

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

**APPEAL NO. 68/2022**

BETWEEN:

**ALICE SOKO** (Administratrix of the Estate of the  
Late George Soko)

**APPELLANT**

AND

**EUNICE BANDA**  
**ANDREW SEKELA**  
**IJUOMA ZULU**  
**BRAIN SOKO**  
**FRED MTONGA**



**1<sup>ST</sup> RESPONDENT**  
**2<sup>ND</sup> RESPONDENT**  
**3<sup>RD</sup> RESPONDENT**  
**4<sup>TH</sup> RESPONDENT**  
**5<sup>TH</sup> RESPONDENT**

**CORAM: SIAVWAPA, JP, MAKUNGU AND CHISHIMBA, JJA**

On 23<sup>rd</sup> March and 25<sup>th</sup> April, 2023

FOR THE APPELLANT: MR. G. TEMBO OF JAMES AND DORIS  
LEGAL PRACTITIONERS

FOR THE RESPONDENTS: NOT IN ATTENDANCE

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**J U D G M E N T**

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**SIAVWAPA, JP** delivered the Judgment of the Court.

**Cases referred to:**

1. *Mukumbuta and Others v Choobana and Others SCZ Judgment No. 8 of 2003*
2. *Kalusha Bwalya v Chardore Properties Ltd and Others (2009) HPC/0294 [2012]*

3. *Lewanika and Another v Chiluba* 1998 ZR 79
4. *Jamas Milling Co Ltd v Imex International (PTY) Ltd* (2002) ZR 79
5. *John Mumba and Others v Zambia Red Cross Society* (2006) ZR 137
6. *Robert Lawrence Roy v Chitakaka Ranching Co.* (1976) HN/790

**Legislation referred to:**

1. *The Rules of the Supreme Court* 1999 edition
2. *The Intestate Succession Act Chapter 59 of the Laws of Zambia*
3. *The High Court Rules Chapter 27 of the Laws of Zambia*

**1.0 INTRODUCTION**

- 1.1 This appeal is against the Ruling of the Honourable Mrs. Justice Ruth Chibbabbuka delivered on 3<sup>rd</sup> November 2020 refusing to review her earlier Ruling dated 27<sup>th</sup> July 2020.
- 1.2 By the said Ruling of 27<sup>th</sup> July 2020, the learned Judge dismissed the Appellant's action for an order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from intermeddling in the affairs of the estate of George Soko.
- 1.3 The learned Judge dismissed the application on a point of law of her own motion pursuant to Order 14A rules 1(b), 2 and 3 of the Rules of the Supreme Court 1999 edition.
- 1.4 The learned Judge formed the view that since there was a pending matter before the Subordinate Court arising from the



same facts, the matter before her was premature and a recipe for multiplicity of actions.

## **2.0 BACKGROUND**

- 2.1 In 2001, the 1<sup>st</sup> Respondent was granted an order of Administration jointly with one Steven Soko by the Matero Local Court over the intestate estate of one George Soko who died on 26<sup>th</sup> January 2001.
- 2.2 On 5<sup>th</sup> June 2019, the Appellant issued a summons in the Matero Local Court seeking an order revoking the 1<sup>st</sup> Respondent's letter of Administration on the allegation that she had failed to administer the Estate of the late George Soko.
- 2.3 By Certificate of Judgment exhibited at page 121 of the Record of Appeal, the Local Court revoked the appointment of Mr. Steven Soko and the 1<sup>st</sup> Respondent as administrator and administratrix respectively of the Estate of the late George Soko.
- 2.4 On 9<sup>th</sup> July 2019, the Letters of Administration in respect of the estate of the late George Soko were granted to Jimmy Soko and the Appellant herein by the High Court Probate Registry.
- 2.5 On 12<sup>th</sup> August 2019, the Appellant and Jimmy Soko, filed an originating summons in the High Court by which they sought an order of the Court to sell property known as Plot No. B3/IG

of 8632 Emmasdale which formed part of the estate of the late George Soko.

2.6 They made the application in their capacities as administrator and administratrix of the estate of the late George Soko pursuant to section 19(2) of the Intestate Succession Act Chapter 59 of the Laws of Zambia.

