IN THE COURT OF APPEAL OF ZAMBIA **CAZ Appeal No. 65/2020**
HOLDEN AT LUSAKA **CAZ/08/056/2020**
(Civil Jurisdiction)

BETWEEN:

ABISHEK VIJAY KUMAR PATEL **APPELLANT**

AND

HENRY SAMPA **1ST RESPONDENT**
BIA ZAMBIA LIMITED **2ND RESPONDENT**

CORAM : Chishimba, Ngulube and Muzenga JJAs

On 18th November, 2021, 3rd August, 2022 and 14th December, 2022

For the Appellant : Mr. R. Mwanza of Messrs. Roberts & Partners

For the 1st Respondent : No appearance

For the 2nd Respondent: Mr. W. Nyirenda (SC), Ms. W. M. Mwaba and Mr. M. Kaunda of Mesrs William Nyirenda & Company.

J U D G M E N T

Chishimba JA, delivered the Judgement of the Court.

CASES REFERRED TO:

1) Societe National Des Chemis De Pur Du Congo (SNCC) v Joseph Nonde Kasonde (2013) 3 ZR 51
2) Andreas Panani v Attorney General (2011) 2 ZR 122
3) John R. Ng'andu v Lazarus Mwiinga (1988 - 1989) ZR 197
4) Reeves Malambo v Patco Agro Industries Limited SCZ Appeal No. 234/2005

5) John Chisata v Attorney General (1990 - 1992) ZR 154
6) Chansa Chipili & Powerflex (Z) Limited v Wellingtone Kanshimike & Wilson Kalumba (2012) ZR
7) ANZ Grindlays Bank (Z) Limited v Chrispin Kaona SCZ Appeal No. 12 of 1995 (unreported)
8) Bank of Zambia v Tembo & Others (2002) Z.R. 103
9) Attorney General v Achiume (1983) ZR 1
10) Imbwae v Imbwae SCZ Judgment No. 12 of 2003
11) Nahar Investments Limited v Grindlays Bank International (Zambia) Limited (1984) ZR 99
12) Robert Simeza (Suing in his capacity as Executor of the Estate of Andrew Hadjipetrou) Motel Enterprises Limited (T/A Andrews Motel) Marianthy Noble Yolande Hadjipetrou v Elizabeth Mzyeche (Suing as the Mother and Guardian Ad Litem of Minor Beneficiaries) (2011) 3 ZR 290
13) Atlantic Airways Limited v Zodiac Seats UK Limited (formerly Contour Aerospace Limited) (2013) UKSC 46
14) Chifuti Maxwell vs Chafingwa Rodney Mwansa and Rodgers Chipili Mwansa Appeal No 09/2016

LEGISLATION CITED:

1) The Rules of the Supreme Court of England, 1999 Edition.
2) The High Court Rules Chapter 27 of the Laws of Zambia.
3) The Constitution of Zambia Chapter 1 of the Laws of Zambia
4) The Legal Practitioners Practice Rules, 2002

1.0 INTRODUCTION

1.1 This appeal is against the ruling delivered by Mrs. Justice M. K. Makubalo dated 17th February, 2020 in which she set aside the action by the appellant on the basis that it was *res judicata* and awarded costs to the respondents.

2.0 BACKGROUND

2.1 On 10th May, 2016, the appellant issued a writ of summons against the 1st respondent endorsed with the following claims:

(1) An order for ejection of the 1st respondent from the appellant's land;

(2) An injunction restraining the 1st respondent whether by himself, servants or agents from using or occupying the disputed piece of land namely No. 628, Chimwemwe, Kitwe or in any way usurping any rights over the said land, and for the 1st respondent to remove the fencing erected on the appellant's land as well as to cease clearing/development of the land; and

(3) Costs.

2.2 In a ruling dated 26th October, 2016, the court below refused to grant an interim order of injunction against the 1st respondent on the basis that the balance of convenience tilted in favour of the 1st respondent who had developed the land by putting up a garage and water treatment plant, and had acquired purchasers for the land. The court however, restrained further developments on the land in dispute pending determination of the matter.

2.3 On the 23rd June 2017, the appellant, who was the plaintiff in the court below, applied to add the 2nd respondent as a party to the proceedings, having purchased the disputed piece of land. The 2nd respondent was joined to the proceedings by order of

court dated 12th July, 2017. Thereafter, the 2nd respondent issued summons for an order to set aside process for irregularity and/or abuse of process pursuant to **Order 2 rule 2** and **Order 18 rule 19** of the **Rules of the Supreme Court of England, 1999** as read with **Order 3 rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia**. It was this application which gave rise to this appeal.

