hon. Mrs. Justice N. A. Sharpe-Phiri who subsequently dismissed it on 18th December, 2013.

3.0 **PROCEEDINGS BEFORE THE DEPUTY REGISTRAR**

- 3.1 On 20th April, 2015 after a period of two years, the defendants applied before the Deputy Registrar for an order of inquiry as to whether the defendants had sustained any damages to be paid by the plaintiffs from the discharge of an ex-parte injunction obtained at the commencement of the matter. The plaintiffs did not file any affidavit in opposition to the application and at the hearing, counsel informed the court that they had no objection to the holding of the said inquiry. The court proceeded to grant the defendants the order of inquiry on 2nd July, 2015.
- 3.2 On the 9th July, 2015, the plaintiffs lodged an application before the Deputy Registrar seeking a review of the order for inquiry granted earlier. The defendants reacted by filing a motion to set aside the plaintiffs application for review on grounds of abuse of court process. Owing to late service of the said motion, ruling on the motion was reserved to 16th May, 2016 and the hearing of the application for review was adjourned to 2nd June, 2016.
- 3.3 The basis for the plaintiffs motion was that the defendants only filed the application for inquiry two years after the injunction was discharged on 12th June, 2013 and that there had been no

proceedings since then. Further, because no leave had been obtained to proceed in the said matter in terms of **Order 2 Rule 3 of the High Court Rules Chapter 27 of the Laws of Zambia (HCR)** and **Order 3 Rule 6 of the Rules of the Supreme Court, 1999 Edition (RSC)**. The court had the jurisdiction to review the order granting inquiry as to damages in terms of **Order 39 Rules 1 and 2 of the High Court Rules**.

- 3.4 The defendants, instead of filling an affidavit in opposition filed a motion supported by affidavit to set aside the application for review of the order for an inquiry as to damages on the basis of abuse of court process.
- 3.5 In his ruling, the learned Deputy Registrar was of the considered view that following the plaintiffs' application to review the order granting the inquiry as to damages, the defendants' motion to set aside the application for the alleged abuse of court process had not addressed the issues raised by the plaintiffs on points of law. The order of inquiry was granted to the defendants on 2nd July, 2015 and on the 9th July, 2015, the plaintiffs applied for review pursuant to **Order 39 Rules 1 and 2 of the HCR**. He reasoned that it was in the interests of

justice that the plaintiffs' application for review be interrogated and settled before he could proceed with the matter.

4.0 **APPEAL TO THE JUDGE IN CHAMBERS**

4.1 Being dissatisfied, the defendants appealed to a Judge in Chambers against the ruling of the Deputy Registrar delivered on 16th May, 2016 and advanced three grounds as follows:

- 1) The Learned Deputy Registrar erred in fact and in law by ruling that the defendants' motion to set aside the application for review for abuse of the process of the court had not addressed the issues raised by the plaintiff as a matter of law;*
- 2) The Learned Deputy Registrar erred in fact and in law by holding that the plaintiffs' application for review should be interrogated and settled before proceeding in the matter; and*
- 3) The Learned Deputy Registrar erred in fact and in law by dismissing the defendants' motion to set aside the application for review for abuse of the process of the court which was adjourned for hearing on 2nd June, 2016 at 09:00 hrs.*

5.0 **ARGUMENTS ADVANCED IN COURT BELOW**

5.1 The defendants submitted that the ruling appealed against breached the rules of natural justice because the learned Deputy Registrar was duty bound to hear its motion scheduled for 2nd June, 2016 before delivering his ruling disallowing the

motion and directing that the plaintiffs' summons for review be heard instead.