2.7 In the affidavit in support of the originating summons jointly deposed to by the Applicants, they state as follows in paragraphs 4 and 6;

(4) That the late George Soko died on the 26<sup>th</sup> day of January 2001 at University Teaching Hospital Lusaka.

(6) That upon his demise we were appointed as administrators of the estate by the Local Court and later obtained a probate at the High Court of Zambia hereby produced and marked as exhibit "J52".

2.8 On 14<sup>th</sup> September 2019, the Applicants executed a Contract of sale as vendors with Mr. Mtonga as the purchaser for a consideration of one million kwacha (see page 74 Record of Appeal).

- 2.9 On 23<sup>rd</sup> September 2019, the 1<sup>st</sup> Respondent filed an originating summons supported by an affidavit seeking an order to set aside the order to sell the property in issue.
- 2.10 In the affidavit in support she avers that she had appealed the revocation of her appointment to the Subordinate Court and obtained an interim order of stay.
- 2.11 She further averred that the order to sell was obtained with suppression of material facts.
- 2.12 However, on 5<sup>th</sup> October 2019, the Applicants signed a note declaring that they had since handed over the property to the purchaser, Mr. Fred Mtonga (See page 77 Record of Appeal).
- 2.13 Other interlocutory applications were made by the parties which are of little relevance to this appeal except for the application for an order to stay execution of Judgment pending determination of summons for the order to set aside.
- 2.14 This application was filed on 13<sup>th</sup> November 2019 and its essence sought an order staying the order to sell the property granted to the Appellant.
- 2.15 The Appellant opposed the application via an affidavit filed into Court on 3<sup>rd</sup> December 2019.



2.16 The learned Judge granted the order to set aside the order dated 5<sup>th</sup> September 2019, for the sale of the property by Ruling dated 11<sup>th</sup> December 2019.

2.17 The learned Judge proceeded to issue an order for directions on 11<sup>th</sup> December 2019 and ordered that the matters commenced by originating summons be deemed to have commenced by writ of summons as there were contentious issues.

2.18 On 20<sup>th</sup> January 2020, the Appellant, and Jimmy Soko, issued a writ of summons and a statement of claim and an affidavit in support of summons for an order of injunction which the 1<sup>st</sup> Respondent opposed by affidavit dated 11<sup>th</sup> March 2020. It is presumed that the Appellants also filed a summons for an order of injunction although it appears to have been omitted from the record.

2.19 It is the application for an order of injunction that gave rise to the Ruling of 27<sup>th</sup> July, 2020, which in turn became the subject of an application for review. The Ruling on the application for review is the subject of this appeal.

### **3.0 APPEAL**

3.1 Having already stated the decision of the High Court in the impugned Ruling and the reasons deployed by the learned

Judge in paragraphs 1.1 to 1.4 it is not necessary to repeat the decision here.

3.2 The Appellants filed the Notice and Memorandum of Appeal on 17<sup>th</sup> November 2020 advancing five grounds set out in the Memorandum of Appeal as follows;

1. The Judge below erred in law and fact when it held that a Court may not review its decision save for when fresh evidence that could not, with due diligence have been made available to the Court at the time of its decision is produced.
2. The Judge below misdirected herself in law and fact when she refused to review her Ruling of the 27<sup>th</sup> July 2020 on the ground that Review was not available to the Appellant as the application did not show any fresh evidence on which the Ruling could be reviewed.
3. The Court below misdirected itself in law and fact when it refused to review the Ruling of the 27<sup>th</sup> July 2020 to allow for adjudication of all disputes before the Court thereby rendering a Judgement on merit and as justice so required in casu.
4. The Court below misdirected itself in law and fact when she refused to review her decision on ground that the disputes before her were subject of proceedings before another Court, therefore being multiplicity of process even

after acknowledging the parties before her and subject of adjudication was different to what the matter before the Subordinate Court.

5. That the Court below erred in law and fact when she refused to review her decision in awarding costs for the defendants based on the decision of Mukumbuta and Others v Choobana and Others<sup>1</sup> even after acknowledging that all matters before the Courts were commenced by parties acting in person.