3.0 AFFIDAVIT EVIDENCE IN THE COURT BELOW

3.1 In its affidavit in support of the application to set aside process for irregularity and abuse of process, the 2nd respondent deposed that in 2014, one John Longwani Junior, in his capacity as administrator of the estate of the late John Longwani Senior, commenced proceedings against the 1st respondent, his wife, the Kitwe City Council and two others in respect of Stand Nos. 720 and 721 Chimwemwe, Kitwe, formerly Stand No. 221 Chimwemwe, Kitwe, under Cause No. 2014/HK/386.

3.2 The above action culminated in a consent judgment dated 5th September, 2014 in which the 1st respondent and his wife were adjudged to be the legal and beneficial owners of Stand Nos. 720 and 721 Chimwemwe, Kitwe.

3.3 In 2015, the 2nd respondent purchased Stand No. 720 Chimwemwe, Kitwe from the 1st respondent having conducted due diligence though its advocates at the time, Messrs. Musa Dudhia. The 2nd respondent proceeded to obtain a certificate of title in respect of the property and later conducted a forensic investigation by a surveyor, after it was joined to the proceedings. The forensic investigation revealed that the subject land, Stand No. 628 Chimwemwe, Kitwe, together with Stand Nos. 626, 627, 629, 630 and 631, fall within Stand No. 720 Chimwemwe, Kitwe, which land, the beneficial ownership was determined in Cause No. 2014/HK/386.

3.4 The affidavit further stated that a second action in respect of the property was again commenced under Cause No. 2017/HK/44 by John Longwani Junior against the Kitwe City Council, Silvia Phiri, Henry Sampa (1st respondent herein) and nine others. This matter was determined by way of consent judgment dated 20th February, 2018 and the terms were as follows:

i) That Kitwe City Council erroneously planned and allocated Stand No 221, Chimwemwe, Kitwe;

ii) That the land that was not allocated by Kitwe City Council but has been illegally trespassed on reverts to John Longwani;

iii) *That the land allocated by Kitwe City council that has not been developed on revert to John Longwani, and Kitwe City Council shall give affected offerees alternative plots;*

iv) *That for the portion of the subject land allocated by Kitwe City Council and which has actually been developed, Kitwe City Council undertakes to offer the plaintiff alternative land within;*

v) *That upon execution and sealing of the Consent Judgment, the plaintiff shall have no further claims against all the defendants inclusive and a formal notice of discontinuance will be filed into court within seven (07) days of sealing of this order.*

3.5 The 2nd respondent, in reference to the *affidavit in reply* to *affidavit in opposition for interim injunction*, states that the appellant had deposed that Sylvia Phiri, his predecessor in title, was formerly offered Stand No. 628, Chimwemwe, Kitwe by the Kitwe City Council. The appellant averred in his statement of claim that he went on to adopt Sylvia Phiri's building plans submitted to the council for a warehouse but was yet to commence developments.

3.6 Being undeveloped, Stand 628 is captured by paragraph 3 of the consent judgment under Cause No. 2017/HK/44, that such land ought to revert back to the estate of the late John Longwani Senior from whom the 1st respondent duly purchased Stand No. 720 in whose boundaries Stand No. 628 falls. Therefore, the recourse for the appellant was to pursue the Kitwe City Council,

in its capacity as the local planning authority, for an alternative plot in terms of paragraph 3 of the consent judgment, as opposed to commencing a fresh action against the respondents.

3.7 In addition, the 2nd respondent deposed that the process commenced by the appellant is tantamount to duplicity of court process and is therefore, an abuse of the process of the court. That the appellant is devoid of any cause of action there being no triable issues for the court to determine in view of the consent judgments in Cause Nos. 2014/HK/384 and 2017/HK/44.

3.8 Neither the appellant nor the 1st respondent filed any affidavit or skeleton arguments in the court below. When the matter came up for hearing on 24th September, 2018, the appellant was absent. The respondents' advocates informed the court that they were unaware of the reasons for the non-attendance by the appellant. The learned Judge informed the parties that a notice to adjourn by the appellant was filed on 18th September, 2018 supported by an affidavit. Further that the reasons advanced therein were reasonable, and ample notice having been given, the court adjourned the matter to 27th March, 2019.