- 5.2 It was contended that the ruling appealed against sanctioned an abuse of court process because the plaintiffs had waived the right to raise a challenge against the order granted on the basis of lack of notice of intention to proceed. In terms of **Order 2 Rule 3 of the HCR** and **Order 3 Rule 6 of the RSC**, the defendants were required to give notice of intention to proceed in matters which are of an interlocutory nature, before the conclusion of the case. Reference was made to the explanatory notes under **Order 3/6/2 of the RSC**. The failure to give notice of intention was contended to be an irregularity which can be waived in terms of **Order 2/2/4**, if a party takes fresh steps after becoming aware of the irregularity.
- 5.3 It was submitted that the plaintiffs waived the right to raise the issue of lack of notice of intention to proceed when they stated, through their advocates, that they had no objections to the grant of an order for an inquiry as to damages.
- 5.4 In the second instance, the defendants contend that by raising an objection only after the grant of the order for inquiry as to

damages, the plaintiffs are caught in the principle of res judicata, and are precluded from reopening the said application.

5.5 The plaintiffs opposed the appeal to the Judge in chambers contending that the ruling appealed against was not rendered in breach of the rules of natural justice nor was its application to review an abuse of the court process. Reference was made to the provisions of **section 13 of the High Court Act Chapter 27 of the Laws of Zambia (HCA)**, and submitted that the learned Deputy Registrar was on firm ground when he ruled that in the interest of justice, the application for review must be interrogated and settled before he could proceed in the matter. This would allow all matters in controversy between the parties to be completely and finally determined as opposed to determining the issues based on the defendants' motion to set aside the application for review on the alleged basis of abuse of the court process.

5.6 The plaintiffs further submitted that the defendants were given an opportunity to be heard and that the matter was determined after both parties were heard as evidenced from lines 24 – 26 of the ruling of the learned Deputy Registrar at page 46 of the

record of appeal. To underscore this point, the plaintiffs relied on **Order 38 Rule 2 of the RSC** which provides for the hearing and determination of a matter on affidavit evidence without the need for parties to attend trial.

5.7 It was plaintiffs' position that they did not waive their right to apply to review the order for inquiry because the purported acquiescence to the order of inquiry does not preclude them from applying for review of the said order. They maintained that all the issues in controversy between the parties must be interrogated and settled on merit as opposed to being settled on a technical default.

5.8 The plaintiffs in response to the argument on res judicata, submitted that it was inapplicable to this matter because the application to review the order granting an inquiry as to damages, was not done in any subsequent proceedings, but within the same proceedings. The case of **Ya Tung Investments Company Limited v Dao Heng Bank Limited** ⁽¹⁾, was called in aid where it was stated that the doctrine of res judicata may be used in a wider sense to show that it is an abuse of court

process to raise in subsequent proceedings matters which should and ought to have been litigated in earlier proceedings.

6.0 **DECISION OF THE HIGH COURT**

6.1 Judge Charles Chanda considered the affidavits and submissions on record. He observed that the appeal before him was premised on **Order 30 Rule 10(1) of the HCR**. The learned Judge guided himself in terms of the case of **Mohamed Omar v Zambia Airways Corporation Limited** ⁽²⁾ that *“an appeal to a Judge in Chambers is treated as an actual rehearing of the application and the Judge should have regard to the contents of supplementary affidavits.”* He then proceeded with the appeal as a rehearing.

6.2 The learned Judge observed that the application before the Deputy Registrar by the plaintiffs to review the order granting an inquiry into damages was made pursuant to **Order 39 Rules 1 and 2 of the HCR**. The court considered the cases of **Zambia Consolidated Copper Mines Plc v Daka** ⁽³⁾ and **Kingfarm Products Limited v Dipti Rani Sen** ⁽⁴⁾ where the Supreme Court held that **Order 39 Rule 1 of the HCR** empowers a Judge

to review his own decision, receive fresh evidence to either vary or confirm his earlier judgment. The said provision does not refer to a 'court', and that a District Registrar has no power to review his own decision.

6.3 On this basis, the lower court found that the plaintiffs' application for the Deputy Registrar to review his order for an inquiry to be made, was a nullity as the Registrar had no jurisdiction to review his order or decision. Therefore, the plaintiffs' application was legally untenable.