#### **4.0 ARGUMENTS IN SUPPORT**

- 4.1 The Appellant has forcefully argued that the learned Judge misdirected herself in law by holding that a review is available only where fresh and relevant evidence sought to be relied upon was available at the time of the decision except it could not be found with due diligence.
- 4.2 She cited Order 39 rule 1 of the High Court Rules which empowers a trial Court to review its own decision upon such grounds as the Judge shall consider sufficient.
- 4.3 This provision appears not to restrict the exercise of the discretion to evidence available at the time of the decision. It however, empowers the Judge to call fresh evidence if he deems it necessary.



- 4.4 Among the many cases referred to, the most relevant one is that of Kalusha Bwalya v Chardore Properties Ltd and Others<sup>2</sup> where order 39 was considered.
- 4.5 What came out of that case, which made reference to the cases of Lewanika and Another v Chiluba<sup>3</sup>, Jamas Milling Co Ltd v Imex International (PTY) Ltd<sup>4</sup> and John Mumba and Others v Zambia Red Cross Society<sup>5</sup>, among others, is that sufficient grounds is the key to the door for review at the discretion of the Court.
- 4.6 Overall, the arguments for grounds one and two are similar. The Appellant however, brings in the issue of how the learned Judge applied order 14A of the Rules of the Supreme Court in deciding the Ruling the subject of this appeal. She criticizes the learned Judge for not according the parties a hearing as provided for under sub-rule (3) (a).
- 4.7 It is further argued that the learned Judge ought not to have dismissed the matter because the claims and reliefs before the High Court and the Subordinate Court were different and therefore, not causing a multiplicity of actions.
- 4.8 Ground three criticizes the learned Judge for allegedly refusing to deal with all the disputes before the Court. In this ground, other than the numerous quotations from various Court decisions, there is nothing by way of arguments.

4.9 Ground four is a repeat of the argument in grounds one and two.

4.10 Ground five is on the Judge's refusal to review the award of costs. The argument here seems to be that if not for the reasons discussed earlier in other grounds, the learned Judge ought to have reviewed her Ruling on the basis of costs as awarded to the Respondent.

## **5.0 ARGUMENTS IN OPPOSITION**

5.1 The Respondents did not file heads of argument in opposition and as such, we shall rely on the arguments by the Appellant, the Judgment appealed against and the grounds of appeal for our analysis and decision.

## **6.0 ANALYSIS AND DECISION**

6.1 The main issue for determination is whether the learned Judge below properly exercised her discretion when she refused to review her Ruling of 27<sup>th</sup> July 2020 in her Ruling of 3<sup>rd</sup> November 2020.

6.2 In this regard, grounds one, two and four will be treated together as they all criticize the learned Judge for refusing to review the said Ruling.

- 6.3 The two bases of the arguments by the Appellant hinge on the interpretation of Order XXXIX (1) of the High Court Rules and whether the two matters before the High Court and the Subordinate constituted a multiplicity of actions.
- 6.4 The argument based on Order XXXIX is that based on the earlier cited Judgments, the proper interpretation of Order XXXIX is that the applicant should only tender grounds which the Judge shall consider sufficient to persuade him/her to review his/her decision and not necessarily that the applicant should rely on evidence which was available but could not be accessed at the time of the decision with exercise of due diligence.
- 6.5 However, the Appellant cited some of the cases the learned Judge relied upon which seem to suggest that the Judge was right in her interpretation of Order XXXIX.
- 6.6 The position is however, clearer in the case of John Mumba, Danny Mseteka, Dr. W. Amisi, Denis S. Simuyuni v Zambia Red Cross Society (Supra) where the Supreme Court of Zambia stated as follows;
3. *A Court may review its decision or order on sufficient grounds, one such ground is that some evidence that existed at the time of hearing was not made available to Court on the ground that even after a diligent search, it could not be found.*
  4. *The power to review under Order 39, rule 1 of the High Court Rules is discretionary for the Judge and there must be sufficient grounds to exercise that discretion.*

6.7 We fully endorse this exposition of the law on review by the Supreme Court in this case for holding that the power to review under order 39(1) is discretionary and only exercisable on sufficient grounds, one of which is the availability of evidence which existed at the time of the decision but not brought to Court because it could not be found even with due diligence.