3.9 On the return date, of 27th of March 2019, the court proceeded to hear the application by the 2nd respondent set aside process.

4.0 DECISION OF THE COURT BELOW

4.1 In her ruling, the learned Judge stated that the application by the 2nd respondent substantially centered on the argument that the cause of action herein had already been conclusively determined under Cause Nos. 2014/HK/386 and 2017/HK/44, thereby making the process in this cause a duplicity and an abuse of court process. The court framed the issue for determination as follows; whether the questions or issues pleaded in this action have previously been determined in the causes above.

4.2 The court below further stated that Sylvia Phiri, from whom the appellant traced his title to Stand No. 628 being claimed, was one of the parties in Cause No. 2017/HK/44 and consented to the judgment. The contract of sale for Stand No. 628 was dated 19th September, 2014 while the consent judgment in Cause No. 2014/HK/386 is dated 5th September, 2014. The consent judgment under Cause No. 2017/HK/44 was filed into court on 20th February, 2018 well after the action was commenced.

4.3 The lower court was satisfied that the subject matter in the two matters concluded by consent judgments is the same as the one under consideration, even though the appellant was not a party. She considered the case of **Societe National Des Chemis De Pur Du Congo (SNCC) v Joseph Nonde Kasonde** [1], on the principle of law that *res judicata* extends to the opportunity to claim matters which existed at the time of instituting the first action and giving judgment. In that regard, she accepted, in the absence of evidence to the contrary, that the appellant was fully aware of the existence of the two consent judgments prior to commencement of this action.

4.4 That the appellant had the opportunity to join the proceedings to protect his interests and recover that which he seeks in this action. She was of the view that there was a likelihood of arriving at a judgment that might conflict with the terms of the consent judgments if she were to proceed to determine the action.

4.5 Consequently, she came to the conclusion that the present action is *res judicata* and set it aside with costs to be agreed upon, or taxed in default.

5.0 GROUNDS OF APPEAL

5.1 The appellant has advanced three grounds of appeal couched as follows:

1) ***The ruling of the court below made in the absence of the appellant and without proof of service of the 2nd respondent's application culminating into the subject ruling as well as notice of hearing was erroneous, unjust and in breach of the principles of the fair play or alternative;***
2) ***The court below erred in law and fact in its reliance on the principles of res judicata which is a question of jurisdiction after finding it otiose to deal with the actual reliefs sought by the 2nd respondent granted res judicata was not anywhere in the summons (application) apt to be determined raised as part of the reliefs sought nor was res judicata raised as a defence or plea by the 2nd respondent; and***
3) ***The court below erred in law and fact in concluding that the appellant's case was conclusively determined or was res judicata on the strength of disputable and not so plain or obvious facts and law and issues/grounds contained in the affidavit in support of the 2nd respondent's application subject of the ruling.***

6.0 APPELLANT'S HEADS OF ARGUMENTS

6.1 The appellant filed heads of argument dated 27th October, 2020. The first ground is its main ground of appeal, the rest of the grounds being argued in the alternative.

6.2 The appellant submits that when the 2nd respondent's application came for hearing on 24th September, 2018, the court below adjourned it because the appellant's advocates had filed a notice of adjournment supported by an affidavit. The court below was satisfied with the reasons advanced and adjourned the matter to 27th March, 2019.

6.3 The appellant submitted that during the interim period, neither the 1st nor 2nd respondent prepared and served notice of hearing for service on the appellant's advocates. Further, that when the matter came for hearing on 27th March, 2019, the advocates of the 2nd respondent did not inform the court as to whether they had served any notice of hearing on the appellant. The appellant equally blamed the learned judge for not inquiring from the advocates of the 2nd respondent why counsel for the appellant was absent.

6.4 In addition, the 2nd respondent had filed skeleton arguments and list of authorities which were never served on the appellant. In this regard, the appellant contends that its right to a fair hearing coupled with natural justice were trampled on. To buttress the above contentions, reference was made to the case

of **Andreas Panani v Attorney General** [2] and **Article 18(9) of the Constitution of Zambia Chapter 1 of the Laws of Zambia**.

6.5 On the absence of a notice of hearing being served on the appellant, it was submitted that this robs the court of jurisdiction. We were referred to the case of **John R. Ng'andu v Lazarus Mwiinga** [3] where it was held that:

> ***"The trial judge had no jurisdiction to dismiss the appeal for want of attendance of the appellant's advocate. In the absence of proof of service of a notice of the new hearing date the only course open to the court were to allot a fresh hearing date and to cause notices thereof to be served on the advocates for the parties or to strike the case out of the list and leave it to the parties to make application to restore."***

6.6 In the absence of proof of service, the lower court ought not to have proceeded to hear the 2nd respondent, render a ruling and set aside the case on the ground of *res judicata*.