6.4 The learned Judge was of the further view that though this was a rehearing, he still could not proceed to review the order sought to be reviewed on the ground that it was not his order. In addition, that the application was a nullity which could not be cured under the guise of an appeal to a Judge in Chambers. As authority he relied on the holding by Lord Denning in **Macfoy v United Africa Company Limited** ⁽⁵⁾ at page 1171 that:

"...If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on

it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. ...”

6.5 The learned judge upheld the appeal and dismissed the plaintiffs’ application to review the order granting an inquiry into damages for being a nullity. As regards the motion by the defendants to set aside the review application, the learned Judge found it unnecessary to deal with the application as it was anchored on the plaintiff’s application for review.

6.6 He ordered the parties to proceed with the pending inquiry as to damages before a different Registrar and awarded costs to the defendants.

7.0 **GROUND OF APPEAL**

7.1 The plaintiffs have appealed against the ruling of the court below and advances two grounds couched as follows:

- 1) The court below erred in law and in fact when it ordered the parties to proceed with the pending inquiry as to damages before a different Registrar when the said inquiry is defective, void and a nullity; and*
- 2) The court below erred in law and in fact when it found that it was not necessary to deal with the application before it when it was within its jurisdiction to enquire the basis upon which the matter was referred to the Registrar for enquiry.*

8.0 **APPELLANTS' ARGUMENTS**

8.1 The plaintiffs filed heads of arguments dated 4th August, 2020 in which grounds one and two were argued together.

8.2 It was submitted that the court below erred in law when it ordered the parties to proceed with the inquiry as to damages before a different Registrar in view of **Order 2 Rule 3 of the HCR** which provides as follows:

“3. In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give one month's notice to the other party of his intention to proceed. A summons on which no order has been made shall not, but notice of trial although countermanded shall be deemed a proceeding within this rule.”

8.3 The plaintiffs contends that the above provision is couched in mandatory terms by the use of the word “shall”, and is not regulatory. As such, it does not give a court discretionary powers. A breach of the said provision is fatal in view of the defendants' failure to file a notice to proceed prior to filing the application for an order for enquiry as to damages.

8.4 In support of this argument, we were referred to the case of **Phillip Mutantika & Another v Kenneth Chipungu** ⁽⁶⁾ where

in respect of the issue of failure of parties to strictly adhere to the rules of court, the Supreme Court stated as follows:

“... on our part, we have always underscored the need for parties to strictly adhere to the rules of court and that the failure to comply can be fatal to the party’s case. This is the position we took in NFC Africa Mining PLC v Techpro Zambia Limited (2009) ZR 236 in which we made it clear that litigants who fail to strictly adhere to the rules of court risk having their appeals dismissed, and we dismissed the appeal in that case. We reiterate this position in the current case ...”

- 8.5 It was submitted that the failure by the defendants to file a notice of intention to proceed with the application for an order for enquiry as to damages, is fatal. The court below ought to have dealt with the issue of failure to file notice of intention to proceed as it was within its jurisdiction to do so.
- 8.6 With respect to the passage stated in the case of **Macfoy v United Africa Company Limited** ⁽⁵⁾ cited by the court below, the plaintiffs contended that the learned Judge was wrong at law when he ordered the parties to proceed with the inquiry as to damages, when such inquiry is defective, null and void in view of the period of time (two years) that had passed since the last proceedings. It was further contended that the defendants

have not taken any steps to cure the defect of the failure to comply **with Order 2 Rule 3 of the HCR**. Therefore the court below, cannot simply gloss over the defect by sending the parties to appear before a different Registrar.

8.7 The plaintiffs in addition contend that in the same way that the court below stated that it cannot cure a defect in the guise of an appeal, the lower court cannot cure a defect in the guise of sending the matter for inquiry as to damages to be dealt with before a different Registrar. The point being underscored is that the order for inquiry was defective *ab initio* because it was not done in conformity with the provisions of **Order 2 Rule 3 of the HCR**. The defect not having been cured, it follows that the order of the lower court is incapable of being enforced.