6.8 So, for the Appellant to successfully assail the decision of the Court below, she ought to show that she presented sufficient grounds for her to exercise that discretion.

6.9 In her Ruling at page 18 of the Record of Appeal in line 1, the learned Judge referred to the Jamas case as confirmed by the Supreme Court in the case of Robert Lawrence Roy v Chitakaka Ranching Co<sup>6</sup> to the effect that;

*"For review under Order 39 of the High Court Rules to be available the party seeking it must show that he has discovered fresh material evidence which would have had material effect upon the decision but could not, with reasonable diligence have discovered before".*

6.10 On the face of it, the learned Judge used this statement to make the following statement from line 9 to 15 of the Ruling at page 18 of the Record of Appeal;

*"It follows therefore, that for the plaintiffs in casu to have recourse under Order 39 of the High Court Rules, it must be shown that fresh evidence exists to warrant a review ....."*



- 6.11 The learned Judge then went on to consider the caveat that had been lodged as fresh evidence but that the same was not available at the time of the Ruling.
- 6.12 In view of the John Mumba case cited earlier, the question of fresh evidence only arises if that is the ground the applicant seeks to rely upon not that it is the only ground for every case.
- 6.13 The learned Judge, was therefore, entitled to find as she did because she considered the ground of the caveat as the ground the Appellant had sought to rely on and dismissed it on the basis that it was not in existence at the time of her Ruling.
- 6.14 On whether or not the two matters constituted a multiplicity of actions, the starting point is that the action before the Subordinate Court was an appeal against the order of the Local Court revoking the appointment of the 1<sup>st</sup> Respondent and Jimmy Soko as Administrators of the Estate of George Soko. The notice of Appeal, at page 273 of the Record of Appeal, shows that it was filed in the Matero Local Court on 7<sup>th</sup> June 2019 more than a month before the Ruling sought to be reviewed.
- 6.15 On the other hand, the summons for an order of injunction was filed in the High Court on the 20<sup>th</sup> January, 2020 and after reviewing the claims in the two matters, the learned Judge found that the two causes emanated from the same facts,

namely the Estate of the late George Soko and the parties were the same thereby, giving rise to a multiplicity of actions.

6.16 The Ruling however, at page 199 lines 13 and 14, shows that the learned Judge did not dismiss the cause for being a multiplicity of actions but because it had been commenced prematurely and improperly before the Court in view of the pending appeal before the Subordinate Court.

6.17 The learned trial Judge, in her Ruling, which is the subject of this appeal, maintained that there was more than one case dealing with facts arising from the same subject matter which amounted to abuse of the court process.

6.18 The learned Judge also relied on the fact that she had in fact set aside her order of 5<sup>th</sup> September 2019, by which she had granted the Appellant leave to sell the property.

6.19 As regards the order for costs in favour of the Respondents, there is no question that as a general rule, costs are for the successful party and in this case the Respondents were the successful party and therefore, entitled to costs.

6.20 An order for costs to the successful party cannot be a ground for a review of a decision by the Judge. If costs are found to

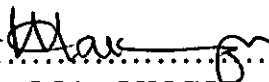
have been wrongly awarded, an appeal can correct the situation.

## **7.0 CONCLUSION**

- 7.1 The learned Judge below cannot be faulted for refusing to review her Ruling because in her view, the Appellant did not advance sufficient ground upon which she could exercise her discretion under Order XXXIX of the High Court Rules.
- 7.2 We do not think there is any such ground upon which a review may be justified either.
- 7.3 This appeal is therefore devoid of merit and it is dismissed with costs.
- 7.4 The Court below shall proceed to hear and determine the substantive cause seeing that the Subordinate Court dismissed the appeal from the Local Court on 31<sup>st</sup> March 2021.



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**M.J. SIAVWAPA**  
**JUDGE PRESIDENT**



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**C.K. MAKUNGU**  
**COURT OF APPEAL JUDGE**



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**F.M. CHISHIMBA**  
**COURT OF APPEAL JUDGE**