6.7 In ground two, the appellant contends that though the court below dismissed the case on the basis of *res judicata*, it was not raised in the application or summons to be dealt with. Counsel submitted that though the summons for an order to set aside process for irregularity and/or abuse of process contained a reference or rule authority, it metamorphosed into an application to dismiss the case on grounds of *res judicata*

without any amendment. As regards the provisions relied on, the appellant contended that **Order 2 rule 2** and **18 rule 19 of the RSC** do not envisage dismissal of cases by way of *res judicata*.

6.8 Therefore, the lower court should not have proceeded to set aside the suit on grounds of *res judicata* as though the application had been amended. The court was only enjoined to deal with the application before it or if amended, as amended. The cases of **Reeves Malambo v Patco Agro Industries Limited** [4], **John Chisata v Attorney General** [5] and **Chansa Chipili & Powerflex (Z) Limited v Wellingtone Kanshimike & Wilson Kalumba** [6] were cited in support.

6.9 In ground three, it is submitted that in the ruling in respect of the application for an injunction against the 1st respondent, the court had indicated that the Kitwe City Council ought to be made a party to the proceedings to help clear uncertainty about the title to the land in dispute. According to the appellant, this demonstrates that only a trial could resolve the issues in this case. Therefore, the dismissal of the case on the basis of *res judicata* in light of the ruling dated 26th October, 2016 is conflicting and added to uncertainty.

6.10 The appellant further contended that the learned judge in relying on the likelihood of conflicting decisions and *res judicata*, was mixing up two principles of law founded on different principles, and clearly misapprehended the contents of the two consent judgments. That the court below not only misapprehended the import of the real issue or subject matter to be determined *in casu*, but also the essence and facts on which can be justified a determination of the principle of *res judicata*, multiplicity of actions which can lead to conflicting of the above three principles.

6.11 As regards the principle of *res judicata*, it was submitted that the dismissal of the matter was made contrary to the principle of *res judicata* as espoused in a plethora of cases, among them, **ANZ Grindlays Bank (Z) Limited v Chrispin Kaona** [7] and **Bank of Zambia v Tembo & Others** [8]. That the requirements to establish *res judicata* viz-a-viz the facts of the case are not in consonant.

6.12 It was argued that the cause of action in this matter is not the same or about the same subject-matter. That in this case, the subject matter relates to Stand No 628, Chimwemwe Kitwe which is not mentioned in Cause Nos. 2014/HK/386 and

2017/HK/44. Further, that the requirement in applications for *res judicata* are that the plaintiff should have commenced the first action in which the plaintiff had opportunity of recovering that which is sought to be recovered in the second action. No such action was commenced or shown to have been commenced by the appellant who was neither a party nor made a party to the two actions in 2014 and 2017.

6.13 As regards the requirement that the first and second cause of action must be between the same parties, it was argued that on the facts of the case, there was no second action commenced by the appellant. The appellant was neither a party to any other case other than the present nor is Sylvia Phiri his predecessor in title, but Natvarish Dodia Kirishirih.

6.14 It is submitted that there was no final conclusive judgment on the subject matter as the consent judgments under Cause Nos. 2014/HK/386 and 2017/HK/44 were not from cases instituted by the appellant nor was the appellant a party to either of them. The appellant's certificate of title in respect of Stand No. 628, was issued on 5th August, 2011 well before the title for Stand No. 720 which was issued on 17th September, 2014.

6.15 The gist of the argument being that on the available facts, there is neither a multiplicity of actions nor an abuse of court process by the appellant. That the court below had no basis to dismiss this matter on the ground that there was a likelihood of arriving at a judgment that might conflict with the terms of the consent judgments, and that this matter was *res judicata.*

7.0 ARGUMENTS BY THE RESPONDENT

7.1 The respondents relied on heads of argument dated 14th December 2020. It was submitted that this is a proper case for this court to uphold the findings of the court below. The said findings of fact cannot be said to be perverse, or having been made in the absence of supporting evidence and/or a misapprehension of any relevant facts. Reliance was placed on the case of **Attorney General v Achiume** [10].