8.8 Lastly, the plaintiffs contend that the learned Deputy Registrar did not state that he was going to review his order, but that the plaintiffs' application ought to have been interrogated before he could proceed with the inquiry as to damages. Therefore, the lower court should have made an order regarding the efficacy of the defendants' application for inquiry as to damages which was not in conformity with **Order 2 Rule 3 of the HCR**.

8.9 It was prayed that the ruling of the lower court be discharged entirely and that the efficacy of the defendants' application for an inquiry as to damages must be determined by this court.

9.0 **RESPONDENTS' ARGUMENTS**

9.1 The defendants filed their heads of arguments dated 20th October, 2020. The two grounds of appeal were argued separately.

9.2 With respect to ground one, the defendants submit that there is no nexus between the arguments advanced in support of the two grounds of appeal and the issues considered by the court below in arriving at its decision. It was contended that the issues canvassed by the plaintiffs before us, were not advanced before the court below and therefore, did not form the basis of the lower court's decision. Citing the cases of **Roman Wilhelm Buchman v Attorney General** ⁽⁷⁾ and **Kenny Sililo v Mend-A-Bath Zambia Limited & Spencom Zambia Limited** ⁽⁸⁾, the respondents contends further that an issue not raised in the court below, cannot be raised on appeal. Therefore, the lower court cannot be attacked on appeal nor can its decisions be

assailed for not considering issues, which it was not called upon to decide when the matter was before it.

- 9.3 The defendants argue that the plaintiffs must attack, in support of the appeal, issues which were considered by the court below and which formed the basis of the decision subject of the appeal.
- 9.4 In this regard, it was submitted that the issue of whether the inquiry as to damages was a nullity, void or defective for want of a notice pursuant to **Order 2 Rule 3 of the HCR**, was not raised before the lower court. Therefore, the plaintiffs can only appeal to this court against the decision of the court below on issues that were covered in the three grounds of appeal settled by the defendants. In a nutshell that the appeal is misconceived and incompetently before this court because it is founded on issues that did not arise in the court below.
- 9.5 With respect to ground two, the defendants submit that the substance of the ground and the last part of the arguments advanced suggests that the lower court ought to have considered the non-compliance of **Order 2 Rule 3 of the HCR**, although the issue was never raised before it. We were referred

to the case of **Richard Mofya v Staylon Employment & Investments Limited & Ecobank Limited** ⁽⁹⁾ where the Supreme Court guided that a court has no jurisdiction to make a determination on a matter that is not before it. Further that it is improper for a court hearing a matter to make comments which have the effect of pre-empting the decision on the issues which are to be decided on the merits.

9.6 The defendants argue that the plaintiffs have not advanced any law in support of the proposition that the lower court was under a legal obligation, and on its own motion, to consider the regularity of the application to inquire into damages occasioned by the grant of the interim injunction, in the face of the alleged non-compliance with **Order 2 Rule 3 of the HCR** when such an issue was not before it.

9.7 We were referred to the case of **Murray & Roberts Construction Limited and Kaddoura Constrcution Limited v Lusaka Premium Health Limited & Industrial Development Corporation of South Africa** ⁽¹⁰⁾. In that case, the court guided that where a trial judge is of the view that there is some irregularity in the manner a default judgment was

obtained and that there was an abuse of the court process, the court should request the parties, especially the applicants who had filed the application being considered to address him on the issues in his mind, but which had not been presented by any of the parties before proceeding to make any orders.

9.8 Therefore the respondents submit that a court must confine itself to the issue before it because the court has no jurisdiction to determine a matter that is not before it. In the present case, what was before the lower court was an appeal against the decision of the Deputy Registrar to review, its earlier decision to proceed with the inquiry into damages. That decision had nothing to do with compliance or non-compliance with **Order 2 Rule 3 of the HCR**, which is being canvassed by the appellants in this appeal. Therefore, it was submitted that the court below cannot be faulted for not interrogating the issues which the plaintiffs maintain ought to have been probed.

9.9 In conclusion, the respondents reiterated that the appellants have not explained the nexus between the arguments presented centered on the alleged non-compliance with **Order 2 Rule 3 of the HCR**, and the rehearing of the motion to dismiss their

application for review. The arguments touching on **Order 2 Rule 3 of the HCR** were not advanced either before the Deputy Registrar nor the Judge of the High Court. The application pursuant to **Order 39 Rule 1 and 2 of the HCR** has not been heard. Therefore, the court below cannot be attacked for not having considered issues, which were neither canvassed before the Deputy Registrar nor before it on appeal.

9.10 In conclusion, it was submitted that the plaintiffs have not assailed the ratio or reasoning of the court below. The lower court upheld the defendants' appeal on the ground that the Deputy Registrar had no authority under **Order 39 Rules 1 and 2 of the HCR** to review his own decision nor to direct that the inquiry into damages occasioned by the grant of the injunction be conducted by another Registrar.

9.11 We were urged to dismiss the appeal with costs in both courts.

10.0 **DECISION OF THIS COURT**

10.1 We have considered the record of appeal, the ruling appealed against and the arguments advanced by respective learned counsel.

- 10.2 It is not in issue that the appellants sued the respondent for a declaration that the 2nd appellant is the bonafide owner of half of plot number 2152/M Leopards Hill Road Lusaka. An ex-parte injunction was obtained against the respondents preventing them from entering or continuing to enter onto the said property pending determining of the matter.
- 10.3 After the inter partes hearing, the ex-parte order of injunction was discharged on the 12th of June 2013. On the 18th February 2015 after a period of close to two years, the respondents applied by way of summons, for an Order of Inquiry as to damages sustained by themselves by reason of the ex-parte injunction granted to the plaintiffs and later discharged. When the matter came up for hearing before the learned Deputy Registrar, the plaintiffs stated that they had no objections to the order being granted. The learned Deputy Registrar accordingly granted the Order of Inquiry.
- 10.4 Thereafter, the plaintiff applied for review of the order of inquiry on the basis that the defendants had offended the provisions of **Order 2 Rule 3 of the HCR** by failing to obtain leave of court before proceeding with the application for inquiry order as to

damages. The application for review was made pursuant to **Order 39 Rule 1 and 2 of the HCR** which is couched in the following terms:

- 1. Any Judge may, upon such grounds as he shall consider sufficient, review any judgment or decision given by him (except where either party shall have obtained leave to appeal, and such appeal is not withdrawn), and, upon such review, it shall be lawful for him to open and rehear the case wholly or in part, and to take fresh evidence, and to reverse, vary or confirm his previous judgment or decision:*

Provided that where the judge who was seized of the matter has since died or ceased to have jurisdiction for any reason, another judge may review the matter.

- 2. Any application for review of any judgment or decision must be made not later than fourteen days after such judgment or decision. After the expiration of fourteen days, an application for review shall not be admitted, except by special leave of the Judge on such terms as seem just.*

10.5 The learned Deputy Registrar proceeded to consider the application for review and held that the order for inquiry as to damages granted earlier, ought to be interrogated in view of the issues raised by the plaintiffs. The defendants then appealed against this decision to the judge in chambers. The learned Judge found that the Deputy Registrar had no jurisdiction to

review his earlier decision as the powers under **Order 39 Rule 1 and 2 of the HCR** are only applicable to a Judge of the High Court and not to a Registrar. The proceedings before the Registrar were held thus, to be a nullity. In any event, the lower court reasoned that it could not review a decision that it had not made. The lower court then ordered the parties to proceed with the pending inquiry as to damages before a different Registrar.