7.2 With respect to ground one, it was submitted on behalf of the 2nd respondent that the ground raises two issues to be addressed as follows:

1) Whether or not the court below flouted the principles of natural justice and fair hearing as protected by the law to result in an injustice; and
2) Whether or not the court proceedings below were undertaken without the knowledge of the appellant.

7.3 We were referred to the case of **Imbwae v Imbwae** [10] where the court held that:

> ***"There is no procedural injustice occasioned when a Court proceeds, where there has been inaction on the part of a party despite being aware of proceedings."***

7.4 It was argued that the appellant was aware of pending proceedings and/or applications having been in receipt six months prior to the hearing date and chose to do nothing about it. Therefore, the court was justified in proceeding to hear the application in the absence of the appellant as long as the court come to a reasonable conclusion, as was the case herein, that the said party was aware of the date of hearing, it having been issued at the instance of his application.

7.5 It was contended that where a party applies to have his matter adjourned, as was the case with the appellant, and the court allows such an application, and proceeds to give the next date of hearing, the party can be said to be impliedly or expressly aware of the next date of hearing. The party need not be served a notice of hearing, and neither should the court even issue any. That in light of the inactivity in the prosecution of the matter

coupled with the fact that the date of hearing was issued at their instance, one can only come to the conclusion that the appellant was aware of the proceedings on the said date. There was no injustice occasioned by the court proceeding to hear the application.

7.6 Counsel submitted that the application to set aside process for irregularity/abuse of court process was returnable on 24th September, 2018 and was duly served on the appellant's advocates of record on 13th September, 2018 as per the affidavit of service at page 214 of the record of appeal. The 2nd respondent had complied with the provisions of **Order 10 rule 4 of the High Court Rules Chapter 27 of the Laws of Zambia** and that the appellant was aware of the proceedings before court though he chose not to oppose the said application. Instead, the appellant's advocates opted to apply for an adjournment on 18th September, 2018, which application was not served on the 2nd respondent. As a result of the application to adjourn, the court adjourned the matter to 27th March, 2019.

7.7 The gist of the 2nd respondent's argument is that no new notices of hearing was required to have been issued and neither did the appellant need any further notification of the same. The new

date having been issued at the instance of the appellant, the court by implication was satisfied and needed no further inquiry as regards knowledge of the said hearing by the appellant since his counsel was fully aware of the same or ought to have been aware of the said date of hearing.

7.8 Counsel contended that the appellant was duty bound, as a serious litigant, to cause a search to be undertaken, which he unfortunately may not have undertaken. His laxity in the prosecution of his case cannot be blamed on the 2nd respondent or the court below but himself for the manner he chose to prosecute his case.

7.9 We were referred to the provisions of **rule 35(1)(a) of the Legal Practitioners Practice Rules, 2002** on the duty of counsel to ensure that his client does not suffer any unnecessary costs by being diligent at every stage of the proceedings such as carrying out searches at the court registry on the court records.

7.10 The case of **Nahar Investments Limited v Grindlays Bank International (Zambia) Limited** [11] was called in aid on the undesirability of respondents being kept in suspense because of dilatory conduct on the part of appellants who sit back until

there is an application to dismiss their appeal before making their own frantic application for an extension.

7.11 In this case, it was submitted that having filed a notice for an adjournment, the appellant ought to have made a follow up to find out what occurred at the last hearing having been absent, or to have sent someone to make an application on their behalf. To sit back for about six months without knowing what transpired at court coupled with not filing anything in opposition is a clear indication of not being interested in defending the case. A court that subsequently proceeds to hear the matter cannot be faulted and neither can one claim breach of the rules of natural justice.

7.12 In support of the above argument, reliance was placed on the case of **Robert Simeza (Suing in his capacity as Executor of the Estate of Andrew Hadjipetrou), Motel Enterprises Limited (T/A Andrews Motel) & Marianthy Noble Yolande Hadjipetrou v Elizabeth Mzyeche (Suing as the Mother and Guardian Ad Litem of Minor Beneficiaries)** [12] where the court stated as follows:

> ***"It is clear that the first appellant had notice, as the matter was adjourned at his counsel's request. He took no steps to file***

an affidavit in opposition. Even in the Supreme Court he never filed the appeal within time. The first appellant's attitude in this litigation has been similar to that in the lower Court and this Court. He appears to be seized with the notion that he must drive the litigation and not the judges. The High Court and Supreme Court judgments decided on the facts. ..."