10.6 The respondents strongly argue that there is no nexus between the arguments, the grounds of appeal and the issues considered by the High Court in its decision. The same not having been advanced before the court below, cannot be attacked on appeal nor be considered by us as an appellate court.

10.7 The main issue for determination in our view is as follows;

(1) Whether the Deputy Registrar had jurisdiction to hear and determine the application by the respondents for an Order of Inquiry as to damages

10.8 The respondent contends that this issue was not the subject of the appeal as the appeal arose from the decision of the Deputy Registrar and from that of the judge in Chambers arising from

the appellants' application to review the order of inquiry as to damages. And that the court below was on firm grounds to refuse the review sought on the basis that Deputy Registrar has no powers of review and that a judge can only review decisions made by him/herself and not those made by other adjudicators.

10.9 **Order 39 Rule 1 of the High Court Rules**, is clear that a judge has power only to review his/her own decision and to vary or confirm a judgment/order made earlier. As stated in the cited case of **ZCCM v Daka**⁽³⁾, a District Registrar has no power to review his own decision nor a decision of another District Registrar.

10.10 Further, it is a settled position of the law as held in the case of **Kingfarm Products Limited v Dipti Rami Sen** (supra) that **Order 39 Rule 1 of the High Court Rules** does not refer to a court but to a judge and that a Registrar has no power to review his/her own decision.

10.11 The issue is in respect to the application for an order of inquiry as to damages subject of all the attendant applications for review and the application to set aside the review application. This is the issue of importance for determination. The

respondents have submitted that the issue was not raised in the court below and should not be entertained on appeal.

10.12 It is settled that an issue not raised in the court below will not be entertained on appeal. There are a plethora of court decisions on the subject matter and we shall not rehash. In our view, the issue is whether the appellants summons for inquiry as to damages is defective, void and a nullity; and whether though not raised in the court below can be considered on appeal as a point of law.

10.13 It is not in dispute that the issue of non-compliance with **Order 2 Rule 3 of the High Court Rules** i.e the giving of one month's notice of intention to proceed in a cause where there have been no proceedings for one year the from date the of last proceedings was not raised by the appellants in the court below. When the application for an order of inquiry of damages was filed, there was no opposition by the appellants who stated on record that they had no objection to the application for an order granting inquiry as to damages.

10.14 An appellate court should not allow a point not raised in the court below to be raised except in the most exceptional

circumstances i.e on a point of law. **Order 2 Rule 3 of the High Court Rules** is a procedural rule in our view, it is therefore a point of law. It is a procedural point of law that goes to jurisdiction and falls within the exceptional circumstances. We shall therefore allow and consider this point raised.

10.15 In the case of **Nevers Sekwila Mumba v Muhabi Lungu** ⁽¹¹⁾, which dealt with injunctions, the Supreme Court on the issue of a point not raised in the court below not being allowed to be raised on appeal, went further to state that:

“The court will, however, affirm or over rule a trial court on any valid legal point presented by the record, regardless of whether that point was considered or even rejected.”

10.16 The point of law being raised on appeal is pursuant to **Order 2 Rule 3 of the High Court Rules** which stipulates that

“In any cause or matter in which there has been no proceedings for one year from the last proceedings had, the party who desired to proceed shall give one month’s notice to the other party of his intention to proceed. A summon on which no order has been made shall not, but notice of trial although counter mandate shall be deemed a proceedings within this rule.”

In terms of the above provisions a litigant/party who desires to proceed in a matter that has been dormant for a year must give a month's notice to the other party of his/her intention to proceed.

10.17 It is not in issue that the summons for an order of inquiry as to damages was filed almost two years after of the ex-parte order of injunction was discharged. **Order 3 Rule 6 of the Supreme Court Practice 1999 Edition (RSC)** stipulates that where a year or more has elapsed since the last proceedings in a cause or matter, the party desiring to proceed must give to every other party not less than one month's notice of his/her intention to proceed. A summons on which no order was made is not a proceeding for the purpose of this rule.