7.13 In response to ground two, the respondent began by defining the term *res judicata* as stated in the English case of **Atlantic Airways Limited v Zodiac Seats UK Limited (formerly Contour Aerospace Limited)** [13]. In that case, Lord Sumpton defined the term *res judicata,* as being a portmanteau term, used to describe a number of different legal principles with different juridical origins. In this regard, it was submitted that the term *res judicata* covers abuse of court process and/or irregularity depending on the context under consideration.

7.14 It was contended that the application in issue was to set aside the matter for abuse of court process/irregularity. Therefore the 2nd respondent as a matter of fact, had pleaded res judicata through abuse of court process and/or irregularity. To argue that *res judicata* was not pleaded is misplaced and is devoid of an understanding of the portmanteau nature of the term. Therefore, the reliefs sought and granted by the court below,

cannot be faulted at all if the portmanteau nature of the word *res judicata* is taken into account.

7.15 It was submitted that **Order 2 rule 2** and **18 rule 19 of the RSC**, relate to applications to set aside for irregularity as confirmed by the **Editorial Note 2/2/2 at page 11 of the White Book**. **Order 3 rule 2 of the HCR** empowers the court to award reliefs either expressly asked for by a party or not so long as the same are viewed to serve the interests of justice. Irregularity as a matter of fact, can result in setting aside process depending on the nature of the said irregularity.

7.16 The respondent in opposing ground three, drew our attention to the case of **Bank of Zambia v Tembo & Others** [8] which dealt with the defence of *res judicata.* It was submitted that what remains cardinal is the link between this process and two other finalized matters on the subject matter. The said matters under Cause Nos. 2014/HK/386 and 2017/HK/44 relating to Plot No. 720, Chimwemwe, Kitwe (formerly Plot No. 221 Chimwemwe, Kitwe) were settled by consent judgments.

7.17 That whilst the appellant was a party to the action under Cause No. 2017/HK/44, one Sylvia Phiri remains the only traceable offeree by the Kitwe City Council though wrongfully and

illegally, and as such could not transmit good title. Plot No 628 Chimwemwe, Kitwe was offered to Sylvia Phiri by the Kitwe City Council which property formed part of Plot No. 221 now 720 Chimwemwe, Kitwe, which is basically a subset of Plot No. 720.

7.18 The 2nd respondent contends that the appellant having admitted in its statement of claim that Plot 638 was not developed, it follows that it was subject to the terms of settlement under Cause No. 2017/HK/44. Further that it remains subject of the second consent order which nullified all plots given by the Kitwe City Council within the parameters of Stand No. 720 belonging to the 2nd respondent.

7.19 Counsel contended that while the name of the appellant was not a party to the consent judgment in Cause No. 2017/HK/44 on final settlement, he was aware of the proceedings as the matter was against all former and current occupants of Plot 221 Chimwemwe, including the 1st respondent and appellant. Therefore, the appellant had the opportunity to defend his cause having been among all occupants of Plot 221.

7.20 The appellant being aware of the above proceedings, opted to commence a fresh action, which action does not seek to challenge the consent order in Cause No. 2017/HK/44. The

appellant is seeking to obtain conflicting judgments and bring the name of the court into disrepute, hence abuse of court process. It was prayed that the appeal be dismissed with costs for being incompetent and devoid of plausible grounds.

8.0 DECISION OF THIS COURT

8.1 We have considered the appeal before us, the authorities cited and the arguments advanced by the Learned State Counsel on record and Counsel for the appellant. Before we proceed to deal with the grounds of appeal, we shall narrate the background facts in the court below leading to the ruling subject of appeal.

8.2 On the 10th of May 2016, the appellant commenced an action seeking an order to eject the 1st respondent from his land. The appellant further sought an order of injunction restraining the 1st respondent from using or occupying the disputed piece of land namely plot 628 Chimwemwe Kitwe or in any way usurping any rights over the said land as well as to remove the fencing erected on the his land. In a ruling dated 26th October, 2016, the lower court declined to grant an order of interim injunction against the 1st respondent (the only defendant at the time).

8.3 There were no proceedings on record for over seven months until the 23rd June, 2017, when the appellant filed summons to

add BIA Zambia Limited as a party. The application was granted on 12th July, 2017 joining BIA Zambia Limited to the proceedings as the 2nd respondent.

8.4 On 21st August, 2018, the 2nd respondent filed a conditional memorandum of appearance. On the same date, it lodged summons for an order to set aside process for irregularity and/or abuse of process. The court issued a date for hearing returnable on 24th September, 2018. The appellant was served the notice of the hearing date on the 13th September, 2018.