10.18 The effect of failure or breach of the provision on the requirement of the giving of notice of intention to proceed is that the summons is not a proceeding at all. The issue then is whether the decision made arising from the application/summons for an order for an inquiry as to any sustained damages arising from the discharged ex-parte

- injunction can stand? Did the court below have jurisdiction to
- entertain the said application?

10.19 In our view, there being no notice of intention to proceed having been filed/issued as prescribed under **Order 2 Rule 3 of the High Court Rules**, the learned Deputy Registrar lacked jurisdiction to proceed with the application for an order of injury as to damages.

10.20 It is trite that jurisdiction is everything and without it a court has no power to take or make one more step. See the case of **Owners of the Motors Vessel “Lillian S v Caltex Oil** ⁽¹²⁾ where it was stated that

“Where the court takes it upon itself to exercise jurisdiction which it does not possess its decision amounts to nothing.”

Equally a court without jurisdiction to determine a particular matter/application cannot make any lawful orders or grant reliefs sought by the party or applicant in the proceedings.

10.21 We therefore hold the view that the decision by the Deputy Registrar to proceed and grant the relief sought of an order of inquiry to damages sustained amounted to nothing and is a nullity on account of lack of jurisdiction. This is on the basis of the failure by the respondent to issue a notice of intention to

proceed after the lapse of a period of over one year from date of last proceeding in the cause.

10.22 We are fortified in our decision by the holding of the Supreme Court in the case of **Antonio Ventriglia & Manuela Ventriglia v Finsbury Investments Limited** ⁽¹³⁾. Though the cited decision dealt with the issue of leave to appeal having been sought and granted after the lapse of 14 days, it dealt with the aspect of jurisdiction. The Supreme Court in agreeing with the respondent's argument by Mr Sangwa (S.C) stated that they had ***“no jurisdiction to entertain this appeal in light of the legally flawed circumstances which characterized its launching before the court.”***

The Supreme Court went on to state that **“where an objection is of the nature of a jurisdictional challenge, such an objection must be dealt with at once.....”**


10.23 Reverting back to the appeal, we are of the view that the appeal has merit. The learned Deputy Registrar in the court below had no jurisdiction to proceed to hear a matter where a period of more than a year had elapsed from the date of last proceedings without notice of intention to proceed being issued. Therefore, the decision made of an order of inquiry as to damages sustained amounts to nothing. Further, all subsequent

applications anchored or arising from the above such as; the application to review the order of inquiry as to damages, and the application to set aside the application to review the order of inquiry are a nullity, having arisen from an application heard without jurisdiction.

10.24 The court below erred by ordering that the parties proceed with the pending inquiry as to damages before a different Registrar. The said order as to inquiry as to damages was made by a court without jurisdiction to entertain or hear the application.

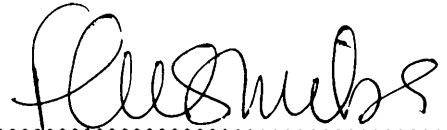
10.25 For the forgoing reasons, the appeal is allowed. For avoidance of doubt the effect of the order of inquiry as to damages which launched the applications subject of appeal is that the decree is a nullity. It is trite that when a court passing a decree lacks inherent competence over the subject matter/parties, there is a total lack of jurisdiction. The lack of jurisdiction goes to the root and any decisions made by such a court are a complete nullity. The court below in a nutshell lacked jurisdiction to entertain the application subject of appeal. We accordingly set aside the order of inquiry as to damages made by the Deputy Registrar.

10.26 We uphold the appeal with costs to the appellant to be taxed in default of agreement.




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M. M. Kondolo S C
COURT OF APPEAL JUDGE



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F. M Chishimba
COURT OF APPEAL JUDGE



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P. C. M. Ngulube
COURT OF APPEAL JUDGE