8.5 On 18th September, 2018, the appellant's advocates filed a notice to adjourn supported by an affidavit in which it was deposed that Robert Mwanza, counsel seized with conduct of the matter would be out of jurisdiction from the 15th September, 2018 to 8th October, 2018. In the same affidavit, counsel proposed that the matter be adjourned to any of the following dates, 23rd October, 2018, 25th October, 2018 and 14th November, 2018.

8.6 We note that even after being served with the summons, affidavit and arguments in support of the application for an order to set aside process for irregularity and/or abuse of

process, the appellant did not file any affidavit and arguments in opposition. He simply filed a notice to adjourn.

8.7 When the matter came up for hearing on 24th September, 2018, the appellant was not in attendance. The court being aware that a notice to adjourn was filed on 18th September, 2018, adjourned the matter to 27th March, 2019 being the next available date. On the said return date, the court proceeded to hear the application by counsel for the 2nd respondent.

8.8 We shall first determine ground one of appeal. The issues raised in ground one for determination are as follows;

(1) Whether the appellant was served with the application by the 2nd respondent to set aside process for irregularity/abuse of process.

(2) Whether the appellant was aware or notified of the hearing date of 27th March 2019.

(3) Whether the court was required to issue fresh notices of hearing in respect of the adjourned application

(4) Whether there was a breach of the principle of natural justice and fair hearing.

8.9 In ground one, the appellant contends that the absence of proof of service and notice of hearing on the appellant by the 2nd respondent rendered the ruling appealed against erroneous, unjust and in breach of the principles of fair play. On the other

hand, the 2nd respondent contends that the appellant, having sought an adjournment (and being granted one), did not require to be served a fresh notice of hearing more so that no affidavit and arguments in opposition to the application were filed.

8.10 The 2nd respondent placed reliance on the case of **Robert Simeza & Others v Elizabeth Mzyeche** [12], the facts being that the matter had been adjourned at the instance of the 1st appellant and a date set. However, on the date set for hearing, the 1st appellant did not appear nor was there any explanation tendered for the absence. In addition, no affidavit in opposition was filed against the assessment by the 1st appellant. The Deputy Registrar proceeded to hear the matter for assessment and rendered a decision.

8.11 In dismissing the appeal, the court stated that:

> ***"... no procedural injustice is occasioned when a party who is aware of the proceedings does not turn up as we said in Imbwae v Imbwae (4). In Chibuye and Others v The People (5), which was a criminal matter we said:***
> ***"It is for an accused person to avail himself in Court when called upon and let due process of law take its course. An accused should not be allowed to dictate whether or not to be tried or unreasonably hold the Court to ransom. Procedural rights must be invoked."***

The tenor of our judgments in these two cases is that 'you cannot force a litigant who does not want to litigate to litigate'."

8.12 It is not in dispute that the court below granted the appellant an adjournment. The appellant was not in attendance on the 24th of September 2018 when the matter came up for hearing. The motion to adjourn was brought to the attention of the 2nd respondent. The court granted the motion and adjourned the application at the instance of the appellant to the 27th of March 2019.

8.13 As regards the issue of whether the appellant was served with the application by the 2nd respondent to set aside process for irregularity/abuse of court process, we are of the firm view that the appellant's advocates were duly served. We refer to the affidavit of service at page 214 of the record of appeal showing that on 13th September 2018, his advocates were served with summons supported by an affidavit in support returnable on the 24th of September 2018. This is confirmed by the fact that in its affidavit in support of notice to adjourn, the appellant's advocates made reference to the application set for 24th September 2018.

8.14 Before proceeding to determine whether the appellant was aware of the fresh return date of 27th of March 2019 and whether the court had a duty to issue and serve a fresh notice of hearing, we wish to make *obiter dictum* comments.

8.15 It is trite that *obiter dictum* are judges' comments or observations made in passing on a matter arising in a case before the court and are remarks not essential to a decision and do not create binding precedent. Our comments are as follows; that having been served with the summons to set aside process for irregularity and abuse of process and affidavit in support, the appellant was not only duty bound to file an affidavit and arguments in opposition if at all, but also to make enquiries as to what transpired upon his return from his trip as opposed to sitting back and folding his hands expecting to be served a fresh notice of hearing.

8.16 A prudent litigant/lawyer after seeking an adjournment, ought to have made a follow up as to the next date of hearing from his learned colleague present at the hearing. A mere search on the record would have revealed the date to which the pending application was adjourned to. As stated earlier, the matter was adjourned to a date six months away. This was sufficient time

for counsel for the appellant to make the necessary enquiries and file a response to the pending application, if any.

8.17 Having sat back for six months until the application was heard and then challenging it on principle of breach of natural justice can be viewed as dilatory conduct on the part of counsel. Litigation is no longer driven at the pace of lawyers/litigants but court driven.

8.18 Reverting to the issue at hand, we find ourselves bound by the precedents from the Apex Court, on the fundamental principles of natural justice, which require that every litigant should have his day in court and that the court must afford litigants an equal opportunity to present their cases. It is trite that before proceeding in the absence of a party, the court must satisfy itself that the process was served upon parties.

8.19 The absence of the litigant arose from the fact that the appellant received no notification of the date of adjourned hearing.

8.20 As regards the principles of natural justice, they require that every person should have his day in court and that **"the court must afford litigants an equal opportunity to present their cases".** See the case of **Chifuti Maxwell v Chafingwa Rodney Mwansa and Rodgers Chipili Mwansa** [14].

8.21 The issue to be determined in this matter is whether court processes i.e. notice of hearing of the return date of 29th March 2019, was served on the appellant. Should the court have satisfied itself that process was served before proceeding to hear the matter?

8.22 We hold the view, that the court below should not have proceeded to hear the application on the new return date of the 27th day of March 2019 unless satisfied that such notice had been served. Further, it ought to have considered as to whether the appellant was aware of the date of hearing. The court could only proceed to hear the matter upon proof of service of the date of the adjourned hearing or being satisfied that process was indeed served upon the appellant.

8.23 In the absence of the above, the court ought to have adjourned the matter to another date and further directed that service of the notice of hearing be served upon the appellant.

8.24 The record shows that when the matter came up on the 18th of September 2018, it was adjourned to the 27th of March 2019. The applicant present at the time of adjourning the application had an obligation to serve or notify the other side of the date of the adjourned hearing. The 2nd respondent, proponent of the

application did not notify the appellant of the date of the adjourned hearing.

8.25 The proponent of the application has a responsibility to serve process on the other party to the litigation. It is trite that proof of such service is by way of affidavit of service deposing to the facts that service was effected on the party to the action. Further the proponent of the application did not bring to the appellant's attention the fresh date for hearing nor file an affidavit of service to the effect that its' application to set aside process was adjourned to the 27th of March 2019.

8.26 We therefore, come to the conclusion that the court below erred by proceeding to hear the 1st respondent's application in the absence of the appellant who was not served with the notice of hearing for the return date of 27th March 2019. Further the court erred by failing to satisfy itself that the appellant was notified of the date of hearing by service. Therefore, there was procedural injustice occasioned by the court proceeding in the manner it did.

8.27 **Order 35 Rule 3 of the High Court Rules** is instructive, on non-attendance of the parties at hearing be it a trial or other. That ***"the court may upon proof of service of notice of trial***

(hearing) proceed to hear the cause .... Or may postpone the hearing of the cause and **direct notice of such postponement to be given to the defendant (other Party).....”**

8.28 We hold the view that the court below flouted the principles of natural justice and fair hearing by failing to postpone the hearing of the application to set aside process, in the absence of proof of service of the date of hearing for the 27th March 2019. At the hearing of 27th March 2019, the court ought to have considered whether notice had been received, and be satisfied that there was proof of service before proceeding to hear the applicant in the absence of the appellant.

8.29 Having held that the court below erred by proceeding to determine the matter in the absence of the appellant, who had not been properly serviced with the notice of the date of the adjourned hearing, the remaining grounds two and three are academic and we will not belabor to pronounce ourselves on the issue of *res judicata.*

9.0 **CONCLUSION**

9.1 For the forgoing reasons, we hereby uphold the appeal on the basis that the ruling of the court below was made in the absence

and without proof of service of the notice of hearing on the appellant. We accordingly, set aside the ruling of the court below dismissing the action on the basis of *res judicata*. We hereby remit the record back to the High Court before another judge, to hear the application by the 1st respondent to set aside process for irregularity and or abuse of process.

9.2 We order that the costs in this appeal abide the outcome of the matter in the court below.

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F. M. Chishimba
COURT OF APPEAL JUDGE

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P. C. M. Ngulube
COURT OF APPEAL JUDGE

.....

K. Muzenga
COURT OF APPEAL JUDGE